A

# PRACTICAL TREATISE

OF

# THE LAW

OF

# VENDORS AND PURCHASERS

OF

# ESTATES.

BY

THE RIGHT HON. SIR EDWARD SUGDEN.

BONÆ FIDEI VENDITOREM, NEC COMMODORUM SPEM AUGERE, NEC INCOMMODORUM COGNITIONEM OBSCURARE OPORTET.

*Valerius Maximus*, l. vii. c. 11.

TENTH EDITION—IN THREE VOLUMES.

VOL. I.

*LONDON:*
S. SWEET, 1, CHANCERY-LANE;
R. MILLIKEN & SON, DUBLIN.

1839.

LONDON:
Printed by James, Luke G. and Luke J. Hansard,
near Lincoln's-Inn Fields.

# ADVERTISEMENT TO THIS EDITION.

THE alterations and additions are very extensive: the former adapt the Work to the Law as it now stands, and the latter comprise every head which properly belongs to the general subject, together with a full view of all the New Laws of Property, and an explanation of their operation on Titles. The Author has at every step freely stated his own opinions as materials to assist the practitioner in arriving at a safe conclusion.

The arrangement has, it is hoped, been improved. The Second Volume is wholly confined to questions arising upon Title, and upon the Conveyance and its incidents.

Although the bulk of the Work is greatly increased, yet the matter contained in it may be more readily referred to than the contents of the former Edition. The propositions are numbered, and a Table of Contents prefixed to each Section, and the Chapters and Sections are increased. A separate Index is added to every Volume, which whilst it facilitates a reference to the particular Book, is in effect a General Index, simply by the addition of references at the end of each

subject to the other Volumes, where there is a corresponding title.

The Writer has bestowed more time and labour upon this than upon any former production. He has not presumed upon the kindness with which previous Editions have been received, but he has endeavoured to merit a continuance of it by making this Edition as perfect as his opportunities would permit.

As no alteration of moment can for some period be required in this voluminous Work, a much larger number of Copies has been printed than upon any former occasion.

Boyle Farm,
30*th Nov.* 1839.

# CONTENTS.

## INTRODUCTION.


| | | Page |
|---|---|---|
| 1. | *Vendor's liability to disclose defects* | 1 |
| 2. | *Unnecessary where the purchaser has knowledge* | 2 |
| 4. | *Or they are patent* | 2 |
| 6. | *But they must not be concealed* | 2 |
| 7. | *Sale subject to all faults* | 3 |
| 9, 10. | *Random praise by vendor* | 3 |
| 11. | *False statement of value; small fine; speedy vacancy; rich meadow* | 4 |
| 12. | *No deceit unless party off his guard* | 4 |
| 13. | *False statement of valuation fatal* | 5 |
| 14. | *So of rent* | 5 |
| 15. | *Misrepresentations by a stranger* | 6 |
| 18. | *Misrepresentations and non-disclosures by a purchaser* | 7 |
| 19. | *Must not mislead the seller* | 7 |
| 20. | *Nor conceal a death which adds to value* | 7 |
| 21. | *Concealment of incumbrances and defects in title* | 8 |
| 22. | *Attorney's liability in such cases* | 8 |
| 23. | *Same attorney for both sides* | 8 |
| 26. | *Attorney may not disclose defect to party interested* | 10 |
| 28. | *Obligation of grantor of annuity* | 10 |
| 29. | *Necessity for investigation of title* | 10 |
| 30. | *Result* | 11 |
| 31. | *Purchasers bound by covenants in lease* | 11 |
| 32. | *Inquiry after incumbrances* | 11 |
| 34. | *Where a purchaser may take possession* | 12 |
| 36. | *Purchaser of equitable rights* | 13 |
| 37. | *Auctioneers not to prepare conditions* | 14 |
| 38. | *Title to be investigated before sale* | 14 |

## CHAPTER I.

### OF SALES BY AUCTION AND PRIVATE CONTRACT.

#### Sect. I.—Of the Auction Duty:


Page

1. *Amount of Duty* - - - - - - - - 15
2. *Exemptions* - - - - - - - - 15
3. *Duty in Ireland* - - - - - - - - 16
4. *Duty on fixtures* - - - - - - - - 16
5. *Sales of bankrupts' estates in mortgage* - - - 16
8. *Sale of equity of redemption* - - - - - 21
9. *Auctioneer to pay the duty* - - - - - 21
10. *No duty if estates bought in* - - - - - 21
13. *What is an auction* - - - - - - - 22
15. *Dumb bidding* - - - - - - - - 24
16. *Candlestick bidding* - - - - - - 24
17. *Marked paper bidding* - - - - - 24
18. *Glass of liquor bidding* - - - - - 24
19. *Putting up an estate not a bidding* - - - 24
20. *Auctioneer must sell* - - - - - - 25
21. *Duty, if not proper notices of buying in* - - - 25
22. *Warranty by auctioneer* - - - - - 25
24. *Bad title, duty to be returned* - - - - 26


#### Sect. II.—Of Puffing:


1. *Civil law* - - - - - - - - - 27
2. *Lord Mansfield against: Bexwell* v. *Christie* - - 28
3. *Lord Kenyon against: Howard* v. *Castle* - - 28
4. *Lord Rosslyn for: Conolly* v. *Parsons* - - - 29
5. *Lord Alvanley for: Bramley* v. *Alt* - - - 30
6. *Sir W. Grant for: Smith* v. *Clarke* - - - 30
8. *Later authorities against* - - - - - 31
9. *Result favourable* - - - - - - 32
10, 17. *Public notice* - - - - - 32. 34
11. *Appointment to run up price, bad* - - - - 32
12. *So appointment of more than one puffer* - - - 32
14. *Or where an implied condition against it* - - 33
15. *Or sale is without reserve* - - - - - 34
16. *Effect on sub purchaser* - - - - - 34
18. *Purchaser not to deter bidders* - - - - 35
19. *Sale damaged by supposed puffers, not enforced* - 35
20. *Puffer bidding for the wrong estate not bound in equity* 36

## Sect. III.—Of the Particulars and Conditions of Sale:


Page

1. *Bidding may be countermanded* - - - - 37
2. *Condition against it* - - - - - - 37
6. *Auction duty* - - - - - - - 38
7. *Conditions favourably construed* - - - - 39
9. *Cannot be contradicted at sale* - - - - 40
15. *Purchaser bound by previous knowledge* - - - 42
17. *Condition to take a defective title* - - - - 43
20. *Condition to avoid sale if title defective* - - - 43
21. *Effect of condition to avoid sale* - - - - 44
22. *Description of estate* - - - - - - 44
24. 34. *Free public-house* - - - - - 45. 49
25. *Rights of way* - - - - - - - 45
26. *Plan of new street* - - - - - - 47
27. *Lights* - - - - - - - - - 47
29. *Reading of lease at auction* - - - - - 47
30. *Buildings removed* - - - - - - 48
31. *Covenant against trades* - - - - - 48
32. *Clear yearly rent* - - - - - - 48
33. *Covenants in lease* - - - - - - 49
36. *Waterloo Bridge annuity; power to redeem not stated* - - - - - - - - 50
37. *Power of purchase not stated* - - - - 50
38. *Condition that misdescription not to avoid sale* - 50
39. *Does not extend to fraudulent description* - - 50
40. *Equitable doctrine thereon* - - - - - 51
41. *Nor to want of title to material part* - - - 52
46. *Nor to unintentional error where purchaser misled* - 54
49. *Or the value cannot be estimated* - - - - 57
52. 55. *Effect, generally, of error not fraudulent upon the condition* - - - - - - - 58, 59
56. *Timber* - - - - - - - - - 61
58. *Timber-like trees to be paid for* - - - - 61
59. *Fixtures* - - - - - - - - 61
60. *Deeds not to be produced* - - - - - 62
61. *Assignments of terms, &c.* - - - - - 63
62. *Attested copies* - - - - - - - 63
63. *Landlord's title* - - - - - - - 63
64. *Liability of purchaser of leaseholds* - - - 63
68. *Preparation of conveyance* - - - - - 65
69. *Forfeiture of deposit and right to re-sell* - - 65
70. *Stipulated damages* - - - - - - 65
72. *Re-sale after bankruptcy* - - - - - 66
73. *Seller's lien* - - - - - - - 67

Page
74. *Time allowed to purchaser* - - - - - 67
76. *Unusual conditions* - - - - - - 68
77. *Agreements to be signed* - - - - - 68
78. *Auctioneer may bind purchaser and seller* - - 68

## Sect. IV.—Of Auctioneers and Agents, and of the Deposit and Purchase Money:

1. *Auctioneer liable if no authority* - - - - 70
3. *If sale defeated by his negligence, not entitled to commission* - - - - - - - - - 71
4. *Amount of commission on sale* - - - - 71
5. *Amount for finding a purchaser* - - - - 72
6. *When it is payable* - - - - - - 72
7. *Agent bidding beyond his authority* - - - 72
9. *Agent to sell not entitled to receive the money* - - 73
10. *Auctioneer cannot give credit* - - - - 73
11. *Set-off* - - - - - - - - - 73
12. *Remittance by seller's direction* - - - 74
13. *Purchaser may stop his check if contract void* - - 74
14. *Must not pay agent before the fixed time* - - 74
15. *Seller's direction to pay third person binding* - - 74
16. *Deposit is part payment* - - - - - 75
17. *Auctioneer to retain it till contract completed* - - 75
18. *Interpleader by auctioneer in equity* - - - 76
21. *At law* - - - - - - - - - 76
23. *Loss by insolvency of auctioneer falls on seller* - - 77
24. *Auctioneer liable where principal not disclosed* - - 78
25. *Not liable to interest* - - - - - - 78
26. *May pay to insolvent principal* - - - - 78
27. *Payment to agent payment to principal* - - - 78
28. *Deposit invested by Court at risk of seller* - - 78
29. *Where loss by sale cannot be thrown on purchaser* - 79
30. *Seller not bound by investment without his assent* - 79
31. *Waiver of payment of deposit* - - - - 79
32. *No election to forfeit deposit* - - - - - 80
33. *Forfeiture of deposit relieved against* - - - 80
34. *Seller to repay deposit although his bill dismissed* - 80

## Sect. V.—Of Sales by Private Contract:

1. *Printed conditions and agreement* - - - - 81
2. *Written agreement; letters* - - - - - 81
3. *Previous representations at an end* - - - - 81
4. *Unless there be fraud* - - - - - - 82

Page

5. *Purchase completed by agent binding although contract not in writing* - - - - - - 82
7. *Where agent binds himself* - - - - - 83
8. *Personal undertaking by solicitor* - - - - 83
9. *Attested copies of parcels where sale is in lots* - - 83
10. *Contract to procure a purchaser* - - - - 84
11. *Waiver of contract on compromise by the other party with his creditors* - - - - - - 84
12. *Purchaser liable for nuisance on the estate* - - 84
13. *Duties on valuations* - - - - - - 85

Sect. VI.—Of Sales by Persons not being Owners:

2. *Valuation of property* - - - - - 86
4. *May sell privately, or by auction* - - - 86
5. *Insolvents' estates to be sold by auction* - - 87
7. *Assignees of bankrupts not to delay sale* - - 87
8. *Sale by private contract not within authority to sell by auction* - - - - - - - - 87
9. *Sale in lots* - - - - - - - - 87
11. *Sale by auction valid although not at full price* - 88
12. *Trustees must use reasonable diligence* - - 88
14. *Time of sale* - - - - - - - - 89
15. *Where sale will be stopped* - - - - - 89
18. *False representation by trustee* - - - - 90
19. *Conditions of sale* - - - - - - 91
20. *Where assignees may buy in* - - - - 91
21. *Where they may have a reserved bidding* - - 91
22. *Where damages against the assignees fall on the estate* - - - - - - - - 92
23. *Assignees putting up an estate* - - - - 92
24. *Deposit repaid without a bill filed* - - - 93
25. *Biddings for bankrupt's estate opened* - - - 93
26. *Power to mortgagee to sell* - - - - - 94
28. *Liability to make a good title* - - - - 94
29. *And compensation for misdescription* - - - 94
30. *Cannot sell to themselves* - - - - - 94
31. *Trustee of legal estate to convey to trustees to sell* - 95
32. *Tenant for life, when entitled to rents* - - - 95
33. *Sales by trustees under powers of sale and exchange* - 95
34. *Cannot be controlled: how to sell* - - - 96
35. *Their contract binds the estate* - - - - 96
36. *Trustees' liability to costs* - - - - - 96

## CHAPTER II.

### OF SALES UNDER THE AUTHORITY OF THE COURTS OF EQUITY.

#### Sect. I.—Of the Proceedings from the Advertisements to the Conveyance:


| | | Page |
|---|---|---|
| 1. | *Reserved bidding* | 97 |
| 2. | *Particulars and advertisements* | 98 |
| 3. | *Sales in the country* | 99 |
| 5. | *Improper description* | 99 |
| 7. | *Verbal declarations* | 99 |
| 8. | *Mortgagee not to conduct sale* | 100 |
| 9. | *How sale conducted* | 100 |
| 10. | *Deposit* | 100. |
| 11. | *Substitution of another as purchaser* | 101 |
| 13. | *Re-sale at a profit* | 101 |
| 14. | *Decree a security to purchasers* | 101 |
| 15. | *Judgment creditors affected* | 102 |
| 17. | *Contract not complete till confirmation* | 103 |
| 18. | *How report is confirmed* | 103 |
| 20. | *Loss by fire, &c. in the interim* | 104 |
| 21. | *Proceedings where purchaser holds back* | 105 |
| 22. | *Bidding by insane person void* | 105 |
| 23. | *Payment of purchase-money and possession* | 106 |
| 24. | *Incumbrances, how paid off* | 106 |
| 27. | *Possession from previous quarter-day* | 107 |
| 30. | *Mortgagee's right when purchaser* | 108 |
| 32. | *Purchaser's right to life annuity* | 108 |
| 33. | *And to a life interest* | 108 |
| 34. | *And to a colliery* | 109 |
| 35. | *Court alone gives possession* | 109 |
| 36. | *Preparation, &c. of conveyance* | 109 |
| 39. | *Exceptions to report as to draft conveyance* | 110 |
| 41. | *Or to report of title* | 111 |
| 42. | *Costs to purchaser where title bad* | 111 |
| 43. | *Who is to pay them* | 111 |
| 44. | *Costs of reference of title* | 112 |
| 47. | *Delay in making out title* | 113 |
| 49. | *Sale contrary to order void* | 113 |
| 51. | *Sale not within statute of frauds* | 114 |
| 53. | *Purchaser restrained from waste* | 114 |

Page

## Sect. II.—Of the Practice in Ireland:

1. *Opinion on abstract before a sale* - - - - 115
2. *Sale must be before the Master* - - - - 115
3. *Solicitor bidding must pay deposit* - - - 115
4. *General practice up to confirming report* - - 116
5. *Neglect to lodge three-fourths* - - - - 116
6. *Promissory note for purchase-money* - - - 117
7. *Purchaser entitled to possession from preceding quarter-day* - - - - - - - 117
8. 10. 12. *Receiver's fees, and loss by his insolvency*, 117, 118
9. *Loss by insolvency of tenants* - - - - 117
11. *Payments after purchase attributable to former arrears* - - - - - - - - - 118
13. *Remedy for neglect in making out title* - - - 119
14. *Receiver appointed for purchaser's costs* - - 119
15. *Costs of investigating title* - - - - - 119
16. *Profit and loss by investment in the funds* - - 120
18. *When purchase-money can be obtained out of Court*, 120

## Sect. III.—Of Opening the Biddings, and of Rescinding the Contract:

1. *Opening biddings* - - - - - - 121
3. *Advance required* - - - - - - 122
5. *When report absolutely confirmed advance of price not sufficient* - - - - - - - 123
12. *Fraud sufficient* - - - - - - 125
13. *Costs of first purchaser* - - - - - 125
14. *Re-allotment upon re-sale* - - - - - 126
16. *Person present at sale may open it* - - - 126
17. *Sham biddings* - - - - - - - 126
18. *Person opening not repaid his costs* - - - 127
20. *Where lots, all to be opened* - - - - 127
21. *Opening sale of lots to different purchasers* - - 128
22. *Substitution of sub-purchaser* - - - - 128
23. *Return of stock on rescinding contract* - - - 128
24. *Inequitable sale rescinded* - - - - - 128
25. *But not a hard bargain* - - - - - 129
26. *Unless there is mistake* - - - - - 129
28. *But there must be no delay* - - - - - 130
29. *Solicitor bound although only buying in* - - 130
30. *Remedy against executors* - - - - - 130
31. *No costs to purchaser of extended estate although no title* - - - - - - - - - 131

## CHAPTER III.

### OF PAROL AGREEMENTS.

### Sect. I.—Of the General Construction of the Statute:


Page

1. *Construction of first section* - - - - 133
3. *Construction of fourth section* - - - - 135
5. *Construction of third section* - - - - 137
6. *Parol license valid* - - - - - - 138
8. *Collateral agreement valid* - - - - - 140
9. *Void agreement may operate as a license* - - 140


### Sect. II.—Of the Fourth Section:


1. *Extends to interests created* de novo - - - 141
5. *Exclusive right to vesture within it* - - - 142
6. *So growing crops, as grass* - - - - - 142
7. *Or growing poles, underwood, timber* - - - 142
8. *But not wheat* - - - - - - - - 142
9. *Nor trees sold as wood* - - - - - 142
10. *Nor potatoes* - - - - - - - - 143
11. *Nor turnips* - - - - - - - - 143
12. *Nor hops* - - - - - - - - - 143
13. *Nor crops between tenants* - - - - - 144
14. *But void sale, if executed, binding* - - - 144
15. 32. 36. *And sales of crops not within fourth section, are within the seventeenth* - 144. 154, 155
16. *Crops sold with the land within fourth section* - 144
17. *Fixtures* - - - - - - - - - 145
18. 32. 35. *Examination of the cases* - - 145. 154, 155
19. 35. *Anon. in Lord Raymond* - - - 145. 155
20. *Waddington* v. *Bristow* - - - - - 146
21. 34. *Crosby* v. *Wadsworth* - - - - 147. 155
22. 34. *Emmerson* v. *Heelis* - - - - 148. 155
23. *Teall* v. *Auty* - - - - - - - 148
24. *Parker* v. *Staniland* - - - - - - 149
25. *Warwick* v. *Bruce* - - - - - - 150
28. *Smith* v. *Surman* - - - - - - 152
29. *Scorell* v. *Boxall* - - - - - - 153
30. *Carrington* v. *Roots* - - - - - - 153
31. *Sainsbury* v. *Matthews* - - - - - 154
32. *Dunne* v. *Ferguson* - - - - - - 154

Page
38. *Purchaser of husbandry crops* - - - - 158
39. *Proper stamp* - - - - - - - - 158
40. *Mining company shares within the fourth section* - 158
41. *Entire parol agreement for realty and personalty wholly void* - - - - - - - - 159

## Sect. III.—Of the Form and Signature of the Agreement:

2. *Signature by party to be charged sufficient* - - 160
5. *How the other party may be bound* - - - 163
8. *Receipts and letters sufficient* - - - - 163
9. *Stamping letters* - - - - - - 164
11. *Offers in writing binding* - - - - - 164
13. *Unless there be fraud* - - - - - 165
14. 39. *Simple acceptance binding* - - - 165. 175
15. *Offer may be retracted before acceptance* - - 165
16. *Where special acceptance necessary* - - - 166
17. *Receipt or letter must specify all the terms* - - 166
24. *Trifling omission fatal* - - - - - 168
25. *Omission supplied by reference to other writings* - 169
31. *What amounts to an adoption of an unsigned agreement* - - - - - - - - - 171
32. *Insufficient references to other papers* - - - 172
34. *Want of signature not supplied by letter abandoning an agreement* - - - - - - - - 173
35. *Reference to different contract insufficient* - - 173
36. *Auctioneer's receipt, entry, &c., binding* - - 173
38. *Letters to third persons binding* - - - - 174
40. *Bonds of reference to surveyor* - - - - 176
41. *Rent rolls, abstracts, &c., not agreements* - - 176
44. *Nor draft of conveyance* - - - - - 178
45. *Valid agreement binding, though sent as instructions* 178
47. *Pleading letters* - - - - - - 179

## Sect. IV.—Of the Signature to an Agreement:

1. *Of specialties and parol contracts* - - - 179
4. *Of the place of the signature* - - - - 181
7. *Signature in form as witness valid* - - - 181
9. *But not a signature as an attesting witness* - - 181
11. *Name of agent sufficient* - - - - - 183
12. *Initials sufficient* - - - - - - 183
14. *Signature on particulars and conditions of sale* - 183

Page
16. *Alterations of draft of conveyance, &c., insufficient* 184
17. *Draft unstamped, evidence* - - - - - 185

Sect. V.—Of Signature by Agents:

1. *Agent appointed by parol good* - - - - 185
4. *Clerk of agent requires distinct authority* - - 187
5. *Revocation of authority* - - - - - 187
7. *Signature for one party sufficient, whether lands or goods* - - - - - - - - 188
6. 8. *Auctioneer and clerk agents for both parties* - 188
13. *Although an agent bid* - - - - - 190
14. *Where auctioneer can sign for a party and sue him* - 191
16. *Ratification of act of assumed agent* - - - 191

Sect. VI.—Of Parol Agreements not within the Statute:

2. *Sales by auction within the statute* - - - 192
3. *Sales before a Master not* - - - - - 193
5. *Agreements confessed not* - - - - - 193
10. *But agreement may be admitted and statute insisted upon* - - - - - - - - - 197
12. *Conviction of perjury* - - - - - 198

Sect. VII.—Of Fraud and Part Performance:

1. *Agreement in writing prevented by fraud* - - 198
2. *Part performance, parol agreement enforced* - - 199
3. *What acts are a part performance* - - - 199
4. *Delivery of abstracts or the like, not* - - - 200
5. *Delivery of possession sufficient* - - - - 200
6. *Unless referable to another title, or wrongfully obtained* - - - - - - - - 201
7. *Payment of rent, where sufficient* - - - - 201
8. *Expenditure in improvements* - - - - 201
10. *Payment of purchase-money insufficient, semble* - 202
16. *Payment of auction duty insufficient* - - - 209
17. *Acts done to a man's own prejudice* - - - 209
18. *Distinct lots* - - - - - - - - 210
19. *Where terms of agreement are uncertain* - - 210
29. *Representatives bound where part performance* - 215
30. *Whether remainder-man bound* - - - - 215
31. *Issue directed* - - - - - - - - 216

## Sect. VIII.—Of the Admissibility of Parol Evidence to Vary Written Instruments:


Page

1. *Parol averments to support a deed* - - - 217
2. *Parol addition rejected* - - - - - 218
5. *So of what passed upon the treaty* - - - 219
7. 11. *Parol declaration of auctioneer rejected* - 220. 222
10. *Parol addition also rejected in equity* - - - 222
14. *Or to diminish the rent* - - - - - 223
18. *Unless on behalf of a* defendant *in equity* - - 224
20. *Where there is fraud* - - - - - - 225
21. *Or mistake or surprise* - - - - - 225
23. *But not to explain the instrument* - - - 226
24, 25. *Clowes* v. *Higginson considered* - - 228, 229
26, 27, *Croome* v. *Lediard considered* - - 230, 231
28. *Parol variations after the contract, without consideration, rejected* - - - - - - 231
32. *Negative words of the statute* - - - - 233
33. *Where written agreement correct, parol addition rejected altogether* - - - - - - 233
36. *Parol evidence of collateral matters, as taxes, &c., rejected* - - - - - - - - 235
41. *Waiver of stipulation for good title rejected* - - 238
42. *Contra in equity* - - - - - - 240
43. *Time cannot be waived by parol at law* - - 240
45. *Contra in equity* - - - - - - 241
46. *Parol variation part performed enforced in equity* - 242
50. *Result as to parol variations* - - - - 244
51. *Entire agreement for realty and personalty* - - 244


## Sect. IX.—Of the Admissibility of Parol Evidence to Annul Written Instruments:


1. *Principle of the rule: parol waiver* - - - 245
2. *Gorman* v. *Salisbury* - - - - - - 246
3. *Buckhouse* v. *Crossby* - - - - - - 246
5. *Davis* v. *Symonds* - - - - - - 247
6. *Price* v. *Dyer* - - - - - - - 248
7. *Robinson* v. *Page* - - - - - - 248
8. *Goss* v. *Lord Nugent* - - - - - 248
9. *Result* - - - - - - - - - 249
10. *Waiver of* parol *agreement cannot be proved* - - 249

Sect. X.—Of Parol Evidence to Explain Ambiguities:

Page
1. *Sorts of ambiguities* - - - - - - - 250
2. *Latent ambiguity cleared up by parol evidence* - 250
4. *Patent ambiguity not* - - - - - - - 251
7. *Explanation of words of trade in Act of Parliament* 252
8. *General words not restrained by parol* - - - 253
12. *Contra in equity upon mistake* - - - - 255
13. *Situation of parties, &c. looked at where there is ambiguity* - - - - - - - - 255
15. *Ancient statute: contemporaneous usage* - - 256
16. *Whether price can be looked at where there is an ambiguity* - - - - - - - - - 256

Sect. XI.—Of Parol Evidence in Equity to Correct Mistakes or Frauds.

1. *Mistakes and frauds corrected by parol evidence* - 258
2. *Effect of defendant's denial* - - - - - - 259
4. *Issue directed* - - - - - - - - 260
5. *Whether settlement can be corrected by parol evidence alone* - - - - - - - - - 260
10. *Mistake proved by instructions and parol evidence* - 263
13. *Mistake of purchaser's attorney in conveyance corrected* - - - - - - - - - 265
14. *Proposals to correct by, must be final contract* - 266
15. *Settlement to prevent a forfeiture* - - - 266
16. *Omission of provision on supposed illegality* - - 267
19. *Fraud corrected* - - - - - - - 268
20. *What amounts to fraud* - - - - - - 268
21. *Third person drawing up minutes contrary to intention* - - - - - - - - - - 269
23. *Promise to rectify an accidental omission enforced* - 270
26. *Effect of fraud* - - - - - - - - 271
27. *No relief against bonâ fide purchaser* - - - 271

## CHAPTER IV.

### OF THE CONSEQUENCES OF THE CONTRACT.

Sect. I.—Of the Purchaser's Title from the Time of the Contract:

1. *Seller trustee of estate for purchaser* - - - 273
2. *Bankruptcy does not discharge the contract* - - 273

Page
3. *Assignees put to their election* - - - - 274
5. *Extent prevails over contract* - - - - 275
6. *Purchaser without notice also* - - - - 275
7. *Death of party immaterial* - - - - - 275
8. *Purchase-money assets of vendor* - - - - 275
9. *Mortmain Act* - - - - - - - - 276
10. *Purchaser not to cut timber* - - - - 276
11. *Operation of contract where the purchaser is tenant* 276
13. *Conveyance destroys covenants in lease* - - - 277
14. *Purchaser's power over the estate* - - - 278
15 to 42. His power of devising before 1 Vict. c. 26, *viz.*
21. *Effect of devise where the purchaser had a term of years* - - - - - - - - - 280
22. *Revocation of previous bequest of term* - - 281
24. *Conveyance did not operate a revocation* - - 281
25. *Unless new uses introduced* - - - - - 284
26. *Estates contracted for after the will not affected by it* - - - - - - - - - 284
27. *Republication* - - - - - - - - 285
29. *Heir put to his election* - - - - - 285
30. *Cautions in purchasing from heir* - - - - 286
31. *Copyholds* - - - - - - - - 286
32. *Contract revoked* seller's *will* - - - - 287
34. *Where the agreement could not be enforced in equity,* qu. - - - - - - - - 288
37. *Or had been abandoned,* qu. - - - - 289
38. *Devise by seller after the contract* - - - 291
39. *Estate converted, although election to buy given to purchaser* - - - - - - - - 291
42. *So of timber* - - - - - - - - 293
44. *Right of pre-emption enforced* - - - - 293
45 to 65. Purchaser's right to devise since 1 Vict. c. 26, 295—304
48. *Operation of Act on Atcherley* v. *Vernon* - - 296
50. *Operation upon previous bequest where the purchaser was a termor* - - - - - - - - 296
52. *Operation of the Act upon general bequest and general devise, where the purchaser is a termor* - - 298
53. *Where the fee is conveyed or the term assigned to attend* - - - - - - - - 299
54. *Where the term is specifically bequeathed* - - 299
56. *No form of conveyance a revocation* - - - 300

Page

57. *Cautions in purchasing of heir* - - - - 301
59. *Operation of Act on the* seller's *will* - - - 301
60. *Agreement void in equity not a revocation* - - 303
61. *Nor an agreement abandoned* - - - - 303
62. *Operation of Act on Knollys* v. *Shepherd* - - 303
63. *And on Lawes* v. *Bennett* - - - - - 303
64. *General operation of Act* - - - - - 303
65. *Operation of Act on Arnold* v. *Arnold* - - - 304
66. *Demonstrative legacy* - - - - - - 305
67. *Where heir of purchaser entitled* - - - - 305
68. *His power over estate* - - - - - 305
69. *Executor must pay for the estate* - - - - 305
71. *Death of vendor or purchaser, and no title* - - 306
72. *Where estate directed to be bought cannot be obtained* - - - - - - - - - 308

## Sect. II.—Of other Rights and Liabilities arising out of Contracts:

2. *Where purchaser liable to existing mortgage debt* - 310
4. *Stopping proceedings in ejectment* - - - 310
5. *Further advances to mortgagor after a sale by him* 311
6. *Redemption of mortgages on distinct estates* - - 311
7. *Loss of mortgage deed* - - - - - - 312
8. *Production of mortgage deed* - - - - 312
9. *Assignee of mortgagee subject to the account* - - 312
11. *Annuity the price of an estate, how to be secured* - 312
12. *Purchaser to indemnify against charges* - - 313
13. *As where he buys a lease* - - - - - 313
14. *Or an equity of redemption* - - - - 313
15. *Remedy of surety against purchaser* - - - 313
16. *Agreement to give real security enforced* - - 314
17. *Purchaser's remedy for rent and covenants* - - 314
18. *Apportionment of rents* - - - - - - 316
19. *Liquidated damages* - - - - - - - 317
20. *Purchaser of legacy entitled to stock investment* - 317
21. *Fraud in sale of life policy* - - - - 317
22. *Where power to re-purchase makes a loan* - - 318
23. *Payment to be made on condition* - - - 318
24. *Re-purchase on a condition* - - - - 318
25. *Notice to purchase binding under Act of Parliament* 318
27. *Purchaser bound by grant of stewardship for life* - 319

Page

Sect. III.—Of Specific Performance:

1. *Specific performance by Court of Review* - - 320
2. *Form of decree* - - - - - - 320

I. Against the vendor:

3. *Heir at law bound* - - - - - - 321
4. *Infant heir of vendor* - - - - - 321
5. *Devisees in strict settlement of vendor* - - - 323
6. *Tenant in tail* - - - - - - - 324
7. *Provisions by statute* - - - - - 326
8. *Equitable tenant in tail* - - - - - 327
9. *Tenants in tail of copyholds* - - - - 327
12. *Doweress* - - - - - - - 329
13. *Joint tenant* - - - - - - - 329
14. *Feme covert* - - - - - - - 330
15. *Where she has a power* - - - - - 331
16. *Decree against the husband* - - - - 331
20. *Feme covert with separate estate, purchasing* - 334
21. *Lunatic; effect of lunacy on contract* - - - 334
23. *Trustees under power* - - - - - 335
24. *Infant* - - - - - - - - - 335

II. As regards the agreement:

28. *Sale of annuity, stock, &c.* - - - - 336
29. *Discretionary* - - - - - - - 337
30. *Misrepresentation by purchaser or seller* - - 338
31. *Value* - - - - - - - - - 339
32. *Intoxication* - - - - - - - 340
34. *Where the action is lost* - - - - - 340
35. *Damages recoverable at law* - - - - 340
36. *Hardship of sale upon seller* - - - - 341
37. *Want of competency* - - - - - - 341
39. *Purchase of lease or under-lease* - - - - 341
40. *Suppressio veri: suggestio falsi* - - - - 342
41. *Mistake* - - - - - - - - 342
42. *Surprise* - - - - - - - - 343
44. *Sale by agent contrary to authority* - - - 344
45. *Breach of trust* - - - - - - 344
46. *Discretionary power in trustees* - - - - 345
49. *Seller not owner* - - - - - - 346
50. *Want of title* - - - - - - - 347
53. *Purchaser nominal contractor* - - - - 348
57. *Seller pretending to be an agent* - - - - 351
58. *Sale of annuity for lives not named* - - - 351
59. *Specific performance where no action will lie* - - 351
66. *Penalty: specific performance* - - - - 353
67. *Penalty: action* - - - - - - 354

Sect. IV.—Of the Remedies for a Breach of Contract:

Page

I. The remedy in equity:

2. *Injunction to prevent injury* - - - - 356
3. *Reference of title* - - - - - - 357
5. *Purchase money ordered into Court* - - - 357
7. *Where not* - - - - - - - - 359
11. *Time allowed* - - - - - - - 360
12. *Seller ordered to pay in deposit* - - - - 361
13. *Multifariousness* - - - - - - 361
15. *Adverse claimants not proper parties* - - - 362
16. *Mortgagee not a proper party* - - - - 362
17. *Plaintiff proving different agreements* - - - 363
19. *Upon dismissal of bill, no account* - - - 363
20. *Damages to purchaser* - - - - - 363
23. *No compensation for defective title* - - - 365
24. *New defence by purchaser* - - - - - 365
26. *Seller cutting ornamental timber pending suit* - - 366
27. *Bill for injunction and specific performance* - - 366

II. The remedy at law:

28. *Action by purchaser for fraud after decree* - - 366
29. *Party having waived, cannot bring action after decree* - - - - - - - - - 366
30. *Nor where bill dismissed for want of title* - - 367
31. *Actions by parties after bill dismissed* - - - 367
32. *A second action not allowed* - - - - 367
33. *Money had and received* - - - - - 367
38. *No damages for loss of bargain* - - - - 369
40. *Loss by selling out of the funds* - - - - 369
41. *Interest on deposit* - - - - - - 369
42. *Expenses of investigating title* - - - - 370
43. *Particulars of fact and law* - - - - - 370
47. *Averment of title: proof of title-deeds* - - - 371
48. *Action by heir or executor of purchaser* - - 371
49. *Delivery of agreement to be stamped* - - - 372
50. *Agreement by letters, one stamp* - - - - 372
51. *Mutual covenants* - - - - - - 372
54. *Seller to execute conveyance before action* - - 374
55. *Purchaser to tender conveyance and purchase-money* 374
61. *Unless there is a bad title, or seller has re-sold* - 377
62. *Purchaser let into possession not a tenant* - - 377
63. *Ejectment against him* - - - - - 378
65. *Condition that purchaser shall be deemed tenant* - 378
67. *Ne exeat* - - - - - - - - - 380

Sect. V.—Of rescinding and confirming a Contract:


Page

1. *Notice of rescinding* - - - - - 381
3. *Doctrine of rescinding a contract* - - - 381
4. *Concealment of a fact by a purchaser* - - 381
5. *Dealing unduly with purchaser* - - - - 382
6. *Misrepresentation by a purchaser* - - - 382
7. *Whether fraud be necessary* - - - - 383
8. *Seller believing his own misrepresentation* - - 383
9. *Party left to his remedy at law* - - - - 384
10. *Doctrine of rescinding a conveyance* - - - 384
11. *For unreasonableness of price* - - - - 385
12. *For inadequacy* - - - - - - 385
13. *Because trustee sold to himself* - - - - 385
14. *Where by mistake a man bought his own estate* - 385
15. *Because improvidently made* - - - - 386
18. *Because defect in title concealed* - - - - 387
19. *Eviction not necessary to relief* - - - - 388
20. *Because remainder sold had been barred* - - 388
21. *Action of deceit* - - - - - - 389
22. *Dobell v. Stevens* - - - - - - 390
24. *Rule in equity* - - - - - - 391
25. *Purchaser's general remedy* - - - - 391
26. *Acquiescence bars right* - - - - - 392
27. *Confirmation releases right* - - - - - 392
28. *Although new circumstance of fraud discovered* - 392
29. *Acquiescence where fraud and oppression* - - 392
31. *Confirmation where fraud* - - - - 393
32. *Whether fraudulent transaction can be purged* - 393
33. *Requisites to valid confirmation* - - - - 393
36. *Time a bar to relief* - - - - - 394
38. *Statutory bar* - - - - - - - 395
40, 49, 50. *Profit and loss by stock: interest* - 395. 397
42. *Purchaser, how charged* - - - - - 396
43. *Occupation rent: improvements* - - - - 396
44. *Not interest upon interest* - - - - - 396
46. *Repairs after notice of defect in title* - - - 397
47. *Conversion of shop into private house* - - - 397
49. *Power of Court where bill is dismissed* - - - 397
52. *After an injunction: interest* - - - - 398
54. *Re-transfer of sums after reversal of decree* - - 399
55. *No interest upon costs* - - - - - 399
56. *Power of Court after reversal, and cause remitted* - 399
57. *Whether purchase-money can be followed* - - 400

## CHAPTER V.

### OF THE TIME ALLOWED TO COMPLETE THE CONTRACT.


Sect. I.—Of the materiality of Time:

Page

1. *Lunar or calendar months* - - - - 402
2. *Time essence of contract at law* - - - - 402
4. *Lang* v. *Gale* - - - - - - - 403
5. *Observations upon it* - - - - - - 404
6. *Waived at law* - - - - - - 406
7. *Waived or enlarged by writing or parol* - - 406
8. *Where not material in equity* - - - - 406

Sect. II.—Of Delays occasioned by the Neglect of either Party.

1. *Time in equity: Gibson* v. *Paterson* - - - 408
3. *Purchaser must be prompt* - - - - - 409
5. *Diligence necessary in equity* - - - - 409
6. *Agreement void at law if title not ready* - - 410
8. *But in equity both parties must be active* - - 410
9. *Waiver by receipt of abstract after the day* - - 410
10. *Where vendor loses his remedy* - - - - 410
12. *There must be gross negligence* - - - - 411
14. *Time required for repairs, or to get possession* - 412
15. *Effect of delay by purchaser* - - - - 413
16. *Unwilling purchaser* - - - - - 413
17. *Reversion sold: time important* - - - - 413
18. *Or if sale is to pay debts, &c.* - - - - 414
19. *Or treaty be with ecclesiastical corporation* - - 414

Sect. III.—Of Delays occasioned by the State of the Title.

1. *Delay through title not material* - - - 415
2. *Vendor should file a bill* - - - - - 415
3. *Procuring title after filing bill* - - - - 416
4. *At law, where no time fixed* - - - - 416
5. *Willet* v. *Clarke* - - - - - - 417
6. *Title at time of trial not sufficient* - - - 417
9. *In equity, time allowed* - - - - - 420
10. *Purchaser not bound where new suit necessary* - 420
12. *Or an account of debts to be taken* - - - 422

Page
14. *Title should be at date of report* - - - - 422
15. *Purchaser proceeding with knowledge of defect* - 422
17. *Acceptance of abstract with notice* - - - 424
20. *Proceeding, but with protest* - - - - 425
21. *Dormant treaty* - - - - - - 425
22. *Title too late after purchaser has abandoned* - 426
23. *Delay in filing a bill* - - - - - 427
24. *Vendor may rescind contract where money cannot be paid* - - - - - - - - - 427
26. *Forfeiture of deposit* - - - - - - 428
27. *Time in equity may be of essence of contract* - 429
29. *Gregson* v. *Riddle* - - - - - - 430
33. *Observations on the rule* - - - - - 432
34. *Cannot be made of essence after contract* - - 434
35. *Notice of abandonment: Reynolds* v. *Nelson* - 434
36. *Observations on the case* - - - - - 435
37. *Rule in equity where no time limited* - - - 435

## CHAPTER VI.

### OF THE CONSIDERATION.

### Sect. I.—Of Unreasonable and Inadequate Considerations:

1. *Unreasonable price, yet specific performance* - - 438
2. *Unless there be fraud or concealment* - - - 438
3. *Or there is gross inadequacy* - - - - 438
5. *Fall in value immaterial* - - - - - 439
6. *Purchaser seldom relieved after conveyance* - - 439
8. *Inadequacy of price no bar* - - - - - 440
9. *Sale by auction* - - - - - - - 440
10. *Life annuity* - - - - - - - 440
11. *Concealment by purchaser* - - - - - 440
14. *Misrepresentation by purchaser* - - - - 441
15. *Both parties ignorant of value* - - - - 441
18. *Seller seldom relieved after conveyance: gross inadequacy* - - - - - - - - 442
20. *Unless ignorant of right, and purchaser aware of it* - 443
21. *Or advantage taken of distress* - - - - 443
23. *Heir dealing for expectancy favoured* - - - 444
24. *Although unprovided for* - - - - - 445

Page

25. *Purchaser to prove adequacy* - - - - 445
26. *Sellers of reversions not heirs* - - - - 446
27. *Bulk sold reversionary* - - - - - 446
28. *Loan under mask of trading: King* v. *Hamlet* - 446
29. *Observations on that case* - - - - - 447
30. *Where sale of reversion valid* - - - - 448
31. *Gowland v. De Faria: value by the tables, and market price* - - - - - - - - 448
32. 35. *Observations upon that case* - - - 449. 451
33. *Dews v. Brandt* - - - - - - 450
36. *Scott* v. *Dunbar* - - - - - - 451
37. *Hinksman* v. *Smith* - - - - - - 451
38. 41. *Headen* v. *Rosher* - - - - 452. 457
39. *Potts v. Curtis* - - - - - - - 453
40. *Newton* v. *Hunt* - - - - - - 456
42. *Wardle* v. *Carter* - - - - - - 457
43. *Ryle* v. *Swindells* - - - - - - 458
44. *Evidence of surveyors* - - - - - 459
45. *Sale by auction valid* - - - - - - 459
47. *Or person in possession join* - - - - 460
50. *Where contingency cannot be valued* - - - 460
53. *Mis-statement of consideration* - - - - 462
54. *How adequacy to be shown* - - - - - 462
55. *Delay and confirmation* - - - - - 463
56. *Sale set aside, upon what terms* - - - - 463
57. *Improvements allowed for* - - - - - 464
58. *Price to be fixed by arbitrators* - - - - 464
60. *Cannot delegate authority* - - - - - 464
61. *Where Court will fix the price* - - - - 465
62. *Not where parties chosen* - - - - - 465
64. *Failure of arbitration: death* - - - - 465
65. *Nomination of arbitrator cannot be compelled* - 466
66. *Where award after death of party binding* - - 466
67. *Acquiescence in informal award* - - - - 467
68. *Attachment: action* - - - - - - 467

## Sect. II.—Of the Failure of the Consideration before the Conveyance:

1. *Purchaser to bear loss by fire, &c. after contract* - 467
7. *Not where purchase under decree not confirmed absolute* - - - - - - - - - 469
8. 15. *Purchaser entitled to benefit* - - - 470. 473
10. *Wyvill* v. *Bishop of Exeter* - - - - - 470
11. *Observations upon that case* - - - - 471

Page
13. *Validity of title* - - - - - - - 472
14. *Deeds destroyed by fire* - - - - - 472
16. *Lives dropping in* - - - - - - 473
18. *Insurance* - - - - - - - - 473
19. *Sale for life annuity: purchaser entitled though life drops* - - - - - - - - - 474
27. *Where seller may retain estate and purchase-money* 477
29. *Sale of life annuity enforced though life drops* - 478
31. *Seller to become tenant* - - - - - 480

## CHAPTER VII.

OF THE PARTIAL EXECUTION OF A CONTRACT, WHERE A VENDOR HAS NOT THE INTEREST WHICH HE PRETENDED TO SELL; AND OF DEFECTS IN THE QUANTITY AND QUALITY OF THE ESTATE.

### Sect. I.—Where the Vendor has not the Interest which he Sold:

1. *Sale of lease for more years than seller has* - - 482
3. *Power of redemption not stated* - - - - 483
5. *Small deficiency of term: sale good in equity* - 483
10. *Underlease sold as original lease* - - - - 484
11. *Whether purchaser of old lease bound to take a new one* - - - - - - - - - 484
12. *Or a seller to underlease who sold the whole lease* - 485
14. *Rent and interest on sale of leaseholds* - - - 485
17. *Purchaser of freehold not bound to take leasehold* - 486
19. *Nor copyhold* - - - - - - - - 487
22. *Acquiescence by purchaser* - - - - - 488
26. *Purchaser not bound to take less than the entirety* - 490
27. *Of two-sevenths not bound to take one-seventh* - 490
28. *But may elect to do so* - - - - - - 490
29. *Unless condition to the contrary* - - - - 490
31. *Reversionary interests not forced upon purchaser of possession* - - - - - - - - 491
32. *Purchaser's right against the seller* - - - 491
34. *Dale* v. *Lister* - - - - - - - 492
35. *Milligan* v. *Cooke* - - - - - - 493
36. *Indemnity not compelled* - - - - - 495
38. *Contract upon mistake of interests* - - - 495

Page

39. *Lawrenson* v. *Butler* - - - - - - - 495
41. *Sale by tenant for life, &c. not partially enforced against purchaser* - - - - - - - 496
43. *Lord Eldon's opinion of purchaser's right against seller* - - - - - - - - - 497
44. *Thomas* v. *Dering, right denied* - - - - 497
45. *Observations on it* - - - - - - - 498
46. *Effect of expenditure by purchaser* - - - 499
47. *Misrepresentation by purchaser* - - - - 500
48. *Void lease* - - - - - - - - - 501
49. *Rights incapable of compensation* - - - - 501
50. *Acquiescence by purchaser* - - - - - 501
51. *Right of common not disclosed* - - - - 501
52. *Limited right and unlimited sold* - - - - 502
53. *Sheep-walk represented as freehold* - - - 502
54. *Right to dig mines* - - - - - - - 502
55. *Charge of repairs of chancel* - - - - 502
56. *Fee-farm rent: at law* - - - - - - 502
57. *Quit-rent: in equity* - - - - - - - 503
58. *Rentcharge: in equity* - - - - - - 503
63. *Quit-rents less than stated* - - - - - 504

## Sect. II.—Of Want of Title to a Part of the Estate:

1. *Mistake as to what is sold* - - - - - - 505
3. *Want of title to part fatal at law* - - - 506
4. *Separate valuations* - - - - - - - 506
5. *Enforced partially against purchaser where part small* - - - - - - - - - - 507
6. *Sale of house and wharf* - - - - - - 508
7. *Opinions upon it* - - - - - - - 508
8. *Not binding on purchaser where portion large* - 509
9. *Fee-farm rent* - - - - - - - - 510
11. *Purchaser's right against seller where no title to large part* - - - - - - - - 510
13. *Wheatley* v. *Slade* - - - - - - - 511
14. *Observations upon it* - - - - - - - 512
15. *Mutual contracts* - - - - - - - 512
16. *Lease containing more than is held under it* - - 513
17. *Sale in lots good as to those with title* - - - 513
20. *Unless complicated with the rest* - - - - 514
22. *Rule acted upon at law* - - - - - - 514
25, 31. *Lord Kenyon's doctrine* - - - 516. 519

Page
27, 29, 30. *Lord Eldon's* - - - - 517, 518
28, 29. *Lord Brougham's* - - - - 517, 518
31. *The present rule* - - - - - - 519
34. *Where the seller has not all the tithes he sells* - 520
35. *Where the estate is not tithe free* - - - - 520
40. *Commutation of tithes by statute* - - - - 523
41. *Land-tax and tithe-rent charge* - - - - 524
42. *Purchaser's right bound by his conduct* - - 524

## Sect. III.—Of Defects in the Quantity of the Estate:

1. *Compensation for deficiency* - - - - 525
3. *Though not sold by the acre* - - - - 525
4. *Lands conveyed by estimation* - - - - 526
5. *Contract for sale by estimation* - - - - 526
6. *By estimation, more or less* - - - - 526
8. *Stipulation that excess or deficiency not to be answered for* - - - - - - - 528
9. *Fraudulent statement* - - - - - 528
10. *Purchaser's knowledge of estate* - - - - 528
11. *About the quantity stated* - - - - - 529
12. *Principle of abatement* - - - - - 529
13. *Where quantity greatly exceeds that sold* - - 529
14. *Lands shown to purchaser, but excepted in conveyance* - - - - - - - 530
15. *Sale by particular, and part omitted* - - - 530
16. *Where more is conveyed than was sold* - - 530
18. *General description: copyholds* - - - - 531
19. *Contents of an acre: old law* - - - - 531
21. *Customary acres* - - - - - - 533
23. *Contents of an acre: new law* - - - - 534
24. *Contracts, how affected by statute* - - - 534

## Sect. IV.—Of Defects in the Quality of the Estate:

2, 21. *Caveat emptor* - - - - - 536. 544
3. *Right of way not stated* - - - - - 536
4. *Uncommonly rich water meadow* - - - 537
5. *Residence for a respectable family* - - - 537
6. *House in different county* - - - - - 537
7. *Where house will not answer for purpose intended* 538
8. *Opinions on Shirley* v. *Davis* - - - - 538
11. *False description of locality* - - - - 539
12. *Of state of repair* - - - - - - 540
13. *Notice to repair not disclosed* - - - - 540

Page
15. *Where purchaser knows the description is false* - 541
19. *Statement of annual produce of woods* - - - 543
22. *Repairs subject of compensation* - - - - 544
23. *Cutting down ornamental timber after contract* - 544
26. *Latent defect which purchaser cannot discover* - 545
27. *Lord Kenyon's opinion although estate sold with all faults* - - - - - - - - 545
28. *Lord Ellenborough's opinion* - - - - 546
29. *Sir James Mansfield's* - - - - - 547
30. *Mr. Justice Heath's and Mr. Justice Gibbs'* - - 548
31. *Observations on the rule* - - - - - 549
33. *The scienter* - - - - - - - - 550
34. *In the case of title* - - - - - 551
36. *Concealment of defect* - - - - - 552
38. *Purchaser waiving his right* - - - - 552

## CHAPTER VIII.

### OF AGREEMENTS TO ACCEPT A TITLE, AND OF WAIVING OBJECTIONS TO TITLE, AND OF THE REMEDIES WHERE THE TITLE IS IN DISPUTE.

### Sect. I.—Of Agreements to Accept a Title, and of Waiving Objections:

1. *Right to good title* - - - - - - ii. 2
3. *Condition to accept the title as it is* - - - ii. 3
6. *Not inferred from conditions as to deeds* - - ii. 5
8. *Condition as to identity: property not to be found* ii. 6
9. *Condition to accept a bond for title* - - - ii. 7
10. *Observations on Clarke* v. *Faux* - - - ii. 8
11. *Solicitor buying from client with a title which he accepted* - - - - - - - - ii. 9
12. *Condition to avoid contract if title cannot be made* ii. 9
14. *Roberts* v. *Wyatt and Williams* v. *Edwards distinguished* - - - - - - - - ii. 10
15. *Purchaser to elect whether contract shall be void* ii. 11
16. *Possession a waiver of objections* - - - ii. 11
17. *Waiver a question of fact* - - - - ii. 11
18. *Forcible possession by purchaser* - - - ii. 12
19. *Right of sporting first disclosed in abstract* - - ii. 12

Page

20. *Possession with long delay a waiver* - - - ii. 12
22. *Although purchaser swear he did not mean it* - ii. 13
23. *Lease by a purchaser to one in possession* - - ii. 13
26. *Possession under contract no waiver* - - - ii. 15
27. *Or with vendor's concurrence* - - - - ii. 15
29. *And acts of ownership do not bind* - - - ii. 15
31. *Re-selling where a waiver* - - - - ii. 16
32. *Or preparation of conveyance* - - - - ii. 17
33. 38. *Notice of limited title binding* - - ii. 17. 19
34. *Purchaser not bound by his counsel's opinion* - ii. 17
35. *Nor by his solicitor's statement if seller file a bill* ii. 17
36. *Purchaser accepting abstract may prove title bad* - ii. 18
37. *Waiver of objections to title but not of proof* - ii. 19
40. *Acquiescence a waiver* - - - - - ii. 19
41. *Possession: interest and costs* - - - - ii. 20
42. *Seller turning purchaser out of possession has no equity* - - - - - - - ii. 20
43. *Waiver restricted by subsequent acts* - - - ii. 20
44. *Waiver qualified* - - - - - - ii. 21
45. *Waiver, and then bad title produced* - - - ii. 21
47. *Purchaser rejecting title should relinquish possession* - - - - - - - ii. 23
48. *Purchaser keeping back one objection* - - ii. 23
50. *Authority of agent to waive* - - - - ii. 24
53. *Agreement to take defective title with covenants* - ii. 26

## Sect. II.—Of Title: in Suits in Equity:

1. *Seller with equitable estate* - - - - ii. 27
2. *Doubtful title* - - - - - - ii. 28
4. *Reference of title* - - - - - - ii. 28
6. *Reference back where new fact* - - - - ii. 29
7. 10. *Or where seller can clear up objections* - ii. 30. 32
9. *Exceptions to report of title* - - - - ii. 32
11. *Purchaser plaintiff, and there is no title* - - ii. 33
13. *Observations on Nicloson* v. *Wordsworth* - - ii. 34
14. *Objections considered by Court* - - - - ii. 35
15. *Reference of title upon motion* - - - - ii. 35
16. *Unless other questions raised* - - - - ii. 36
17. *Inquiry when a title was shown* - - - ii. 37
18. *What may be referred* - - - - - ii. 38
19. *Dismissal of bill upon motion* - - - - ii. 38
20. *Decree without reference where delay* - - ii. 38
21. *Contract cancelled where no title* - - - ii. 39
22. *Deposit ordered into Court* - - - - ii. 39

Page

23. *Purchase-money ordered into Court* - - - ii. 39
24. *New evidence before Master* - - - - ii. 40
25. *Master's report where legal estate outstanding* - ii. 40
26. *Pendency of a suit for the estate* - - - ii. 40
27. *Report of conditional title bad* - - - - ii. 40
28. *Where exception should stand over* - - - ii. 40
29. *Purchaser not to file a cross bill if title bad* - ii. 41
30. *Bad title no decree for purchaser* - - - ii. 41
31. *Purchaser may take bad title* - - - - ii. 41
33. *Seller obtaining good title after conveyance* - ii. 42
35. *Man buying his own estate* - - - - ii. 43
36. *Sale of a remainder already barred* - - - ii. 43
37. *Purchaser neglecting to examine title* - - - ii. 44
38. *Sale of pretended title* - - - - - ii. 44
39. *Sale of estate contracted for, good* - - - ii. 45
40. *Champerty* - - - - - - - - ii. 46
41. *Maintenance* - - - - - - - - ii. 46
42. *Slander of title* - - - - - - ii. 46

## Sect. III.—Of Title: in Actions at Law:

1. *Injunction until Master's report of title* - - ii. 47
2. *Title to be proved bad* - - - - - ii. 48
3. *Damages* - - - - - - - - ii. 48
4. *None for loss of bargain* - - - - - ii. 48
5. *Hopkins* v. *Grazebrook* - - - - - ii. 48
8. *Nor for loss by the funds* - - - - - ii. 51
9. *Interest on deposit recoverable* - - - - ii. 51
10. *And expenses of investigating title* - - - ii. 51
12. *But not preliminary expenses* - - - - ii. 52
13. *Right of action in purchaser's personal representative* - - - - - - - - ii. 53
15. *Costs as between attorney and client* - - - ii. 53
16. *Particular of objections of law* - - - - ii. 54
18. *Where purchaser is confined to objection taken before action* - - - - - - - ii. 54
19. *Pleading title* - - - - - - - ii. 54
20. *Tender of conveyance unnecessary if title bad* - ii. 55
21. *Seller restrained from bringing an action after bill dismissed* - - - - - - - - ii. 55

## CHAPTER IX.

OF THE ABSTRACT, AND OF THE PRODUCTION OF DEEDS; OF COVENANTS TO PRODUCE THEM, AND OF ATTESTED COPIES.

### Sect. I.—Of Preparing and Examining Abstracts:


| | | Page |
|---|---|---|
| 3. | *Abstract of ancient deeds cannot be required* | ii. 57 |
| 4. | *How it should be written* | ii. 58 |
| 6. | *Heading* | ii. 58 |
| 7. | *What deeds should be abstracted* | ii. 58 |
| 8. | *Lessor's title* | ii. 59 |
| 9. | *Exchanged estate* | ii. 59 |
| 10. | *Allotments under inclosures* | ii. 59 |
| 11. | *Printed copies of act* | ii. 59 |
| 13. | *Exchange of common field lands* | ii. 60 |
| 14. | *Copyholds enfranchised* | ii. 60 |
| 15. | *Allotment for several estates* | ii. 60 |
| 16. | *Separate purchases* | ii. 60 |
| 17. | *Margin* | ii. 60 |
| 18. | *Description of parties* | ii. 61 |
| 19. | *Recitals* | ii. 61 |
| 20. | *Witnessing part* | ii. 61 |
| 21. | *Granting part* | ii. 61 |
| 22. | *Parcels* | ii. 61 |
| 23. | *One abstract for several estates* | ii. 62 |
| 24. | *Exception* | ii. 62 |
| 25. | *Habendum* | ii. 62 |
| 26. | *Limitations and uses* | ii. 62 |
| 27. | *Provisoes for cessor* | ii. 63 |
| 28. | *Trusts* | ii. 63 |
| 29. | *Powers* | ii. 63 |
| 30. | *Covenants* | ii. 63 |
| 31. | *Executions: attestations* | ii. 63 |
| 32. | *Receipt* | ii. 64 |
| 33. | *Registry* | ii. 64 |
| 34. | *Intestacy* | ii. 64 |
| 35. | *Leasehold title* | ii. 64 |
| 36. | *Renewable leaseholds* | ii. 64 |
| 37. | *Attendant terms* | ii. 64 |
| 38. | *Descent* | ii. 65 |
| 39. | *Wills* | ii. 65 |

Page

40. *Acts of Parliament* - - - - - - ii. 65
41. *Judgments and crown debts* - - - - ii. 65
42. *Decrees* - - - - - - - - ii. 65
43. *Fiats in bankruptcy* - - - - - ii. 65
44. *Liability of seller's solicitor* - - - - ii. 66
45. *Purchaser's solicitor to examine the abstract* - ii. 66
46. *Where examination may be delayed* - - - ii. 67
47. *Solicitor perusing abstract* - - - - ii. 67

## Sect. II.—Of Perusing Abstracts:

1. *Perusal at one sitting* - - - - - ii. 68
3. *Notes* - - - - - - - - - ii. 68
4. *Opinion book* - - - - - - - - ii. 68
5. *How to be perused* - - - - - - ii. 69
6. *Parcels* - - - - - - - - - ii. 69
7. *Dates: new laws* - - - - - - - ii. 69
8. *Evidence* - - - - - - - - ii. 70
9. *Office copies, extracts, probates, &c.* - - - ii. 70
10. *Pedigree: certificates: receipts* - - - ii. 71
11. *Registry: enrolment: execution: attestation* - ii. 71
12. *Negative answers* - - - - - - ii. 72
13. *Searches* - - - - - - - - ii. 72
14. *Court rolls* - - - - - - - - ii. 73
15. *Expense of searches* - - - - - ii. 73
16. *Power of attorney* - - - - - - ii. 73
17. *Evidence* - - - - - - - - ii. 74
18. *Pedigrees* - - - - - - - - ii. 74
19. *Recitals of pedigree* - - - - - ii. 75
20. *Evidence of pedigree* - - - - - ii. 76
21. *Registries of birth* - - - - - - ii. 76
22. *Marriage: legitimacy* - - - - - ii. 76

## Sect. III.—Of Comparing the Abstract with the Documents:

1. *Abstract, when complete* - - - - - ii. 78
2. *No inquiry in suit whether perfect* - - - ii. 79
3. *Acceptance of abstract* - - - - - ii. 79
4. 14. *Restricted abstract by contract* - - ii. 79. 83
5. *Of the title of a tenant in common* - - - ii. 79
6. *For what purposes abstract delivered* - - - ii. 80
7. *Purchaser's property in it* - - - - ii. 80
8. *Seller to produce the deeds* - - - - ii. 81
9. *Place for examination* - - - - - ii. 81
10. *At a third person's* - - - - - - ii. 81

Page
11. *At a distance, seller to pay expense* - - - ii. 82
12. *So in sale by Court* - - - - - - ii. 82
13. *Agent in London to examine abstract* - - ii. 83
14. *Southby* v. *Hutt: verifying abstract* - - - ii. 83
15. *Purchaser not bound to go to record offices* - - ii. 83
16. *Grant from the Crown: impropriate tithes: tithe rentcharges* - - - - - - - ii. 84
17. *Notice to purchaser of place of production* - - ii. 84
18. *Seller having covenant to produce deeds must produce them* - - - - - - - - ii. 85
19. *Promise to produce deeds* - - - - ii. 85
20. *Deeds burned after examination* - - - ii. 85
22. *Copies of court roll* - - - - - - ii. 86
23. *Abstract to be examined before purchaser act as owner* - - - - - - - - ii. 86
24. *Expense of examination where no title* - - ii. 86
25. *Purchaser neglecting to call for deeds for examination* - - - - - - - - ii. 87

## Sect. IV.—Of a Purchaser's Right to the Deeds:

1. *Warranties* - - - - - - - - ii. 88
4. *Pledge by seller of escrow* - - - - - ii. 89
5. *Right of purchaser to follow the deeds* - - ii. 90
7. *Lien of seller's solicitor* - - - - - ii. 91
8. *Deeds left with third person to prepare conveyance* ii. 91
10. *Or with the purchaser* - - - - - ii. 91
12. *Sale of part without stipulation* - - - ii. 92
13. *Where seller is under covenant to produce* - - ii. 92
14. *Leaving deeds in seller's custody* - - - ii. 93
15. *Arrangement where estate in mortgage* - - ii. 93
16. *Opinion of R. P. Commissioners* - - - ii. 93
17. *Deposit of deed, where sufficient* - - - ii. 95
19. *Implied notice of pledge of documents* - - ii. 95
20. *Nature of evidence* - - - - - - ii. 96
22. *Assignments lost* - - - - - - ii. 96
23. *Lease for a year lost* - - - - - ii. 97
24. 27. *Recitals as evidence* - - - - ii. 97, 98
25. *Evidence where deeds lost or destroyed* - - ii. 97
26. *Seller to execute new conveyance if old one burnt* - ii. 98
27. *Prosser* v. *Watts: recitals* - - - - ii. 98
28. *Whether covenant to produce within covenant for further assurance* - - - - - - ii. 98
29. *Purchaser's right to evidence after conveyance* - ii. 99
31. *Relieved if fraud, &c.* - - - - - ii. 99

Page

32. *Execution of title-deeds not to be proved* - - ii. 100
33. *Laythoarp* v. *Bryant* - - - - - - ii. 101
34. *Effect of it* - - - - - - - - ii. 101
36. *Will to be produced though seller heir* - - ii. 103
37. *Not to be proved against heir* - - - ii. 103
41. *Whether the deeds are transferred with the seisin* ii. 104
42. *Grant of deeds* - - - - - - - ii. 105
43. *Yea* v. *Field* - - - - - - - ii. 105
44. *Observations upon it* - - - - - ii. 106

Sect. V.—Of the Production of Deeds in Equity and at Law:

2. *Settlement relating to property of several owners: partition* - - - - - - - - ii. 108
3. *Right of purchaser where he has no covenant to produce* - - - - - - - - ii. 108
4. *Tenants in common, &c.* - - - - ii. 109
5. *Holder of deeds becoming mortgagee* - - ii. 109
7. *Tenant for life and remainder-man* - - - ii. 109
8. *Tenant for life parting with deeds, &c.* - - ii. 110
9. *Remainder-man no right to have deeds brought into Court* - - - - - - - - ii. 111
10. *Remote remainder-man* - - - - - ii. 111
11. *Contingent remainder-man* - - - - ii. 111
12. *Father and son* - - - - - - - ii 111
13. *Mortgagee under remainder-man without the deeds* ii. 112
14. *Fraud by tenant for life* - - - - ii. 112
15. *Mortgagee in fee under tenant for life, with the deeds* - - - - - - - - ii. 112
16. *Ejectment bill for deeds* - - - - - ii. 113
17. *Production of deeds in a suit* - - - - ii. 114
19. *Where the conveyance is impeached* - - - ii. 114
20. *Production at law* - - - - - - - ii. 115
22. *Production of title-deeds not compelled at law* - ii. 116
23. *R. P. Commissioners' opinion on want of possession of deeds* - - - - - - - ii. 116
24. *Observations thereon* - - - - - ii. 117

Sect. VI.—Of Attested Copies and Covenants to Produce Deeds:

2. *Purchaser entitled to attested copies* - - ii. 118
3. *Unless on record* - - - - - - - ii. 119
6. *And of them if in seller's custody* - - - ii. 120

Page
7. *Attested copies of copies of court roll* - - ii. 120
8. *Right excluded by agreement to produce deeds, qu.* - - - - - - - - - ii. 121
10. *Purchaser entitled to covenant to produce* - - ii. 122
11. *Although the sellers are assignees* - - - ii. 122
12. *Equitable right to production insufficient* - - ii. 122
13. *Seller having only a covenant to produce* - - ii. 123
14. *Covenant, how framed as to copies* - - - ii. 124
15. *Where a covenant to produce can be enforced after conveyance* - - - - - ii. 124
16. *By whom to be entered into* - - - - ii. 124
17. *The covenant runs with the land purchased* - ii. 124
18. *R. P. Commissioners' observations on Barclay* v. *Raine* - - - - - - - ii. 124
19. 21. *Rule in equity* - - - - ii. 125, 126
20. *Barclay* v. *Raine* - - - - - - ii. 125
22. *Observations on the law of that case* - - - ii. 127
23. *Validity of title in that case* - - - - ii. 128
24. *Whether the covenant runs with the land retained by the seller* - - - - - - ii. 129
25. *How covenant affects a marketable title* - - ii. 131

## CHAPTER X.

### OF THE TITLE WHICH A PURCHASER MAY REQUIRE.

### Sect. I.—Of the Root of the Title:

1. *Sixty years: old rule* - - - - - ii. 132
2. *Where earlier title could be required* - - ii. 133
6. *New statute of limitations* - - - - ii. 134
7. *Opinion of R. P. C. as to shortening the sixty years in abstracts* - - - - - ii. 134
8. *Observations upon it* - - - - - ii. 135
9. *Twenty years not sufficient* - - - - ii. 135
10. *Mr. Brodie's opinion in favour of sixty years* - ii. 135
11. *Suggestions in favour of a shorter period* - ii. 137
12. *Abstract to begin with a document* - - - ii. 139
13. *Copyhold title* - - - - - - ii. 139
14. *Lay tithes* - - - - - - - ii. 139
15. *Modus* - - - - - - - ii. 140
16. *Advowson* - - - - - - - ii. 140

Page

17. *Lessor's title* - - - - - - - ii. 140
18. *Whether lessee can require it* - - - - ii. 141
26. *A purchaser can, in equity* - - - - ii. 145
27. *And also at law* - - - - - - ii. 147
28. *Unless he knew it could not be produced* - - ii. 148
29. *Or he agree to waive it* - - - - - ii. 148
30. *Clear agreement required* - - - - ii. 148
31. *And he may show the title is bad* aliunde - - ii. 149
32. *Bishop's title not required* - - - - ii. 149
33. *Root of lessor's title* - - - - - ii. 149
35. *Renewable leaseholds* - - - - - ii. 150
36. *Root of that title* - - - - - - ii. 151
37. *Lessor's consent to be obtained by seller* - - ii. 151
38. *Equitable title* - - - - - - ii. 152
39. *Assignees to produce title like other sellers* - ii. 152

## Sect. II.—Of a Title with an Indemnity:

1. *Title subject to a charge* - - - - ii. 153
3. *Compensation and indemnity: Horniblow* v. *Shirley* - - - - - - - - - ii. 154
4. *Observations upon it* - - - - - ii. 155
5. *Indemnity: Halsey* v. *Grant* - - - - ii. 155
8. *Fee-farm rents on estate sold and others: title bad* - - - - - - - - ii. 157
11. *Purchaser not bound to take indemnity* - - ii. 161
12. *Apportioned rent* - - - - - - ii. 161
14. *Sale in lots subject to whole rent on one lot* - ii. 162
15. *Stipulation for a charge on one lot as an indemnity* - - - - - - - - ii. 162
16. *Nature of indemnity* - - - - - ii. 163
17. *Danger of eviction not a case for indemnity* - ii. 163

## Sect. III.—Of Doubtful Titles:

1. *Title to be sifted* - - - - - - ii. 165
2. *Purchaser favoured* - - - - - ii. 165
3. *Doubtful title not enforced in equity: case directed* - - - - - - - - ii. 166
4. 15. *House of Lords adopts the rule* - - ii. 167. 171
5. *What is a doubtful title* - - - - - ii. 167
6. *Marlow* v. *Smith* - - - - - - ii. 167
8. *Rational doubt: operation of rule* - - - ii. 168
9. *Decision in D. P. not a warranty* - - - ii. 168
10. *Doubts upon law or fact* - - - - ii. 169

Page

11. *Moody* v. *Walters* - - - - - - ii. 170
12. *Biscoe* v. *Perkins* - - - - - - ii. 170
13. *Biscoe* v. *Wilks* - - - - - - ii. 171
14. *Observations upon them* - - - - - ii. 171
16. *Lord Eldon regretted the rule* - - - - ii. 172
17. *House of Lords refused to decide upon exceptions* ii. 173
18. *Observations upon it* - - - - - ii. 173
19. *Judge gives weight to his own doubts only* - ii. 174

## Sect. IV.—Examples of Bad, Doubtful, and Good Titles in Equity:

1. *Cases where doubtful* - - - - - ii. 176
2. *Shapland* v. *Smith: estate tail* - - - ii. 176
3. *Wilcox* v. *Bellaers: estate tail* - - - ii. 177
4. *Jervoise* v. *Duke of Northumberland: executory trust: estate tail* - - - - - ii. 177
5. *Heath* v. *Heath: executory devise* - - - ii. 177
6. *Sharp* v. *Adcock: fee by devise* - - - ii. 177
7. *Price* v. *Strange: "legal representatives"* - ii. 178
8. *Barclay* v. *Raine: covenant to produce* - - ii. 178
9. *Sheffield* v. *Lord Mulgrave: leaseholds for lives* ii. 178
10. *Wheate* v. *Hall: power of sale* - - - ii. 178
11. *Cooper* v. *Denne: confirmation* - - - ii. 178
12. *Crewe* v. *Dicken: trustee's receipt* - - - ii. 178
14. *Adams* v. *Taunton: trustee renouncing* - - ii. 179
15. *Oxenden* v. *Skinner: portion of tithes* - - ii. 179
16. *Cassamajor* v. *Strode: allotment* - - - ii. 179
17. *Fort* v. *Clarke: pedigree* - - - - ii. 179
18. *Sloper* v. *Fish: escrow* - - - - - ii. 179
19. *Blosse* v. *Clanmorris: reversion in Crown* - ii. 179
20. *Coolmore* v. *Tyndale: fee in trustees* - - ii. 179
21. *Lowes* v. *Lush: act of bankruptcy* - - - ii. 179
22. *Cann* v. *Cann: commission unopened* - - ii. 180
23. *Stapylton* v. *Scott: entirety or share* - - ii. 180
24. *Hartley* v. *Pehall: covenant to take beer* - - ii. 180
25. *Jenkins* v. *Herries: contingency rejected* - - ii. 180
26. *Cases where title held good* - - - - ii. 180
27. *Lord Braybroke* v. *Inskip: devise of trust estate* ii. 180
28. *Nouaille* v. *Greenwood: equitable recovery* - ii. 180
29. *Warneford* v. *Thompson: power of sale* - - ii. 181
30. *Gibson* v. *Clarke: grant from the Crown presumed* - - - - - - - - ii. 181
31. 73. *Hillary* v. *Waller: presumption of conveyance* - - - - - - - ii. 181. 195

Page

32. 74. *Emery* v. *Grocock: presumption of surrender* - - - - - - - - ii. 181. 196
33. *Nouaille* v. *Greenwood: presumption* - - ii. 181
34. *Monck* v. *Huskisson: tithe exemption* - - ii. 181
35. *Hasker* v. *Sutton: contingent remainder destroyed* - - - - - - - - ii. 181
36. *West* v. *Burney: release of power* - - - ii. 182
37. *Howard* v. *Ducane: sale to tenant for life* - ii. 182
38. *Biddle* v. *Perkins: power too remote* - - ii. 182
39. *Rushton* v. *Craven: quantity of estate* - - ii. 182
40. *Clarke* v. *Royle: lien for purchase-money* - ii. 183
41. *Bare possibility no objection* - - - - ii. 183
42. *Suggestions: suspicions* - - - - ii. 183
43. *Mines reserved to Crown* - - - - ii. 183
45. *Mines under common* - - - - - ii. 184
47. 57. *Suspicion of fraud in appointment to child,* ii. 185. 190
48. *Bill filed by adverse claimant* - - - - ii. 185
49. *Existing right an objection* - - - - ii. 185
50. *Reservation of mines* - - - - - ii. 186
51. *General description of parcels* - - - - ii. 186
53. *Destruction of contingent remainders* - - ii. 187
54. *Reversion: incumbrances* - - - - ii. 187
55. *Sale under power in mortgage* - - - ii. 188
56. *Bankruptcy* - - - - - - - - ii. 189
58. *Title to allotments before award* - - - ii. 190
61. *Title to allotments* - - - - - ii. 192
62. *Purchaser taking possession of allotments* - - ii. 192
63. *Equitable title under decree* - - - - ii. 192
67. *Not under decree* - - - - - - ii. 194
70. *Infant heir of seller* - - - - - ii. 194
72. *Infant trustee acts* - - - - - ii. 195
73. *Presumption of conveyance* - - - - ii. 195
74. *Presumption of surrender of term* - - - ii. 196

## Sect. V.—Of Good and Doubtful Titles at Law:

1. *Good titles at law* - - - - - ii. 198
2. *Alpass* v. *Watkins: estate tail* - - - ii. 198
3. *Romilly* v. *James: estates tail by implication* - ii. 198
4. *Boyman* v. *Gutch: ambiguous proviso* - - ii. 198
5. *Doubtful title not recognised at law: Hartley* v. *Pehall; Oxenden* v. *Skinner* - - - ii. 198
7. *Wilde* v. *Fort* - - - - - - ii. 199
9. *Curling* v. *Shuttleworth* - - - - - ii. 200

Page

10. *Boyman* v. *Gutch* - - - - - - ii. 201
11. *Equitable objections allowed at law* - - - ii. 202
12. *Alpass* v. *Watkins* - - - - - ii. 202
13. *Elliot* v. *Edwards*; *Johnson* v. *Johnson*; *Maberly* v. *Robins* - - - - - - ii. 203
14. *Willett* v. *Clarke* - - - - - - ii. 204
16. *Seller must have the legal estate* - - - ii. 207

Sect. VI.—Of Titles Depending upon Questions of Fact:

1. *Fact not admitting of proof* - - - - ii. 207
3. *Deed depending upon extrinsic circumstances* - ii. 209
4. *Doubt raised by devise of shares where entirety sold* - - - - - - - - ii. 209
7. *Title depending upon proof of party answering a description* - - - - - - ii. 211
8. *Doubtful reference by codicil to a will* - - ii. 211
9. *Construction of ill-penned shifting clause: residence* - - - - - - - ii. 212
10. *Issue upon pedigree* - - - - - ii. 212
11. *Doubt as to legitimacy* - - - - - ii. 212
13. *Doubtful fact at law* - - - - - ii. 213

## CHAPTER XI.

### OF THE NEW LAWS OF REAL PROPERTY AS CONNECTED WITH TITLE.

Sect. I.—Of Title with Reference to Dower:

1. *Dower barred by legal term* - - - - ii. 214
2. *Dower of wife of trustee or mortgagee* - - ii. 215
3. *Eviction of jointure* - - - - - ii. 215
7. *Equitable jointure* - - - - - ii. 219
8. *Bar of dower no bar of thirds* - - - - ii. 219
9. *Infants* - - - - - - - ii. 220
10. *Equitable jointure on infant* - - - - ii. 220
11. *Eviction thereof* - - - - - - ii. 220
13. *Exceptions out of new dower act* - - - ii. 222
14. *New right of dower* - - - - - ii. 223

| | | Page |
|---|---|---|
| 16. | *Husband's power over dower by disposition* | ii. 225 |
| 17. | *By charge or contract* | ii. 225 |
| 18. | *By declaration in the conveyance, or by deed* | ii. 225 |
| 19. | *By his will* | ii. 226 |
| 21. | *Observations upon these provisions* | ii. 226 |
| 23. | *Wife barred by devise to her of any dowable land* | ii. 227 |
| 24. | *But not by personal estate or of land not liable to dower* | ii. 227 |
| 25. | *Covenants binding in equity* | ii. 227 |
| 26. | *Purchaser's inquiry* | ii. 227 |
| 27. | *Curtesy* | ii. 227 |

Sect. II.—Of Title by Descent:

| | | |
|---|---|---|
| 1. 19. | *Descent to be traced from the purchaser,* | ii. 228. 236 |
| 2. | *Actual seisin unnecessary* | ii. 230 |
| 3. | *Descent to be proved to exclude title as purchaser* | ii. 230 |
| 4. | *Son of illegitimate father* | ii. 230 |
| 5. | *Heir though devisee to take by descent: grantor or his heirs also* | ii. 232 |
| 6. | *The old law* | ii. 232 |
| 7. | *Where purchaser's ancestor to be deemed the purchaser* | ii. 232 |
| 9. | *Descent from brother or sister* | ii. 233 |
| 10. | *Lineal ancestors heirs to issue* | ii. 233 |
| 11. | *Male line before the female* | ii. 234 |
| 12. | *Preference of mother of more remote male ancestor* | ii. 234 |
| 14. | *Half blood admitted* | ii. 235 |
| 15. | *Attainder not an impediment* | ii. 235 |
| 16, 17. | *Limit of act* | ii. 236 |
| 18. | Possessio fratris *abolished* | ii. 236 |
| 21. | *Canons of descent* | ii. 238 |
| 22. | *Examination of pedigree* | ii. 240 |
| 23. | *Where a son is the purchaser* | ii. 241 |
| 25. | *Where the father is the purchaser* | ii. 242 |

Sect. III.—Of Title by Devise:

| | | |
|---|---|---|
| 1. | *Wills not within the act* | ii. 244 |
| 2. | *What may be disposed of by will* | ii. 245 |
| 4. | *Operation of a will* | ii. 249 |
| 5. | *Infant cannot make a will* | ii. 250 |

| | Page |
|---|---|
| 6. *Married women may, as before* | ii. 250 |
| 8. *How will is to be executed* | ii. 251 |
| 9. 12. *Appointments the same as wills* | ii. 251, 252 |
| 10. *Publication unnecessary* | ii. 252 |
| 11. *Attestation* | ii. 252 |
| 12. *Witnesses* | ii. 252 |
| 14. *Incompetency of witnesses* | ii. 252 |
| 16. *Marriage a revocation* | ii. 253 |
| 17. *No revocation by presumption* | ii. 254 |
| 18. *Other revocations* | ii. 254 |
| 19. *Alterations, &c.* | ii. 254 |
| 20. 27. *Reviving revoked will* | ii. 254. 256 |
| 21. *No re-conveyance by subsequent conveyance or act* | ii. 255 |
| 22. *Will to speak, when* | ii. 255 |
| 23. *Cancellation* | ii. 255 |
| 24. *Change of estate* | ii. 255 |
| 26. *Modes of revocation* | ii. 255 |
| 28. *Lapsed devises fall into residue* | ii. 256 |
| 29. *Copyhold and leasehold pass with freehold under general devise* | ii. 256 |
| 30. *So estates subject to general powers* | ii. 257 |
| 32. *Fee passes without words of limitation* | ii. 257 |
| 33. *Die without issue, &c.* | ii. 258 |
| 34. *Devise to trustees not a chattel interest* | ii. 258 |
| 35. *Trustees to take the fee, when* | ii. 258 |
| 37. 39. *Estates tail not to lapse* | ii. 259, 260 |
| 38. *Gifts to children leaving issue not to lapse* | ii. 259 |


## Sect. IV.—Of Title under Tenant in Tail:


| | |
|---|---|
| 1. *Equitable tenant to the præcipe with legal estate* | ii. 262 |
| 3. *New law: 3 & 4 Will. 4, c. 74* | ii. 267 |
| I. Where defects in existing recoveries are amended | ii. 268 |
| 5. *Ancient demesne* | ii. 268 |
| 6. *Court without jurisdiction* | ii. 269 |
| 7. *Errors apparent from deed amended in fines* | ii. 269 |
| 8. *So in recoveries* | ii. 269 |
| 9. *How acted upon* | ii. 269 |
| 10. *Recoveries defective rendered valid* | ii. 270 |

Page

II. What the act abolishes - - - ii. 271

12. *Fines and recoveries* - - - - ii. 271
13. *Warranties by tenant in tail* - - - - ii. 271
14. *Statute as to estates tail* ex prov. viri. - - ii. 271

III. How existing agreements are to be performed - - - - - ii. 271

15. *By deeds under the statute* - - - - ii. 271

IV. The power of tenant in tail - - ii. 271

16. *He can acquire the fee simple* - - - - ii. 271
17. *Against whom* - - - - - - ii. 272
18. *Estates tail in contingency, or divested* - - ii. 272
19. *Persons taking in defeasance of the estate tail* - ii. 274
21. *Roper* v. *Halifax* - - - - - - ii. 275
23. 26. *Powers* - - - - - - ii. 276, 277
24. *Lord Scarborough's case* - - - - ii. 276
26. *Prior estate, to pass, must be conveyed* - - ii. 277
27. *Any disposition effectual* - - - - ii. 278
28. *Contracts: charges, &c.* - - - - ii. 278
29. *Contracts may be enforced* - - - - ii. 279
31. *Confirmation of voidable estate* - - - ii. 279
32. *Base fee may be enlarged* - - - - ii. 280

V. Of the effect of partial dispositions - ii. 281

33. *Mortgage, &c., limited estate, operate variously* - ii. 281
34. *Explanation* - - - - - - - - ii. 281

VI. Protector - - - - - - - ii. 282

36. *What prior estate gives the office* - - - ii. 282
37. *Undivided shares: husband and wife* - - ii. 283
38. *Estates by confirmation give the right* - - ii. 283
39. *Lessees at a rent, dowress, bare trustee or representatives, not entitled* - - - - - - ii. 283
40. *Savings of rights under existing settlements* - ii. 284
41. *Where a seller of a remainder may bar it* - - ii. 284
42. *Where a protector may be appointed* - - - ii. 284
43. 73. *Saving of right of bare trustees* - - ii. 285. 298
44. *Lunatics, traitors, infants, &c. represented by L. C. or Court of Chancery* - - - ii. 285
45. *Decisions in cases of lunacy* - - - - ii. 286

Page

VII. Of the office and power of a protector ii. 287

49 *His consent necessary* - - - - - ii. 287
51. *Uncontrollable* - - - - - - ii. 287
52. *Consent cannot be revoked* - - - - ii. 288
53. *Married woman's consent* - - - - ii. 288

VIII. Where a base fee shall be enlarged without deed - - - - ii. 288

54. *Where it is united with the base fee, and no intermediate estate* - - - - - - ii. 288

IX. What deeds are to be executed - - ii. 288

55. *A deed of conveyance: married woman* - - ii. 288
56. *Protector, how to consent* - - - - ii. 289
57. *Enrolment* - - - - - - - ii. 289
58. *Leases for a certain term, &c. exempted from enrolment* - - - - - - - ii. 290
59. *How conveyance operates* - - - - ii. 290
60. *Equitable jurisdiction excluded* - - - ii. 291

X. Review of the preceding provisions - ii. 291

61. *Tenant in tail may create base fee not under the statute* - - - - - - - ii. 291
62. *Retains his old power by the substitute: greater power in one case* - - - - - ii. 291
63. *Appointments* - - - - - - ii. 293
64. *Issue in tail* - - - - - - ii. 293
65. *Protectors by estate* - - - - - ii. 293
66. *Nature of estate* - - - - - - ii. 294
67. *Bare trustees excluded: operation of act considered* - - - - - - - ii. 294
68. *Assigns excluded: like consideration* - - ii. 296
69. *Power of tenant in tail enlarged* - - - ii. 296
70. *Power of Lord Chancellor* - - - - ii. 297
71. *Savings in existing settlements* - - - ii. 297
72. *Where a remainder has been sold* - - - ii. 298
73. *Saving of right of bare trustee* - - - ii. 298
74. *Error in dates* - - - - - - ii. 299
76. *Protector by appointment* - - - - ii. 299
77. *Limit of power* - - - - - - ii. 300
78. *Nature of office* - - - - - - ii. 300
79. *Purchaser's title under act* - - - - ii. 301

| | | Page |
|---|---|---|
| | XI. Of copyholds - - - | ii. 302 |
| 80. | *Legal and equitable tenants in tail, how to convey: consent of protectors* - - - | ii. 302 |
| 81. | *Where the consent is not by deed* - - - | ii. 302 |
| 82. | *Equitable tenant in tail* - - - - - | ii. 303 |
| 83. | *Prior purchaser without notice protected* - - | ii. 303 |
| 84. | *Enrolment* - - - - - | ii. 303 |
| | XII. Of bankrupts - - - - | ii. 304 |
| 85. | *Extent of repeal* - - - - - - | ii. 304 |
| 86. | *Power of commissioners over estates tail and base fees* - - - - - - - - | ii. 304 |
| 87. | *Consent of protector* - - - - - | ii. 304 |
| 88. | *Base fee in purchaser enlarged by act* - - | ii. 304 |
| 89. | *Where voidable estate confirmed by act of commissioner* - - - - - - - | ii. 305 |
| 90. | *Saving of right of a purchaser without express notice* - - - - - - - | ii. 305 |
| 91. | *Bankrupt's estate* - - - - - | ii. 305 |
| 92. | *Effect of bankrupt's death* - - - - | ii. 305 |
| 93. | *Equitable estate in copyholds* - - - | ii. 306 |
| | XIII. Of money - - - - - | ii. 306 |
| 94. | *Treated as land* - - - - - | ii. 306 |
| 95. | *Lands to be sold, &c. in Ireland* - - - | ii. 307 |
| | XIV. Of dispositions by married women - | ii. 307 |
| 96. | *Power of married woman not tenant in tail* - | ii 307 |
| 97. | *May release right of dower* - - - - | ii. 308 |
| 98. | *Powers: deeds* - - - - - - | ii. 308 |
| 99. | *Surrenders of copyholds* - - - - | ii. 308 |
| 100. | *Power to dispense with husband's concurrence* - | ii. 309 |
| 101. | *Enrolment, &c. of deeds executed by her as tenant in tail, protector or owner* - - - - | ii. 309 |
| | XV. Of enrolments and acknowledgments of deeds, and of confirming a purchaser's voidable estate - - | ii. 309 |
| 102. | *Acknowledgment unnecessary* - - - - | ii. 309 |
| 103. | *Operation of enrolment* - - - - - | ii. 309 |
| 104. | *Conflicting rights of purchasers* - - - | ii. 310 |
| 105. | *Policy and frame of the act* - - - - | ii. 311 |

Page

XVI. Of the act relating to Ireland - - ii. 312

107. *Operates, from what period* - - - - ii. 312
108. *Extends to contingent interests* - - - ii. 312
109. *Rights of Crown partially saved in English act* - ii. 312
110. *To what extent saved in Irish act* - - - ii. 313
111. *The like in bankruptcy and money entuiled* - ii. 313
113. *Confirmation of voidable estate* - - - ii. 314
114. *Married woman's power* - - - - ii. 314
116. *General power to convey contingent interests* - ii. 315

Sect. V.—Of a Title by Non-claim:

2. *Old statutes barred the remedy only* - - ii. 318
3. *Savings in* 32 *H.* 8. - - - - - ii. 319
4. *And in* 21 *Ja.* 1. - - - - - - ii. 319
5. *Successive disabilities* - - - - - ii. 319
9. *Presumption of death* - - - - - ii. 322
10. *Disability of coparcener* - - - - ii. 322
11. *Sixty years' possession not a title* - - - ii. 322
14. *Rule in equity as to trusts* - - - - ii. 324
18. 22. *As to an equity of redemption* - - ii. 326, 327
21. *In cases of fraud* - - - - - ii. 327
24. *Disabilities in equity* - - - - - ii. 327
25. *Title by non-claim* - - - - - ii. 328
26. *New law:* 3 & 4 *Will.* 4, *c.* 27 - - - ii. 328

I. What the act has abolished - - - ii. 329

27. *All real and mixed actions, except dower,* quare impedit *and ejectment* - - - - ii. 329
28. *Savings* - - - - - - - ii. 329
29. *Descent cast, discontinuance, &c. abolished* - ii. 330
30. *Continual claim also* - - - - - ii. 330
31. *Right extinguished* - - - - - ii. 330
32. *Time runs, from what period* - - - ii. 330

II. Period of non-claim, and when time first accrues - - - - - - ii. 331

33. *Twenty years' non-claim and an ejectment* - ii. 331
36. *In cases of possessions where time accrues* - ii. 332
37. *Where party has been in possession* - - - ii. 332
38. *Where a deceased person was last in possession* - ii. 333
39. *Where a grantor was last in possession* - - ii. 333
40. *Doe* v. *Williams* - - - - - ii. 333

Page

41. *Where any payment has been made to a mortgagee* ii. 334
42. *Summary* - - - - - - - - ii. 334
43. *Twenty years a bar, although case not within the conditions stated* - - - - - ii. 334
44. 78. *Observations on James* v. *Salter* - ii. 336. 353
45. *Rent newly created by will* - - - - ii. 338
46. *Reversionary estate, and no possession* - - ii. 339
47. *Forfeiture, or breach of condition* - - - ii. 339
49. *Remainder-man may wait till possession fall* - ii. 340
50. *Concurrent rights* - - - - - ii. 340
51. *Administrator* - - - - - - ii. 341
52. *Possession by tenant* - - - - - ii. 341
53. *Receipt of rent, against tenant* - - - ii. 341
54. 56. 77. *Tenant at will, possession by* ii. 341, 342. 352
55. *Doe* v. *Thompson* - - - - - - ii. 341
57. 73. *Tenant from year to year without lease in writing, possession by* - - - ii. 342. 350
58. 76. *Tenant under lease in writing, at a rent of 20l. or more, possession by* - - - ii. 342. 351
59. *Making an entry not possession* - - - ii. 343
60. *Possession by coparcener, and the like* - - ii. 343
61. *Or by younger brother* - - - - ii. 344
62. *Acknowledgment of title in writing* - - - ii. 344

III. Of savings in cases of disabilities - ii. 345

64. *Savings* - - - - - - - - ii. 345
65. *Forty years the full period* - - - - ii. 345
66. *What is not beyond the seas* - - - - ii. 346

IV. Of adverse possession - - - ii. 346

67. 72. *Report of Commissioners* - - ii. 346. 349
69. 71. *Doe* v. *Williams: what is adverse possession* - - - - - - - ii. 347. 349
70. 80. *Doe* v. *Bramston: husband and wife out of possession for forty years* - - - ii. 347. 353
73. *Possession by tenants* - - - - - ii. 350
74. *Acknowledgment of title* - - - - ii. 350
75. *Danger of time running where possession is not adverse* - - - - - - - ii. 351
76. *Lease in writing* - - - - - - ii. 351
77. *Tenancies at will* - - - - - ii. 352
78. *Rents and particular estates* - - - - ii. 353
79. *Forty years not a perfect bar* - - - - ii. 353
80. *Imperfect conveyance by husband and wife* - ii. 353

| | | Page |
|---|---|---|
| V. | Bar of tenant in tail bars remainder-man | ii. 355 |
| 81. | *Where time has run against him* | ii. 355 |
| 82. | *Where he dies before time is out* | ii. 355 |
| 83. | *Possession under an imperfect assurance by him* | ii. 355 |
| 84. | *Proposition of commissioners thereon* | ii. 356 |
| 85. | *Observations on the provision* | ii. 356 |
| 86. | *Does not operate retrospectively* | ii. 357 |
| 87. | *Base fees, how affected* | ii. 358 |
| 88. | *Voidable fees* | ii. 359 |
| VI. | Of bars in equity | ii. 360 |
| 89. | *Same period as at law: express trusts: concealed frauds* | ii. 360 |
| 90. | *Acquiescence, &c.* | ii. 361 |
| 91. | *Mortgagor out of possession* | ii. 361 |
| VII. | Of money, legacies, dower, rent and interest | ii. 362 |
| 92. | *Twenty years a bar of money secured upon land, &c., or legacy* | ii. 362 |
| 93. | *Judgment creditor barred* | ii. 363 |
| 94. | *Legacy become a trust* | ii. 363 |
| 95. | *Whether act extends to legacies out of personalty* | ii. 363 |
| 96. | *Observations on the act* | ii. 364 |
| 97. | *Dower, rent or interest* | ii. 365 |
| 99. | *Rents in leases secured by covenants* | ii. 366 |
| VIII. | Church property and advowsons | ii. 368 |
| 100. | *Time for spiritual and eleemosynary corporations* | ii. 368 |
| 101. | *Advowsons* | ii. 368 |
| 104. | *One hundred years full period* | ii. 369 |
| IX. | Limits of act | ii. 369 |
| 105. | *Spiritual Court included; Scotland, and partially Ireland excluded* | ii. 369 |
| X. | Rights of common, of way, &c., and lights | ii. 369 |
| 106. | 2 & 3 *Will.* 4. *c.* 71, *Right of common, &c. thirty years: sixty years* | ii. 369 |
| 107. | *Ways, watercourses, twenty years: forty years* | ii. 370 |
| 108. | *Lights, twenty years* | ii 371 |

| | | Page |
|---|---|---|
| 109. | *Time, how to be reckoned* | ii. 371 |
| 110. | *Presumption excluded* | ii. 372 |
| 111. | *Savings for disabilities* | ii. 372 |
| 113. | *Pleadings* | ii. 374 |
| 118. | *Effect of permission asked* | ii. 375 |
| 119. | *Evidence of enjoyment before the fixed period* | ii. 376 |
| | XI. Moduses and exemptions | ii. 376 |
| 121. | *2 & 3 Will. 4, c. 100: moduses or exemptions, thirty years: 60 years* | ii. 376 |
| 122. | *Corporation sole* | ii. 377 |
| 123. | *Decrees* | ii. 378 |
| 124. | *What time shall be excluded* | ii. 378 |
| 125. | *Disabilities: presumption* | ii. 378 |
| 126. | *Tithe Commutation Act* | ii. 379 |


## CHAPTER XII.

### OF SEARCHING FOR INCUMBRANCES AND OF RELIEF AGAINST INCUMBRANCES.

### Sect. I.—Of Searching for Incumbrances:


| | | |
|---|---|---|
| 2. | *Judgments must be stated in abstracts* | ii. 381 |
| | 3. Judgments under the Old Law: | |
| 4. | *Judgment after payment of purchase-money not binding on purchaser* | ii. 382 |
| 5. | *Forth* v. *Duke of Norfolk* | ii. 382 |
| 6. | *Mortgagee without notice buying equity of redemption not bound by judgments* | ii. 384 |
| 7. | *Trust estate, how far liable* | ii. 385 |
| 9. | *Trust for sale; purchaser not liable* | ii. 387 |
| 10. | *Lodge* v. *Lyseley* | ii. 388 |
| 11. | *Foster* v. *Blackston* | ii. 389 |
| 12. | *Purchaser without notice protected by a term* | ii. 390 |
| 13. | *After purchased lands bound* | ii. 392 |
| 14. | *Judgments defeated by an appointment* | ii. 392 |
| 15. | *Judgment creditors under a decree* | ii. 392 |
| 16. | *Leaseholds bound by writ of execution* | ii. 393 |
| 18. | *Equity of redemption of a term not bound* | ii. 393 |

| | Page |
|---|---|
| 20. *Purchaser with notice bound by undocketted judgment* | ii. 394 |
| 21. *Moiety only bound unless two judgments of the same term* | ii. 394 |
| 22. JUDGMENTS UNDER THE NEW LAW: | |
| 22, 23. *Bind the whole estate, legal or equitable, and copyholds and general powers* | ii. 395 |
| 24. 28. *An actual charge, and bind issue and others who could be barred* | ii. 395, 396 |
| 25. *Purchasers without notice protected* | ii. 396 |
| 26. *Operation of act* | ii. 396 |
| 27. *Decrees, &c. equal to judgments* | ii. 396 |
| 29. *Protection to purchasers without notice* | ii. 397 |
| 30. *Judgment after payment of purchase-money still not binding* | ii. 397 |
| 32. *Trust estate, how far liable* | ii. 399 |
| 33. *Trust for sale, purchaser not liable* | ii. 399 |
| 34. *Purchaser without notice protected by a term* | ii. 399 |
| 35. *Judgments not defeated by an appointment: purchaser* | ii. 401 |
| 36. *Leaseholds* | ii. 401 |
| 37. *Copyholds* | ii. 401 |
| 38. *Judgments not docketted not binding on purchasers* | ii. 401 |
| 39. *Notice to a purchaser* | ii. 402 |
| 40. *Search for judgments* | ii. 402 |
| 41. *Although a register county* | ii. 403 |
| 42. *Extent of search* | ii. 403 |
| 43. *Judgments under old dockets* | ii. 403 |
| 44. *Registry, how to be made* | ii. 404 |
| 45. *Judgments against tenant in tail* | ii. 405 |
| 46. *Purchasers before the 1st of October, 1838, protected* | ii. 405 |
| 47. *When search should be made* | ii. 405 |
| 48. *Judgments against bankrupts* | ii. 405 |
| 49. *Identity of person bound by judgments* | ii. 406 |
| 50. *Judgments of inferior courts removed* | ii. 406 |
| 51. *Whether they are to be registered* | ii. 407 |
| 52. *Contribution* | ii. 408 |
| 54. *Remedy against any part* | ii. 408 |
| 55. *Search for insolvency and bankruptcy* | ii. 409 |
| 56. *Enrolment of proceedings* | ii. 409 |
| 57. *Of certificate of conformity* | ii. 410 |

| | | Page |
|---|---|---|
| 58. | *Search for* lis pendens | ii. 410 |
| 59. | *Search for Crown debts, &c.* | ii. 410 |
| 60. | *Protection against Crown debts by term* | ii. 411 |
| 61. | *Accountant's estate, how charged* | ii. 411 |
| 62. | *What sales binding on Crown* | ii. 412 |
| 63. | *Simple contract debtor to Crown* | ii. 412 |
| 64. | *Notice, how far material* | ii. 413 |
| 65. | *Collector of taxes* | ii. 413 |
| 66. | *Search for substitution for fines and recoveries deeds* | ii. 413 |
| 67. | *Search of registry of deeds* | ii. 414 |
| 68. | *Wills registered or unregistered* | ii. 415 |
| 70. | *Leaseholds* | ii. 415 |
| 71. | *Where registry unnecessary* | ii. 415 |
| 72. | *Judgments* | ii. 415 |
| 73. | *Binding leaseholds* | ii. 416 |
| 74. | *When search should be made* | ii. 416 |
| 75. | *Search for annuities* | ii. 416 |
| 76. | *Solicitor's liability for neglect* | ii. 417 |
| 77. | *Chief clerk's and registrar's liability* | ii. 417 |
| 78. | *Inquiry of tenant* | ii. 417 |


## Sect. II.—Of relief from Incumbrances:


| | | |
|---|---|---|
| 1. | *Seller to pay off incumbrances* | ii. 418 |
| 3. | *Unless purchaser has agreed to accept a covenant* | ii. 419 |
| 4. | *Purchaser may recover, though money paid, if conveyance not perfected* | ii. 419 |
| 5. | *Eviction after conveyance not relieved against* | ii. 420 |
| 7. | *Serjeant Maynard's case* | ii. 420 |
| 8. | *Urmston* v. *Pate* | ii. 424 |
| 9. | *Title under forged instrument* | ii. 425 |
| 10. | *Matthews* v. *Hollings: erroneous* | ii. 426 |
| 12. | *Covenants of earlier vendors* | ii. 426 |
| 13. | *No relief though money secured* | ii. 426 |
| 15. | *Or sale by the Court* | ii. 428 |
| 16. | *Unless in case of misrepresentation* | ii. 428 |
| 17. | *Concealment of defect in title* | ii. 428 |
| 18. | *Purchase with all faults of title* | ii. 428 |
| 20. | *Suit for relief* | ii. 429 |
| 21. | *Issue directed* | ii. 429 |
| 22. | *Relief where concealment* | ii. 430 |
| 23. | *No lien on purchase-money after appropriation* | ii. 430 |
| 24. | *Fund appropriated against a claim, liable for the real claim* | ii. 431 |

Page

25. *Payment by purchaser to a creditor of vendor* - ii. 431
26. *Purchase of incumbrances by third person* - ii. 432
27. *How far binding on purchaser* - - - ii. 432
28. *Purchase of incumbrances by purchaser of estate* ii. 432
29. *Seller buying in interests after conveyance a trustee for purchaser* - - - - - ii. 433

## CHAPTER XIII.

### OF THE CONVEYANCE AND COVENANTS FOR TITLE.

### Sect. I.—Of the Conveyance:

1. *Expense where incumbrancers join thrown on seller* - - - - - - - - ii. 434
2. *Statement of objection to title* - - - - ii. 435
3. *Mistake in conveyance corrected* - - - - ii. 435
4. *Alteration in draft should be communicated* - ii. 435
5. *When conveyance may be prepared* - - - ii. 435
6. *Discovery of defect before engrossment* - - ii. 436
7. *Eviction before execution* - - - - - ii. 436
8. *Preparation of conveyance relying upon a promise by seller* - - - - - - - ii. 436
9. *Bad title, no conveyance need be prepared* - - ii. 436
10. *Conveyance to lessee determines covenants in lease* ii. 436
11. *Expense of conveyance falls on purchaser: of execution on seller* - - - - - - ii. 436
12. *Purchaser pays for surrender and admittance* - ii. 437
13. *Seller to convey or surrender, not by attorney* - ii. 437
15. *Seller not bound to appoint attorney* - - ii. 438
16. *Draft belongs to purchaser* - - - - ii. 438
17. *So deed imperfectly executed* - - - - ii. 438
18. *Or deed executed by seller where contract is rescinded, as purchments* - - - - ii. 439
19. *But it may be cancelled* - - - - ii. 440
20. *Purchaser's lien on deeds* - - - - ii. 441
21 *Seller's attorney has no lien on conveyance* - ii. 441
22. *Jointress releasing, her remedies on fund to answer her jointure* - - - - - ii. 441
23. *Conveyance should be registered* - - - ii. 442
25. *Consequences of neglect* - - - - ii. 443

Page

Sect. II.—Of Stamps:

1. *Instruments executed, stamped upon payment of penalty* - - - - - - - ii. 444
2. *Agreements not to be stamped as conveyances* - ii. 444
3. *False statement of consideration does not avoid the deed* - - - - - - - - ii. 444
4. *Price may be reduced to save duty* - - - ii. 445
5. *Apportionment of consideration* - - - ii. 445
6. *One set of stamps only to conveyance* - - ii. 445
7. *Unless other estates or matter not incident* - ii. 446
9. *Junction of third person to enter into covenant requires no further stamp* - - - - ii. 446
10. *Endorsements, &c. to be counted* - - - ii. 446
11. *Inventory also* - - - - - - ii. 447
12. *Attornment requires no stamp* - - - - ii. 447
13. *Ad valorem duty sufficient, though less than 1 l. 15 s.* - - - - - - - - ii. 447
14. *Conveyance with mortgage requires two stamps* - ii. 447
15. *Award under enclosure does not require ad valorem stamp* - - - - - - ii. 447
16. *Whilst execution in fieri, alterations and re-executions valid without new stamps* - - ii. 447

Sect. III.—Of Covenants for Title:

1. *Attorney answerable to seller for improper covenants* - - - - - - - - ii. 448
2. *Usual covenants* - - - - - - ii. 449
3. *Synonymous covenants* - - - - - ii. 449
4. *Agreement to take bad title with covenants* - ii. 449
5. *Right to covenants under agreement* - - ii. 449
6. *Vendor who bought covenants against himself only* - - - - - - - ii. 450
7. *Even though he retains the deeds* - - ii. 451
8. *Vendor who did not buy covenants against last purchaser* - - - - - - ii. 451
9. *Restricted in equity* - - - - - ii. 452
10. *No covenants for title where estate sold under will for debts, &c.* - - - - - ii. 452
11. *Or by a court of equity* - - - - ii. 453
12. *Practice in those cases* - - - - ii. 453
14. *Purchaser is entitled to covenants if parties entitled to the money* - - - - - ii. 454

| | | Page |
|---|---|---|
| 15. | *Or the debts are paid* | ii. 454 |
| 17. | *No covenants upon sales by the Crown or assignees* | ii. 455 |
| 18. | *Practice as to bankrupts* | ii. 455 |
| 19. | *Purchaser not entitled to unbroken chain of covenants* | ii. 455 |


## CHAPTER XIV.

## OF THE CONSTRUCTION OF COVENANTS FOR TITLE.

### Sect. I.—What Covenants Run with the Land:


| | | |
|---|---|---|
| 1. | *Covenants for title are real ones: right of assignees, heirs and executors* | ii. 458 |
| 2. | *Right of devisees to action* | ii. 458 |
| 3. | *Such covenants run with term of years* | ii. 459 |
| 4, 5. | *Operation of* 32 *H.* 8, *on* cestuis que use | ii. 459 |
| 6. | *Covenants run with the seisin* | ii. 459 |
| 7. | *Do not run where covenantee is* cestui que use, *and afterwards appoints* | ii. 460 |
| 8. | *But do where assignee takes the estate of* cestui que use | ii. 460 |
| 9. | *R. P. Commissioners contra* | ii. 461 |
| 10. | *Covenants with appointee run with the land* | ii. 462 |
| 11. | *But not where a power is created by a power* | ii. 462 |
| 12. | *Roach* v. *Wadham: appointment defeats estate and covenants with it* | ii. 463 |
| 13. | *Distinction as to the legal seisin* | ii. 463 |
| 13 a. | *Whether there must be privity in vendors covenanting* | ii. 464 |
| 15. | *Privity of estate* | ii. 466 |
| 16. | *Privity of contract* | ii. 466 |
| 17. | *Privity of contract and estate* | ii. 466 |
| 18. | *Where debt lies* | ii. 466 |
| 19. | *Assignee of lessee bound by and entitled to covenants with lessee:* 32 *H.* 8 | ii. 466 |
| 20. | *Assignee of reversion* | ii. 467 |
| 21. | *Webb* v. *Russell: privity of estate* | ii. 469 |
| 22. | *Purchaser's covenants with the seller, a mortgagor* | ii. 469 |
| 23. | *Wilmot's opinion in Bally* v. *Wells* | ii. 470 |

Page

25. *Purchaser entitled to covenant against lessee* - ii. 470
26. *Covenant to reside, whether it binds a purchaser* ii. 471
28. *Opinion of R. P. C. as to covenants by a stranger running with the land* - - - - ii. 471
29. *Coke's opinion: partition: covenant by a prior to perform divine service: Pakenham's case* - ii. 472
30. *Horne's case* - - - - - - - ii. 475
31. *State of authorities* - - - - - ii. 475
32, 33. *Manor: Horne's case* - - - ii. 475. 477
34. *Parson covenanting:* 6 *H.* 4 - - - - - ii. 477
35. *Keppell* v. *Bailey: purchaser covenanting to keep a shop, &c.* - - - - - - ii. 477
36. *King* v. *Jones: covenant by husband of mortgagor* - - - - - - - - ii. 478
37. *Vyvyan* v. *Arthur: suit to mill* - - - ii. 478
38. *Milnes* v. *Branch: rent created by seller's conveyance: covenant by purchaser does not run with it* - - - - - - - - ii. 479
41. *Rent created by way of use, covenant with grantee does not run* - - - - - - - ii. 480
43. *Whether a covenant to pay with a grantee of a rent will run with it* - - - - - - ii. 481
44. *Holt's opinion in favour: Ellenborough's contra* ii. 481
45. *Covenant to pay mortgage money does not run* - ii. 482
46. *Nor does covenant by assignee to assignor to pay rent and indemnify* - - - - - - ii. 483
47. *Covenant by lessee of mines* - - - - ii. 483
48. *Power of distress granted to assignees of another estate* - - - - - - - - ii. 484
49. *Grant by lessee of equitable estate, who obtains the legal estate and assigns* - - - - ii. 484
50. *Lease with covenant to render account of wine sold, &c. collateral* - - - - - - ii. 484
51. *Covenants in gross, how far binding* - - ii. 485
52. *Where for further assurance, will be specifically enforced* - - - - - - - - - ii. 485
53. *Where the seller's remaining lands are bound by covenants* - - - - - - - - ii 485
54. *Grant of watercourse, with covenant to cleanse it* - - - - - - - - - ii. 485
55. 62. *Brewster* v *Kidgell: covenant to pay rent in fee does not bind assignee of land,* qu. - ii. 485. 492
56. *Cook* v. *Lord Arundel: where purchaser can throw incumbrances on other estates* - - ii. 486

Page

57. *Wilmot's opinion of Holt's* - - - - ii. 489
58. *Roach* v. *Wadham: against Holt's opinion* - ii. 489
59. *Opinion of R. P. C. on Roach* v. *Wadham* - ii. 489
60. *Roach* v. *Wadham explained* - - - - ii. 490
62. *Result* - - - - - - - - ii. 492
63. *Covenant to produce deeds* - - - - ii. 492
64. *Covenants not to build on lands, &c. whether they run with the land: bind in equity* - ii. 492
66. *Do not tend to a perpetuity* - - - - ii. 493
67. *Keppell* v. *Bailey, accordingly* - - - ii. 494
68. *Covenant by lessor for right of pre-emption of other land does not run* - - - - ii. 495
69. *Nor similar covenant by lessee* - - - ii. 495
70. *Nor covenant to contribute to expense of establishing a modus* - - - - - ii. 495
71. *Collins* v. *Plumb: covenant by purchaser of well not to sell the water* - - - - - ii. 496
72. *British Museum case: injunction in equity* - ii. 496
73. *Opinion of Leach, V. C., as to the covenant running* - - - - - - - - ii. 498
74. *Opinion of Lord Eldon and Master of the Rolls on appeal* - - - - - - - ii. 499
75. *Brighton Steyne case* - - - - - ii. 499
76. *Keppell* v. *Bailey: covenant to use a railway does not run* - - - - - - ii. 500
77. *Observations upon that case* - - - - ii. 502
78, 79. *Doctrine as to binding a purchaser, with notice of the covenant* - - - - ii. 503, 504
80. *Short view of Keppell* v. *Bailey* - - - ii. 506
81. *Proposition of R. P. C. as to covenants entered into by owners of land* - - - - ii. 507
82. *Mr. Preston's opinion, that the remedy under covenants cannot be apportioned* - - - ii. 507
83. *Observations contra* - - - - - ii. 508

## Sect. II.—To what Acts Covenants for Title extend:

2. *Five distinct covenants* - - - - - ii. 509
3. *Covenant where the seller has a power* - - ii. 510
5. *Do not extend to tortious evictions* - - - ii. 510
6. *Unless the party is named* - - - - ii. 511
7. *Or the seller himself assert his title* - - - ii. 512
8. *Or the covenant embrace pretended claims* - - ii. 512
9. *General covenant with an exception* - - - ii. 512

Page

10. *Suit in equity a disturbance* - - - - - ii. 512
11. *Jerritt* v. *Weare* - - - - - - - ii. 513
12. *Observations upon it* - - - - - - ii. 513
13. *Covenant for right to convey extends to capacity to grant* - - - - - - - - ii. 514
14. 20. *Whose entry is a breach where the covenant is against persons claiming by the means, title, &c. of covenantor* - - - - ii. 514. 516
15. *Or by, from, or under him: dower* - - - ii. 514
16. *Or by or through his acts or means: act not proceeding from covenantor* - - - - ii. 515
18. *Appointee a person claiming under covenantor* - ii. 515
21. *Quit-rents incident to tenure within general covenant* - - - - - - - - - ii. 517
22. *Arrear by default: Howes* v. *Brushfield* - - ii. 517
23. *Observations upon it* - - - - - - ii. 518
24. *Default includes persons whom the covenantor might have barred: Lady Cavan* v. *Pulteney* - ii. 518
25. *Observations on the two last cases* - - - - ii. 519
26. *Covenant by trustee: permitted or suffered, or been party or privy to* - - - - - ii. 519
28. *Default does not include persons whom covenantor had not the power to bar: Woodhouse* v. *Jenkins* - - - - - - - ii. 520
29. *Covenant confined to the estate conveyed* - - ii. 522

## Sect. III.—Extent of Restrictive Words:

1. *How covenants are restricted* - - - - - ii. 523
2. *General covenants not cut down without clear intention* - - - - - - - - ii. 524
3. *Covenants by executors and trustees* - - - ii. 524
4. *Recital: the word grant* - - - - - ii. 525
6. *Restrictive words to first covenant extend to all having the same object:* "and that" - - ii. 526
11. *Covenant for quiet enjoyment where general: Howell* v. *Richards* - - - - - - ii. 528
12. *Nind* v. *Marshall* - - - - - - - ii. 529
14. *First general covenant not restrained by other limited ones* - - - - - - - - ii. 531
18. *Milner* v. *Horton: Smith* v. *Compton* - - ii. 532
20. *General covenant does not enlarge subsequent limited one* - - - - - - - - ii. 534
21. *Or where covenants are of divers natures* - - ii. 535
22. *For title and value* - - - - - - ii. 535

Page

25. *Equity reforms general covenants entered into by mistake* - - - - - - ii. 535

Sect. IV.—Of the Remedy under Covenants for Title:

1. *Action for damages on eviction* - - - ii. 536
2. *But no relief unless within the covenant, or fraud* ii. 537
3. *What is a breach* - - - - - - ii. 537
4. *Damages where copyhold and not freehold* - ii. 538
5. *Breach although no estate passed* - - - ii. 538
6. *Purchaser may wait till eviction* - - - ii. 538
7. *Damages under covenant for further assurance* ii. 538
8. *Interest* - - - - - - - ii. 539
9. *Improvements and buildings* - - - - ii. 539
10. *Contingent incumbrance* - - - - ii. 539
11. *Demand against assets* - - - - - ii. 540
12. *Effect of want of notice to seller from purchaser of adverse suit* - - - - - - ii. 540
13. *Bankruptcy, &c. no bar of covenant for title* - ii. 540
14. *Action against devisees* - - - - - ii. 540
15. *Specific performance of covenant for further assurance* - - - - - - - ii. 541
16. *Duplicate of conveyance: covenant to produce deeds* - - - - - - - ii. 541
17. *Relief against assignees* - - - - ii. 541
18. *Relief in equity against covenants for title* - ii. 542
19. *Judgments, &c.* - - - - - - ii. 542
20. *Limited time for further assurance* - - - ii. 542
21. *Unnecessary act cannot be required* - - - ii. 542
22. *Costs to be tendered* - - - - - ii. 542
23. *Assurance to be devised by counsel or party* - ii. 543
24. *What time is allowed for the execution of a further assurance* - - - - - - - ii. 543
25. *Bond cannot be required* - - - - ii. 544
26, 27. *What covenants may be required in assurance* - - - - - - - ii. 544, 545
28. *Where a trustee conveys by way of further assurance* - - - - - - - ii. 545

## CHAPTER XV.

### OF ASSIGNMENTS OF TERMS.

Sect. I.—Of what Terms a Purchaser may require an Assignment:


| | | Page |
|---|---|---|
| 1. | *Of all which may be used in ejectment* | iii. 1 |
| 2. | *Where terms are barred* | iii. 2 |
| 3. | *Where terms cease under a proviso for cesser* | iii. 3 |
| 4. | *Hays* v. *Bailey* | iii. 4 |
| 5. | *Observations on it* | iii. 6 |
| 6. | *Fictitious mortgages to keep a term alive* | iii. 8 |
| 7. | *Purchaser bears the expense of the assignment* | iii. 9 |
| 8. | *Unless term has never been assigned to attend* | iii. 9 |
| 9. | *Where an assignment may be dispensed with* | iii. 10 |
| 10. | *Mr. Butler's rules* | iii. 11 |
| 11. | *Observations on them* | iii. 12 |
| 13. | *Where term should be assigned by a separate deed* | iii. 13 |
| 14. | *Representation to terms of years, as stated by R. P. C.* | iii. 13 |
| 15. | *The proper court for probate* | iii. 14 |
| 16. | *How mistake in probate is to be corrected* | iii. 14 |
| 17. | *Where assignment is void* | iii. 15 |
| 18. | *Limited letters of administration* | iii. 16 |
| 19. | *Where administration is necessary* | iii. 16 |
| 20. | *Limited administration from Prerogative Court* | iii. 16 |
| 22, 23. | *Trustees of large and small estates* | iii. 18 |
| 24. | *Frequency of want of probate, &c.* | iii. 18 |


Sect. II.—Of the Merger of Terms:


| | | Page |
|---|---|---|
| 1. | *Union of term and inheritance a merger* | iii. 19 |
| 2. | *Unless freehold in* auter droit | iii. 19 |
| 3. | *Particularly if union by act in law* | iii. 20 |
| 4. | *Tenant by the curtesy and termor* | iii. 20 |
| 5. | *Executor having a term and buying the fee* | iii. 20 |
| 6. | *Freeholder in his own right and termor in* auter droit *no merger* | iii. 22 |
| 7. | *Freeholder marrying the termor* | iii. 22 |
| 8. | *Grant by lessee to the wife of lessor* | iii. 22 |
| 9. | *Purchase of freehold by termor in right of his wife* | iii. 22 |

Page

10. *Lessee appoints freeholder executor no merger* - iii. 23
11. *Years may merge in years* - - - - iii. 23
12. *Term saved where termor releasee, &c. to uses* - iii. 23
13. *Resuscitation of term or creation of new one* - iii. 24

## Sect. III.—Of Presuming a Surrender of Terms:

1. *Presumption where trustees ought to convey* - iii. 25
2. *Not where jury find the term still continues* - iii. 25
3. *Policy of the law: nature of a term* - - iii. 26
4. *Protection to purchasers* - - - - iii. 28
5. *Presumption of surrender of term assigned to attend: at death of owner* - - - - iii. 29
6. *The like on the death of his heir* - - - iii. 31
7. *The like on a settlement by the heir without noticing the term* - - - - - - - iii. 31
9. *The like on a purchase of the heir's life estate, and no assignment of the term* - - - iii. 33
10. *Analogy of doctrine of easements* - - - iii. 34
11. *Effect of claim by an adverse party* - - - iii. 35
12. *Of quiet enjoyment and possession of deeds* - iii. 36
13. *Of the assignment being by a representative* - iii. 37
14. *Former practice as to assignments* - - - iii. 37
15. *Lord Hardwicke's opinion* - - - - iii. 38
16. *Jurisdiction of law and equity* - - - iii. 38
17. *Opinions of Gundry, Buller, &c.* - - - iii. 39
18. *Goodtitle* v. *Morgan* - - - - - iii. 41
19. *Doe* v. *Staple* - - - - - - iii. 42
20. *Doe* v. *Sybourn* - - - - - - iii. 42
21. *Objection against the presumption* - - - iii. 42
22. *Trustees ought not to surrender* - - - iii. 43
23. *Possession consistent with trustee's title: no presumption against the trust* - - - - iii. 44
24. *Doe* v. *Scott* - - - - - - - iii. 44
25. *Observations on it* - - - - - - iii. 45
26. *Evans* v. *Bicknell: Lord Eldon's opinion* - iii. 46
27. *Maundrell* v. *Maundrell* - - - - iii. 47
29. *Doe* v. *Wright* - - - - - - iii. 48
30. *Doe* v. *Holder: Doe* v. *Stace* - - - - iii. 49
31. *The judgment in favour of the presumption* - iii. 51
32. *New ejectment and motion for new trial contra* - iii. 59
33. 37. 40. *Lord Eldon's opinion against the judgment* - - - - - - iii. 61. 63. 65
36. *And Richards', C. B.* - - - - - iii. 63
38. *And Plumer's, Master of the Rolls* - - - iii. 64

Page

41. *The old rule restored* - - iii. 65
42. *Doe* v. *Plowman* - - iii. 65
43. *Presumption of surrender of terms not assigned to attend* - - iii. 66

Sect. IV.—Of the Protection afforded by Terms of Years:

1. *Protects against incumbrances* - - iii. 68
2. *Lord Hardwicke's opinion* - - iii. 69
3, 7. *King* v. *Smith: term assigned in trust for Crown debtor cannot be used against the Crown,* iii. 69. 73
4. *Observations on it* - - - iii. 71
5. *Attorney-General* v. *Sands considered* - - iii. 71
8. *Contra where term not so assigned* - - - iii. 73
9. *Proof of deeds, &c. necessary: want of notice* - iii. 74
10. *Alleged distinction where the term is in gross* - iii. 74
12. *Protection against dower* - - - - iii. 75
14. *Recitals in assignments of terms* - - - iii. 76
15. *Where purchaser entitled to benefit of terms without assignment* iii. 77
16. *Stanhope* v. *Lord Verney* - - - - iii. 77
17. *Term to be got in in some sense* - - - iii. 77
18. 25. *Effect of purchaser's possession of deed: trustee assigning with notice* - iii. 78. 83
19. *No tacking where outstanding term* - - iii. 79
20. *Frere* v. *Moore: equal equities* - - iii. 80
21. *Observations on it* - - - - iii. 81
22. *Lord Talbot's rule* - - - - iii. 81
23. *Blake* v. *Hungerford* - - - - iii. 82
24. *Purchaser must have best right to support his assignment* - - - - iii. 82
25. *Liability of trustee assigning with notice distinguished* - - - iii. 83
28. *Where purchaser is protected* - - - iii. 85

Sect. V.—Of Terms attendant by Implication:

1. *Term in gross attends by implication if it would merge by union* - - - - iii. 87
2, 3. *Examples* - - - iii. 87, 88
4. *Although there is an intervening term to which purchaser is entitled* - - - - iii. 88

| | | Page |
|---|---|---|
| 5. *And although a nominal reversion be left out-standing, if no charge* | iii. | 88 |
| 6. *Scot v. Fenhoullet explained* | iii. | 88 |
| 7. *Express declaration operative although an intervening interest outstanding* | iii. | 91 |
| 8. *Implication may be rebutted* | iii. | 91 |


## Sect. VI.—Of the Nature of an Attendant Term:


| | | |
|---|---|---|
| 1. *Not forfeited by felony: escheat, term goes with freehold* | iii. | 92 |
| 2. *Bequests, &c. of such a term before 1 Vict. c. 26* | iii. | 92 |
| 4. *How far assets before 3 & 4 Will. 4, c. 104* | iii. | 93 |
| 7. *The estate itself now assets for simple contract debts* | iii. | 95 |


# CHAPTER XVI.

## OF INTEREST, DETERIORATION, AND COSTS.

## Sect. I.—Of Interest and Deterioration:


| | | |
|---|---|---|
| I. Of Interest | iii. | 97 |
| 1. *Purchaser to take profits and pay interest from time fixed for completion* | iii. | 97 |
| 2. *So of a reversion* | iii. | 98 |
| 4. *Even if money lie dead if purchaser in default* | iii. | 98 |
| 5. *Contra if seller cause delay* | iii. | 98 |
| 6. *Winter v. Blades* | iii. | 99 |
| 7. *Observations on it* | iii. | 100 |
| 8. *Possession gives right to interest* | iii. | 100 |
| 9. *Where a receiver is appointed* | iii. | 100 |
| 10. *Rule not universal* | iii. | 101 |
| 13. *Possession taken and abandoned* | iii. | 102 |
| 14. *Objection to title* | iii. | 103 |
| 15. *Agreement to pay interest on possession rescinded if there will be long delay* | iii. | 103 |
| 16. *Acquiescence in delay* | iii. | 103 |
| 18. *Interest on auction duty unpaid* | iii. | 105 |
| 19. *Interest excluded by agreement to repay costs and charges* | iii. | 105 |

| | | Page |
|---|---|---|
| 20. | *Interest on timber money* | iii. 105 |
| 21. | *Rents and interest on sale of estate in possession by the Court* | iii. 106 |
| 22. | *Same on sale of reversion* | iii. 106 |
| 23. | *Ex parte Manning* | iii. 106 |
| 24. | *Davy* v. *Barber* | iii. 107 |
| 25. | *Observation on it* | iii. 108 |
| 26. | *Blount* v. *Blount* | iii. 108 |
| 27. | *Observation on it* | iii. 109 |
| 28. | *Lord Hardwicke's dicta in Blount* v. *Blount, as to wearing, &c. of lives* | iii. 109 |
| 29. | *Not accurate* | iii. 110 |
| 30. | *Child* v. *Lord Abingdon: purchaser pays interest and takes the benefit* | iii. 110 |
| 31. | *Champernown* v. *Brooke* | iii. 110 |
| 32. | *Observations on it* | iii. 111 |
| 33. | *Trefusis* v. *Lord Clinton* | iii. 113 |
| 34. | *Delay where there is a pepper-corn rent* | iii. 113 |
| 35. | *Delay where a lease is sold* | iii. 114 |
| 36. | *Annuity sold by the Court* | iii. 114 |
| 37. | *Annuity sold by private contract* | iii. 114 |
| 38. | *Written agreement to pay interest* | iii. 114 |
| 39. 73. | *Rests* | iii. 115. 128 |
| 40. | *Lessee under option, buying fee, interest in lieu of rent* | iii. 115 |
| 41. | *Seller answerable for rent not received from wilful default* | iii. 115 |
| 42. | *Where interest on rents* | iii. 115 |
| 43. | *Delay in vendor: if interest exceed rents no interest, and seller takes rents* | iii. 115 |
| 44. | *Effect of stipulation to pay interest during delay: Esdaile* v. *Stephenson* | iii. 116 |
| 45. | *Monk* v. *Huskisson: unforeseen or unavoidable obstacles* | iii. 116 |
| 46. | *Birch* v. *Podmore: unavoidable obstacle* | iii. 117 |
| 47. | *Oxenden* v. *Lord Exmouth: any cause: wilful default* | iii. 117 |
| 48. | *Public-house, with good will, stock, &c.* | iii. 118 |
| 49. | *Purchaser not to pay interest on deposit* | iii. 119 |
| 50. | *Nor the seller if contract proceed* | iii. 119 |
| 51. | *Interest on money left with purchaser to pay incumbrances* | iii. 120 |
| 52. 58. 60. | *Interest at law* | iii. 120. 123, 124 |
| 54, 55. | *Not against auctioneer* | iii. 121 |

Page

57. *Statute of limitations* - - - - - - iii. 123
59. *Vendor to pay interest on money lying ready if no title* - - - - - - - - iii. 124
61. 3 & 4 *Will.* 4, *c.* 42, *s.* 28 - - - - iii. 125
62. *Interest on opening biddings* - - - - iii. 126
63. *Unless examination of title affects right to interest* - - - - - - - - iii. 126
64. *Investment, at whose risk* - - - - - iii. 126
65. *Return of deposit and interest where seller's bill dismissed* - - - - - - - iii. 126
66. *Injunction: no interest on instalments of interest* - - - - - - - - iii. 126
67. *Effect of Court's suspending payment of interest* iii. 127
68. *Reversal in D. P.: instalments of interest not due* iii. 127
69. *Reversal: re-transfer of stock and dividends, or price without interest* - - - - - iii. 127
70. *Reversal: re-payment of costs without interest* - iii. 127
71. *Interest on improvements where sale set aside* - iii. 127
72. *Not interest on rents* - - - - - - iii. 128
74. *Usury* - - - - - - - - - iii. 128
76. *Purchase, not loan* - - - - - - iii. 129
78. 83. *Five per cent. at law four per cent. in equity* iii. 130. 132
81. *Waldron v. Forester* - - - - - - iii. 131

II. Of Deterioration - - - - - iii. 133

85. *Delay in seller: compensation for deterioration* iii. 133
86. *Not after possession by purchaser* - - - iii. 133
87. *Interest on amount* - - - - - - iii. 133
88. *Securing crops, &c. during dispute* - - iii. 133
89. *Felling ornamental timber* - - - - iii. 134
90. *Or coppice wood* - - - - - - iii. 134
91. *Wind-falls* - - - - - - - iii. 134
92. *Failure of tenants* - - - - - iii. 134
93. *Loss from agreement by purchaser with tenant* - iii. 134
94. *Mistake in interest: receipt in conveyance* - - iii. 135

Sect. II.—Of Costs:

1. *Costs at law and in equity: trustees* - - iii. 136
2. *In equity, do not follow the event of the cause* - iii. 136
3. *Purchaser's bill: no title* - - - - iii. 137
5. *Vendor's bill: no title and misrepresentation* - iii. 137
6. *Vendor's bill: no title* - - - - - - iii. 138
7. *Report of good title, but considered too doubtful* iii. 138

| | | Page |
|---|---|---|
| 8. | *Costs of objections abandoned at the hearing* - | iii. 138 |
| 9. | *Bad title only primâ facie case for costs* - - | iii. 138 |
| 10. | *Costs of objections overruled where report is against the title* - - - - - - | iii. 139 |
| 11. | *Improper suit by seller proper one by purchaser* | iii. 139 |
| 12. | *Opinion at law against the title after Master's report contra* - - - - - - | iii. 140 |
| 13. | *Good title not till after bill filed* - - - | iii. 140 |
| 14. | *Costs of case at law for the title after Master's report also for it* - - - | iii. 140 |
| 15. | *Title made contrary to abstract: purchaser's acquiescence* - - - - - | iii. 140 |
| 16. | *Costs of appeal where title doubtful* - - | iii. 141 |
| 17. | *Purchaser may take fair objection* - - - | iii. 141 |
| 18. | *Opinion of counsel does not save costs* - | iii. 141 |
| 19. | *Where purchaser is misled* - - - - | iii. 142 |
| 20. | *Point decided in a former cause* - - | iii. 142 |
| 21. | *Doubtful fact found against purchaser* - | iii. 142 |
| 22. | *Necessary and unnecessary evidence required* - | iii. 142 |
| 23. | *Materiality of further abstracts considered* - | iii. 143 |
| 24. | *Where purchaser might have had the evidence* - | iii. 143 |
| 25. | *Suit occasioned by purchaser's misconstruction of contract* - - - - - - | iii. 144 |
| 26. | *Or by unfounded claim* - - - - | iii. 144 |
| 27. | *Lots, and a good title to some, and all refused* - | iii. 145 |
| 28. | *Possession by purchaser* - - - - | iii. 145 |
| 29. | *Set-off: deposit and costs* - - - | iii. 146 |
| 30. | *Suit occasioned by trustee* - - - - | iii. 146 |
| 31. | *Costs of unnecessary action* - - - - | iii. 146 |
| 32. | *Purchaser's conduct dishonourable* - - | iii. 146 |
| 33. | *Objection taken after waiver* - - - - | iii. 147 |
| 34. | *Inadequate price* - - - - - | iii. 147 |
| 35. | *Improper allegation of fraud, &c.* - - - | iii. 147 |
| 37. | *Claim by plaintiff contrary to the contract* - | iii. 147 |
| 38. | *Suit occasioned by seller's mis-statement* - - | iii. 148 |
| 39. | *Incumbrances preventing a title* - - - | iii. 148 |
| 41. | *Costs of sale by courts of equity* - - - - | iii. 148 |
| 42. | *Dismissal of bill with costs by House of Lords* - | iii. 148 |

## CHAPTER XVII.

## OF THE OBLIGATION OF A PURCHASER TO SEE TO THE APPLICATION OF THE PURCHASE-MONEY.

### Sect. I.—Of the Liability in regard to Real Estate:


| | | Page |
|---|---|---|
| 1. | *Direction that trustees' receipts shall be discharges* | iii. 151 |
| 3. | *Distinctions between real and personal estate* | iii. 151 |
| 5. 7. | *Purchase from heir or devisee* | iii. 152. 154 |
| | I. As to real estate. | |
| 6. | *Purchaser liable to legacies or scheduled debts* | iii. 153 |
| 8. 11. | *Sale of more than required valid* | iii. 154, 155 |
| 9. | *Not bound where trust is for debts generally* | iii. 154 |
| 10. | *Or for debts and legacies* | iii. 155 |
| 12. | *Whether bound after decree:* qu. | iii. 155 |
| 13. | *Not bound where infants or unborn issue entitled* | iii. 156 |
| 14. | *Charge for an infant at majority* | iii. 156 |
| 15. | *Not bound where money is to be applied upon trusts* | iii. 156 |
| 16. | *Or purpose undefined* | iii. 157 |
| 17. | *Or money to be invested* | iii. 158 |
| 18. | *Charge equal to trust* | iii. 159 |
| 25. | *Charge of annuities* | iii. 161 |
| 26. | *Existing charges* | iii. 161 |
| 27. | *Where debts and legacies are not intended to be paid* | iii. 161 |
| 28. | *Johnson* v. *Kennett* | iii. 161 |
| 29. | *Opinions on general power in trustee to discharge a purchaser* | iii. 162 |
| 32. | *Cuthbert* v. *Baker, with observations* | iii. 164 |
| 33. | *Currer* v. *Walkley* | iii. 168 |
| 34. | *Observations on it* | iii. 168 |
| 35. | *Trust to raise deficiency of personal estate, purchaser not liable* | iii. 169 |
| 36. | *Contra of a power* | iii. 170 |
| 37. | *How such a power should be given* | iii. 171 |
| 38. | *Modes of seeing to the payment of debts, &c.* | iii. 172 |
| 42. | *Implied power to vary securities* | iii. 172 |
| 43. | *Effect of contract on trust for sale, &c.* | iii. 173 |
| 44. | *What trustees should give receipt* | iii. 173 |
| 45. | *Disclaimer* | iii. 174 |

Page

46. *New trustee* - - - - - - iii. 175
47. *New trustee appointed by Court* - - - iii. 175
48. *Payment of money to solicitor or agent* - - iii. 175
49. *Payment upon solicitor's undertaking* - - iii. 176

Sect. II.—Of the Liability in regard to Leasehold Estates:

1. *Purchaser of personalty not liable* - - - iii. 176
2. *Humble* v. *Bill* - - - - - - iii. 177
3. *Ewer* v. *Corbet* - - - - - - iii. 177
4. *Sale for private debt of executor not valid* - iii. 177
8. *M'Leod* v. *Drummond* - - - - - iii. 179
9. *Sale at undervalue, or with notice of debts paid* iii. 179
10. *Fraud and covin* - - - - - iii. 179
11. *Delay by legatee* - - - - - iii. 180
12. *Contingent interest no excuse for delay* - iii. 180
13. *Charge upon particular part not protected* - iii. 180
14. *Langley* v. *Lord Oxford* - - - iii. 181
15. *Executor also legatee of the chattel* - - iii. 181

## CHAPTER XVIII.

### OF THE VENDOR'S LIEN ON THE ESTATE FOR THE PURCHASE-MONEY UNPAID.

Sect. I.—Of the Lien: and the Discharge of it by taking other Securities:

1. *Vendor's lien* - - - - - - iii. 183
2. *Purchaser's lien* - - - - - - iii. 183
3. 6. *Vendor's lien, although agreement for bond during the seller's life: Winter* v. *Lord Anson* iii. 184. 186
4. *No lien where conveyance in consideration of covenants: Clarke* v. *Royle* - - - iii. 185
5. 7. *Clarke* v. *Royle, not overruled* - - iii. 186, 187
6. *Observations on Sir J. Leach's decision in Winter* v. *Lord Anson* - - - - - iii. 186
8. *Mortgage to third person with seller's consent: no lien* - - - - - - - iii. 187

Page

9. *Bonds with sureties* - - - - - iii. 188
10. *Covenant by purchaser and surety, and consent required to re-sale* - - - - - - iii. 188
11. *Conveyance for bond: no lien: Parrott* v. *Sweetland* - - - - - - - iii. 189
12. *Intention not important* - - - - iii. 190
13. *Money to be paid after resale: no lien* - - iii. 190
15. *Independent security: no lien* - - - iii. 191
16. *As upon stock* - - - - - - - iii. 191
17. *Mortgage of another estate, or of estate sold for part* - - - - - - - iii. 191
18. *Lord Eldon's observations thereon* - - - iii. 191
19. *A bond and mortgage of part of estate: no lien* iii. 192
20. 28. *Bond or note does not destroy lien* - iii. 192. 196
23. *Fawell* v. *Heelis contra* - - - - iii. 193
24. *Overruled* - - - - - - - iii. 194
27. *Bills of exchange do not destroy lien* - - iii. 195
31. *Effect of a covenant* - - - - - iii. 197
32. *Annuity, the price, whether bond or note, excludes the lien* - - - - - - iii. 197
33. *Mackreth* v. *Symmons* - - - - - iii. 198
34. *Lord Eldon's opinion on the law* - - - iii. 199
35. *Observations upon it* - - - - - iii. 200
36. *Comer* v. *Walkley* - - - - - iii. 202
37, 38. *Tardiff* v. *Scrughan not overruled* - iii. 202, 203
39. *Lien may exist although no part paid* - - iii. 203
40. *Part left with one trustee where several sell* - iii. 203
41. *Lien for part and none for rest* - - - iii. 203
42. *Declaration to prevent lien* - - - - iii. 204

## Sect. II.—To Whom the Lien Extends:

1. *Whether marshalling takes place* - - - iii. 205
2. *Coppin* v. *Coppin* - - - - - iii. 205
3. *Pollexfen* v. *Moore* - - - - - iii. 206
4. *Statement from Registrar's book* - - - iii. 208
5. *Lord Eldon's opinion: Trimmer* v. *Bayne* - iii. 209
6. *Observations upon the authorities* - - - iii. 209
7. *Lord Eldon's opinion subsequently* - - iii. 211
8. *Selby* v. *Selby: Marshalling for simple contract creditors* - - - - - - - iii. 212
9. *Wythe* v. *Henniker: not for legatees against devisee* - - - - - - - iii. 212
10. *Sproule* v. *Pryor: for legatees against the heir* iii. 213
11. *The present law* - - - - - - iii. 214

Page

12. *Contribution* - - - - - - iii. 214
13. *Lien in the hands of third persons* - - - iii. 214
14. *Against purchaser's heir, &c* - - - - iii. 215
15. *Not against purchaser without notice* - - iii. 215
16. *Davies* v. *Thomas: recital of title* - - - iii. 215
17. *Possession of seller as lessee not notice* - - iii. 216
18. *Assignees of bankrupt bound by lien* - - iii. 216
19. *Sale under lien* - - - - - - iii. 217
20. *Lien on plant: bankruptcy* - - - - iii. 217
21. *Creditors under conveyance bound* - - - iii. 217
22. *Equitable mortgage by deposit of deeds overreaches lien* - - - - - - iii. 217
23. *Priorities according to time* - - - - iii. 218
24. *Deposit of deeds binds the Crown* - - - iii. 219
25. *Deposit of deeds as a security* - - - iii. 219

---

## CHAPTER XIX.

### OF THE PERSONS INCAPABLE OF PURCHASING.

---

### Sect. I.—Of Persons Incapable of Purchasing:

1. *The several incapacities* - - - - iii. 220
2. *Parishioners, &c.* - - - - - iii. 221
3. *Parson and churchwardens in London* - - iii. 221
4. *Aliens purchase for benefit of Crown* - - iii. 221
5. *Denizen may purchase and hold* - - - iii. 221
6. *Office found* - - - - - - iii. 221
7. *Felons and traitors* - - - - - iii. 221
8. *Corporations* - - - - - - iii. 222
9. *Infants may at age waive a purchase* - - iii. 222
10. *Femes covert: husband's dissent* - - - iii. 222
11. *Contract to purchase by feme covert with separate estate* - - - - - - - iii. 223
12. *Feme covert buying with husband's authority* - iii. 223
13. *Lunatics* - - - - - - - iii. 223
15. *Roman Catholics* - - - - - - iii. 223

Page

Sect. II.—Of Purchases by Trustees, Agents, &c.:

1. *Trustees, &c. incapable of purchasing* - iii. 225
3. *Execution creditor may buy* - iii. 227
4. *So may mortgagee* - iii. 227
5. *Unless a trustee of a power to sell* - iii. 229
6. *Attorney cannot buy from client* - iii. 229
7. *Arbitrator cannot buy claims* - iii. 229
8. 29. *Prohibition extends to buying as agent* - iii. 229. 239
11. *Davidson* v. *Gardner* - iii. 230
13. *Purchase before a Master may be confirmed* - iii. 232
15. *Guardian and ward* - iii. 233
16. 19. *Relation of trustee purchasing* - iii. 233, 234
20. *Tenant for life purchasing under his power of sale* - iii. 234
22. *Trustees relinquishing their office* - iii. 236
23. *Trustee for creditors: majority of creditors* - iii. 236
25. *Trustee buying in the name of a third person* - iii. 237
26. *Trustee may buy from* cestui que *trust when confidence at an end* - iii. 237
27. *Authority from attorney to buy* - iii. 238
28. *Attorney may buy from client at arm's length* - iii. 238
30. *How purchase to be effected where* cestui que *trust not* sui juris - iii. 239
31. *Mortgagee relieved against purchase* - iii. 239
32. *Estate not re-sold to be re-conveyed* - iii. 240
33. *Terms upon which purchase is set aside where estate is re-sold* - iii. 240
34. *New sale* - iii. 240
35. *In lots* - iii. 240
36. *Rise in funds where money invested* - iii. 241
37. *Allowance for repairs, &c.* - iii. 241
38. *Old buildings pulled down* - iii. 241
39. *Rise in funds no objection to relief* - iii. 241
41. *Increased price, to be paid to* cestui que *trust* - iii. 242
42. *Costs* - iii. 242
43. *Shares in a company* - iii. 242
44. *Purchasers with notice bound by the equity* - iii. 242
45. *Acquiescence* - iii. 244
46. *Laches: Creditors* - iii. 244
47. *Knowledge of* cestui que *trust* - iii. 244
48. *Confirmation* - iii. 244

## CHAPTER XX.

OF JOINT PURCHASES; PURCHASES IN THE NAMES OF THIRD PERSONS; AND PURCHASES WITH TRUST-MONEY: AND OF THE PERFORMANCE OF A COVENANT TO PURCHASE AND SETTLE AN ESTATE.


Page

Sect. 1.—Of Joint Purchases:

1. *Equal or unequal advance of purchase-money* - iii. 246
2. *Expenditure on repairs by one* - iii. 247
3. *Severance of joint tenancy in equity* - iii. 247
4. *In partnership, no survivorship in equity* - iii. 248
6. *Building-leases to two* - iii. 248
8. *Other incidental speculations* - iii. 249
9. *Issue directed whether purchase for trade* - iii. 249
10. *Contract to sell to two* - iii. 249
11. *Parol evidence inadmissible that one was the purchaser* - iii. 250
12. *Abatements on incumbrances enure to both* - iii. 250
13. *So a new lease to one* - iii. 250
14. *Covenant to pay mortgage-money* - iii. 250
15. *No lien for one paying all the money where conveyance is to both* - iii. 251
16. *Renewal of lease by one* - iii. 251
17. *Conveyance to one, trust for the other proved by letters* - iii. 252
18. *Desisting to treat in favour of another* - iii. 252
23. *Where upon completion of conveyance by one, the other must accept the title, &c.* - iii. 254

Sect. II.—Of Purchases in the Names of Third Persons:

1. *Purchase in the name of stranger a trust* - iii. 255
2. *Clear proof required* - iii. 256
3. *Where parol proof admissible* - iii. 257
6. *Weight of such evidence* - iii. 259
7. *Evidence from alleged owner's poverty* - iii. 259
8. *Conveyance by one to another as purchaser, lien only for purchase-money* - iii. 259
9. *Unless some written evidence to prove trust* - iii. 259
10. *Parol express trust prevents resulting trust* - iii. 260

Page

11. *Parol evidence in favour of alleged trustee* - iii. 260
12. *Purchase by agent* - - - iii. 260
13. *Conviction of agent of perjury* - - - iii. 260
14, 15. *Same law where several pay the money* - iii. 261
16. *Purchase in the name of a child, no trust* - iii. 261
18. *Copyholds for lives* - - - - iii. 262
21. *Child already advanced* - - - iii. 263
22. *Child treated as a trustee from the first* - iii. 263
25. *Possession by the father* - - - - iii. 264
27. *Expenditure by the father for repairs* - - iii. 265
28. *Subsequent declaration of trust by father inoperative* - - - - - - - iii. 266
29. *Election* - - - - - - iii. 266
30. *Conveyance to sever joint-tenancy* - - iii. 266
31. *Purchase in the joint names of father and son, an advancement* - - - - - iii. 266
34. *Operation of 27 Eliz.* - - - - iii. 267
35. *And of Bankrupt Acts* - - - - iii. 268
37. *Purchase by grandfather in the name of grandchild* - - - - - iii. 268
38. *Purchase by husband in the name of wife* - iii. 268
39. *Purchase by trader in the name of wife or child* iii. 269
40. *Purchase in the name of a daughter* - iii. 269

## Sect. III.—Of Purchases with Trust-Money:

1. *Purchase by trustee or executor with assets in his own name* - - - - - iii. 270
2. *Requisite proof* - - - - - iii. 271
3. *If bound to invest in land, presumption accordingly* - - - - - - iii. 271
4. *Purchase by executor of mortgagee of equity of redemption* - - - - - iii. 271
5. *Trustee claiming the money, presumption excluded* iii. 272
6. *Covenant to settle personal estate, and purchase of real estate* - - - - - iii. 272

## Sect. IV.—Of the Performance of a Covenant to Purchase and Settle an Estate:

1. *Purchase by person who has agreed to purchase and settle lands, a performance* - - - iii. 273
2. *Although purchase only partial* - - - iii. 273
3. *Or trustees were to buy* - - - - - iii. 274
4. *Or consent required* - - - - - iii. 274

Page

6. *Where descended lands go in performance of covenant* - - - - - - - - iii. 274
7. *What estates will satisfy the covenant* - - iii. 275
9. *Value how to be taken* - - - - - iii. 276
10. *Where covenant is a lien* - - - - iii. 276
11. *Where a covenant to settle is confined to an existing contract to purchase* - - - - iii. 277

---

## CHAPTER XXI.

### OF THE PROTECTION AND RELIEF AFFORDED TO PURCHASERS BY STATUTES.

### Sect. I.—Of Fraudulent and Voluntary Settlements, and Settlements with Powers of Revocation:

1. 27 *Eliz. c. 4: fraudulent conveyances void against purchaser* - - - - - iii. 280
2. *Bonâ fide conveyances preserved* - - - iii. 280
3. *Conveyance with power of revocation in grantor void against purchaser* - - - - iii. 280
4. *Act extends to copyholds: mortgagee a purchaser* - - - - - - - - iii. 281
5. *Adequacy of purchaser's consideration* - iii. 281
6. *Purchaser must buy an existing interest* - iii. 282
7. *Fraudulent conveyances void though not made by the vendor* - - - - - - iii. 282
8. *Burrell's case* - - - - - - - iii. 282
9. *Clerk* v. *Rutland* - - - - - iii. 283
10, 11. *The proposition considered* - - - iii. 283
12. *Conveyances to the King* - - - - iii. 284
13. *Notice to purchaser immaterial* - - - iii. 285
14. *Conveyance for payment of debts* - - iii. 285
16. *Voluntary settlements are void against purchaser* - - - - - - - - iii. 286
18. *Deposit of deeds* - - - - - iii. 287
20. *Conveyance to wife or children voluntary* - iii. 288
21. *Purchase in name of wife or child binding* - iii. 288
22. *Settlement prior to marriage not voluntary* - iii. 288

Page

23. *Marriage consideration runs through the settlement* - - - - - - - - iii. 289
24. *Whether marriage consideration extends to collaterals: cases considered* - - - iii. 289
25. *Clayton* v. *Lord Wilton* - - - - iii. 291
26. *Observations on it* - - - - - - iii. 292
29. *Johnson* v. *Legard* - - - - - iii. 293
30. *Remainders to collaterals not supported though settlor tenant in tail* - - - - - iii 294
31. *Re-settlement by two, on the survivor* - - iii. 294
32. *Settlement supported by additional portion, &c.* iii. 294
33. *Or by wife's concurrence in destroying another settlement* - - - - - - iii. 295
34. *Release of dower* - - - - - iii. 295
35. *Separation with deed of indemnity* - - iii. 296
36. *Settlement of personal estate binding* - iii. 296
37. *Stranger not aided in equity* - - - iii. 296
38. *Voluntary settlement good by matter ex post facto* - - - - - - - - iii. 297
39. *Applied to equitable rights* - - - - iii. 297
40. *Marriage upon the faith of voluntary settlement* - - - - - - - - iii. 298
42. *Voluntary settlement under direction of Court* iii. 299
43. *Settlement for valuable consideration apparently voluntary* - - - - - - iii. 299
44. *Lord Hardwicke's opinion on Ferrars* v. *Cherry* iii. 299
45. *Agreement to sell by voluntary settlor considered* - - - - - - - - iii. 300
48. *Enforced for purchaser who had notice* - iii. 302
50, 51. *Vendor cannot enforce the agreement* iii. 302, 304
52. *Johnson* v. *Legard: creditors of vendor cannot enforce it* - - - - - - - iii. 304
53. *Suit to enforce voluntary settlement: sale by settlor* - - - - - - - - iii. 307
54. *Powers of revocation: partial power* - - iii. 307
55. *Power with colourable conditions* - - - iii. 308
56. *Binding powers* - - - - - - iii. 308
57. *Settlement with power void although made for valuable consideration* - - - - iii. 308
58. *Future power, and sale before the day* - - iii. 309
59. *Extinguishment of power inoperative* - - iii. 309
60. *Effect of purchaser taking his title under the power* - - - - - - - - iii. 310

Page

Sect. II.—Of Protection from Charitable Uses:

1. *Purchaser without notice protected* - - - iii. 311
2. *Inadequate consideration* - - - - iii. 311
3. *Rentcharge* - - - - - - - iii. 311
4. *Notice to first purchaser binds all* - - - iii. 312
7. *And length of possession will not support his title* iii. 313

Sect. III.—Of Protection from Acts of Bankruptcy:

1. 13 *Eliz. made act of bankruptcy operative generally against a purchaser* - - - - iii. 313
2. 21 *Jac.* 1, *confined the liability to five years* - iii. 314
4. *But purchaser affected by notice* - - - iii. 314
6. *Romilly's act confined the liability to two months if without notice* - - - - - iii. 315
7. 10. 12. *Commission or docket notice* iii. 316. 318, 319
8. *But not extended to* 21 *Jac.* 1. - - - iii. 317
9. *Effect of constructive notice under Romilly's act* - iii. 317
11. *Notice of insolvency or stopping payment under that act* - - - - - - - iii. 318
15. 6 *Geo.* 4, *confined liability to two months if without notice* - - - - - - - iii. 319
16. *And made valid payments if without notice* - iii. 320
17. *Gazette, notice* - - - - - - iii. 320
18. *Confined to payments, semble* - - - - iii. 321
19. *What is notice* - - - - - - iii. 322
20. *Notice not operative after twelve months* - - iii. 323
21. *Purchaser protected against defects* - - - iii. 323
22. *Conveyance for creditors valid* - - - iii. 324
23. 2 *Vict. protects purchasers generally without notice* - - - - - - - iii. 325
24. *And after twelve months if with notice* - - iii. 325
25. 2 *&* 3 *Vict. protects contracts, &c., generally, without notice* - - - - - - iii. 325
26. *Observations as to payments* - - - - iii. 326
27. *Effect of notice now* - - - - - iii. 326
28. *Present law* - - - - - - - iii. 327

Sect. IV.—Of Protection from Judgments and Recognizances:

1. *Judgments formerly all of first day of term* - iii. 328
2. *Corrected by* 29 *Car.* 2. - - - - iii. 329
4. *Doggets under* 4 *&* 5 *Will. & Mary* - - iii. 330

| | Page |
|---|---|
| 6. *Errors in names* - - - - - - - - | iii. 331 |
| 8. *Judgments, how entered when signed: entry nunc pro tunc* - - - - - - | iii. 331 |
| 9. *Notice of unregistered judgment* - - - - | iii. 332 |
| 10. *Judgments against bankrupts under the old law* - - - - - - - - - | iii. 332 |
| 11. *Sloper* v. *Fish* - - - - - - - | iii. 332 |
| 12. *Sharpe* v. *Roahde* - - - - - - | iii. 333 |
| 13. *Judgments against them under the new law* - | iii. 333 |
| 14. 21 *Jac.* 1, *c.* 24: *new execution where debtor died in execution* - - - - - - | iii. 334 |
| 16. 29 *Car.* 2, *c.* 3, *s.* 16, *execution against goods* | iii. 334 |
| 18. *Sale of chattels after judgment, but before execution was valid* - - - - - | iii. 335 |
| 20. 29 *Car.* 2, *c.* 3, *s.* 18, *enrolment of recognizances* - - - - - - - - - | iii. 336 |
| 21. *New law:* 1 & 2 *Vict. c.* 110. - - - - | iii. 337 |
| 22. *Execution now against debtors' freeholds, leaseholds and copyholds, at the time of judgment or afterwards: general power: purchasers* - - - - - - - - | iii. 337 |
| 23. *Judgments a charge: general power: issue and remainder-men bound: bankruptcy: purchasers* - - - - - - - - | iii. 338 |
| 24. *Decrees, &c. equal to judgments* - - - - | iii. 340 |
| 25. *Judgments not to bind purchasers unless memorandum left with the Master of C. P.: entry by him* - - - - - - - - - | iii. 340 |
| 26. *Judgments of inferior courts removed into superior court: purchasers* - - - - | iii. 341 |
| 27. 2 *Vict. c.* 11, *old doggets closed* - - - | iii. 343 |
| 28. *Old judgments after* 1 *Aug.* 1841, *to be entered under new act to bind purchasers* - | iii. 343 |
| 29. *Year and day of the month when left* - - | iii. 343 |
| 30. *Judgments to be re-registered every five years to bind purchasers* - - - - - - | iii. 343 |
| 31. *Protection to purchasers without notice: the old law restored* - - - - - - | iii. 344 |
| 32. *Extinguished judgments not revived: volunteers* - - - - - - - - - | iii. 345 |

Sect. V.—Of Protection from Unregistered Deeds, &c.:

Page

1. *Deeds and wills in York, Kingston-upon-Hull and Middlesex to be registered* - - - iii. 346
2. *Deeds not registered void against purchasers* - iii. 346
3. *So devises* - - - - - - - - iii. 346
5. *Time allowed for registry of wills in York or Kingston-upon-Hull* - - - - - iii. 347
6. *In the North Riding of York* - - - iii. 347
7. *In Middlesex* - - - - - - - iii. 347
8. *Copyholds and certain leases excepted* - - iii. 348
9. *Judgments to be registered* - - - - iii. 348
10. *Different allowance of time for registry* - iii. 348
11. *Appointment of assignee of insolvent, &c. to be registered* - - - - - - - iii. 348

I. What memorial is required.

12. *How to be framed* - - - - - iii. 350
14. *A witness to the deed must be a witness to the memorial* - - - - - - - iii. 351
15. *Execution of memorial by representatives* - iii. 352
16. *Deed of corporation* - - - - - - iii. 352
17. *Writs of execution, &c.* - - - - iii. 353
18. *Necessary contents of memorial* - - - iii. 353
19. *Description of parcels* - - - - iii. 354

II. What deeds are to be registered.

21. *An appointment must* - - - - - iii. 355
22. *Assignment of legacy, not* - - - - iii. 355
23. *Lease must, although assignment of it is registered* - - - - - - - - iii. 356
24. *Settlement by a woman must, to prevent charges by her husband* - - - - - - iii. 356
25. *Warburton v. Loveland: Irish act* - - iii. 356
26. *Two successive grants without registry, and grant by the second grantee to one who registers: Irish act* - - - - - iii. 362
27. *Unregistered deed good against execution: Irish act* - - - - - - - - iii. 362

III. Exceptions.

28. *Of copyholds: leases by licence* - - - iii. 365
29. *Of leases at rack-rent* - - - - iii. 366

Page

30. *Of leases not beyond 21 years, with possession and occupation: sale: mortgage* - - iii. 366
32. *Of Serjeant's Inn* - - - - - iii. 369

IV. Notice.

33. *Further advance by mortgagee without notice of second registered mortgage, valid* - - iii. 369
35. *Mortgagor paying off mortgage without notice of registered transfer, valid* - - - iii. 370
36. *So further advances after sale of equity of redemption* - - - - - - iii. 370
37. *Purchaser without notice not bound by prior equitable registered incumbrance* - - iii. 371
38. *Purchaser with notice bound by unregistered deed* - - - - - - - iii. 372
40. *Nature of notice* - - - - - iii. 372

41. *Observations on the act* - - - - iii. 373
42. *Observations against a general registry* - iii. 373
43. *Registry of incumbrances under 2 Vict. c. 11.* - iii. 391

Sect. VI.—Of Protection from Acts of Papistry:

1. 11 & 12 *Will. 3: Papists incapable of purchasing* - - - - - - - iii. 392
2. 3 *Geo. 1: Sale to Protestant valid* - - iii. 392
5. *Titles depending upon the act* - - - iii. 394
6. *Amount of consideration* - - - - iii. 395
7. *Bill of discovery* - - - - - iii. 395
8. *Notice of disability of seller* - - - iii. 395
9. *Roman-catholic Relief Bill* - - - iii. 395

Sect. VII.—Of Protection from Defects in Recoveries:

1. 14 *Geo. 2: Recoveries made good in favour of purchasers* - - - - - - - iii. 396
2. *Loss of deeds making tenant to the præcipe supplied* - - - - - - - - iii. 397
4. *Voidable estate in purchaser under tenant in tail enlarged: purchaser without express notice* - - - - - - - - iii. 397
5. *The like where tenant in tail becomes bankrupt* - - - - - - - - iii. 398
6. *Equitable aid to defective instruments, &c. excluded* - - - - - - - iii. 400

Sect. VIII.—Of Protection from Defects in Sales for Land-tax:

Page

1. *Sales by persons not authorised without some further assurance: or where all estates not settled to same uses: or more than necessary sold: or any other mistake, confirmed* - iii. 401
2. *Power to confirm sales where commissioners have not joined* - - - - - iii. 403
3. *Power to rescind contract for land-tax where no title to estate sold* - - - - iii. 405
4. *Power to enrol and register deeds* - - iii. 406
5. *Sales and conveyances for redeeming land-tax confirmed* - - - - - iii. 407

Sect. IX.—Of Protection from Crown Debts:

1. *Quietus* - - - - - - - - iii. 409
2. 1 & 2 *Geo.* 4: *Sale of estate of public accountant under extent, &c.* - - - iii. 409
3. *Order under the act: costs: dilapidations* - iii. 410
5. *Judgments, &c. to the Crown, bonds, or acceptance of office to be registered* - - - iii. 410
6. *Quietus may be registered* - - - - iii. 412
7. *Power to the Treasury to complete sales, or leases upon fines* - - - - - iii. 412
8. *But not to prejudice Crown further* - - iii. 413

Sect. X.—Of Protection from Lis Pendens:

1. *Lis pendens to be registered* - - - - iii. 414
2. *General operation of statutes in favour of purchasers* - - - - - - - iii. 415

## CHAPTER XXII.

### OF EQUITABLE RELIEF AND PROTECTION.

Sect. I.—Of equitable Relief and Protection where the Purchaser has no Notice:

3. *Purchaser protected although equitable title a forged instrument* - - - - - iii. 417

| | Page |
|---|---|
| 4. *May avail himself of satisfied charges* | iii. 418 |
| 5. *Where he has the best right to call for legal estate* | iii. 419 |
| 6. *Lord Eldon's observation in Mackreth v. Symmons: first mortgagee with notice conveying to third* | iii. 419 |
| 7. 9. *Observation thereon* | iii. 419. 421 |
| 8. *Peacock v. Burt* | iii. 420 |
| 9. *First mortgagee not a trustee for the second* | iii. 421 |
| 10. *First mortgagee joining in second mortgage* | iii. 422 |
| 11. *Priorities according to time in equities* | iii. 422 |
| 12. *Lease and release: no estoppel* | iii. 422 |
| 13. *No protection from estate in a trustee upon an express trust* | iii. 423 |
| 14. *Fraud in others, or accident, no ground of relief against purchaser: no discovery of writings* | iii. 423 |
| 15, 16. *Purchaser stealing a deed, &c.* | iii. 424 |
| 17. *Trustee refusing to act against a purchaser* | iii. 424 |
| 19. *Dormant incumbrances relieved against* | iii. 425 |
| 20. *So defective execution of power* | iii. 425 |
| 21. *But not a power by will where estate sold* | iii. 425 |
| 22. *Production of deed with evidence on its face of fraud, enforced* | iii. 426 |
| 23. *Mistake, &c. of conveying parties no prejudice to purchaser* | iii. 426 |
| 26. *Unless objection not fairly stated* | iii. 427 |
| 27. *If a general statement, party is bound* | iii. 427 |
| 29. *All rights of conveying parties pass* | iii. 427 |
| 30. *Party with right encouraging another to buy binds his right* | iii. 428 |
| 32. *So where the representation is by mistake* | iii. 428 |
| 33. *So where an incumbrance is denied: liability of trustees* | iii. 428 |
| 34. *Incumbrancer not bound to give notice to purchaser* | iii. 429 |
| 35. *Vendor, his heirs and assignees, to make good defective conveyance* | iii. 429 |
| 36. *So judgment creditors* | iii. 429 |
| 37. *Even a subsequent title bound* | iii. 429 |
| 38. *Whether this is a personal equity* | iii. 430 |
| 39. *Contingent remainder conveyed to a purchaser and destroyed, seller's subsequent title to make it good* | iii. 430 |

Page

40. *No relief against solemnities under act of parliament* - - - - - - - - iii. 431
41. *Chose in action: notice to trustee gives preferable title* - - - - - - - iii. 431
42. *Whether given before or after subsequent assignment* - - - - - - - - iii. 432
44. *Notice to some of several trustees* - - - iii. 432
45. *Previous inquiry unnecessary* - - - iii. 433
46. *Rule does not extend to equity of redemption* - iii. 433
47. *Right of purchaser of chose in action* - - iii. 433
48. *Equity between trustees of renewable leasehold and purchaser* - - - - - - - iii. 434
49, 50. *Equal equities: contribution by several purchasers to judgment debts* - - - iii. 435
51. *Purchaser of part relieved against concealed incumbrance, by the other part* - - - iii. 436
52. *Purchase set aside: allowance for improvements* - - - - - - - - iii. 436
54. *Unless fraud* - - - - - - - iii. 437
55. *No remedy if evicted at law* - - - - iii. 437
56. *Prior incumbrancer purchasing lets in puisne ones* - - - - - - - - iii. 437
57. *A mortgagee buying after agreement for lease bound by it* - - - - - - - iii. 438
58. *How prior incumbrances should be kept on foot on purchase* - - - - - iii. 438
59. *Bill to perpetuate testimony upon claims to a reversion* - - - - - - - - iii. 438

## Sect. II.—Of the Effect of Notice:

1. *Notice binds a purchaser* - - - - iii. 439
2. *Trustees joining in a recovery* - - - iii. 440
3. *Purchaser bound by parol agreement for a lease* - - - - - - - - iii. 440
4. *Purchaser whose consent is necessary to validity of a lease, not bound by notice* - - iii. 441
5. *Doe* v. *Luffkin* - - - - - - iii. 441
6. *Observations on it* - - - - - iii. 442
7. *Purchaser bound by void estate where he buys subject to it* - - - - - - - iii. 443
8. *So he cannot impeach annuity* - - - iii. 443
9. *Vendor may set aside leases for fraud after sale of fee: Maguire* v. *Armstrong* - - iii. 443

Page

11. *Muskerry* v. *Chinnery contra*: qu. - - iii. 444
13. *Lease under power at inadequate rent apparent: sale of reversion voidable* - - - iii. 446
14. *Purchase under decree obtained by fraud* - iii. 446
15. *Purchaser making good a defective title: acceptance of release of right no acknowledgment* - - - - - - - - iii. 447
16. *Notice before payment or execution of conveyance sufficient* - - - - - iii. 447
17. *Notice at time of procuring an estate to protect, inoperative* - - - - - iii. 448
19. *Purchaser without notice safe although seller to him bought with notice* - - - - iii. 448
20. *And purchaser may buy with notice of a purchaser who bought without* - - - iii. 448
21. *Trustee selling and re-purchasing, how far bound* - - - - - - - - iii. 449
22. *Notice of voluntary settlement not binding* - iii. 449
23. *Effect of express notice under Substitution for Recoveries Act* - - - - - iii. 449

## CHAPTER XXIII.

### OF NOTICE.

### Sect. I.—What Amounts to Notice:

1. *Actual or constructive* - - - - - iii. 451
2. *Actual notice: vague reports* - - - iii. 451
4. *General claim* - - - - - - iii. 452
5. *Must be in the same transaction* - - - iii. 452
6. *Slander of title* - - - - - iii. 453
7. *Constructive notice* - - - - - iii. 453
8. *Notice to counsel, &c. is* - - - - iii. 453
9. *So to country solicitor* - - - - iii. 454
10. *Although purchase under a decree* - - iii. 454
11. *Subsequent assent to purchase* - - - iii. 454
12. *Notice to agent of intention of party contrary to deed* - - - - - - - iii. 454
13. *Binding, although counsel, &c. employed partially only* - - - - - - iii. 454

| | Page |
|---|---|
| 14. 19. *Solicitor committing fraud against seller apparent on the deed, and acting for purchaser, binds the latter* - - - iii. | 455. 457 |
| 15. *Whether party acting for himself without knowledge is bound as if a solicitor were employed* - - - - - iii. | 455 |
| 16. *Notice to counsel, &c. must be in the same transaction* - - - - - iii. | 456 |
| 17. *Unless acts are connected, or previous act is remembered* - - - - - iii. | 456 |
| 18. *Observation on the exception* - - - iii. | 457 |
| 19. 58. *Solicitor committing fraud on seller, and acting for purchaser, the latter not bound* iii. | 457. 474 |
| 20. *Public statute notice : private, not* - - iii. | 457 |
| 21. *Lis pendens notice* - - - - - iii. | 458 |
| 22. *What is a sufficient lis pendens* - - - iii. | 458 |
| 23. *Close prosecution* - - - - - iii. | 458 |
| 24. *Bill dismissed, and appeal to D. P.* - - iii. | 459 |
| 25. *Purchaser pendente lite filing a bill* - - iii. | 460 |
| 27. *Effect of pendency of suit on the seller's rights* iii. | 460 |
| 28. *Decrees not notice* - - - - - iii. | 461 |
| 30. *Unless to account, or the like* - - - iii. | 462 |
| 32. *Lis pendens, unless registered, will not bind without express notice* - - - - iii. | 463 |
| 33. *Judgments, though docketed, not notice* - iii. | 463 |
| 34. *Nor deeds registered* - - - - - iii. | 463 |
| 35. *Search notice to the extent of it* - - - iii. | 463 |
| 36. *Act or commission of bankruptcy not notice* - iii. | 464 |
| 38. *Lord Talbot's opinion accordingly : Collet* v. *De Gols* - - - - - - iii. | 464 |
| 39. *Lord Redesdale contra* - - - - iii. | 465 |
| 40. *Lord Eldon's opinion : ex parte Knott* - iii. | 465 |
| 41. *Lord Erskine's contra to Lord Talbot's : ex parte Herbert* - - - - - iii. | 466 |
| 42. *Commission notice under* 6 *Geo.* 4, *c.* 16 : *purchaser* - - - - - - - iii. | 467 |
| 43. *Hithcox* v. *Sedgwick : commission notice* - iii. | 467 |
| 44. *Overruled in Dom. Proc.* - - - - - iii. | 467 |
| 45. *Purchaser without notice not bound by secret act of bankruptcy* - - - - - iii. | 468 |
| 46. *Sufficient ground for inquiry, notice : legal estate : title deeds* - - - - - iii. | 468 |
| 47. 55. *Notice of tenancy, notice of lease, or of purchase by tenant* - - - - iii. | 469. 473 |

| | | Page |
|---|---|---|
| 47 a. | *But notice of a past tenancy unimportant* | iii. 470 |
| 48. | *If tenant under lessee, purchaser need not inquire further* | iii. 470 |
| 49. | *Lien of tenant as seller not binding where conveyance is with a receipt* | iii. 470 |
| 50. | *Statement that a bond or warrant of attorney existed notice of equitable mortgage* | iii. 470 |
| 51. | *Purchaser not inquiring for deeds bound by a deposit: Whitbread v. Jordan* | iii. 471 |
| 52. | *Observations on it* | iii. 471 |
| 53. | *Purchaser of improper charity lease* | iii. 472 |
| 54. | *Notice of invalid lease inoperative at law* | iii. 473 |
| 55. | *Notice of tenancy not notice of lessor's title* | iii. 473 |
| 56. | *Want of possession in seller not notice of adverse title* | iii. 473 |
| 57. 59. | *Recital, &c. leading to other facts binding* | iii. 474 |
| 58. | *Unusual receipt indorsed, notice: solicitor committing fraud and acting for purchaser* | iii. 474 |
| 60. | *One estate liable in equity to clear another of incumbrances: notice of deed binds* | iii. 475 |
| 61. | *But notice of contemplated deed not sufficient* | iii. 475 |
| 62. | *Purchaser from husband under settlement bound by the wife's equities* | iii. 476 |
| 64. | *Ambiguous recitals, mere suspicion of fraud not notice* | iii. 476 |
| 65. | *Term generally to attend not notice* | iii. 477 |
| 67. | *Court rolls not notice semble* | iii. 478 |
| 68. | *Steward of manor has notice of the admissions* | iii. 478 |
| 69. | *Effect of notice of mortgage title* | iii. 478 |
| 70. | *Witnessing a deed not notice* | iii. 479 |
| 71. | *Improper settlement under articles; the latter, how far binding on a purchaser* | iii. 479 |


## Sect. II.—Of the Proof of Notice:


| | | |
|---|---|---|
| 2. | *Not to be proved by counsel, &c.* | iii. 481 |
| 3. | *Lord Hardwicke's opinion contra* | iii. 481 |
| 4. | *Nor can he produce the purchaser's documents* | iii. 482 |
| 5. | *Case and opinion may be withheld* | iii. 482 |
| 6. | *Communications by mistake to person not an attorney, not protected* | iii. 483 |
| 7. | *Attorney a witness must prove deed* | iii. 483 |
| 8. | *Communications upon sales and purchases protected: advising on title* | iii. 484 |
| 9. | *One witness against answer not sufficient* | iii. 484 |

Page

10. *Unless denial not positive* - - - - iii. 484
11. *Or answer not* ad idem - - - - iii. 485
12. *Or disproved by a letter of defendant's* - - iii. 485
13. *Or concurring circumstances in favour of witness* - - - - - - - iii. 485
14. *Issue directed* - - - - - - iii. 485
17. *Proof on purchaser when deed came into his possession* - - - - - - iii. 486
20. *Account against purchaser with notice* - - iii. 487

## CHAPTER XXIV.

### OF PLEADING A PURCHASE.

1. *Ground of plea* - - - - - - iii. 488
3. *Must be sworn: answer over-ruling or supporting plea* - - - - - - - iii. 489
4. 16. *Purchaser must plead: if answer it must be full* - - - - - - iii. 489. 494
5. *Deeds of purchase to be stated* - - - iii. 489
6. *Averment of seisin* - - - - - iii. 490
7. *And of possession: reversion* - - - iii. 491
8. *And of payment of price* - - - - iii. 491
9. *And denial of notice* - - - - - iii. 492
10. *And particular instances to be denied specially: possession of papers* - - - - - iii. 492
11. *Where general denial of notice sufficient* - iii. 493
12. *Notice to be denied by answer also* - - iii. 493
14. *Plea no protection where want of due diligence* iii. 494
15. *Decree after an issue and appeal to Dom. Proc.* iii. 494
17. *Whether plea protects against a legal title* - iii. 494
18. *Lord Nottingham's decisions for and against* - iii. 495
19. *Parker* v. *Blythmore for* - - - - iii. 495
20. *Lord Thurlow against* - - - - iii. 495
21. *Lord Rosslyn for* - - - - - iii. 495
22. *Sir John Leach against* - - - - iii. 496
23. *Observation on the rule* - - - - iii. 496

## APPENDIX OF MS. CASES, &c.


| | | Appendix, Page |
|---|---|---|
| No. 1. No. 2. No. 3. | *Notices under the Auction Duty Acts* - - - | iii. 1 |
| No. 4. | *Conditions of Sale* - - - - - - | iii. 2 |
| No. 5. | *Agreements to be executed at a Sale by Auction* - | iii. 5 |
| No. 6. | *Agreement for Sale by Private Contract* - - | iii. 6 |
| No. 7. | *Bratt* v. *Ellis* - - - - - - - | iii. 7 |
| No. 8. | *Jones* v. *Dyke* - - - - - - - | iii. 9 |
| No. 9. | *Wyatt* v. *Allen* - - - - - - - | iii. 10 |
| No. 10. | *Morshead* v. *Frederick* - - - - - | iii. 10 |
| No. 11. | *A Bill for extending the Provisions of the Statute of Frauds* - - - - - - - | iii. 12 |
| No. 12. | *Ex parte Tomkins* - - - - - - | iii. 16 |
| No. 13. | *Reasons in King* v. *Hamlet* - - - - | iii. 16 |
| No. 14. | *Observations on the Annuity Act, and on raising the legal Rate of Interest* - - - - - | iii. 20 |
| No. 15. | *Coussmaker* v. *Sewell* - - - - - | iii. 31 |
| No. 16. | *Clay* v. *Sharpe* - - - - - - - | iii. 32 |
| No. 17. | *Belch* v. *Harvey* - - - - - - | iii. 34 |
| No. 18. | *The King* v. *Smith* - - - - - - | iii. 36 |
| No. 19. | *Attorney-General* v. *Lockley* - - - - | iii. 44 |
| No. 20. | *Bret* v. *Sawbridge* - - - - - - | iii. 47 |
| No. 21. | *Forshall* v. *Coles* - - - - - - | iii. 53 |
| No. 22. | *Burton and others* v. *Todd: Todd* v. *Gee and others* | iii. 54 |
| No. 23. | *Duke of Bedford* v. *British Museum* - - - | iii. 57 |
| No. 24. | *Rea* v. *Williams* - - - - - - | iii. 61 |
| No. 25. | *Lechmere* v. *Lechmere* - - - - - | iii. 62 |
| No. 26. | *Fairfield* v. *Birch* - - - - - - | iii. 64 |
| No. 27. | *Sloane* v. *Cadogan* - - - - - - | iii. 66 |
| No. 28. | *Bury* v. *Bury* - - - - - - - | iii. 76 |

# INDEX TO CASES,

## CITED OR INTRODUCED.

*Note*, "*v.*" follows the name of the plaintiff; "*and*," the name of the defendant.

The Cases printed in italics are either cited or stated from MSS. or have been examined with the Register's book, or searched for without success.


| A. | Page |
|---|---|
| ABBOT *v.* Gibbs - | iii. 153 |
| Abbott *and* Gillett - | ii. 97 |
| —— *and* Jebb - - | iii. 155 |
| —— *and* Rex - - | 17 |
| Abdy *v.* Loveday - | iii. 425 |
| Abel *and* Doe - - | 295 |
| Abercorn (Marquis of) *and* Duke of Bedford - | 264 |
| Aberdeen *v.* Watlin - | 104 |
| Abingdon (Lord) *and* Child | iii. 110. 130 |
| Abney *and* Merry - | iii. 454 |
| Abraham *v.* George - | iii. 318 |
| Abrahams *and* Fuller - - | 35 |
| Abrey *and* Wood - - | 460. 463 |
| Aburrow *and* Bennet - | App. 71 |
| Acherley *v.* Acherley - | iii. 256 |
| Ackerman *and* Brand - | iii. 482 |
| Acland *v.* Gaisford, 79; | iii. 115. 130 |

| | Page |
|---|---|
| Ackland *and* Malpas - | iii. 474 |
| Acra *and* Gloss - - | 532 |
| Acton *and* Cage - - | iii. 21 |
| —— *v.* Pierce - - | 351 |
| Adams *and* Daniel, 87. 186. 330, | 331. 333. 344 |
| —— *v.* Fairbain - - | 249 |
| —— *and* Greenaway - | 364 |
| —— *and* Hill - - | iii. 75 |
| —— *v.* Taunton, ii. 179; | iii. 174 |
| —— *v.* Weare - - | 438 |
| Adamson *v.* Evitt - | 10 |
| —— *and* Stevens - | 540 |
| Adcock and Mertens - | 65 |
| —— *and* Sharp - - | ii. 178 |
| Adderly *v.* Dixon - | 337 |
| Addison *v.* Dawson - | iii. 223 |
| Adkinson *and* Hall - | iii. 423 |
| Advocate General *and* Walker - - | 23 |

Page

Aflalo *and* Goom - 183
Agar *v.* Macklew - - 466
Ailsbie *and* Holmes - ii. 97
Alam *v.* Jourdon - - iii. 484
Alcock *and* Goleborn - iii. 419
—— *and* Jeudwine - ii. 29
—— *and* Knollys - 289
Aldrich *v.* Cooper - iii. 208
Aldridge *and* Floyd - 280
—— *and* Mesnard - 43
—— *and* Nelson - 71
Alexander *and* Crockford, 276. 356
—— *v.* Crosbie - - 251
—— *Ex parte* - - iii. 225
*Allan* and *Wyatt*, 73. 186; App. 10
Allen *v.* Anthony - - iii. 469
—— *v.* Bennet, 160. 162. 171. 181. 188
—— *v.* Bower - - 211
—— *and* Bull - - 361
—— *v.* Cameron - - 256
—— (Lord) *and* Cane, iii. 229. 238
—— *and* Garbrand, iii. 222, 223
—— *and* Wilson - iii. 143
Allen's charities - - 100
Alley *v.* Deschamps, 408, 409. 413
Alleyn *v.* Alleyn - 279. 284. 305
Allington *and* Boteler - 327
—— (Lord) *and* Napper, ii. 541
Alliston *and* Stewart, 51. 58. 508; ii. 24
Allpass *v.* Watkins - ii. 198. 202
Allsop *and* Doe - - iii. 372
Alsop *v.* (Lord) Oxford ii. 83
—— *v.* Patten - - 205
Alston *and* Taylor - iii. 260
Alt *and* Bramley - - 30
Altham (Lord) *v.* the Earl of Anglesea - - iii. 260

Page

Altham's case - - 250
Ambler *and* Harding - iii. 135
Ambrose *v.* Ambrose, 75. 101; iii. 256; App. 44
Amcourt *v.* Elever - 373
Amy's case - - 12
Ancaster (Duke of) *and* Earl of Tyrconnel - 49
Anderson *and* Lord Ormond 166
—— *and* Peters - - ii. 432
—— *v.* Wallace - - 464
Anderton *and* Robinson, ii. 419, n.
Andover (Lady) *and* Sir James Lowther - 427; iii. 98
Andrew *v.* Andrew - ii. 29
—— *and* Attorney-General, ii. 394
—— *v.* Wrigley, iii. 177, 178. 180, 181. 448, 449
Andrews *and* Back - iii. 268
Andrew's case - - 533
Andrews *and* Charles, 438; ii. 219; iii. 183
—— *and* Doe - - iii. 483
—— *v.* Emerson - - 122
—— *v.* Emmott - App. 70
—— *and* Sir Darcy Lever, iii. 256
—— *and* Maddison, iii. 260; App. 71. 74
—— *v.* Paradise - - ii. 537
Angier *v.* Stannard - 95
Anglesea (Earl of) *and* Lord Altham - - iii. 260
—— (Earl of) *v.* Annesley 247
Annesley *and* Earl of Anglesea - - - 247
—— *v.* Ashurst - - 114
—— *v.* Muggridge, 76. 78; iii. 140
—— *and* Errington - - 336

Page
Annesley (Lord) *and* Hovenden, ii. 324, 325. 328
—— (Lord) *and* Saunders, 386, 487, n.; ii. 43. 328
Anonymous (2 Ch. Ca. 19), ii. 427
—— (2 Cha. Ca. 53) - 332
—— (2 Cha. Ca. 136) - iii. 464
—— (2 Cha. Ca. 161) - iii. 493
—— (1 Freem. 456) - ii. 510
—— (2 Freem. 106), 526; ii. 44. 419. 426
—— (2 Freem. 128) - 203. 216
—— (—— pl. 151) - iii. 262
—— (2 Freem. 137, pl. 711). iii. 468
—— (2 Freem. 155) - 321
—— (1 Vern. 318) - iii. 458
—— (1 Ventr. 361) - 141
—— (2 Ventr. 46) - ii 510
—— (2 Ventr. 361, No. 2), iii. 492
—— (2 Ventr. 361, No. 3), iii. 256
—— (Carth. 15) - - iii. 247
—— (Mosc. 96) - iii. 153. 159
—— (Mosc. 2. 46) - 312
—— (Sel. Cha. Ca. 57) iii. 271
—— (Skin. 159) - - 268
—— (Skin. 404) - - iii. 481
—— (5 Vin. Abr. 522, pl. 38) 211. 242
—— (5 Vin. Abr. 523, pl. 40) 211
—— (1 Show. 90) - ii. 319, n.
—— (11 Mod. 5) - iii. 94
—— (1 Lord Raym. 182) 146
—— (1 Str. 93) - - 250, n.
—— (3 Atk. 270) - iii. 485
—— (Lofft. 460) - ii. 516
—— (1 Bro. C. C. 158, 6 Ves. jun. 24, cited) - 441
—— (Dougl. 384, cited) 258, n.
—— (2 Dick. 497, n.) - 380

Page
Anonymous (2 Ves. 663) iii. 35
—— (1 Ves. jun. 453) 122. 126
—— (2 Ves. jun. 286) - 126
—— (2 Ves. jun. 335) - 104
—— (2 Ves. jun. 487) - 122
—— (5 Ves. jun. 148) - 122
—— (6 Ves. jun. 470, cited), 211
—— (6 Ves. jun. 513) - 125
—— (3 Mad. 494) - 122
—— (3 Mad. 495) - ii. 37
—— (6 Mad. 10) - 90
—— (E. T. 1790) - 485
—— (1 Cam. Ca. 491, n.) iii. 318
*Anonymous* (L. I. Hall, 16 July 1816, MS.) 109. 359
Anonymous (Chan. 7 September 1803) - ii. 184
—— (Moo. pl. 318) - ii. 484
Ansell *and* Meres - 218
Ansley *and* Farebrother 26
Anson (Lord) *v.* Hodges iii. 126
—— *v.* Lee - - ii. 45
—— *v.* Towgood, 104. 109. 469
*Anson* (*Lord*) and *Winter*, iii. 183, 184. 190. 215. 456
Anspach (Margravine of) *v.* Noel, ii. 13. 38; iii. 145
Anthony *and* Allen - iii. 469
Appleyard *and* Bailey - ii. 376
Appleton *v.* Binks - 83
Appowell *v.* Monneux - ii. 471
Archbold *and* Magrane, 343. 354
Archer *and* Barraud - 11. 49
—— *and* Collins - - iii. 496
—— *and* Doe - - iii. 443
—— *and* Gosbell, 173, 174. 182. 191. 370; ii. 52
*Ardesoife* v. *Bennet* - 279
Ardglasse (Earl of) *v.* Muschamp - - - 445

Page
Arkwright *and* Crossley, App. 21
Armiger *v.* Clarke - 356
Armistead *and* Berry - 10. 382
Armitage *and* Mason, 36. 187. 193. 343
—— *and* Pilling - - - iii. 485
Armstrong *and* Jack - iii. 362
—— *and* Maguire - iii. 444
Arnald *v.* Arnald - - 287
Arnell *v.* Bean - iii. 314, n.
Arnison *and* Ellis - - ii. 190
Arnold *and* Bechinall - iii. 423
—— *and* Lee - - ii. 471
Arnot *v.* Biscoe - - iii. 485
Arrowsmith *v.* Shaftesbury (Lord) - - - ii. 114
Arthur *and* Macnamara, 367; ii. 55
—— *and* Vyvyan - ii. 468. 478
*Artingstall* and *Tyrer*, or *Bailey* - - - 435
Arundel *v.* Arundel - ii. 442
—— *and* Bidlake iii. 193 n.
—— (Lord) *and* Cook - ii. 486
—— *and* Day iii. 489, n; 491
Ascough *v.* Johnson - ii. 433
Ashdown *and* Stileman, iii. 267. 294
Ashley *v.* Baillie - iii. 453. 456
—— *Ex parte* - - iii. 229
—— *and* Harvey - iii. 476
Ashlin *and* Greaves - 65. 218
Ashton *and* Aylett - ii. 161
—— *and* Nash - ii. 514. 542
—— *and* Culpepper, iii. 153. 170. 458
Ashurst *and* Annesley - 114
Askew *and* Oshaldeston, ii. 40. 185; iii. 140
—— *and* Townshend - - ii. 395
Aspinall *v.* Kempson - - iii. 65
Assheton *and* Price - - 168
Astley *and* Dixon - 358; ii. 15
Aston *v.* Aston - - iii. 490
—— *and* Culpepper, iii. 153. 170
—— *v.* Curzon - - iii. 492
—— *and* Nash - - ii. 537
Atcherley *v.* Vernon, 273. 279, 280
Atchison *v.* Dickson - 469, n.
Athowe *v.* Heming - ii. 467
Atkins *and* Hope - 218
—— *v.* Rowe - - iii. 352
*Atkinson* and *Bowles* - 550
Atkinson *and* Magee - 83
Attenborough and Williams, 109 123
Attersoll *and* Blake - App. 24
Attorney-General *v.* Andrew, ii. 394
—— *v.* Christ's Hospital, iii. 313
—— *v.* Backhouse, iii. 243 n.; 473
—— *v.* Bagg - - iii. 265
—— *and* Casberd - ii. 413
—— *v.* Cast Plate Glass Company - - 252
—— *and* Christie - 25, 26
—— *v.* Commissioners of Woods and Forests 259
—— *v.* Corporation of Newark - - - 111
—— *v.* Day - 114. 193. 306
—— *v.* Lord Dudley - iii. 232
—— *v.* Ellison - - ii. 114
—— *v.* Forster - - 256
—— *v.* Gower, 490; iii. 313. 453. 492
—— *v.* Griffith - iii. 243, n.
—— *v.* Lockey - - App. 44
—— *v.* Parker - - 256
—— *v.* Sands, iii. 23, 71. 87. 92. 94

Page
*Attorney-General* v. *Scott*, iii. 75,n.
—— v. *Taylor* - - 24
—— *and* Thruxton, iii. 92, 93, 94
—— v. Vigor - - 286
Atwood *and* Moth - 463
Attwood *and* Small, 5, 342. 382. 395. 397, 398, 399, 400. 439. 442; ii. 15. 430; iii. 126, 127. 149. 245.
Aubrey v. Denny - 123
—— v. Fisher - - 61
Auriol *and* Mills - - ii. 540
Austen *and* Davies, iii. 431. 433
—— v. Halsey - - iii. 209
Austin *and* Crowder - 32. 34
Austwick *and* Maddeford 442
Auty *and* Teall, 142. 144. 148. 153. 157
Aveling v. Knipe - iii. 247
Averall v. Wade, ii. 489; iii. 429. 436
Awbrey v. Keen - - ii. 420
Awder *and* Noke - - ii. 459
Ayers *and* Fain, ii. 98. 109. 127. 541
Ayerst *and* Boys - - 166
Aylesford's (Earl of) case 200
Aylett v. Ashton - - ii. 161
Ayliffe v. Murray - iii. 237
Aylward *and* Hickson - 12

B.

Back v. Andrews - - iii. 268
—— v. Kett - - 286
—— *and* Turner - - iii. 425
Backhouse *and* Attorney-General - iii. 243, n.; 473
—— *and* Bedford - iii. 369
—— *and* Fen - - App. 25
Bacon v. Simpson - 468
Badcock, *ex parte* - iii. 225
Baddall *and* Gibbons, iii. 193, 194. 215
Baden v Earl of Pembroke, 275; iii. 94
Bage, *ex parte* - - iii. 225
Bagenal *and* Whaley - 176. 200
Bagg *and* Attorney-General, iii. 265
Baghlehole v. Walters - 546
Bagnoll *and* Sachevrel - ii. 104
Bagott *and* Blakeney, 445; iii. 444
Baikie v. Chandless - ii. 417
Bailey v. Appleyard - ii. 376
—— v. Ekins - - iii. 160
*Bailey* and *Hays*, ii. 157. 163; iii. 4. 138
Bailey *and* Holwood - iii. 143
—— *and* Keppel, ii. 471. 477. 494, 495, n, 500
Baillie *and* Ashley - iii. 453. 456
—— v. Chaigneau - 122
Bailiffs, &c. of Tewkesbury v. Bricknell - - 256
Baily *and* Lamas - iii. 252, 253
—— *and* Stent - - 468
—— *and* Stevens - 321
Bainbridge *and* Bruce - iii. 140
Bainton *and* Lambert - iii. 230
Baker v. Bent - - 460
—— v. Bulstrode - ii. 543
—— v. Carter - - iii. 242
—— v. Child - - 330
*Baker* and *Cuthbert* - 504
—— v. *Dibbin* - - ii. 189
Baker *and* Freeman - 6. 549
—— v. Henderson - ii. 91
—— v. Morgan - - 102
—— v. Paine - - 269
—— *and* Smith - - iii. 256
—— *and* Squire - - 439

Page
Baker *and* Taylor (1 Dan. 71), iii. 468
—— *and* Taylor (5 Price, 306) - - - iii. 471
Bakershaw *and* Brewer, App. 34
Balch *v.* Symes - - ii. 114
Baldey *v.* Parker - - 514
Baldwin *v.* Poulter - 476
—— *and* Cave, 39; ii. 190. 207
—— *and* Echliff - - 356
—— *and* Lloyd - iii. 154. 156
—— *v.* Rochfort - - 462
Balfe *and* Kine - - 200
Balfour *v.* Welland - iii. 157
Balgney *v.* Hamilton - iii. 271
Balguy *and* Fosbrooke - iii. 271
Ball *v.* Bumford - - iii. 295
—— *and* Gordon - ii. 36
—— *and* Symonds - 193
Ballard *and* Crowe, 394; iii. 237
—— *and* Hercy - - ii. 324
—— *v.* Way - - 50
Ballet *and* Muscat - ii. 537
Bally *v.* Wells, ii. 458. 470. 482. 489
Balmanno *v.* Lumley, 495; ii. 36. 161
Banbury (Earl of) *and* Bisco, iii. 474
—— (Lord) *v.* Briscoe, ii. 108. 110
Bandon (Earl of) *v.* Becher, iii. 180
Banes *and* Croyston - 193
Banks *v.* Sutton, iii. 75; App. 44, 45
Barber *and* Davy - iii. 98. 107
—— *v.* Gamson, App. 24, 25. 27
—— *and* Lea - - 159
—— *and* Mackintosh - 95
—— *v.* Morris - - 318
—— *and* Vansittart - ii. 114
Page
Barchard *and* Low - 443
Barclay *v.* Raine, ii. 123, 124. 178
Barham *v.* Thanet (Lord) 310
Barker *and* Bramton - iii. 492
—— *and* Corbett - ii. 327
—— *v.* Damer - ii. 467, 468
—— *v.* Duke of Devon iii. 155
—— *v.* Greenwood - - 74
—— *v.* Vansommer - 446
—— *v.* Hill - - 275
—— *v.* Holford - - 104
—— *v.* Harper - - 107
—— *and* Preston - - 122
Barkley *and* Jones - 374
Barksdale *v.* Morgan - 532
Barnard *and* Lord Glengall 190
Barnard (Lord) *and* Vane, ii. 419. 538; iii. 455
Barnardiston (Sir J.) *v.* Lingood - - - 445
Barnes *v.* Crowe - - 285
—— *and* Freeman - iii. 2
—— *and* Walker - 314
Barnett *v.* Waddilove - 315
—— *v.* Weston - - iii. 420
Barnfather *v.* Jordan - iii. 223
Barns *v.* Canning - - iii. 458
Barnston *and* Stackhouse ii. 325
Barnwell *v.* Harris, 502; ii. 132. 162. 185. 196
Barr *v.* Gibson - - ii. 44. n.
Barraud *v.* Archer - 11. 49
Barrett *v.* Blake - - 102
Barr *and* Const - - ii. 436
—— *v.* Gomeserra - 200. 440
—— *and* Morris - - iii. 248
Barrington *v.* Horne - 331
—— *Ex parte* - - ii. 14. 38
Barrow *and* Hilton - ii. 41
Barry *v.* Lord Barrymore 186
—— *and* Conran - - 125, n.

Page

Barry *and* Fisher - ii. 166. 177
—— *and* Phillimore - 183. 188
Barrymore (Lord) *and* Barry 186
Bartch *and* Kitchin - 256
Bartlett *v.* Downes - iii. 59
—— *v.* Pickersgill, 198; iii. 257. 260, 261
—— *v.* Purnell - - 42. 190
—— *v.* Tuchin - - 418
—— *and* White - - 78
Barton *and* Buckland - App. 70
—— *v.* Fitzgerald ii. 525. 530
—— *and* Flight - - 242
—— *and* Richards, ii. 51. 78. 381 437
Bartram *and* Hudson - 433
Barwell *and* Wyatt - iii. 373
Barwick *and* Say - - 340
Bascawen *v.* Cook ii. 480. 486
Bascoi *v.* Serra - - iii. 476
Basket *v.* Pierce - - iii. 2
Basset *v.* Nosworthy, iii. 418. 491
—— *and* Upton - - iii. 281
Bastard's Case - - ii. 59
Batalay *and* Edlin - iii. 436
Bateman *and* Cox - iii. 271
—— *v.* Phillips, 160. 372; ii. 115
—— *v.* Shore - iii. 249, n.
—— *and* Stephens - 443
Bates *v.* Bonner - 108. 123. 128
Bath (Earl of) *v.* Sherwin 352
Battersbee *v.* Farrington iii. 294
Baugh *v.* Price, 393. 445. 463; iii. 436
Bawden *and* Right - iii. 263
Bawtree *v.* Watson - 446. 463
Baxter *v.* Conolly - ii. 5
—— *and* Earl - - ii. 97
—— *and* Jernegan - iii. 15
—— *v.* Lewis - - 375
Baylis *v.* Manning - ii. 133

Page

Baylis *v.* Newton - - iii. 266
Bayly *v.* Schofield - iii. 318
—— *and* Ginger - - 372
Bayne *and* Trimmer, iii. 209. 214
Baynham *v.* Guy's Hospital 255
Beable *v.* Dodd - App. 72
Beake *and* Wiseman - 446
Beales *and* Brett - ii. 71
Beale *v.* Sanders - - 65
Bean *and* Arnell - iii. 314, n.
Beane *and* Ithell - - iii. 178
Beard *and* Chandler - ii. 193
—— *and* Right - - 378
*Beard* and *Westcott* App. 50
Beardsham *and* Davie, 273. 279. 284
Beasley *v.* Clark - - ii. 374
Beatniff *v.* Smith - - iii. 372
Beauclerk (Lord) *and* Cant, iii. 486
Beauman *and* Lansdowne 102
Beaumont, *ex parte* - 92
—— *v.* Bramley - - 265
—— *v.* Mountain - ii. 71
—— *v.* Dukes - - 47
—— *and* Needham - iii. 281
*Beaurain* and *Turner*, 502; ii. 51
Beazeley *and* Welford, 175. 181; iii. 479
Becher *and* Baudon (Earl of), iii. 180
Bechinall *v.* Arnold - iii. 423
Beckett *v.* Cordley - iii. 479
—— *and* Chater - 159
—— *and* Kendall - 364. 446
Beckford *v.* Beckford - iii. 262
—— *v.* Wade - ii. 319. 326
—— *v.* Wildman - ii. 114
Bedford *v.* Backhouse - iii. 369
Bedford (Duke of) *v.* Marquis of Abercorn - - 264

Page
*Bedford (Duke of)* v. *Trustees of the British Museum* ii. 496; App. 57
Bedford (Earl of) *and* Clare, iii. 428
—— (Duke of) *and* Charlewood, 135, n.; 174. 186
Bedwell *and* Townley, 292; iii. 115
Beech *and* Taylor - 199
Beechey *and* Pennington iii. 493
Beete v. Bidgood - iii. 129
Beevor v. Simpson - ii. 9
Begbie v. Crook - - iii. 174
*Belch* v. *Harvey*, ii. 326; App. 34
Belchier v. Butler - iii. 420
—— v. Renforth - iii. 420
Belchier v. Reynolds, 354. 464. 466
Bell v. Bell - - - iii. 446
Bell *and* Cablin - - 25
—— v. Cundall - - iii. 423
—— *and* Hutchinson - - 6
—— v. Howard - - 247. 413
—— v. Phyn - iii. 249, n.
—— *and* Scott - - iii. 295
Bellaers *and* Willcox, ii. 41. 177; iii. 138
Bellamy v. Liversedge - ii. 103
Bellasis (Lady) v. Compton, iii. 260
Bellew v. Russell - iii. 229
Bellringer *and* Rex - 256
Bellwood *and* Wetherell ii. 379
Belworth v. Hassell - 482
Bence *and* Brothers - iii. 478
Bengough v. Edridge - App. 52
Bennet v. Aburrow - App. 71
—— *and* Allen, 160. 162. 171. 181. 188.
*Bennet* and *Ardesoife, or Wilson* - - - 279
Page
Bennet College v. Carey, 80; 347; ii. 41; iii. 137
Bennett's Case - - ii. 543
—— v. Mayhew - - iii. 271
—— v. Musgrove - - iii. 301
—— *ex parte*, iii. 225, 226. 229. 241
—— *and* Wilson - - 279
Bennett - *and* Bradshaw, 40, 41, 42. 372; iii. 125
—— v. Harnell - - 102
—— *and* Lawes - - 292. 303
—— *and* Hughes - ii. 535
—— v. Ingoldsby - ii. 98
—— *and* Kelsall - - iii. 492
—— *and* Moore - - iii. 474
—— v. Rees - ii. 38. 79
—— v. Lord Tankerville 290
—— v. Wornack - - 49
Bensley v. Burdon, ii. 43; iii. 423. 430
Benson *and* Camden - 112
—— *and* Doe - 221
—— v. Glastonbury - 360
—— *and* Turton - - iii. 433
Bent *and* Baker - - 460
Bentley *and* Flight 316
Benyon v. Collins iii. 155
Berkeley v. Daubi - ii. 40
—— *and* Weston - iii. 492
Bernal v. Donegal 445
—— *and* Wood - 424
Bernard v. Drought - ii. 73. 91
—— *and* Sitwell - 95
Berney v. Harvey - ii. 179
—— v. Pitt - 445
—— *and* West - ii. 182
Berrington *and* Domville, 100. 123
—— v. Evans - ii. 361. 363
Berrisford v. Milward - iii. 428

Page
Berry v. Armistead - 10. 382
—— *and* Gibbons - 117
—— v. Johnson - - 112
—— v. Young, 63. 75. 402. 410; ii. 119. 122
Besant v. Richards - 224
Bessonet v. Robins - 99
Best v. Stamford - - iii. 88
Betesworth (Dr.) v. Dean and Chapter of St. Paul's 351
Bethill *and* Floyd - 533
Bethune v. Farebrother 368
Bettel *and* Webb - 375
Bevant v. Pope - - ii. 215
Beverley *and* Hanson - iii. 173
Beversham *and* Tyler - 531
Bevill's case - - ii. 324
Bevis *and* Whitchurch, 178. 196. 199, 200
Bewley *and* Noel, ii. 196; iii. 431
Bexwell v. Christie - 28. 32
Bickerstaff *and* Hayes - ii. 512
Bickerton v. Burrell - 368
Bickford *and* Warn - ii. 542
Bicknell *and* Evans, iii. 12. 46. 428. 484
Biddlecomb v. Bond - iii. 318
Biddle v. Perkins - ii. 182
Biddulph v. St. John, iii. 372 479. 485
Bidlake v. Arundel iii. 193, n.
Biggs *and* Brooke - 315
—— v. Rowe - - 126
—— *and* Pope - - 315
Bignold, *ex parte* - 94
Bigwood *and* Beete - iii. 129
Bill *and* Humble, iii. 155. 177. 180
Billing *and* Farrer, ii. 190. 192
Bingham v. Bingham, 385; ii. 43
Bingham v. Clanmorris - iii. 174
Binion (Sir G.) v. Stone, iii. 265

Page
Binks *and* Appleton - 83
*Binks* v. *Lord Rokeby*, 521, 522; ii. 11; iii. 103. 133. 154
Binstead v. Coleman - 200. 218
Birce v. Bletchley - 179
Birch v. Blagrave - iii. 266
—— v. Dawson - - 62
*Birch* and *Fairfield*, iii. 293; App. 64
Birch *and* Fox - - 359
—— v. Haynes - - ii. 37
—— v. Podmore - - iii. 117
—— *and* Watson - 124
—— *and* Wood - - iii. 251
—— v. Wright - - 314
Bircham *and* Ireland - ii. 520
Birchmore *and* Sawyer - iii. 483
Bird v. Boulter - - 191
Birt *and* Meder - - iii. 493
Biscoe *and* Arnot - iii. 485
—— v. Earl of Banbury, iii. 474
—— v. Bret - - ii. 36
—— v. Perkins, ii. 171; iii. 440
—— v. Wilks, ii. 171; iii. 142. 440
Bistolli *and* Phillips - 37
Blackbeard v. Lindigren 106
Blackburn *and* Doe - ii. 231
—— v. Gregson, iii. 194. 203. 216
—— v. Scholes - - 73
—— v. Stace - - 358
Blackburne *and* Strode, ii. 110. 113. 130
Blacket v. Langlands - iii. 489
Blacklow *and* Taylor, 10; iii. 484
Blackstone *and* Foster, ii. 389; iii. 432
—— *and* Lavender, iii. 295. 308

Page
Blackwell *and* Boyer, 123. 127. 516
Blackwood *and* Macartney, iii. 128
Blades *v.* Blades - - iii. 372
—— *and* Winter - - iii. 99
Blagden *v.* Bradbear, 163. 167. 170. 174. 187. 193. 197
Blagrave *and* Birch - iii. 266
Blake's case - - ii. 328
Blake *v.* Attersoll - App. 24
—— *and* Barrett - - 102
—— *and* Brown - iii. 370, n.
—— *and* D'Arcy iii. 75, n.
—— *and* Dykes - 45. 57. 515
—— *v.* Sir Edward Hungerford - - iii. 82, 419
—— *v.* Foster - - ii. 328
—— *and* Kirwan, 116. 120. 422
—— *and* Earl of Macclesfield - - - 127
—— *and* Reynolds - 111, 112
Blakeney *v.* Bagott, 445; iii. 444
Blakeston *v.* Martyn - ii. 408
Blakey *v.* Porter - - 372
Blanchard *v.* Bridges - 47
Bland *and* Doe - - 252
Blanford *and* Carpenter 406
Blandist *and* Miller - 203. 216
Blankley *v.* Winstanley - 256
Blatchford *v.* Mayor of Plymouth - - - ii. 529
Bleasly *v.* Ratcliffe - ii. 115
Blemerhasset *v.* Pierson 245
Blennerhasset *v.* Day, iii. 115. 229
—— *v.* M'Namara, 117; iii. 115
Bletchley *and* Birce - 179
Blewett *v.* Tregonning - iii. 332
Blewitt, *in re* - - ii. 286
Bligh *v.* Brent - iii. 249, n.
Bliss *v.* Collins - - ii. 162
—— *and* Vancouver, 12. 502. 520; ii. 40; iii. 137, 138
Page
Blogg *and* Holmes - iii. 222
Bloodworth *and* Radworth, iii. 315
Blore *v.* Sutton, 168. 181. 187. 364
Blosse *v.* Clanmorris, ii. 167. 172. 179; iii. 141
Blount *v.* Blount, iii. 101. 108. 130
—— *v.* Pearman - - ii. 446
Blundell *v.* Brettargh - 466
Blyth *v.* Elmherst - ii. 36, 37
Blythmore *and* Parker - iii. 495
Boakes *and* Kingdome - iii. 484
Boards *v.* Ross - - 495
Boardman *v.* Mostyn - 212
Boatwright *and* Cubbidge, iii. 178
Bodington *and* Wilker, iii. 36. 77. 464.
Bodmin *v.* Vendebendy or Rotherham - - iii. 75. 492
Boehm *and* Rogers - iii. 121
—— *v.* Wood - 380. 433; ii. 36
Bogan *and* Sir C. Shovel 525
Boland *and* Field, 162. 187; iii. 440
Bolingbroke's (Lord) case 500
Bolland *and* Flight - 335. 347
Bolton *and* Crisdee - 66. 317
—— (Lord) *and* Deverell, ii. 17. 53. 145
—— —— *v.* Tomlins - 135
—— *v.* Liverpool (Corporation of) - - - iii. 482
Bond *and* Biddlecomb - iii. 318
—— *and* Chapman iii. 93. 94
—— *v.* Hopkins - - ii. 328
—— *v.* Kent - - iii. 191
—— *and* Wright - - ii. 35
—— *and* Lucas - - 317
Bone *v.* Cook - - 91
Bonner *and* Bates, 108. 123. 128
—— *v.* Johnson - - 358, 359

Page
Bonnett v. Sadler - 350
Bonney v. Ridgard, iii. 178, 179, 180
Bony v. Smith - - iii. 449
Bodne v. Eyre - - 405
—— v. Mitchell - - ii. 444
Boore *and* Marquis of Hertford - - - 426
Booth *and* Cook - - 225
—— *and* Flight, 45. 48. 55. 59, 60; ii. 19. 23
—— *and* Hope - - 67. 379
—— *and* Seaton - 379. 514
—— *and* Whale - iii. 179
Boothby v. Walker - 359
Borrer *and* Shaw - - iii. 160
Boston *and* Rex - 198; iii. 261
Boswell v. Mendham, ii. 185. 190
Bosworth *and* Stratford 165
Boteler v. Allington - 327
Botelers *and* Hearle, iii. 192. 194. 215
Bothwell *and* Hargreaves, iii. 457
Botley *and* Shaw - - iii. 326
Botting v. Martin - 138
Bottomley v. Lord Fairfax, App. 45. 47
Bottriell *and* Doe - iii. 281
Boughton v. Jewell - ii. 121
Boulter *and* Bird - - 191
—— *and* Baldwin - 476
Boulton *and* Doe - - 378
Bourne *and* Hunt - ii. 319
Bovie's (Sir Ralph) case, iii. 294
Bowden *and* Jones - 549
Bowen v. Kirwan - - 444. 461
Bowen v. Morris - - 83. 161
Bower *and* Allan - - 211
Bowerbank *and* De Havilland, 370, n.; iii. 124
Bowers v. Cator - - 200
Bowes v. Heaps - - 463
—— *and* Lady Strathmore, (Term Rep.) - 285
*Bowles* v. *Atkinson* - 550
—— v. Waller - - 503
Bowles v. Rogers, 67. 273. 428; iii. 216
—— v. Stewart, 8. 10; ii. 110. 328
Bowyer v. Bright - 507
Boxall *and* Scorell, 142. 148. 153.
Boyce v. Green - - 158. 167
Boyes *and* Spencer - ii. 485
Boyer v. Blackwell, 123. 127. 516
Boyman v. Gutch ii. 198. 201
Boys *and* Ayerst - - 166
—— *and* Digs - - iii. 458
—— v. Williams - - 250
Brace v. Duchess of Marlborough, ii. 392: iii. 35. 420. 492
Bracebridge v. Cook - iii. 22
—— v. Heald - - 133, n.
Bradbear *and* Blagden, 163. 167. 170. 174. 187. 193. 197
Braddyll *and* Duck - ii. 445
Bradley *and* Brookfield - 123
—— *and* Westcott - App. 70
Bradshaw v. Bennett, 40, 41, 42. 372; iii. 125
—— v. Bradshaw, 251. 358. 361
—— v. *Midgeley* - iii. 130
—— *and* Salmon - - ii. 537
Bradstreet *and* Shannon. 96. 215. 335
Bragg *and* Calton - iii. 124
Braithwaite v. Britain - iii. 161
—— *and* Howard - 187
Bramah *and* Wheeler - 92
Bramby v. Teal - - 359

Page
Bramley *v.* Alt - - 30
—— *and* Beaumont - 265
Bramston *and* Doe, ii. 346. 348. 353
—— *and* Whichcote - 449
Bramton *v.* Barker - iii. 492
Bramwell *v.* Lucas - iii. 483
Branch *and* Milnes, ii. 479. 481
Brand *v.* Ackerman - iii. 482
Brandling *v.* Ord - iii. 448
Brandon *and* Flint - 336
Brandt *and* Dews, 442. 448. 450
Brasier *and* Lechmere - 113. 421
*Bratt* v. *Ellis*, 71. 369; ii. 48, 51; App. 7
Bray *and* Lowndes, 377; ii. 55. 190
Braybroke (Lord) *v.* Inskip, ii. 180. 183. 213. 435; iii. 175. 427
Brayne *and* Mollett - 138
Breach *and* Doe - - 378
Breadalbane (Marquis of) *v.* Marquis of Chandos 266
Brealey *v.* Collins, 339. 441. 484
Brebner *and* Paton - 495
Bree *v.* Holbech - ii. 420. 426
Breedon *v.* Breedon - iii. 156
Brent *and* Bligh - iii. 249, n.
Bret *and* Biscoe - - ii. 36
*Bret* v. *Sawbridge*, iii. 93; App. 47
Breton (Le) *and* Hargrave, ii. 47; iii. 453
Brett *v.* Beales - - ii. 71
Brett *v.* Marsh - - ii. 432
Brettargh *and* Blundell 466
Brewer *v.* Bakershaw - App. 36
—— *v.* Hill - - ii. 482
—— *and* King - - iii. 296
Brewster *v.* Kidgell, ii. 481. 485
Briant *and* Farley - ii. 540
Page
Brice *v.* Stokes - - 91
Bricknell *and* Bailiffs, &c., of Tewkesbury - - 256
Bridger *v.* Rice - 89. 344, 345
Bridges *and* Blanchard 47
—— *and* Kingdome - iii. 268
—— *and* Philips - - ii. 267
—— *v.* Robinson - iii. 119
Bright *and* Bowyer - 507
—— *v.* Wall - 291; ii. 374
—— *v.* Walker - - ii. 373
Brightwen *and* Doe - ii. 196
Brig's case - 347; ii. 41. 48. 420
Bringloe *and* Mallom - iii. 224
Briscoe *v.* (Lord) Banbury, ii 108 110
—— *and* Gray - - ii. 538
—— *and* Huddleston - 164, 165
Bristow *and* Moneypenny 285
—— *and* Waddington, 143. 146. 148, 149. 157
Britain *and* Braithwaite iii. 161
*British Museum* (*Trustees of the*) and *Duke of Bedford* - ii. 496; App. 57
Broadwood *and* Tubbs - iii. 274
Brockett *and* Oxwick - 530
Brockhurst *and* Whitbread 200
Brockwell *and* Winter, 138. 140
Brodie *v.* St. Paul - 168
Bromley *and* Fillingham ii. 212
Brook (Earl) *v.* Bulkeley 440
Brooke *and* Champernowne, iii. 111
—— *and* Parker - - iii. 480
Brookes *v.* Lord Whitworth, 361
Brookfield *v.* Bradley - 123
Brook *v.* Biggs - - 315
Brooks *v.* Day - - ii. 417
—— *and* Doe - ii. 97; iii. 24
—— *v.* Snaith - - 129

Page

Brooks *and* Sowerby - iii. 464
Broom *v.* Broom - iii. 249, n.
Broome *v.* Monck, 279, 305, 306, 307, 308
Brothers *v.* Bence - iii. 478
Brotherton *v.* Hatt - iii. 453
Broughton *v.* Conway - ii. 528
—— *and* Orme, 371; ii. 53, 458
Brown *v.* Blake - iii. 370, n.
—— *v.* Brown - - ii. 524
—— *and* Burnell, 13. 489. 501. 538, n.; ii. 24; iii. 132. 147
—— *and* Burrell - - ii. 12
—— *v.* Carter - - iii. 298
—— *and* Chapman - 258, n.
—— *and* Church - - ii. 450
—— *and* Corbett - 6
—— *v.* Dowdall - - 118
—— *and* Elliot - - iii. 248
—— *and* Evans - - 443
*Brown* v. *Frost* - - 357
Brown *and* Fain - - 341
—— *v.* Gibbs - - iii. 75
—— *and* Goodrick - ii. 267
—— *v.* Jones - iii. 288. 295
*Brown* v. *Kelty* - - 359. 361
Brown *and* Langley - 269
—— *v.* Newall - - 398
—— *v.* Raindle - - 329
*Brown* and *Robson* - 279
Brown *and* Ryle - - 448
—— *v.* Southhouse - iii. 121
—— *v.* Stead - - iii. 438
—— *and* Street - 372; ii. 115
—— *and* Temple - ii. 57. 142
—— *and* Tickle - ii. 371. 374
*Browne* and *Fenton*, 4. 51. 77. 339. 486. 488. 540; iii. 130
Browne *and* Kenny, iii. 437. 476
—— *v.* Odea - - iii. 436

Page

Browning *and* Burdon - 198
—— *v.* Wright, 262; ii. 510. 526
Brownlow (Lord) *and* Franklin - - 274; ii. 189
Bruce *v.* Bainbridge - iii. 140
—— *v.* Rogers - - 443
—— *and* Warwick - 143. 150
Brushfield *and* Howes - ii. 517
Bruyn's (Sir John) case 533
Bryan *v.* Lewis - - 346
Bryant *v.* Busk, 473; ii. 86. 98; iii. 138
—— *and* Laythoarp, 162. 171; ii. 101
Brydges *v.* Duchess of Chandos - - - 281, n.
*Brydges* and *Stephens* - iii. 23
Brymer *and* Washington, App. 69
Bubb's case - - 275
Buchanan *and* De Sewhanberg - - - 384
Buck *v.* Lodge - - 359
Buckhouse *v.* Crossby, 160. 164. 246
Buckhurst's (Lord) case, ii. 88. 451
Buckingham (Marquis of) *and* Curtis - - 356
—— (Duke of) *and* Philips, 349
—— *and* Smallcomb - iii. 335
Buckland *v.* Barton - App. 70
—— *and* Floyd - - 201
Buckle *and* Cannel - 351
—— *v.* Mitchell - - iii. 302
Buckley *and* Hill, 94. 343. 345. 526. 529
—— *and* Holmes - ii. 485
—— *v.* Lanauze - - iii. 474
Buckmaster *v.* Harrop, 189. 193. 209, 210. 306
Bucknell *and* Weakley - iii. 280
—— *and* Wright - - iii. 423

Page
Bucks (Earl of) v. Drury ii. 220
Budgin *and* Christ's Hospital, iii. 269
Bulkeley *and* Earl Brook, iii. 440
Bulkley v. Wilford - iii. 238
Bull v. Allen - - 361
—— v. Price - - 72
Bullard *and* Rhodes - ii. 522
Buller v. Buller - - 310
Buller v. Fletcher - 284
*Buller* and *Mortlock*, 96, 114. 186. 335. 344, 345. 384. 440. 442. 495. 497
Buller v. Waterhouse - iii. 308
Bullock v. Bullock - ii. 195
—— *and* Ferne - - 203. 216
—— *and* Rex - - iii. 318
—— v. Sadlier - iii. 281. 491
—— v. Thorne - - iii. 309
Bulstrode *and* Baker - ii. 543
Bumford *and* Ball - iii. 295
Bunn *and* Portmore (Lord), ii. 459
Burdon *and* Bensley, ii. 43; iii. 423. 430
—— v. Browning - 198
—— v. Kennedy, ii. 384; iii. 336
Burg's (Lady) case - iii. 297
Burgess v. Wheate - 477
Burgh v. Francis - iii. 35. 429
—— v. Wolf - - iii. 425
Burgis *and* Rawlins - 284
Burke v. Crosbie - - 102
*Burke* v. *Dawson* - - iii. 303
—— v. Green - - ii. 46
Burkett v. Randall - 216
Burlase (Sir John) v. Cooke, iii. 423. 495
Burnaby v. Griffin, 327; iii. 141
Burnell v. Brown, 13. 459. 501. 538 n.; ii. 24; iii. 132. 147.
Page
Burnett v. Lynch - 65
Burney v. Poyntz - iii. 196
Burnam *and* Smith - 410. 423
Burrell *and* Bickerton - 368
—— v. Brown - - ii. 12
*Burrell* and *Coverley* - 50. 483
Burrell's case - - iii. 282
Burrough v. Martin - 12
—— v. Skinner - - 75
Burrough's case - - iii. 269
Burroughs v. Elton - iii. 250
—— v. Oakley, 358; ii, 15. 17. 39
Burrowes v. Lock, 8. 14. 440; iii. 147. 429
—— *and* Lees - - 85
—— *and* Walker - iii. 268
Burt *and* Doe - - 250
—— *and* Peacock - iii. 420, n.
Burting v. Stonnard - iii. 177
Burton v. Neville - ii. 109
Burton *and* Scorbrough iii. 137
*Burton* v. *Todd*, iii. 115. 140; App. 54
Burtonshaw *and* Clayton, 145; ii. 447
*Bury* v. *Bury*, iii. 455. 474; App. 76
Bushell v. Bushell, iii. 370, n. 371. 463
—— *and* Peart - 83; iii. 176
Busk *and* Bryant, 473; ii. 86. 98; iii. 138
Butcher v. Butcher (Ves. jun.), 208
—— v. Stapely - 200; iii. 452
Bute (Earl of) *and* Sir John Eden - - - 255
Butler *and* Belchier - iii. 420
—— *and* Lawrenson - 346. 495

Page
Butler *v.* Swinnerton - ii. 514
—— *v.* Capel - App. 25
Butterfield *v.* Marshall - ii. 522
Butterwick *and* Rob, 265; ii. 435
Buttill, *ex parte* - - 320
Buxton *v.* Buxton - 89
*Buxton* v. *Cooper*, 5. 342. 438
Buxton, *ex parte*, 91; iii. 226, n.
Byrn *and* Dillon - iii. 336, n.
—— *and* Price - iii. 232. 244
—— *v.* Freere - - ii. 45
Byron *and* Creswell - ii. 220
Bywater *v.* Richardson - 43. 546

C.

Cablin *v.* Bell - - 25
Cadell *v.* Palmer - - App. 52
Cadman *v.* Horner, 337, 338, 384. 441
Cadogan (Lord) *and* Lord Montford - - iii. 434
*Cadogan* and *Sloane*, iii. 297; App. 66
Cafe *and* Duncan - 76; ii. 15
Cage *v.* Acton - - iii. 21
Calcraft *v.* Roebuck, 12. 489. 524; ii. 12. 20; iii. 98. 130. 145
Calland *and* Rose, 520; ii. 166. 179; iii. 138
Callaway *v.* Ward - 273
Calthorp *v.* Hayton - ii. 513
Calton *v.* Bragg - - iii. 124
Calverley *v.* Williams, 531; iii. 141
Calvert *and* Doe - - ii. 196
Camden *v.* Benson - 112
Camden (Earl) *and* Garrick, 107, 108
Camelford (Lord) *and* Smith, iii. 256
Cameron *and* Allen - 256
Camfield *v.* Gilbert, ii. 48. 51, 52
Cammeyer *and* Rucker, 186. 188
*Campbell v. Campbell* - ii. 119
Campbell *v.* Fleming - 392. 552
Campbell *v.* Hay - - 99. 117
—— *v.* Lewis, ii. 458, 459. 532
—— *and* Lewis. - ii. 458. 539
—— *and* Squire - - 47
—— *v.* Sandford - - ii. 364
—— *v.* Walker, iii. 225. 232. 239
Campion *v.* Cotton - iii. 269
Cane *v.* Lord Allen, iii. 229. 239
Canham *v.* Rust - ii. 483. 485
Cann *v.* Cann, 394; ii. 20. 180. 189. 194. 428
Cannan *v.* Denew - iii. 326
Cannel *v.* Buckle - - 351
Canning *and* Barns - iii. 458
Cant *v.* Lord Beauclerk, iii. 486
Capel *v.* Butler - App. 25
*Capel* v. *Girdler*, 281; iii. 88, 89
Capp *v.* Topham - 24, 25
Capper *and* Mortimer 440. 474
—— *v.* Spottiswoode - iii. 192
Card *v.* Jaffray - - 166
Carding *and* Lord Verney, iii. 440
Careless *and* Steward - 197
Carey *and* Bennet College, 80, 347; ii. 41; iii. 137
Carleton *v.* Leighton, ii. 43: iii. 430
*Carleton* and *Lowther*, iii. 424. 448, 449, n. 456
*Carlisle (Earl of)* and *Lechmere* - iii. 274, 275, 276
Carpenter *v.* Blandford - 406
—— *v.* Creswell - - 373
—— *and* Faussett - iii. 428
—— *and* Sorrell, - iii. 458. 461
Carr, *ex parte* - - - 6

Page

Carr *and* Hill - - 325
—— *and* Preston - iii. 483
—— *and* Wedderburne 186
Carrill *and* Lowther - 184
Carrington *v.* Roots, 140. 142. 153. 156
Carroll *and* Savage, 201. 214, 215. 306, 307; iii. 272
Carter *and* Baker - iii. 242
Carter *and* Brown - iii. 298
—— *v.* Dean *and* Chapter of of Ely - - - 414
Carter, *ex parte* - - 311
—— *v.* Horne - - iii. 250
—— *and* Maryon - 318. 406
—— *v.* Pritchard - iii. 490
—— *v.* Wardle - - 457. 460
—— *v.* Warne - - 92
*Carter* and *Williams* - 347
Cartwright *and* Denn - iii. 441
Caruthers *v.* Caruthers, ii. 220, 221
Carwarden *and* Parry - iii. 301
Cary *v.* Cary - - iii. 232
Caryll *and* Hayes - 413
Casamajor *v.* Strode, 114. 490. 517; ii. 59. 157. 162, 163. 179. 192.
Casberd *v.* Attorney General, ii. 413
Casberd *v.* Ward ii. 412; iii. 219
Cason *v.* Round - - iii. 492
—— *and* Stadd - - iii. 486
Cass *v.* Rudele - - 468
—— *v.* Waterhouse, 170. 177. 530
Cast Plate Glass Company *and* the Attorney General 252
Castle *and* Howard - 28. 30, 31
Caswall, *ex parte* - - App. 71
Catesby *and* Mountford ii. 510
Cator *and* Bowers - 200

Page

Cator *v.* Charlton - - 312
—— *and* Jackson - 268
—— *v.* Earl of Pembroke, ii. 430
—— *and* Hare - - ii. 508
Catterton *and* Lassels - ii. 545
Cattle *v.* Gamble - - 158
Causton *v.* Macklew - ii. 393
Cavan (Lady) *v.* Pulteney, ii. 518
Cave *v.* Baldwin, 39; ii. 190. 207
—— *and* Payne, 37, 38; App. 2
Cavendish *v.* Worsley - 325
Cazenove *and* Hall - 403
Chaigneau *and* Baillie - 122
Chalie *and* Garthshore, ii. 219; iii. 273
Chamberlain *and* Cox - iii. 141
—— *v.* Ewer - - ii. 537
*Chamberlain* and *Fell*, 198. 222; iii. 261
Chamberlaine *v.* Chamberlaine - - - 252
—— *and* Phillips - 258, n.
Chambers *v.* Griffiths - 516. 519
—— *v.* Waters - - iii. 227
Champernown *and* Townsend, ii. 78; iii. 66. 112. 139, 140. 144.
Champernowne *v.* Brooke, iii. 111
Champion *v.* Plummer - 166
—— *v.* Rigby - iii. 229. 244
Champneys (Sir T.) *and* Gorton - - - ii. 183
Champneys *and* St. John, App. 30
Chandelor *v.* Lopus - - 3
Chandler *v.* Beard - ii. 193
Chandless *and* Baikie - ii. 417
Chandos (Duchess of) *and* Brydges - - 281, n.
—— (Duke of) *v.* Talbot 61
—— (Marquis of) *and* Marquis of Breadalbane 266

Page
Chaplain *v.* Southgate - ii. 512
Chaplin *and* Tatem ii. 458. 471
Chapman *v.* Bond - iii. 93, 94
—— *v.* Brown - - 258, n.
—— *v.* Emery - iii. 288. 299
—— *v.* Gibson - - iii. 425
—— *v.* Tanner - iii. 183, n.
Charles *v.* Andrews, 438; ii. 219; iii. 183
—— *and* Foster - - - 6
Charlesworth *and* Malcolm, iii. 356. 427
Charlewood *v.* the Duke of Bedford - 135, n. 174. 186
Charlton *v.* Cator - - 312
Charlton *v.* Low, iii. 76. 95. 419
Charlwood *v.* Morgan - ii. 133
Charnells *and* Siddon - iii. 424
Chater *v.* Beckett - 159
Chaters *and* Lynn - iii. 195
Cheek *v.* Jeffries - App. 24
—— *and* Watkins - iii. 161
Cheney's (Lord) case - 250
Cherry *and* Ferrars, iii. 299. 448. 474
Chesney's case - - iii. 23
Chester *v.* Gorges - 127
—— *v.* Platt - 334; iii. 223
Chesterfield *v.* Janssen 392. 463
Chetham *v.* Grugeon - 123
Chetwynd *and* Sutton - iii. 305
Child *v.* Lord Abingdon, iii. 110 130
—— *and* Baker - - 330
—— *v.* Godolphin - 195
—— *and* Lord Irnham, 259. 267. 348
Chillingworth *v.* Chillingworth, 104
Chinnery *and* Muskerry iii. 444
Chirton's (Walter de) case, iii. 258; App. 39, 40
Page
Chitty *and* Williams, ii. 219. 221
Chivall *v.* Nicholls - iii. 372
Cholmeley *and* Cockerell, 394; iii. 245
Cholmondley (Marquis) *v.* Lord Clinton, ii. 152. 327; iii. 63
*Cholmondley* v. *Oxford*, iii. 434
—— and *Pitt* - - iii. 88
Cholmondeley (Earl of) *and* Lord Walpole - 251
Chomley's case - - iii. 285
Christian *and* Senhouse iii. 249
Christie *and* —— - 540
—— *v.* Attorney General, 25, 26
—— *and* Bexwell - 28. 32
—— *and* Maltby - - 71
Christ's Coll. *v.* Widdington, iii. 486
—— Hospital *v.* Budgin, iii. 269
—— *and* Attorney General, iii. 313
Church *v.* Brown - ii. 450
Church *v.* Edwards - ii. 283
Church *v.* Legeyt - ii. 48
Churchill, *ex parte* - iii. 226
—— *v.* Grove, ii. 384; iii. 463
—— *v.* Small - - ii. 110
Churchman *v.* Harvey, App. 72
—— *v.* Ireland - - 286
Churchwardens of St. Peter *v.* Johnson - - 316
Chute *and* Selby - - ii. 512
Clanmorris *and* Bingham, iii. 174
—— *and* Blosse, ii. 167. 172. 179; iii. 141
Clapham *and* Wilson - iii. 115
Clare *v.* Earl of Bedford, iii. 428
*Clare* v. *Clare* - - App. 49
—— *v.* Maynard - - ii. 48
Clark *and* Armiger - 346. 356

Page
Clark *v.* Clark - - iii. 483
—— *and* Fullagar - ii. 36
—— *v.* Hackwell - 203. 216
—— *and* Kirk, or Heisier, iii. 298
—— *and* Jervoise - 35. 98.
—— *v.* Upton - - 84
—— *and* Young - - 440, 441
Clarke *and* Dew - - 322
—— *and* Beasley - ii. 374
—— *v.* Elliott - - 358, 359
—— *v.* Faux - - ii. 7. 419
—— *and* Fencott - ii. 115
—— *and* Fort - ii. 75. 179
—— *and* Gibson, 358, 359; ii. 37. 181
—— *and* Goodwin - 380
—— *v.* Grant - - 226
—— *and* Machell - ii. 291
—— *v.* Royle - ii. 183; iii. 185
—— *and* Smith - 30, 31. 33
—— *v.* Terrel - - 164
—— *and* Willett, 416, 417; ii. 7. 204
—— *v.* Wilson - - 358
Clarkson *and* Morris - ii. 193
—— *and* Neesom - ii. 115
Clavell *and* East India Comp. iii. 298
Clay *v.* Clay - ii. 324. 326
*Clay* v. *Sharpe*, ii. 189; App. 32
Clayton *v.* Burtonshaw, 145; ii. 447
—— *and* Fife - 42. 221. 363
Clayton, *ex parte* - - ii. 268
—— *v.* Gregson - - 252
Clayton *and* Simpson - ii. 479
*Clayton* v. *Lord Wilton*, iii. 291
Clayworth *and* Cooke - iii. 484
Clements *and* Hamilton 442
Clerk *v.* Clerk - - iii. 223
—— *v.* Nettleship - iii. 295
Clerk *v.* Rutland - - iii. 283
Page
Clerk *v.* Wright - - 167. 200
—— *and* Young - - 7. 342
Clermont (Lord) *v.* Tasburgh, 338. 342. 500
Clifford *v.* Laughton - 531
Clifton *v.* Walmsley - 256
Clinan *v.* Cooke, 167. 170. 186. 209, 210. 212. 530
Clinton *and* Trefusis, 127; iii. 113
—— (Lord) *and* Marquis Cholmondley, ii. 152. 327; iii. 63
Clissel *and* Leakins - - 4
*Clobery* and *Ker*, 313. 521. 523
Clopton *and* Long - ii. 432
Clough *and* Metcalf - 75
Clowes *and* Higginson, 41, 42. 61. 168. 193. 221. 223. 226. 228. 343. 363. 505.
—— *v.* Higginson - 343. 363
Clynn *v.* Littler - - 289
Coare *v.* Creed - - 16, 17
Coates *and* Nash - - ii. 179
Cobham *v.* Tindal - 360
Cochrane *v.* Cochrane - 123
Cock *v.* Richards - 259
Cocker *v.* Cowper - 138
—— *and* Fludyer, ii. 11; iii. 102, 103. 141
Cockerell *v.* Chomeley, 394; iii. 245
Cockes *v.* Sherman - iii. 448
Cockran *v.* Irlan - - 25
Cocks *v.* Nash - - ii. 115
Codrington *v.* Codrington, ii. 114
Coffin *v.* Cooper - - 420
Coghill *v.* Holmes - App. 72
Coke *v.* Wilkcocks - iii. 493
Coker *v.* Guy - - ii. 475
Colclough *v.* Sterum - 102
Coldcott (Dr.) *v.* Serjt. Hide or Hill - 261; ii. 536

Page
Cole *and* Cordage - 209
—— *v.* Gibbons, 392. 445, 446. 463
—— *and* Pordage - 75
—— *v.* White - - 200, 201
Colegrave *v.* Dias Santos, 62. 145
Coleman *and* Binstead, 200. 218
—— *v.* Upcot, - 160, 164, 165
*Coles* and *Forshall*, ii. 394. 417; iii. 331; App. 53
Coles *and* Hunt - - ii. 385
—— *v.* Kinder - - ii. 544
—— *v.* Trecothick, 25. 163, 164. 181, 182. 186, 187. 189. 193. 207. 344. 440. 444; iii. 226. 234
Collet *v.* De Gols iii. 69. 464
Collett *and* Lloyd, 408. 411. 432; iii. 130
—— *and* Marshall - iii. 427
—— *v.* Munden - - 312
—— *v.* Thomson - 370; ii. 54
—— *v.* Woollaston - 440
—— *and* Shore, ii. 95. 108, 109
Collier *v.* Jenkins - 307. 491
—— *and* Long, 531; ii. 187; iii. 143
—— *and* Vansittart - 104
—— *and* Wheeler 31. 33. 162
Collinge's case - - iii. 143
—— *and* Cosser - 342
Collingwood *v.* Pace - - ii. 233
Collins *v.* Archer - iii. 496
—— *and* Benyon - iii. 155
—— *and* Bliss - - ii. 162
—— *and* Brealey, 339. 441. 484
—— *v.* Plumb - - ii. 496
Collinson *v.* Patrick - iii. 297
Collison *v.* Lettson - ii. 495
Collyer *v.* Willock - iii. 123
Colman *v.* Sarrell - App. 74
Colmore *v.* Tindall - ii. 179
Coltman *and* Dolin - iii. 296
Colt *and* Pratt - - ii. 386
Colton *v.* Wilson - - ii. 103
Colvile *v.* Parker - iii. 288. 294
*Comer* v. *Walkley*, 291, n.; iii. 98. 101. 120. 130. 168. 196
Commissioners of Appeals in Prize Causes *and* Willis, iii. 121
—— of Woods and Forests *v.* Attorney-General 259
Compton *and* Lady Bellasis, iii. 260
—— *and* Ford - - 164
—— *and* Payne - - iii. 496
—— *v.* Richards - - 47
—— *and* Smith - ii. 533. 540
Comyn *and* O'Gorman - iii. 298
Congleton (Mayor of) *v.* Patteson - - - ii. 495
Connard *and* Hallings - ii. 542
Conolly *and* Baxter - ii. 5
—— *v.* Parsons - 29. 30. 33
—— Conran *v.* Barry - 125
Const *v.* Barr - - ii. 436
Constable *and* Walker, 189. 193. 249. 370
Constantine *and* Topham, iii. 183
Conway *and* Broughton ii. 528
—— *v.* Shrimpton - 438
Cood *v.* Cood - - iii. 188
—— *v.* Pollard - - iii. 188
Cook *v.* Arundel (Lord) ii. 486
Cook *and* Bascawen, ii. 480. 486
Cook *and* Bone - - 91
—— *v.* Booth - - 255
—— *and* Bracebridge - iii. 22
—— *and* Sir John Burlase, iii. 423. 495
—— *vid.* Cooth *v.* Jackson.
—— *and* Fountain - iii. 24

Page
Cook *v.* Herle - - ii. 486
—— *and* Thomas - 138
Cooke *v.* Clayworth - iii. 484
—— *and* Clinan, 167. 170. 186. 209, 210. 212. 530
—— *v.* Cooke - 281; iii. 88
—— *and* Doe - - iii. 63
—— *and* Hockin - 532
—— *and* Milligan - 493
—— *and* Mussell - 174
—— *and* Smith - - ii. 111
—— *v.* Soltau - - ii. 196
—— *v.* Tombs, 159. 172. 175. 177. 200
—— *and* Wallace - ii. 438
—— *and* Wotton - ii. 544
Cookson *and* Whelpdale, iii. 236. 242
Coombes *and* Roper - 418
Cooper *and* Aldrich - iii. 208
*Cooper* and *Buxton*, 5. 342. 438
Cooper *and* Coffin - 420
—— *v.* Denne - ii. 166. 178
—— *and* Loveridge - iii. 432
—— *and* Martinez - iii. 12
—— *v.* Smith - 167. 173. 181
—— *v.* Tynman - - iii. 432
Coote *v.* Mammon - iii. 454
Cooth *v.* Jackson, 176. 197. 200. 465
Cope *and* Dakin - iii. 119. 142
Copeland *v.* Stephens - 92
Copner *and* Price - ii. 327
Coppard *and* Harrison, ii. 100. 103. 108; iii. 148
Coppin *v.* Coppin, 305; iii. 193, n. 205
—— *v.* Fernyhough, ii. 151; iii. 474
Corbett *v.* Barker - ii. 327
—— *v.* Brown - - 6
Page
Corbett *v.* Corbet - ii. 220
—— *and* Ewer, ii. 454; iii. 177. 179. 181
—— *and* Kenn - - ii. 187
Cordage *v.* Cole - - 209
Corder *v.* Drakeford - 159
—— *and* Mason - 485; ii. 152
—— *v.* Morgan - - ii. 189
Cordley *and* Beckett - iii. 479
Cordwell *v.* Mackrill - iii. 480
Corke *and* Lampon - iii. 139, n.
Cormick *v.* Trapaud - iii. 294
Cornbury (Lord) *v.* Middleton - - - - ii. 487
Cornelius *and* Simmons, 203. 216
Cornish *v.* Rowley - 406. 417
Cornwall *and* Thrale - ii. 468
—— *v.* Williams - 347; ii. 41
Cornwallis's case - - iii. 452
*Corp* and *Drewe* - 487; ii. 186
Corpe *and* Vau - - 244. 342
Cory *v.* Gerteken - iii. 428
Coryton *v.* Hellier - 258, n.
Coslake *v.* Tilt - - 414
Cosser *v.* Collinge - 342
Coster *v.* Turnor - - 421
Costelloe *and* Dillon (Lord) iii. 425
Costigan *v.* Hastler, 341. 347. ii. 28
Cotbatch *and* M'Cullock 126
Cothay *v.* Sydenham - iii. 476
Cotter *v.* Layer - - 287, 288
Cotterell *v.* Hampson - iii. 154
—— *v.* Dutton - ii. 319. 322
Cottington *v.* Fletcher, 195; iii. 257
Cottle *v.* Warrington, iii. 348, n.
—— *and* Withy, 337. 356; ii. 36
Cotton *and* Campion - iii. 269
*Cotton* v. *Everall* - iii. 154, n.

Page
Cotton *v.* King - - iii. 288
—— *v.* Lee - - 160
Couch *v.* Stratton - ii. 219
Court *and* Oliver - - iii. 226
Courtown (Lord) *and* Underwood - - iii. 372. 447
*Coussmaker* v. *Sewell*, ii. 98. 134; App. 31
Coutts *and* Wallwyn - iii. 285
Coventry *and* Swanborough 47
*Coverley* v. *Burrell* - 50. 483
Coward *v.* Odingsale - 413
Cowell *v.* Simpson - iii. 192
Cowgill *v.* Lord Oxmantoun, 422; ii. 178
Cowper *and* Cocker - 138
—— *and* Stiles - - 215
Cox *v.* Bateman - - iii. 271
—— *v.* Chamberlain - iii. 141
—— *v.* King - - ii. 192
—— *v.* Paxton - - iii. 272
—— *and* Sheldon iii. 372. 454
—— *and* Swan - - 374
Crabb *v.* Crabb - - iii. 266
Cracroft *and* Rex - 131
*Craddock* and *Lake* - iii. 248
Craddock *and* Williams ii. 393
Crafts *v.* Tritton - - 314
Cragg *v.* Holme - - 340
Craig *v.* Hopkins - ii. 424, n.
Crane *v.* Drake - - iii. 179
Craven *and* Rushton - ii. 182
Crawford *and* Gordon - 444
Crawshaw *v.* Maule iii. 249, n.
Crayford *v.* Crayford - ii. 535
Creasy *and* Haycroft, 6; iii. 428, n.
Creed *and* Coare - 16, 17
—— *and* Doe - - ii. 394
Cremorne *and* Hatchell iii. 427
Crespigny *v.* Wittenoom, App. 21

Page
Creswell *v.* Byron - ii. 220
—— *and* Carpenter - 373
—— *and* Watts - - iii. 428
Crethorn *and* Harding - iii. 479
Crewe *v.* Dicken, ii. 166, 178; iii. 174
Cripps *v.* Jee - - iii. 259
—— *v.* Reade - - ii. 420
Crisdee *v.* Bolton - 66. 317
Crisp *and* Cruso - - 24
—— *v.* Heath - - ii. 385
—— *v.* Pratt - - iii. 268
Crispe *and* Lloyd - ii. 3. 152
Crockford *v.* Alexander, 276. 356
—— *and* Knight, 165. 181. 377; ii. 436
—— *v.* Winter - - iii. 124
Croft *v.* Slee - App. 70
Crofton *v.* Ormsby, iii. 298. 440. 469
Croker *and* Legge - 537. 550
Crompton *v.* Melbourne (Lord) - - - ii. 431
—— *and* Sale - - iii. 331
Crook *and* Begbie - iii. 174
Croome *v.* Lediard, 228. 230. 513; iii. 144
Crop *v.* Norton, 347; ii. 28. 41; iii. 253. 258. 261
Crosbie *and* Alexander - 251
—— *and* Burke - - 102
—— *v.* Middleton - 269
—— *v.* Percy - - ii. 100
—— *v.* Tooke - - 351
—— *v.* Wadsworth, 133. 140. 142. 147. 149, 150, 151. 153. 155.
Cross *v.* Faustenditch - iii. 308
Crossby *and* Buckhouse, 160. 164. 246
*Crosse* v. *Young* - ii. 510. 512
Crosskey *v.* Mills - - 78

Page

Crossley *v.* Arkwright, App. 21
Croucher *and* Jones - iii. 296
Crowder *v.* Austin - 32. 34
Crowe *v.* Ballard - 394; iii. 237
—— *and* Barnes - - 285
—— *v.* Tyrrell - - ii. 113
Crowther *and* Tawney - 171
Croyston *v.* Banes - 193
Cruso *v.* Crisp - - 24
Crutchley *v.* Jerningham, 358. 361
Cubbidge *v.* Boatwright, iii. 178
Cuff *v.* Penn - 218. 240.
Culpepper *v.* Ashton, iii. 153. 170. 458
Culpeper's case - - iii. 424
Cundall *and* Bell - - iii. 423
Cunningham *v.* Williams, 105
Cunynghame *and* Rose, 166. 175. 281. 285. 306
Curling *v.* Shuttleworth, ii. 198. 200; iii. 121
Currie *and* Murray - 72
—— *v.* Nind - iii. 281. 288
*Currer or Comer* v. *Walkley*, iii. 168
Curteis *and* Pincke, 374. 411. 423. 520
Curtis *v.* Marquis of Buckingham - - 356
—— *v.* Greated - - 372
—— *and* Potts - - 453
—— *v.* Price - - 102
—— *v.* Spitty - - ii. 508
—— *and* Stackpoole - 103
—— *and* Williamson - iii. 155
Curwyn *v.* Milner - 445
Curzon *and* Aston - iii. 492
Custance *and* Holmes, iii. 428, n.; 479
*Cuthbert* v. *Baker* - 504
Cuthbertson *and* Gray - ii. 479
Cutler *v.* Simons - - 359

Page

D.

Da Costa *and* Greville - 369. 391
Dakin *v.* Cope - iii. 119. 142
Dalby *v.* Pullen - - 421. 490
—— *and* Rex - - iii. 261
Dale, *ex parte* - - iii. 217
—— *v.* Lister - - 493
—— *v.* Sollett - - 368
Dalton *v.* Hammond - ii. 437
Daly *and* Kennedy, 102; ii. 382 iii. 446. 449
—— *v.* Osborne - - ii. 37
Damer *and* Barker, ii. 467, 468
Damon *and* White - 440
Dana *and* Matthews, 357; ii. 36
Dancer *and* Ebrand - iii. 268
Dane *and* Emanuel - 271
Daniel *v.* Adams, 87. 186. 330, 331. 333. 344
Daniels *v.* Davison, 276. 364. 488; iii. 469. 474
Dannah *and* Wright - 191
Danvers *and* Doe - ii. 328
—— *and* Hunt - - ii. 513
D'Arcy *v.* Blake - iii. 75, n.
—— *v.* Hall - - ii. 432
Dare *v.* Tucker - 63; ii. 119
Darkin *v.* Marye - - 107
Darley *v.* Singleton - 443
Darris's case - - 279
Darwin *v.* Lincoln, App. 23. 28
Dashwood *and* Musgrave, 329, 330
Daubuz *and* Pye - - ii. 542
Dauh *and* Berkeley - ii. 40
Davenport *and* Vale - 101
*Davidson v. Gardner* - 330
Davie *v.* Beardsham, 273. 279. 284
—— *v.* Sacheverell - ii. 512
Davies *v.* Austen - iii. 431. 433
—— *and* Denton - iii. 272

Page
Davies *v.* Jones - - - 333
—— *and* Owen, 163. 335; iii. 98. 115
—— *v.* Penton - - 354
—— *and* Selkrig iii. 249, n.
—— *and* Shirley - - 537, 538
—— *v.* Earl of Strathmore, ii. 394
—— *and* Swift - iii. 263, 264
—— *v.* Thomas - iii. 215. 474
Davis, *ex parte* - - iii. 229
—— *v.* Hone - 340, 341
—— *and* Pitt - - 321
—— *v.* Symonds, 220. 223. 225. 247. 337. 348, n.; iii. 147. 250
—— *and* Titley - - 311
—— *v.* Thomas - - 271. 318
*Davis* and *Thomas* - 253. 263
Davis *and* Whitworth - 274
—— *and* Wilks - - 466
Davison *and* Daniels, 276. 364. 488; iii. 469. 474
—— *and* Robinson - iii. 420
Davis's case - - 315
Davy *v.* Barber - iii. 98. 107
Davys *v.* Howard - iii. 275
Dauh *and* Berkeley - ii. 40
Dawes *v.* King - - 5
Dawson *and* Addison - iii. 223
—— *and* Birch - - 62
*Dawson* and *Burke* - iii. 303
Dawson *v.* Dawson - 295
—— *v.* Dyer - - 373
—— *v.* Ellis - - 180, n.
—— *and* Frame - - 202
—— *v.* Massey - iii. 233, 484
—— *and* Miles - - ii. 116
Day *v.* Arundel, iii. 489, n., 491
—— *and* Attorney-General, 114. 193. 306
—— *and* Blennerhasset, iii. 229

Page
Day *and* Brooks - - ii. 417
—— *v.* Finn - - 527
—— *v.* Newman - - 384. 439
Deacon *and* Foster - iii. 133
—— *v.* Smith, iii. 273, 274, 275, 276
*Dean* and *Hodgson* - iii. 463
Dean (Lord) *and* Kinnaird, 3. 5, n.
Dean *and* Leech - - iii. 300
Deane *v.* Rastron - 441
Deardon *and* Keene, ii. 196. 325; iii. 44
Dearle *v.* Hall - - iii. 432
Dearmer *and* Smith - 285
Death *and* Smith - ii. 182. 211
Debar *and* Taylor - ii. 541
De Bernales *v.* Fuller - iii. 124
—— *v.* Wood - - iii. 125
Deem or Powell *v.* Howorth, iii. 180. 474
Deere *and* Parry - - ii. 445
De Faria *and* Gowland, 445, 446. 448. 463
De Gols *and* Collett, iii. 69. 464
De Graves *v.* Smith - 6
De Havilland *v.* Bowerbank, 370, n.; iii. 124
Dehew *and* Sanders - iii. 423
De la Cour *and* Haigh - 271
Delane *v.* Delane - iii. 257
Deligne *and* Saunders, iii. 86, 424
Denew *and* Cannan - iii. 326
—— *v.* Deverall - - 63. 71
Denison *and* King - iii. 265
Deniston *and* Lord Forbes, iii. 372
Denn *v.* Cartwright - iii. 441
—— *v.* Kemeys - - iii. 24

Page
Denn *and* Ireson, 311; iii. 371
Denne *and* Cooper, ii. 166. 178
Dennington *and* Fitzhugh, ii. 544
Denny *and* Aubrey - 123
—— *and* Hamilton - iii. 252
Denton *v.* Davies - iii. 272
*Denton* v. *Stewart or Seward*, 200. 364
Derby Canal Company *v.* Wilmot - - iii. 333
Dering *and* Thomas, 96. 178. 345. 497
*Derivall* and *Dowse* - iii. 87
Derrison *and* Shippey - 170. 184
Deschamps *and* Alley, 408, 409. 413
De Sewhanberg *v.* Buchanan, 384
D'Espard *v.* Head - 118
D'Esterre *and* Wheeler 201
De Tastet *v.* Le Tavernier, iii. 319
Deverall *and* Denew - 63. 71
—— *and* Remington - 313
Deverell *v.* Lord Bolton, ii. 17. 53. 145
*Deverell* and *Lord Ossulston*, ii. 143
Devon (Duke of) *and* Barker, iii. 155
*Devonshire* (*Duke of*) and *Marquis of Normanby*, 180. 216. 351
Devreux *and* Winter - 331
Dew *v.* Clarke - - 322
Dewdney, *ex parte* - ii. 326
Dews *v.* Brandt, 442. 448. 450
Dias Santos *and* Colegrave, 62. 145
Dias *and* City of London, 39
*Dibbin* and *Baker* - ii. 189
Dick *v.* Donald - - 43; ii. 5
Dicken *and* Crewe, ii. 166. 178; iii. 174
—— *and* Eyton - - ii. 187
Dickenson *v.* Dickenson, ii. 153. 158; iii. 156
*Dickenson* v. *Heron*, 427; iii. 103. 130. 141
Dickenson *v.* Lockyer - iii. 177
—— *v.* Shaw - - iii. 262
*Dickinson* v. *Adams* - 206
Dickinson *v.* Baskerville 207
Dickson *and* Atchison 469, n.
Digs *v.* Boys - - iii. 456
Dighton *and* Lane - iii. 271
Dike *v.* Ricks - - iii. 170
Dillon *v.* Byrn - iii. 336, n.
—— (Lord) *v.* Costelloe iii. 425
—— *v.* Leman - - ii. 320
—— *and* O'Fallon - iii. 395
—— *and* Powell - 170; iii. 469
Ditchfield *and* Ulrich - 252
Divett *and* Powell - 223
Dixon *and* Adderly - 337
—— *v.* Astley - 358; ii. 15
—— *and* Stammers - 256
—— *and* Thornton iii. 249, n.
Dobell *v.* Hutchinson, 54. 163. 171. 370. 417
—— *v.* Stevens - 5. 82. 390
Dobie *and* Fagg - 64
Dobson *v.* Leadbeater - iii. 490
Dodd *and* Beable - App. 72
—— *and* Hine - iii. 372. 456
Doe *v.* Abel - - 295
—— *v.* Allsop - - iii. 372
—— *v.* Andrews - - iii. 483
—— *v.* Archer - - iii. 443
—— *v.* Benson - - 221
—— *v.* Blackburn - ii. 231
—— *v.* Bland - - 251

Page

Doe *v.* Bottriell - - iii. 281
—— *v.* Boulton - - 378
—— *v.* Bramston, ii. 346. 348. 353
—— *v.* Breach - - 378
—— *v.* Brightwen - ii. 196
—— *v.* Brooks - ii. 97; iii. 24
—— *v.* Burt - - 250
—— *v.* Calvert - - ii. 196
—— *v.* Cooke - - iii. 63
—— *v.* Creed - - ii. 394
—— *v.* Danvers - - ii. 328
—— *v.* Edgar, 378; ii. 192. 349
—— *v.* Edwards - - ii. 447
—— *v.* Evans, 87; ii. 384. 390. 409
—— *v.* Ford - - App. 28
—— *v.* Gray - - ii. 447
—— *v.* Greenhill - ii. 387
—— *v.* Harrow - - ii. 349
—— *v.* Hayley - - ii. 479
—— *v.* Helder ii. 390; iii. 49
—— *v.* Hellard - - ii. 192
—— *v.* Hogg - - iii. 353
—— *v.* Hopkins - - iii. 287
—— *v.* Jackson - - 378
—— *v.* James ii. 116; iii. 281
—— *v.* Jesson, ii. 320, 321, 322
—— *v.* Jones - ii. 319. 392
—— *v.* Lawder - - 378
—— *v.* Lea - - 221
—— *v.* Luffkin - iii. 441. 473
—— *v.* Lynes - - 487
—— *v.* Manning - - iii. 287
—— *v.* Maple - - ii. 64
—— *v.* Martin - 10; iii. 308
—— *v.* Martyr - iii. 287. 297
—— *v.* Micklem - 258, n.
—— *v.* Miller - - 378
—— *v.* Morris - - iii. 280
—— *and* Nepean, ii. 322. 345. 349

Page

Doe *v.* Oxenden - - 250
—— *v.* Pegge - iii. 13. 39
—— *v.* Perkins - - - 12
—— *v.* Philips - - App. 21
—— *v.* Plowman - iii. 65
—— *v.* Pott - - 282, n.
—— *v.* Preston - - ii. 447
—— *v.* Pullen - - 378
—— *v.* Putland - - iii. 59
—— *v.* Rdgriph - - 184, 185
—— *v.* Reid - - ii. 479
—— *v.* Rolfe - - iii. 294
—— *v.* Routledge iii. 281. 298
—— *v.* Rowe, ii. 447; iii. 277. 281. 288
—— *v.* Saunders - ii. 191
—— *v.* Sayer - - 378
—— *and* Scarborough (Lord), ii. 277
—— *v.* Scott - iii. 26. 44
—— *v.* Seaton ii. 438; iii. 482
—— *v.* Smith - 378; iii. 175
—— *v.* Stace - - iii. 49
—— *v.* Stamion - - 276. 378
—— *v.* Staple, iii. 25, 26. 40. 42
—— *v.* Sybourn - iii. 25. 42
—— *v.* Thompson, ii. 333. 341, 342. 345. 347
—— *v.* Waller - - 378
—— *v.* Watkins - - iii. 484
—— *v.* Webber - - iii. 281
—— *v.* Wheeler - - ii. 447
—— *v.* Williams, ii. 333. 345. 347
—— *v.* Willis - - ii. 191
—— *v.* Wright - - iii. 48
—— *v.* Wrott - - iii. 13
D'Oliff *and* S. S. Company 260
Dolin *v.* Coltman - iii. 296
Dolland *and* Lyster, ii. 384; iii. 248

Page
Dolman (Sir Thomas) *and* Smith - - 423; iii. 101
Doloret *v.* Rothschild, 337. 414
Dolphin *and* Eyre iii. 372. 494
Dolton *v.* Hewen - - iii. 161
Domville *v.* Berrington, 100. 123
Donald *and* East India Company - 352; iii. 484, 485
—— *and* Dick - - 43; ii. 5
Donegal *and* Bernal - 445
Donovan *and* Pitt - ii. 47
—— *v.* Fricker - 396; iii. 128
Doran *v.* Wiltshire - iii. 157
Dormer *v.* Parkhurst - ii. 328
—— (Lord) *and* Roots - 514
Dorrien *and* Kerrison - iii. 287
*Doubble* and *Powell* - - 52
Doughty *and* Eustace - 461
Douglas *v.* Ward - iii. 288. 300
—— *v.* Whitrong - 292
—— *v.* Yallop - - ii. 417
Dowdall *and* Brown - 118
Dowler *and* Higgins - App. 49
Dowling *v.* Maguire, 178. 334; iii. 223
Downes *and* Bartlett - ii. 59
—— *v.* Glazebrook - iii. 229
—— *and* Wood, 392. 394; iii. 238. 245
*Dowse* v. *Derivall* - iii. 87
Dowson *and* Merceron ii. 508
—— *and* Pickering - 82. 549
Doyley *v.* Countess of Powis, 78. 101
Drake *and* Crane - iii. 179
—— *and* Souter - ii. 3. 147. 149
Drakeford *and* Corder - 159
Drapers Company *v.* Yardley, iii. 474
Drayson *v.* Pocock - iii. 175
Drayton *and* Tyler - ii. 114
Drew *and* Stuckey - iii. 314, n.
*Drewe* v. *Corp* - 487; ii. 186
—— *v.* Hanson - - 517. 520
—— *and* Payne - - iii. 335
Driver *and* Gaby, 71. 83; iii. 121
Drought *v.* Bernard ii. 73. 91
Drummond *and* Boydell 172
—— *and* M'Leod - iii. 179
Drury *and* Drury, or Earl of Bucks - ii. 219, 220, 221
—— *v.* Man - - ii. 437
Du Cane, *ex parte* - iii. 228
—— *and* Howard, ii. 182; iii. 236
Duck *v.* Braddyll - ii. 445
Duckenfield *v.* Whichcott - 4
Dudley (Lord) *and* Attorney-General - - iii. 232
—— *v.* Dudley - - iii. 75
—— *v.* Foliott - - ii. 510
Duffel *v.* Wilson - - 482
Du Hourmelin *v.* Sheldon, iii. 221
Duigenan *v.* Nangle - 118
Dukes *and* Beaumont - - 47
Dumbell, *ex parte* iii. 225, 226
Dunbar *v.* Tredennick, 394; iii. 245. 440
—— *and* Scott, 451. 460; iii. 180. 440
Duncan *v.* Cafe - 76; ii. 15
Dunch *v.* Kent - - iii. 153
Duncombe *v.* Mayer - ii. 110
Duncombe *and* Younge 358
Dunmare, *ex parte* - - 87
Dunn *and* Maclean - 191
Dunne *v.* Ferguson - 143. 154
Dunsany (Lord) *and* Latouche, iii. 370, n. 371
Dunsford *and* Eyre - - 6
Durand *and* Hart - 252
Durdin *and* Gaskell - iii. 460
Durell *and* Noble - 532

Page
Durham (Bishop of) *and* Morrice - - - 124
Dursley (Lord) *v.* Fitzhardinge - - - iii. 438
Dutch *v.* Warren - - 368
Dutton *and* Cotterell, ii. 319. 322
*Dyer* v. *Dyer*, iii. 256. 260. 262, 263. 266
—— *and* Dawson - 373
—— *v.* Hargrave, 412. 486. 541. 544; iii. 114
—— and *Price*, 232. 238. 244. 248. 539
—— *v.* Pulteney - 278
*Dyke* and *Jones*, 71. 369; ii. 48. 51; App. 9
—— *and* Ricks - - iii. 170
—— *v.* Sylvester - ii. 183
Dykes *v.* Blake - - 45. 515

E.

Earl *v.* Baxter - - ii. 97
*Earl* v. *Rogers* - 264. 266, n.
Earle *and* Hungerford - iii. 308
—— *and* Senhouse iii. 299. 479
—— *and* Wing - - 533
Early *v.* Garrett, 391. 546. 551; ii. 420. 429
East India Company *v.* Clavell, iii. 298
—— *v.* Donald, 352; iii. 484, 485
—— *v.* Hensley - - - 72
East Greenstead's case, iii. 312. 452
Easterby *and* Sampson - ii. 484
Eaton *v.* Lyon - - 255
—— *v.* Sanxter, 276; ii. 392. 437; iii. 173
—— *and* York - - iii. 247
Ebrand *v.* Dancer - iii. 268
Echliff *v.* Baldwin - 356
Edden *v.* Read - - 368
Edelph *and* Pitts - - iii. 448
Eden (Sir J.) *v.* the Earl of Bute - - - 255
Edgar *and* Doe, 378; ii. 192. 349
Edgar *and* Thring - iii. 493
Edgington *and* Morris - ii. 537
Edlin *v.* Bataly - - iii. 436
Edmunds *and* Powell, 40, 41. 221
—— *v.* Prosser - - ii. 45
Edney *and* Jones, 40. 45. 47. 56. 75. 221
—— *and* Pitcher - - 77
Edridge *and* Bengough, App. 52
Edwards *and* Church - ii. 283
—— *and* Doe - - ii. 447
Edwards, *ex parte* - iii. 423
—— *and* Elliot, ii. 203; iii. 188. 215
—— *v.* Edwards - - iii. 260
—— *and* Fournier - 358
—— *and* Garstone - 123
—— *v.* Harvey, 96; ii. 212; iii. 136. 139
—— *v.* Heather - - 439
—— *v.* Hodding - - - 75
—— *and* Hollis, 132, n.; 136, n.; 352
—— *v.* Jones - - iii. 297
—— or Whiteing *and* Hollis, 199
—— *v.* *M'Leay*, 382. 387, 388. 396, 397; ii. 430
—— *and* Moore - - 197
—— *and* Perry - - ii. 512
—— *and* Williams, 433. 491; ii. 10; iii. 146. 148
Effingham (Lord) *and* Lord Portsmouth - - ii. 325
Egelstone *and* Jarmain, ii. 52. 85. 435, 436

Page
Egerton *and* Head - iii. 490
—— *v.* Jones - - ii. 30
—— *v.* Matthews - 160
Eggington *v.* Flavel - 104
Egremont (Lord) *v.* Hamilton, ii. 325
Ekins *and* Bailey - - iii. 160
—— *and* Pippin - - 261
—— *v.* Tresham - - 4. 5
Elderton *and* Lansdown 105
—— *and* Spurrier, 75; iii. 123
Eldridge *v.* Porter - ii. 36
Elever *and* Amcourt - 373
Eliason *and* Parr - iii. 297
Ellames *and* Hardman, ii. 114; iii. 493
Ellard *v.* Lord Llandaff, 337. 341; ii. 42
Elliot *v.* Brown - - iii. 248
—— *v.* Edwards, ii. 203; iii. 188. 215
—— *v.* Elliot, iii. 262, 263. 266
—— *v.* Merryman, iii. 153. 159. 161. 177. 181
Elliott and Clarke - 358, 359
—— *and* Robinson - ii. 133
Ellis *v.* Arnison - - ii. 190
*Ellis* and *Bratt*, 71. 369; ii. 48. 51; App. 7.
Ellis *and* Dawson - - 180, n
—— *and* Eyles - - 74
—— *and* Knight - - App. 50
—— *v.* Molloy - - 115
—— *and* Rex - - 16
Ellison *and* Attorney-General, ii. 114
—— *v.* Ellison - - App. 74
Elmherst *and* Blyth - ii. 36, 37
Elmore *v.* Kingscote - 167
Elton *and* Burroughs - iii. 250
Page
Ely (Dean and Chap. of) *and* Carter - - - 414
Emanuel *v.* Dane - 271
Emerson *and* Andrews - 122
—— *and* Riddle - - iii. 252
Emery *and* Chapman, iii. 288. 299
*Emery* v. *Grocock*, ii. 181. 196; iii. 66. 143
Emery *v.* Wase, 330. 332, 333. 442. 464
Emmerson *v.* Heelis, 68. 144. 148, 149. 155. 174. 183, 184. 186. 189. 191. 514.
Emmott *and* Andrews - App. 70
England (Bank of) *and* Willis - - iii. 322. 326
Erhart *and* Gunnis, 40. 42. 221
Errington *v.* Annesley - 336
—— *and* Randall - iii. 240. 243
Esdaile *v.* Oxenham, ii. 439. 441
—— *and* Oxenham, ii. 441; iii. 183
*Esdaile* v. *Stephenson*, 420. 503; ii. 30; iii. 116
Estcourt *v.* Estcourt - ii. 219
Estofte *v.* Vaughan - ii. 104
Eustace *v.* Doughty - 461
Evans *and* Berrington, ii. 361
—— *v.* Bicknell, iii. 12. 46. 428. 484
—— *v.* Brown - - 443
—— *and* Doe, 87; ii. 384. 390. 409
—— *v.* Griffith - - 446
—— *v.* Llewellyn - 387. 443
—— *and* Peacock, 448. 451. 463
—— *v.* Roberts, 142, 143, 144, 145. 150
—— *v.* Tweedy - - iii. 183
—— *v.* Vaughan - - ii. 516
Evelyn *v.* Evelyn - 310
—— *v.* Templar, iii. 286, 287, 288. 295

Page

*Everall* and *Cotton*, iii. 154, n.
Everard *and* Rex - 532
Everest *and* Rundall - 66. 317
—— *and* Wickham - 358
Evitt *and* Adamson - 10
Ewer *and* Chamberlain - ii. 537
—— *v.* Corbett, ii. 454; iii. 177. 179. 181
—— *and* White - - ii. 326
Ewing *v.* Osbaldeston - iii. 183
Exeter (Marquis of) *v.* Marchioness of Exeter 264
Exeter (Bishop of) *and* Gully, iii. 287. 296
—— (Bishop of) *and* Hill, iii. 281. 287. 296
—— (Bishop of) *and* Wyvill, 470. 474; iii. 145
Eyles *v.* Ellis - - 74
—— *and* Hanger - 438. 483
—— *and* Hooper - iii. 258
Eyre *and* Boone - - 405
—— *v.* Dolphin - iii. 372. 494
—— *v.* Dunsford - 6
—— *and* Holland - 165
—— *v.* Iveson - - 194
—— *v.* Lord Middleton, 168, n.
—— *v.* Popham, 168. 194. 348. 414
—— *and* Popham - 210
—— *and* Prendergast, 107. 117. 488. 504. 507. 509; ii. 156.
Eyton *v.* Dicken - - ii. 187

F.

Fagg *v.* Dobie - - 64
Fagg's case, or Fagg *and* Sherly - - iii. 424

Page

Fain *v.* Ayers, ii. 98. 109. 127. 541
—— *v.* Brown - - 341
Fairbain *and* Adams - 249
Fairclaim *v.* Newland - iii. 393
Faircloth *v.* Gurney, App. 25. 31
Fairfax (Lord) *and* Bottomley, App. 45. 47
*Fairfield* v. *Birch*, iii. 293; App. 64
Falkland (Lady) *and* Strode, 254
Falkener *v.* Morse - ii. 43
Fallon, *ex parte* - - App. 21
—— *and* Magennis, 112. 366. 421, 422. 425. 537, 539. 545; ii. 23. 30. 40. 210; iii. 126. 134. 300, n.
Falmouth (Lord) *v.* Thomas, 144. 159
—— *and* Oxenden - iii. 118. 143
Fane *v.* Spencer - - ii. 149
Farebrother *v.* Ansley - 26
—— *and* Bethune - 368
—— *v.* Prattent - - 76
—— *v.* Simmons - - 191
—— *and* Yates - - 76
Farguson *v.* Maitland - 444
Farley *v.* Briant - - ii. 540
Farley *and* Farquhar, iii. 121. 124, 125
Farlow *v.* Weildon - 123
Farmer *v.* Robinson - 187
—— *and* Shelling - 254
—— *v.* Wardell - - 446
Farquhar *v.* Farley, iii. 121. 124, 125
—— *and* M'Queen, 507, 508; ii. 185; iii. 130. 141. 477
Farr *v.* Newman - - iii. 179
Farrell *v.* Irwin - - 121

Page
Farrell *and* Whitmel - 353
Farrer *v.* Billing - ii. 190. 192
—— *v.* Farrer - -
—— *v.* Nightingale - 367. 482
Farrington *and* Battersbee, iii. 294
Fauconberge *and* Fitzgerald, iii. 456
Faulkner *and* Morse, iii. 429, 430
Faussett *v.* Carpenter - iii. 428
Fausset *and* Whitfield, ii. 104; iii. 434
Faustenditch *and* Cross iii. 308
Faux *and* Clark - ii. 7. 419
Fawcett *and* Longchamps 250
Fawell *v.* Heelis - iii. 193. 217
Fearnley *and* Wright - iii. 326
Featherstonhaugh *v.* Fenwick, 348; iii. 250
Fector *v.* Philpott, ii. 413; iii. 219
—— *ex parte* - - 93
*Fell* v. *Chamberlain*, 198. 222; iii. 261
Fellowes *v.* Lord Gwydyr, 350, 351
Fen *v.* Backhouse - App. 25
Fencott *v.* Clarke - ii. 115
Fenhoullet *and* Scott - iii. 89
Fenner *v.* Taylor - iii. 297
*Fenton* and *Browne*, 4. 51. 77. 339. 486. 488. 540; iii. 130
Fenwick *and* Featherstonhaugh, 348; iii. 250
Feoffees of Herriott's Hospital *v.* Gibson - 47. 170
Fereday *v.* Wightwick, iii. 249, n.
Fergus *v.* Gore - - 124
Ferguson *v.* Dunne - 143, 154
—— *and* Stuart - iii. 185. 356
Page
Ferguson *v.* Tadman - iii. 133
Fermor *and* Ferrors - iii. 23
Ferne *v.* Bullock - - 203. 216
Fernyhough *and* Coppin, ii. 151; iii. 474
Ferrars *v.* Cherry, iii. 299. 448. 474
Ferrors *v.* Fermor - iii. 23
—— *and* Hanning - iii. 428
—— (Lord) *and* Upton, 122. 126
Field *v.* Boland, 162. 187; iii. 440
—— *and* Yea - - ii. 105
Fielder *v.* Higginson, 112; iii. 141
—— *v.* Studly - 262; ii. 536
Fielding *and* Lewes - iii. 494
—— *and* Philips - 374; ii. 55
Fife *v.* Clayton - 42. 221. 363
Fifield *and* Twigg, 107, 108; iii. 114
Fildes *v.* Hooker, ii. 29. 143. 160. 164
Fillingham *v.* Bromley - ii. 212
Finch *v.* Finch - iii. 263, 264
—— *v.* Newnham - iii. 460
—— *v.* Earl of Winchelsea, ii. 382
*Fingal* (*Lord*) v. *Ross* - 207
Finlay *and* Flood - 226
Finn *and* Day - - 527
*Fish* and *Sloper*, ii. 166. 179; iii. 148. 332
Fishe *v.* Rogers - - ii. 437
Fisher *and* Aubrey - 61
—— *v.* Barry - ii. 166. 177
Fitzgerald *and* Barton, ii. 525. 530
—— *v.* Fauconberge - iii. 456
—— *v.* Forster - - 32
—— *and* Spurrier - 197

Page
Fitzhardinge *and* Lord Dursley - iii. 438
Fitzhugh *v.* Dennington ii. 544
Flamstead *and* Walker, iii. 155. 458
Flavel *and* Eggington - 104
Fleaureau *v.* Thornhill, 347. 369; ii. 41. 48. 51; iii. 124
Fleetwood *v.* Green, ii. 13. 38; iii. 145
Fleetwood's (Sir Gerrard) case, ii. 391; iii. 335
Fleming *and* Campbell, 392. 552
Fletcher *and* Buller - 284
—— *and* Cottington, 195; iii. 257
—— *and* Hurd - - ii. 516
—— *and* Long - - 484
—— *and* Orlebar, 273; ii. 152; iii. 333
—— *v.* Robinson - App. 45
—— *and* Sibson - - iii. 425
—— *v.* Sidley - - iii. 269
—— *v.* Tollet - - 327
Flexny *and* Kellick - iii. 225
Flight *v.* Barton - - 342
—— *v.* Bolland - 335. 347
—— *v.* Booth, 45. 48. 55. 57. 60; ii. 19. 23
—— *v.* Bentley - - 316
—— *v.* Lake (Lord) - App. 23
Flint *v.* Brandon - - 336
Flood *v.* Finlay - - 226
—— *and* Fryer - - iii. 268
Florence *and* Tanner - iii. 474
Floyd *v.* Aldridge - 280
—— *v.* Bethill - - 533
—— *v.* Buckland - 200
Floyer *v.* Sherard - 443
Fludyer *v.* Cocker, ii. 11; iii. 102, 103. 141
Fohaine's (Lady) case - 273
Foley *v.* Hill - - iii. 493
Foley *and* Moore - - 255
—— *and* Paget, ii. 331. 365. 379, n.
—— *v.* Percival - 275. 291, n.
—— *and* Whitcomb - ii. 38
Foljambe *and* Ogilvie, 42. 165. 167. 175. 184
—— *and* White, ii. 145. 153; iii. 138
Foliott *and* Dudley - ii. 510
Foord *and* Hayes - App. 72
—— *v.* Wilson - - ii. 529
Foot *v.* Salway - - 222
Forbes (Lord) *v.* Deniston, iii. 372
—— *and* M'Cann, 79. 120; iii. 98
—— *and* Stannard, ii. 526, 527
Ford *v.* Compton - 164
—— *and* Doe - - App. 28
—— *and* Fordyce, 412. 489; ii. 19
—— *v.* Peering - - ii. 110
Fordyce *v.* Ford, 412. 489; ii. 19
Foreman *and* Wilson - iii. 271
*Forester* and *Waldron*, iii. 106. 131
Forrester *v.* Lord Leigh, iii. 251
*Forshall* v. *Coles*, ii. 394. 417; iii. 331; App. 53
Forster *and* Attorney-General, 171. 213. 256
—— *v.* Clarke - - ii. 75. 179
—— *and* Fitzgerald - 32
—— *v.* Forster - - iii. 277
—— *v.* Hale, 171. 213; iii. 252
—— *and* Jerdon - 321
—— *and* Wilson - - ii. 114
Fort *v.* Clarke - ii. 75. 179
Forte *and* Wilde, 406; ii. 23. 52. 199, 200; iii. 115
—— *v.* Vine - - ii. 512
Forteblow *v.* Shirley 502; ii. 155; iii. 103

Page

Forth *and* Harrison - iii. 448
—— *v.* Duke of Norfolk, ii. 383; iii. 336
Fosbrooke *v.* Balguy - iii. 271
Foster *v.* Blackston, ii. 389; iii. 432
—— *and* Blake - - ii. 328
—— *v.* Charles - - 6
—— *v.* Deacon - - iii. 133
—— *v.* Foster - - ii. 92
—— *v.* Hargreaves - iii. 432
—— *and* Jerdon - - 321
—— *and* Norman - ii. 531
—— *v.* Mapes - - ii. 511
*Foster* and *Savage* - iii. 428
Fothergill *v.* Fothergill, App. 72
Foulkes *and* Owen (6 Ves. jun.) - - - iii. 226
Foulks *v.* Owen (9 Ves. jun., 348.) - - - 127
Fountain *v.* Cook - - iii. 24
—— *v.* Young - - iii. 483
Fourdrin *v.* Gowdry - iii. 221
Fournier *v.* Edwards - 358
—— *and* Bishop of Winchester - - - iii. 481
*Fowle* v. *Freeman* - 160
Fowle *v.* Welsh - - ii. 512
Fowler *and* Pechell - 90
—— *v.* Richards - - iii. 15, n
—— *v.* Willoughby - 305
Fox *v.* Birch - - 359
—— *v.* Mackreth iii. 225. 242.
—— *v.* Wright - - 459
Foxcraft *v.* Lister - 200
Frame *v.* Dawson - 202
—— *and* Parry - - ii. 92
Francis *and* Burgh iii. 35. 429
Francis *v.* Wigzell - iii. 222
Frank *v.* Frank - - ii. 217

Page

Frank *and* Marshall - iii. 489
Franklin *v.* Lord Brownlow, 274; ii. 189
—— *v.* Miller - - 405
—— *and* Murless - iii. 263
*Frederick* and *Morshead*, 129; App. 10
Freebody *v.* Perry - 359
Freeland *and* Sayle - 325. 327
Freeman *v.* Baker - 6. 549
—— *v.* Barnes - - iii. 2
*Freeman* and *Fowle* - 160
Freeman *and* Malins, 36. 38. 343
—— *and* Parsons (Revocation) - - - 281
—— *and* Pasley - - 6
—— *v.* Taylor - ii. 384, n.
Freer *and* Thorp - - iii. 133
Freme *v.* Wright - 43; ii. 3
French *and* Johns, 102; ii. 385. 387, n. 393
Frere *v.* Byrne - - ii. 45
—— *v.* Moore, iii. 80. 217. 422
Frewen *v.* Relfe - - 330
Fricker *v.* Donovan, 396; iii. 128
Frith *and* Parker - - 414
*Frost* and *Brown* - - 357
Fruhling *v.* Schroeder, 370; iii. 125
Fry *v.* Porter - - iii. 452
—— *and* Richards - ii. 372
—— *and* Wilkins - 64
Fryer *v.* Flood - - iii. 268
Fullagar *v.* Clark - ii. 36
Fullarton *and* Watts - 281
Fuller *v.* Abrahams - 35
—— *and* De Bernales - iii. 124
Furnell *and* Zagury - 469

Page

Fursman *and* Radcliffe, iii. 482, n. 483
Fury *v.* Smith - iii. 362. 367

G.

Gaby *v.* Driver, 71. 83; iii. 121
Gainsford *and* Acland, 79; iii. 115. 130
—— *v.* Griffith - - ii. 531
Gaitskill *and* Parnther - 74
Gale and Lang - - 402, 403
Gallimore *and* Moss - 315
*Galloway* (Lord) and *Steadman* 429
Galton *v.* Hancock - 281
Gamble *and* Cattle - 158
—— *and* Hilliard - 463
Gamson *and* Barber, App. 24, 25. 27
Gape *v.* Handley - - 256
Garbrand *v.* Allen, iii. 222, 223
Gardiner *and* Goldson - iii. 458
—— *and* Onley - - ii. 372
*Gardner* and *Davidson* - 330
Gardner *v.* Lord Townsend, iii. 274
Gardom, *ex parte* - - 160
Garland *and* Smith - iii. 304
Garner *and* Hughes, iii. 485. 492
Garnons *v.* Swift - - 372
—— *and* Ward - - ii. 97
Garrard *v.* Girling - 226
Garraway *and* Meynell iii. 448
Garrett *and* Early, 391. 546. 551; ii. 420. 429
—— *v.* Noble - - 89
Garrick *v.* Earl Camden, 107, 108
Garroway *and* Harrington (Sir John) - - ii. 391
Garstone *v.* Edwards - 123
Garth *and* Hughes - iii. 491
—— *v.* Ward - - iii. 458

Page

Garthshore *v.* Chalie, ii. 219; iii. 273
Gartside *v.* Isherwood - 443
—— *and* Tipping - 110
Gascoign *v.* Stut - iii. 336, n.
—— *v.* Thwing - iii. 256. 258
Gaskarth *v.* Lord Lowther, 165. 308; iii. 131
Gaskell *v.* Durdin - iii. 460
Gathorne, *in re* - - 325, n.
Geddes *and* Havelock, 373. 404
*Gee* and *Todd*, 364. 523; iii. 140
Gee *and* Todd - - App. 54
Gell *v.* Vermedum - 321
—— *v.* Watson - 529; iii. 126
*Gennor* v. *Macmahon* - 269
George *and* Abraham - iii. 318
—— *and* Howell, 332. 341. 347
—— *v.* Milbanke, iii. 298. 434
—— *and* Pritchard - ii. 147
Gerteken *and* Cory - iii. 428
Gervoyes's case - - ii. 216
Gery *and* Milnes - - 465
Gibbin *and* Prideux - 281
Gibbons *v.* Baddall, iii. 193, 194. 215
—— *v.* Berry - - 117
—— *and* Cole, 392. 445, 446. 463
Gibbs *and* Abbot - iii. 153
—— *and* Brown - - iii. 75
Gibson *and* Barr - - ii. 44
—— *and* Chapman - iii 425
—— *v.* Clarke, 358, 359; ii. 37. 181
—— *and* Feoffees of Heriott's Hospital - - 47. 170
—— *v.* Jeyes - - iii. 238
—— *and* Lake, 138. 140; iii. 247, 248
—— *v.* Lord Montford 279
—— *v.* Paterson - - 408

Page
Gibson *v.* Smith - - 531
—— *v.* Spurrier, 501. 514; ii. 213; iii. 453
Giddings *and* Hitchcock, 389; ii. 43, 44. 426
Giffard *v.* Hort - 102; iii. 446
Gifford *v.* Nugent iii. 178, 179
Gilbert *and* Camfield, ii. 48. 51, 52
Gillett *v.* Abbott - - ii. 97
Gill *v.* Watson - - 359
Ginger *v.* Bayly - - 372
*Girdler* and *Capel*, 281; iii. 88, 89
Girdlestone *and* Grenfell, ii. 327
Girling *and* Garrard - 226
Glaister *v.* Hewer iii. 268, 269
Glastonbury *v.* Benson - 360
Glazebrook *and* Downes, iii. 229
—— *v.* Woodrow - 373
Glazier *and* Goodright - 290
Glengall (Lord) *v.* Bernard 190
Gloss *v.* Acra - - 532
Glover *and* Penn - - ii. 512
Godolphin *and* Child - 195
Goffe *v.* Mitchell - - 120
Goldson *v.* Gardiner - iii. 458
Goleborn *v.* Alcock - iii. 419
Gomeserra *and* Barrett, 200. 440
Gompertz *v.* —— - ii. 36
Gooch *and* Owen - 78
Gooch's case - - iii. 285
Goodale *and* Middlemore, ii. 458, 459
Goodall *v.* Pickford - 128
Goodinge *v.* Goodinge - 254
Goodison *v.* Nunn - 373
Goodrick *v.* Brown - ii. 267
Goodright *v.* Glazier - 290
—— *v.* Hodges - - iii. 260
Page
Goodright *v.* Jones - ii. 328
—— *v.* Moses - - iii. 288
—— *v.* Sales - - iii. 87
—— *v.* Swymmer - ii. 196
Goodtitle *v.* Jones, ii. 325; iii. 26. 42
—— *v.* Meredith - 285
—— *v.* Morgan, ii. 44. 426; iii. 41
—— *v.* Pope - - 311
—— *v.* Saville - 293, n. 295
Goodwin *v.* Clarke - 380
—— *and* Hooper - 126
—— *v.* Lithbody - 274, 275. 418
—— *v.* Lister - - 321
—— *and* Pimm - - ii. 328
Goom *v.* Aflalo - - 183
Gordon *v.* Ball - - ii. 36
—— *v.* Crawford - 444
—— (Lord Wm.) *v.* Marquis of Hertford - - 226
—— *v.* Trevelyan - 168
Gore *and* Fergus - - 124
—— *v.* Stacpoole - 102
—— *v.* Wigglesworth - iii. 440
Gorge's (Lady) case, iii. 262. 268. 270
Gorges *and* Chester - 127
Goring, *ex parte* - - 87
—— *v.* Nash, iii. 281; App. 73
—— *and* Portmore (Lord) ii. 115
Gorman *v.* Salisbury - 246
Gorton *v.* Champneys (Sir T.) ii. 183
Gosbell *v.* Archer, 173, 174. 182. 191. 370; ii. 52
Gosden *and* Ramsbottom, 226. 288
Gosnold *and* Sheppard - 256
Goss *v.* Lord Nugent, 220. 236. 241. 248

Page

Goudge *and* Lane - 258, n.
Gough *and* Shine, iii. 82. 419. 436
—— *v.* Stedman - - iii. 488
Gould *and* Nicols - 448. 463
—— *v.* Okenden - - 444
—— *v.* Shoyer - - iii. 324
—— *and* Shrewsbury (Lord) ii. 522
Gourlay *v.* Duke of Somerset, 464, 465
Govett *v.* Richmond - iii. 428
Gowan *v.* Tighe - - 107. 117
Gowdry *and* Fourdrin - iii. 221
Gower *and* Attorney-General, 490; iii. 313. 453. 492
—— *and* Ryder - - 125
Gowland *v.* De Faria, 445, 446. 448. 463
—— *and* Mayor - - 289
Graham *v.* Graham - iii. 423
—— and Harvey - - 244
—— *v.* Sime - - ii. 437
Granger *and* Lord Townshend, 50
—— *v.* Worms - - 48
Grant *and* Clarke - - 226
—— *and* Halsey - ii. 155. 158
—— *and* Hamilton - 346
—— *v.* Munt - 540. 542. 559
—— *and* Pendleton 252
—— *and* Routledge, 37. 165, 166
—— *v.* Shills - iii. 195
—— *v.* Yea - ii. 286
Graves *v.* Weld - 156
Gray *v.* Briscoe - ii. 538
—— *v.* Cuthbertson ii. 479
—— *and* Doe ii. 447
—— *v.* Gutteridge 75. 83.
—— *and* Hatton - 160
—— *and* Hill - 351
Grayme *v.* Grayme - 328
Grazebrook *and* Hopkins iii. 48

Page

Greaves *v.* Ashlin - 65. 218
Greated *v.* Curtis - 372
Green *and* Boyce - 158. 167
—— *and* Fleetwood, ii. 13. 38; iii. 145
—— *v.* Jackson - - ii. 417
—— *and* Kennedy, ii. 67. 115: iii. 426. 455. 457. 474
—— *v.* Lowes - - iii. 153
—— *v.* Smith - 273. 307. 337
—— *v.* Wood - - 413
Greene *and* Burke - ii. 46
—— *v.* Lambert - - iii. 87
Greenhill *and* Doe - ii. 387
—— *v.* Greenhill - 279
Greenstead's (East) case, iii. 312. 452
Greenaway *and* Sevier - 318
—— *v.* Adams - - 364
Greenwood *and* Barker - 74
—— *and* Nouaille, ii. 134. 181. 219
—— *and* Woodroff ii. 512
Gregory *v.* Gregory - iii. 244
—— *v.* Mighell - 299. 465
—— *and* Rex - - 113
Gregson *and* Blackburn, iii. 194. 203. 216
—— *and* Clayton 252
—— *v.* Riddle - - 430
Grenfell *v.* Girdlestone ii. 327
Gresley *and* Woodyatt - iii. 476
Greswold *v.* Marsham, ii. 385; iii. 463
Grew *and* Ieely - 66
Grey (Lord) *v.* Lady Grey, iii. 262
Greville *v.* Da Costa - 369. 391
Griffin *and* Burnaby, 327; iii. 141
—— *v.* Stanhope iii. 294. 308
—— *v.* Taylor - - 331

Page
Griffith *and* Attorney-General, iii. 243, n.
—— *and* Evans - - 446
—— *and* Gainsford - ii. 531
—— *v.* Heaton - - iii. 115
—— *and* Leland - - 120. 123
—— *and* Lloyd - 110; ii. 453
—— *and* Twisleton - 445. 463
*Griffith* and *Wood*, 278. 314. 492; ii. 46
—— *and* Wynne, 361; ii. 39
Griffiths *and* Chambers, 516, 517. 519
—— *and* Spratley - 443
*Grocock* and *Emery*, ii. 181. 196; iii. 66. 143
Groobham *and* Jones - iii. 282
Grove *and* Churchill, ii. 384; iii. 463
—— *and* Michaux - iii. 223
—— *and* Watt - - iii. 225
Grover *v.* Hugell, iii. 146. 236
Groves *v.* Groves - iii. 256
Growsock *v.* Smith, 375; iii. 113
Grueber *and* Knatchbull, 330, 507; ii. 16, 17. 20, 21
Grugeon *and* Chetham - 123
Guest *v.* Homfray, 410. 426. 483
—— *and* Lewin, 519; ii. 79; iii. 143. 145
Gully *v.* Exeter (Bishop of), iii. 281. 287. 296
Gun *and* Pawle - - 83
Gunnis *v.* Erhart - 40. 42. 221
Gunter *v.* Halsey - 178. 200
Guppy *and* Stevens, 13. 363; ii. 15. 103
Gurney *and* Faircloth, App. 25. 31
Gutch *and* Boyman, ii. 198. 201
Gutteridge *and* Gray - 75. 83
—— *and* Simpson - ii. 216
Page
Guy *and* Coker - - ii. 475
—— *and* Sanders - 105, n.
Guy's Hospital *and* Baynham 255
Guyon *and* Smith, iii. 153. 168
Gwillim *v.* Stone, 365; ii. 142, 143
—— *and* Stone - - ii. 143
Gwydyr (Lord) *and* Fellowes, 350, 351
Gwynne, *ex parte*, 80; iii. 183, n.
—— *v.* Heaton, 443. 445. 448. 463
Gyde, *ex parte* - - - 67
Gyles *and* Moyse - iii. 247

H.

Hackwell *and* Clark - 203. 216
Haddenham (Inhabitants of) *v.* Rex - - - iii. 222
Haddon's case - - 331
Hagedon *v.* Laing - 67. 406
Haigh *v.* De la Cour - 271
Halcot *v.* Markant - iii. 271
Hale *and* Forster, 171. 213; iii. 252
Hale's case - - 328; App. 74
Halifax *and* Roper - ii. 275
Hall, *ex parte* - - iii. 289
—— *v.* Adkinson - iii. 423
—— *v.* Cazenove - 403
—— *and* D'Arcy - ii. 432
—— *and* Dearle - iii. 432
—— *v.* Hallet - - iii. 242
—— *v.* Hardy - 331, 332. 352
—— *v.* Jenkinson - 358
—— *and* Keech, ii. 141; iii. 280
—— *v.* Laver - ii. 13
—— *v.* Noyes - iii. 225. 244
—— *and* Shepherd - ii. 445
*Hall* *v.* *Smith* - 11. 412; iii. 474
Hall *v.* Warren, 335. 348. 464

Page
Hall *and* Wheate, ii. 166. 178
Haller *v.* Render - - 143. 145
Hallet *and* Hall - - iii. 242
Hallett *and* Pennill, iii. 275, 276
—— *v.* Middleton - ii. 99. 541
Halliday *and* Lawrence 123
Hallings *v.* Connard - ii. 542
Halsey *and* Austen - iii. 209
—— *v.* Grant - ii. 155. 158
—— *and* Gunter - - 178. 200
Hamil *v.* Stokes - - iii. 433
Hamilton *and* Balgney - iii. 271
—— *v.* Clements - 442
—— *v.* Denny - - iii. 252
Hamilton *and* Lord Egremont, ii. 325
—— *v.* Grant - - 346
—— *and* Hobhouse, 116; iii. 352
Hamilton *v.* Royse, iii. 456. 475
—— *v.* Worley - - 310
Hamlet *and* King, 447; App. 16
Hammond *and* Dalton - ii. 437
—— *v.* Hill - - ii. 517
—— *v.* Toulmin - - ii. 540
Hampson *and* Cotterell iii. 154
Hampton *and* Stockman, ii. 104, 105
Hanbury *v.* Litchfield - 493
Hancock *and* Galton - 281
—— *and* Spurrier, 413, 414. 473; ii. 152
Handley *and* Gape - 256
Hanger *v.* Eyles - - 438. 483
Hankin *and* Hicks - - - 72
Hanning *v.* Ferrers - iii. 428
—— *and* Trent - - ii. 167
Hansard *v.* Hansard - iii. 479
Hanson, *ex parte* - - iii. 216
—— *v.* Beverley - - iii. 173
—— *and* Drewe - - 517, 520
—— *and* Macdonald - ii. 153
Page
Hanson *v.* Roberdeau - 78. 80
—— *and* Scott - - 4. 537
Harcourt *v.* Knowel - iii. 424
Hardcastle *and* Sparrow, 283. n
Harding *v.* Ambler - iii. 135
—— *v.* Crethorn - - iii. 479
—— *v.* Middleton - 119
—— *v.* Nelthorpe, ii. 428, 429
—— *v.* Suffolk - - 250
Hardingham *v.* Nichools iii. 491
Hardman *v.* Ellames, ii. 114; iii. 493
Hardman *and* Omerod, 234. 420; iii. 155, n.
—— *v.* Willcock - - 78, n.
Hardwicke *v.* Mynd, iii. 155. 175
Hardwicke (Lord) *v.* Vernon, iii. 237. 240
Hardy *and* Hall, 331, 332. 352
—— *v.* Reeves - iii. 480. 494
Hare *v.* Cator - - ii, 508
—— *and* Haynes, 82. 259. 267
—— *v.* Horton - - - 62
—— *v.* Shearwood - 259. 267
Harford *and* Monmouthshire Canal Company - ii. 376
Harford *v.* Purrier, 468; iii. 135
Hargrave *v.* Le Breton, ii. 47; iii. 453
—— *and* Dyer, 412. 486. 541. 544; iii. 114
—— *and* Sedgwick - 332
Hargreaves *v.* Bothwell iii. 457
—— *and* Foster - - iii. 432
Harmood *v.* Oglander, ii. 324, 325
Harnell *and* Bennett - 102
Harnett *v.* Yielding, 337. 341. 343. 347. 496; ii. 41
Harper *and* Baker - 107
Harrington (Sir John) *v.* Garroway - - - ii. 391

Page
Harrington *v.* Hoggart, iii. 121. 123
—— *v.* Long - - ii. 46
—— *v.* Price - ii. 90; iii. 219
*Harrington* and *Robinson*, iii. 330
—— *v.* Rydear - - ii. 538
Harrington *v.* Wheeler - 413
Harris *and* Barnwall, 502; ii. 132. 162. 185. 196
—— *v.* Hill - - ii. 116
—— *v.* Ingledew - iii. 493, 494
—— *v.* Kemble - - - 8
—— *and* Mills - - - 65
—— *and* Pope - - 341
—— *v.* Pugh - - ii. 385
Harrison, *ex parte* - iii. 225
—— *v.* Coppard, ii. 100. 103. 108; iii. 148
—— *v.* Forth - - iii. 448
—— *v.* Harrison - - 276
—— *v.* Hollins - - ii. 328
—— *v.* Southcote, iii. 190. 193 395
—— *v.* Wright - - 354
Harrop *v.* Shelmardine 312
Harrow *and* Doe - - ii. 349
Harrup *and* Buckmaster, 189. 193. 209, 210. 306
Hart *v.* Durand - - 252
—— *and* Wilson - - 187
Hartley *v.* Pehall, ii. 180. 199. 479
—— *v.* O'Flaherty, ii. 408; iii. 419. 435
—— *v.* Smith - - ii. 209
—— *v.* Wilkinson - 195
Harvey *v.* Ashley - - iii. 476
*Harvey* and *Belch*, ii. 326; App. 34
—— *and* Berney - - ii. 179
Page
Harvey *and* Churchman - App. 72
—— *and* Edwards, 96; ii. 212; iii. 136. 139
—— *v.* Graham - - 244
—— *v.* Harvey - - 266
—— (Sir Thomas) *v.* Montague, iii. 461
—— *v.* Parker - - 327
—— *v.* Phillips - - ii. 97
—— *and* Turner, 8. 89. 92. 344. 382. 396. 441. 484
—— *v.* Young - - - 4
Harvy *v.* Woodhouse - iii. 423
Harwood *v.* Wallis - 260
Hasker *v.* Sutton - ii. 181. 187
Hassell *v.* Belworth - 482
Hastings *v.* Wilson - - 93
Hastler *and* Costigan, 341. 347; ii. 28
Hatchell *v.* Cremorne - iii. 427
Hatchet *and* Watkins iii. 490, n.
Hatt *and* Brotherton - iii. 453
Hatton's case (Sir Christopher), ii. 411
Hatton *v.* Gray - - 160
—— *v.* Jones - - iii. 282
Havard *and* Prytharch - 322
Havelock *v.* Geddes - 373. 404
Haw *and* Levy - - 367
Hawkes *v.* Retallick - 371
Hawkins *v.* Holmes - 184. 209
—— *v.* Kemp - 376; iii. 174
—— *v.* Obeen - - 321
—— *and* Polyblank - iii. 20
—— *v.* Rutt - - - 74
—— *and* Taylor - - iii. 181
*Hawley* and *Staughton* - 332, n.
Hay *and* Campbell - 99. 117
Haycroft *v.* Creasy, 6; iii. 428, n.
Hayes *v.* Bickerstaff - ii. 512
—— *v.* Caryll - - 413

Page
Hayes v. Foorde - - App. 72
—— v. Kingdome - iii. 248
Hayley *and* Doe - ii. 479
Hayne *and* Mitchell - 76
Haynes *and* Birch - ii. 37
—— v. Hare - 82. 259. 267
*Hays* v. *Bailey*, ii. 157. 163;
iii. 4. 138
Hayton *and* Calthorp - ii. 513
Hayward v. Lomax - ii. 432
—— *and* Stevenson - iii. 286
Head *and* D'Espard - 118
—— v. Egerton - iii. 490
Headen v. Rosher 452
Headley v. Roadhead, iii. 209. 214
Heald *and* Bracebridge 133, n.
Heaps *and* Bowes 463
Heard v. Wadham - 373. 375
Hearle v. Botelers, iii. 192. 194.
215
Hearne v. James - 164
—— v. Tenant - - 407
—— v. Tomlin - 15. 377. 482
—— *and* Woollam - 225
Heath *and* Crisp - - ii. 385
—— v. Heath ii. 166. 177
—— *and* Schneider - 44. 547
Heathcote v. Paignon 443
Heather *and* Edwards - 439
Heaton *and* Griffith iii. 115
—— *and* Gwynne, 443. 445. 448.
463
Hebden *and* Lamplugh 362
Hedges *and* O'Herlihy, 268. 209,
210. 348
Heelis *and* Emmerson, 68. 144. 148,
149. 155. 174. 183, 184.
186. 189. 191. 514
—— *and* Fawell - iii. 193. 217
Hegan v. Johnson 378
Heisler *and* Clarke - iii. 258
Page
Hellard *and* Doe - ii. 192
Hellier *and* Coryton - 258, n.
Heming *and* Athowe - ii. 467
Hemmington *and* Standley, 375
Hemingway v. Lee - 467
Henderson *and* Baker - ii. 91
—— v. Wild - iii. 193, n.
Hendon (Lord of the Manor
of) *and* Rex - - ii. 437
—— *and* Waller - 186
Henkle v. the R. E. A. Office,
258. 268
Henniker *and* Wythe, iii. 212. 214
Hensley *and* East India Com-
pany - - - - 72
Herbert, *ex parte* - - iii. 466
Herbert's (Sir Wm.) case ii. 408
Hercy v. Ballard - - ii. 324
Heriott's Hospital (Feoffees
of) v. Gibson - 47. 176
Herle *and* Cook - ii. 486
Herne v. Meers - 444
—— *and* Sloman - iii. 482
*Heron* and *Dickenson*, 427;
iii. 103. 130. 141
Heron v. Heron - iii. 271
—— v. Treyne - ii. 542
Herries *and* Jenkins, 90;
ii. 173. 180
—— v. Jenkins - ii. 173
Herron *and* Norton - - 83
Hertford (Marquis of) v.
Boore - 426
—— (Marquis of) *and* Lord
William Gordon 226
Hervey v. Hervey - App. 72
Hesse v. Stevenson, 262; ii. 518
Hewen *and* Dolton - iii. 161
Hewer *and* Glaister, iii. 268, 269
Hewit, *ex parte* - iii. 240
Heygate *and* Hulme 285

Page
Heylyn *v.* Heylyn - - 286
*Hibbard* and *Smith*, 275, 321; ii. 103; iii. 130. 183
Hibbert *v.* Shee - - 482
Hickford *v.* Machin - - ii. 392
Hickman *and* Hopcraft - - 464
—— *and* Peterson, iii. 436, 437
—— *and* Earl of Plymouth, iii. 271
Hicks *v.* Hankin - - - 72
—— *v.* Morant - - - 10
—— (Sir Harry) *v.* Phillips, 438. 487
—— *and* Lovell, 344. 383. 395; ii. 430
Hickson *v.* Aylward - - 12
Hide (Serj.) *and* Dr. Coldcot, 261; ii. 536
Hiern *v.* Mill - - iii. 469
Higgins *v.* Dowler - App. 49
Higgins *v.* the York Buildings Company - - ii. 385
Higginson *v.* Clowes, 41, 42. 61. 168. 193. 221. 223. 226. 228. 343. 363. 505
—— *and* Clowes - - 343. 363
—— *and* Fielder, 112; iii. 141
Hilbert *and* Wallinger, 520. 522; ii. 37
*Hilder* and *Doe*, ii. 390; iii. 49
Hiles *and* Jenkins, 416; ii. 29
Hill *v.* Adams - - iii. 75
—— *and* Barker - 275
—— *and* Brewer - ii. 482
—— *v.* Buckley, 94. 343. 345. 526. 529
—— *v.* Carr - - 325
—— *and* Coldcott - ii. 536
—— *v.* Bishop of Exeter, iii. 281. 287. 296
—— *and* Foley - - iii. 493
Hill *v.* Gray - - 351
—— *and* Hammond - ii. 517
—— *and* Harris - - ii. 116
*Hill* and *Holland* - - ii. 195
*Hillary* *v.* *Waller*, ii. 97. 181. 186; iii. 25; App. 69
Hilliard *v.* Gambel - 463
Hills *v.* Kirwan, 116, 117. 119
—— *and* Lewes - - iii. 275
—— *and* Maling, ii. 168; iii. 142
—— *and* Nott - 445. 462
—— *v.* Simpson - - iii. 178
—— *v.* Worsley - - iii. 458
Hilton *v.* Barrow - - ii. 41
Hincksman *v.* Smith - 451
Hinde *v.* Whitehouse, 167. 170. 174. 188. 193
Hine *v.* Dodd - iii. 372. 456
Hinton *v.* Hinton - - 329
Hipwell *v.* Knight, 402. 424, 425. 433
Hitchins *v.* Lander - ii. 45
Hithcock *v.* Giddings, 389; ii. 43, 44, 426
Hithcox *v.* Sedgwick, iii. 69. 419. 464. 467
—— *and* Underwood - 446
Hitchman *v.* Walton - 62
Hoadly *v.* M'Lain - 172
Hoare *v.* Parker - iii. 489
—— *and* Playford, ii. 177; iii. 138
Hobbs *and* Walton - iii. 485
Hobhouse *v.* Hamilton, 116; iii. 352
—— *and* Spratt, iii. 318. 320. 322
Hobs *v.* Norton - - iii. 428
Hobson *v.* Middleton - ii. 529
Hobson *and* Rist - - 163

Page

Hoby *v.* Roebuck - 140
Hockin *v.* Cooke - - 532
Hodder *v.* Ruffin - - 128
Hodding *and* Edwards - - 75
Hodges *and* Anson (Lord) iii. 126
Hodges *v.* Lichfield (Lord), 369. 371; ii. 51, 52, 53, 54. 86. 405
Hodges or Goodright *v.* Langfielde - - iii. 260
—— *v.* Horsfall - - 251
—— *v.* Jones - - 122
—— *v.* Templar - - iii. 321
*Hodgson* v. *Dean* - - iii. 463
Hodgson *and* Le Bret - 183
Hodson *and* Kendray - - 83
Hogg *and* Doe - - iii. 353
—— *v.* Snaith - - 218
Hoggart *and* Harrington, iii. 121. 123
—— *v.* Scott - - 425
—— *and* Todd - - ii. 54
—— *and* Waring, 45. 48. 56
Holbech *and* Bree, ii. 420. 426
Holcroft (Lady) *v.* Smith, ii. 119
*Holdsworth* v. *Holdsworth*, 208
Holford *and* Barker - 104
—— *v.* Lade - - iii. 25
Holland *v.* Eyre - - 165
—— *v.* Hill - - ii. 195
—— *and* Rex - - iii. 221
Hollier *and* Rex - - iii. 73
Hollings *and* Matthews, ii. 420. 426
Hollins *and* Harrison - ii. 328
Hollis *v.* Edwards, 132, n.; 136, n.; 352
Hollis *and* Humphreys - 332, n.
—— *v.* Whiting or Edwards, 199
Holman, *ex parte*, ii. 196; iii. 66

Page

Holme *and* Cragg - 330
Holmes *v.* Ailsbie - ii. 97
—— *v.* Blogg - - iii. 222
—— *v.* Buckley - - ii. 485
—— *v.* Coghill - - App. 72
—— *v.* Custance, iii. 428, n.; 479
—— *and* Hawkins - 184. 209
—— *and* Poultney - 141
Holt *v.* Holt - - iii. 88
Holwood *v.* Bailey - iii. 143
Homfray *and* Guest, 410. 426. 483
Hone *and* Davis - - 340, 341
Honeycomb *v.* Waldron, iii. 356
Hood *and* Pilmore - 351. 390
Hooker *and* Fildes, ii. 29. 143. 160. 163, 164
Hooper, *ex parte* - - 207
—— *v.* Eyles - - iii. 258
—— *v.* Goodwin - - 126
—— *v.* Ramsbottom, ii. 90; iii. 219
Hopcraft *v.* Hickman - 464
Hope *v.* Atkins - - 218
—— *v.* Booth - - 67. 379
Hopkins *and* Bond - ii. 328
—— *and* Craig - - ii. 424
—— *and* Doe - - iii. 287
—— *v.* Grazebrook - ii. 48
—— *and* Howard - 7. 342. 353
Hopson *and* Trevor - 354
Hopton *and* Jennings - ii. 37
Hopwood *v.* Watts - iii. 332
Horde *and* Taylor - ii. 323
Horford *v.* Wilson - - 84
Horn *and* Carter - - iii. 250
—— *v.* Horn, iii. 154; App. 21
—— *and* Jelliff - - iii. 315
Horndon (Inhabitants of) *and* Rex - - - - 138
Horne *and* Barrington - 331
—— *and* Carter - - iii. 250

Page
Horne's Case - - ii. 475
Horner *and* Cadman, 337, 338. 384. 441
—— *and* Mayor of Hull, App. 69
Horniblow *v.* Shirley, 502; ii. 154. 158
Horsfall *and* Hodges - 251
—— *and* Waller - - 372
Hort *and* Giffard, 102; iii. 446
Horton *and* Hare - - 62
—— *and* Milner - - ii. 532
—— *and* Nannock - App. 70
Horwood *and* Underhill - 443
*Hosier* v. *Read* - - 233
Hoskins *and* Trenchard, ii. 534
Hovenden *v.* Lord Annesley, ii. 324, 325. 328
Houghton, *ex parte*, iii. 256. 263
—— *v.* Rushley, iii. 334, 335, n.
How *and* Nicholls, ii. 411; iii. 72
—— *v.* Stiles - - iii. 24
—— *v.* Weldon - - iii. 424
Howard *and* Bell - - 247. 413
—— *v.* Braithwaite - 187
—— *v.* Castle - 28. 30, 31
—— *and* Davys - - iii. 275
Howard de Walden (Lord) *and* Master of St. Cross 532
—— *v.* Ducane, ii. 182; iii. 236
—— *v.* Hopkins - 7, 342. 353
—— *and* Wright, 414. 487: iii. 347
Howarth *v.* Smith - ii. 212
Howe *v.* Howe - - iii. 256
—— *and* Warren - ii. 447
Howell *v.* George, 332. 341. 347
—— *v.* Howell - - iii. 487
—— *v.* Richards - - ii. 528
Howes *v.* Brushfield - ii. 517
Howland *v.* Norris, 502, 503. 521; iii. 98
Page
*Howorth* v. *Powell* or *Deem*, iii. 180. 474
*Hoy* and *Noel* - - ii. 32
Huddleston *v.* Briscoe, 164, 165
Hudson *v.* Bartram - 433
—— *and* Wrightson - iii. 369
Hugell *and* Grover iii. 146. 236
Hughes *ex parte*, 114; iii. 226. 240, 241. 436
—— *v.* Bennett - - ii. 535
—— *v.* Garner - iii. 485. 492
—— *v.* Garth - - iii. 491
—— *v.* Kearney, iii. 120. 195, 196
—— *and* Rann - - 180. 233
—— *v.* Robotham - iii. 23
—— *v.* Wynne - - ii. 83
Hull (Mayor of) *v.* Horner, App. 69
Hulm *v.* Sandys - - iii. 432
Hulme *v.* Heygate - 285
Humble *v.* Bill, iii. 155. 177. 180
—— *and* Savage - - iii. 177
Humphreys *v.* Hollis - 332, n.
—— *v.* Pensam - - iii. 281
—— *and* Rogers - - 314
Hungate *v.* Hungate - iii. 256
Hungerford (Sir Edward) *and* Blake - - iii. 82. 419
—— *v.* Earle - - iii. 308
—— *and* Mildmay - 538
—— Market Company *and* Rex, 319
Hunt *v.* Bourne - - ii. 319
—— *v.* Coles - - ii. 385
—— *v.* Danvers - - ii. 513
*Hunt* and *Mattock* - 482
Hunt *and* Mackrell, 112; ii. 103; iii. 106
—— *v.* Newton - - 460
—— *v.* Silk - - 367
Hunter, *ex parte* - 65. 67
—— *v.* Wilsons - - 496, n.

Page
Huntington *v.* Mildmay ii. 104
Huntingford *and* Woods 310
Huntley *and* Jaques - iii. 429
Hurd *v.* Fletcher - ii. 516
Huskisson *and* Monk ii. 181
Hussey *and* Revel - 337, 468
Hutchinson, *ex parte* - 93
—— *v.* Bell - - 6
—— *and* Dobell, 54. 163. 171. 370. 417
—— *v.* Johnson - - iii. 335
—— *and* Moulton - App. 70.
—— *and* Rastel - 198; iii. 260
Hutt *and* Southby, 13. 63; ii. 5. 19. 38. 83
Hutton *v.* Lewis - App. 21
Hyde *v.* Price - iii. 125
Hyde *v.* Wroughton - ii. 37
Hylliard, *ex parte* 374
Hylton *and* Ramsden - iii. 294

I.

Ibbotson *v.* Rhodes 12; iii. 486
Icely *v.* Grew - 66
Idem *and* Whitchurch - App. 52
Idem *and* Wilcox - App. 64
Iggulden *v.* May - 255, 256
Inchiquin (Earl of) *and* Countess of Shelburn, 255. 259. 268, 269.
Inge *v.* Lippingwell - 248
Ingledew *and* Harris, iii. 493, 494.
Ingoldsby *v.* Bennett - ii. 98
Innes *and* Brakespear - iii. 409
Inskip *and* Lord Braybroke, ii. 180. 183. 213. 435; iii. 175. 427.
Ireland *v.* Bircham - ii. 520
Ireland *and* Churchman 286
Ireson *v.* Denn - 311; iii. 371
Ireson *v.* Pearman - ii. 417
Page
Ireland *and* Cockram - 25
Irnham (Lord) *v.* Child 259. 267. 348
Ironside *and* Renforth iii. 420
Irons *v.* Kidwell - - iii. 373
Irwin *and* Farrell 121
Isham *v.* Morrice - iii. 2
Isherwood *and* Gartside 443
Ithel *v.* Potter - 184
—— *v.* Beane - - iii. 178
Iveson *and* Eyre 194
Ivie *v.* Ivie - ii. 111

J.

Jack *v.* Armstrong, iii. 352. 362
Jackson's case - iii. 446
Jackson *v.* Cator - 268
—— *and* Cooth, 176. 197. 200. 465
—— *and* Doe 378
—— *and* Green - ii. 417
—— *v.* Jacob - - 377
—— *v.* Lever - 440. 475
—— *v.* Petrie 380
—— *and* Richards - iii. 483
—— *and* Rich 235. 268
—— *v.* Rowe (2 Sim. & Stu. 472.); iii. 494
—— *v.* Rowe (4 Russ. 514.); iii. 490
—— *and* Smith 358
—— *and* Saunderson, 172. 180. 181
*Jackson* and *Tenant* iii. 154, n.
Jacob *and* Jackson 377
—— *and* Rowntree iii. 193, n.
—— *and* Worrall - iii. 296
—— *and* Sullivan - 339
Jaffray *and* Card - 166
Jakeman *and* Shaw, 264; ii. 206
James, *ex parte*, iii. 232. 236. 241. 244. 436

Page

James *and* Doe, ii. 116; iii. 281
—— *and* Hearne 164
—— v. James - - App. 28
—— v. Morgan 488
—— *and* Plant - ii. 537
—— v. Salter ii. 335, 336. 366
—— *and* Sir Samuel Romilly, ii. 198. 200
—— v. Shore - 514
Janaway, *ex parte* 321
Janssen *and* Chesterfield, 392. 463
Jaques *v.* Huntley - iii. 429
Jarmain *v.* Egelstone, ii. 52. 85. 435, 436
Jason *v.* Jervis iii. 289
Jeanes *v.* Wilkins iii. 336
Jebb *v.* Abbott - iii. 155
Jee *and* Cripps - iii. 259
Jeffereys *v.* Small iii. 248
Jeffery *and* Spratt, ii. 3. 4. 145. 148
—— *and* Warde 411. 423. 432
Jeffrey *and* Vawser 287
Jeffries *and* Cheek App. 24
—— *and* Montague 290
Jelliff *v.* Horn iii. 315
Jendwine *v.* Slade - 366
Jenkins *and* Collier 307. 491
—— v. Herries, 90; ii. 173. 180
—— *and* Herries ii. 173
—— *v.* Hiles, 416; ii. 29
—— v. Keymis - 325; iii. 307
—— *v.* Portman 319
—— *v.* Reynolds 168
—— *and* Woodhouse ii. 520
Jenkinson *and* Hall 358
—— *v.* Pepys 41. 223. 228
—— *v* Watts 281, 282, n.
Jenner *v.* Tracey ii. 326
Jennings *v.* Hopton ii. 37
—— v. Moore - - iii. 454

Page

Jennings *v.* Selleck - iii. 424
Jerdon *v.* Forster 321
Jernegan *v.* Baxter - iii. 15
Jernegan *and* Willis 442
Jerningham *and* Crutchley, 358. 361
Jerrard *v.* Saunders iii. 418. 423. 493. 495
Jerritt *v.* Weare - ii. 513
Jervies *and* Peles - ii. 527
Jervis *and* Jason - iii. 289
Jervoise *v.* Clarke - 35. 98
—— *v.* Duke of Northumberland, ii. 166. 177
Jesson *and* Doe, ii. 320, 321, 322
Jeudwine *v.* Alcock ii. 29
Jevon *and* Noel - - ii. 215
Jewell *and* Boughton ii. 121
Jeyes *and* Gibson - iii. 238
Johnes *and* Lloyd 102
Johns *v.* French, ib.; ii. 385. 387, n. 393
Johnson *v.* Ascough - ii. 433
—— v. Bonner - 358, 359.
—— *v.* Churchwardens of St. Peter - - 316
—— *and* Hegan - - 578
—— *and* Hutchinson iii. 335
—— *v.* Johnson, 596; ii. 203. 420
*Johnson* v. *Kennett*, iii. 161
*Johnson* v. *Legard* iii. 293
Johnson *v.* Mason - ii. 437
—— v. Nott ii. 542
—— *and* Proctor ii. 525
—— *and* Sewell - - 129
—— *and* Stansfield - 189. 193
—— v. Telford - 286
Jolland *v.* Stainbridge, ii. 415; iii. 372, 452, 485
Joliffe *and* Mertins, iii. 448. 474. 486

| | Page |
|---|---|
| Joliffe *and* Mynn | 73; iii. 484 |
| Jones *v.* Barkley - - | 374 |
| —— *and* Brown - | iii. 288. 295 |
| —— *v.* Bowden - - | 549 |
| —— *v.* Croucher - | iii. 296 |
| —— *and* Davies - - | iii. 333 |
| —— *and* Doe - | ii. 319. 392 |
| *Jones* v. Dyke, 71. | 369; ii. 48. 51; App. 9 |
| Jones *v.* Edney, 40. | 45. 47. 56. 75. 221 |
| —— *and* Edwards - | iii. 297 |
| —— *and* Egerton - | ii. 30 |
| —— *and* Goodright - | ii. 328 |
| —— *and* Goodtitle, | ii. 325; iii. 26. 42 |
| —— *v.* Groobham - | iii. 282 |
| —— *and* Hatton - - | - ib. |
| —— *and* Hodges - | 122 |
| —— *v.* Jones, | ii. 113. 448; iii. 433 |
| —— *and* King, | ii. 458. 478. 537, 538, 539 |
| —— *v.* Littledale - | 83 |
| —— *v.* Lewes - - | iii. 146 |
| —— *v.* Marsh - - | iii. 294 |
| —— *and* Matthews, | iii. 153. 480 |
| —— *and* Moggridge - | 374 |
| *Jones* and *Morphett* - | 200 |
| Jones *v.* Mudd - - | iii. 116 |
| —— *v.* Nanney, 23, | n. 26. 38, 39. 71 |
| —— *v.* Newman - - | 250 |
| —— *v.* Powles - - | iii. 417 |
| —— *v.* Price - - | 410 |
| —— *v.* Purefoy - - | iii. 284 |
| —— *and* Reilly - - | 317 |
| —— *v.* Ryde - - | ii. 420 |
| —— *v.* Sheriffe - - | 269 |
| —— *v.* Stanley - - | iii. 448 |
| —— *v.* Thomas - - | iii. 492 |
| Jones *v.* Smith - - | 311 |
| Jordan *and* Barnfather | iii. 223 |
| —— *v.* Savage - | ii. 216. 219 |
| —— *v.* Sawkins - - | 237 |
| —— *and* Shenton - | 354 |
| —— *and* Whitbread, | ii. 86. 95; iii. 471 |
| Jourdain *v.* Wilson | ii. 478, n. |
| Jourdon *and* Alam - | iii. 484 |
| Joy *v.* Joy - - - | ii. 111 |
| Joynes *v.* Statham - | 225 |
| Jukes *and* Maidment - | ii. 133 |
| Julian *and* Rayner - | 361 |


K.


| | |
|---|---|
| Kain *and* Shepherd - | 549 |
| Kancy *and* Watts, or Mutts, | iii. 177 |
| Kaye *and* Tolson - - | ii. 320 |
| —— *v.* Waghorn - - | 245 |
| Keane *v.* Roberts - | iii. 179 |
| —— *and* Wilson - - | 336 |
| Kearney *and* Hughes, | iii. 120. 195, 196 |
| Kearsley *and* Morris - | ii. 5. 79 |
| Keatley *and* Shepherd, | ii. 3, 4. 79. 148, 149 |
| Keeble *and* Wildigos - | iii. 394 |
| Keech *v.* Hall, | ii. 141; iii. 280 |
| —— *v.* Sandford - - | iii. 231 |
| Keene *and* Awbry - | ii. 420 |
| —— *v.* Stukeley - - | 438 |
| Keen *v.* Deardon, | ii. 196. 325; iii. 44 |
| Kellick *v.* Flexny - | iii. 225 |
| Kelly *v.* Powlet - - | 252 |
| Kelsack *v.* Nicholson - | ii. 110 |
| Kelsall *v.* Bennett - | iii. 492 |
| *Kelly* and *Brown* - | 359. 361 |
| Kemble *and* Harris - | 8 |
| Kemeys *and* Denn - | iii. 24 |

Page
Kemp *and* Hawkins, 376; iii. 174
—— *and* Robson - iii. 482, 483
*Kempson* and *Aspinall* - iii. 65
Kemys *v.* Proctor - 189
Kendall, *ex parte* - - 87
—— *v.* Beckett - - 364. 446
Kendar *v.* Milward - iii. 271
Kendray *v.* Hodson - 83
Kenn *v.* Corbett - - ii. 187
Kennedy *and* Burdon, ii. 384; iii. 336
—— *v.* Daly, 102; ii. 382; iii. 446. 449
—— *v.* Green, ii. 67. 115; iii. 428. 455. 457. 474
—— *v.* Wenham - - 478
*Kennett* and *Johnson* - iii. 161
Kenney v. Wenham - 356
Kenny *v.* Browne, iii. 437. 476
Kent *and* Bond - - iii. 191
—— *and* Dunch - - iii. 153
—— *and* Wirdman - 489
Kentish *and* Mortlock - ii. 191
Kenworthy *v.* Schofield, 168. 170. 174. 183. 189. 193
Kenyon (Lord) *and* Myddleton - - - iii. 296
—— *v.* Sutton - - 284
Keppel *v.* Bailey, ii. 471. 477. 494, 495, n., 500
*Ker* v. *Clobery* - 313. 521. 523
Kerrison *v.* Dorrien - iii. 287
Ketsey's case - - iii. 222
Kett *and* Back - - 286
Keymis *and* Jenkins, 325; iii. 307
Keys *and* Vernon - 7
—— *v.* William - - iii. 485
Kidby *and* Luther - 284
Page
Kidd *and* Roake, ii. 166. 177. 187
Kidder *and* Rider, iii. 256. 260
—— *v.* West - - ii. 537
Kidgell *and* Brewster, ii. 481. 485
Kidwell *and* Irons - iii. 373
Killingbeck *and* Poulter 145
Kilpin *v.* Kilpin - - iii. 264
Kilvington *and* Barstow 264
Kilmaine (Lord) *and* Lanesborough (Lady) - iii. 491
Kinder *and* Coles - ii. 544
Kine *v.* Balfe - - 200
King (The.) *See* Rex.
—— *v.* Brewer - - iii. 296
—— *and* Cotton - - iii. 288
—— *and* Cox - - ii. 192
—— *and* Dawes - - 5
—— *v.* Denison - - iii. 265
—— *ex parte* - - 311
—— *v.* Hamlet - 447; App. 16
—— *v.* Holland - - iii. 221
—— *v.* Jones, ii. 458. 478. 537, 538, 539
—— *v.* King, 372; ii. 39. 41; iii. 145
—— *v.* Moody - - ii. 60
—— *and* Noble - - ii. 525
—— *and* Raffety - ii. 327, 328
—— *and* Smith, ii. 325; App. 36
—— *v.* Turner - 322; ii. 195
—— *v.* Wightman - 486
Kingdome *v.* Boakes - iii. 484
—— *v.* Bridges - - iii. 268
—— *and* Hayes - - iii. 248
Kingdon *v.* Nottle ii. 458, 459
Kingscote *and* Elmore - 167
*Kingsley* v. *Young* - ii. 190
Kingston (Duchess of) *and* Meadows - - iii. 493

Page

Kinnaird *v.* Lord Dean, 3. 5, n.
Kinsman *v.* Kinsman, iii. 459. 462
Kirk *v.* Clark - - iii. 298
—— *v.* Webb - iii. 258. 271
Kirkham *v.* Smith - 327
Kirtland *v.* Pounsett, 13. 377; ii. 51
Kirton *and* Wren, 35. 109; iii. 232
Kirwan *v.* Blake, 116. 120. 422
—— *and* Bowen - - 444. 462
—— *and* Hill - 116, 117. 119
Kitchin *v.* Bartch - ii. 256
Klinitz *v.* Surry - - 75
Knatchbull *v.* Grueber, 340. 507; ii. 16, 17. 20, 21
Knight *v.* Creckford, 165. 181. 377; ii. 436
—— *v.* Ellis - - App. 50
*Knight* and *Morris* - 373, n.
Knight *and* Hipwell, 402. 424, 425. 433
—— *v.* Waterford (Marquess of) - - iii. 482, 483
Knipe *and* Aveling - iii. 247
Knollys *v.* Alcock - 289
—— *v.* Shepherd - 291
Knott, *ex parte*, iii. 12. 419, 420. 464, 465. 467
—— *v.* Wise - - ii. 111
Knowel *and* Harcourt - iii. 424
Knubley *and* Wilson - ii. 540

L.

Lacey, *ex parte*, iii. 225. 239, 240
Lacon *v.* Mertins, 200. 206. 306; iii. 115. 183
Lacy *and* Sowarsby - iii. 156
Lade *v.* Holford - - iii. 25
—— *v.* Lade - - iii. 256

Page

Laindon (Inhabitants of) *and* Rex - - - 218
Laing *and* Hagedon - 67. 466
*Lake* v. *Craddock* - - iii. 248
Lake (Lord) *and* Flight, App. 23
—— *v.* Gibson, 138. 140; iii. 247, 248
Lamas *v.* Baily, - iii. 252, 253
Lambard *and* Stevenson ii. 508
Lamb *and* Rex, ii. 411; iii. 73
Lambe *and* Williams - iii. 495
Lambert *v.* Bainton - iii. 230
Lambert *and* Greene - iii. 87
—— *v.* Rogers - - ii. 109
Lamplugh *v.* Lamplugh, iii. 262, 263, 264, 265
—— *v.* Hebden - - 362
Lampon *v.* Corke - iii. 193, n.
Lanauze *and* Buckley - iii. 474
Lander *and* Hitchins - ii. 45
Landon *v.* Morris - iii. 460
Lane *v.* Dighton - - iii. 271
—— *v.* Goudge - - 258, n.
—— *and* Lewis - - iii. 256
—— *and* Lowndes, 339. 520. 536. 543
—— *and* Pearson - ii. 171
Lanesborough (Lady) *v.* Kilmaine (Lord) - iii. 491
Lang *v.* Gale - - 402, 403
Langfield *v.* Hodges - iii. 260
Langford *v.* Pitt 284. 305. 416
—— *and* Prestage, iii. 230. 233
Langham *v.* Nenny - App. 69
—— *and* Prodgers, iii. 297, 298
Langlands *and* Blacket iii. 489
Langley *v.* Brown - 269
—— *and* Lawson ii. 371. 376
—— *and* Miles - - iii. 470
*Langley* v. *Lord Oxford*, iii. 154, n. 181

Page

Langstaffe *and* Scott - 350
Langstroth *v.* Toulmin - 73
Langton *and* North - iii. 87
—— *v.* Tracey - - iii. 286
Lansdown *v.* Elderton - 105
—— *v.* Lansdown 386; ii. 43
Lansdowne *v.* Beauman 102
Lant *v.* Peace - - ii. 447
Lassels *v.* Catterton - ii. 545
Latey, *ex parte* - - iii. 193
Latham, *ex parte* - 440
—— *and* Willis - iii. 227
Latouche *v.* Lord Dunsany, iii. 370, n., 371
Laude *and* Lawson - 222
Laughton *and* Clifford - 531
Lautour, *ex parte* - iii. 423
Lavender *v.* Blackstone, iii. 295. 308
—— *and* Spittle - 83
—— *v.* Stanton - iii. 156
Laver *and* Hall - - ii. 13
Lawder *and* Doe - - 378
Lawes *v.* Bennet - - 292. 303
Lawrence *v.* Halliday - 123
—— *and* Whichcote - iii. 225. 232. 244
Lawrenson *v.* Butler 346. 495
Lawson *v.* Langley, ii. 371. 376
—— *v.* Laude - - 222
Layer *and* Cotter - 287, 288
Laythoarp *v.* Bryant, 162. 171; ii. 101
Lea *v.* Barber - - 159
—— *and* Doe - - 221
—— *and* Osborn - iii. 429
Leach *v.* Dean - - iii. 300
—— *v.* Mullett - - 52
Leadbeater *and* Dobson, iii. 490
Leake *v.* Morrice - 199. 204
Leakins *v.* Clissel - - 4

Page

Leatt *and* Stubback - ii. 189
Le Bret *and* Hodgson - 183
Le Breton *and* Hargrave, ii. 47; iii. 453
Lechmere *v.* Brasier - 113. 421
*Lechmere* v. *Earl of Carlisle*, iii. 274, 275, 276
Lechmere *v.* Lechmere, App. 62
—— (Lord) *and* Lewis, 356. 413. 432. 438
—— *and* Speldt - - iii. 431
Lee *v.* Anson - - ii. 45
—— *v.* Arnold - - ii. 471
—— *and* Cotton - 160
—— *v.* Hemingway - 467
—— *v.* Markham - iii. 481
—— *v.* Morehead - 118
—— *v.* Munn - ii. 52; iii. 121
—— *and* Oxley - - iii. 302
—— *v.* Risden - - 145
*Lee* and *Stanley* - App. 50
Lee *and* Tapp - 6; iii. 428, n.
—— *and* Wallwyn, ii. 113; iii. 423. 489, 490
Lediard *and* Croome, 228. 230. 513; iii. 144
Leech *v.* Leech - iii. 285
Lees *v.* Burrows - - 85
—— *v.* Nuttall - - 73
Lefebury *and* Winged, 275. 351; iii. 440
Lefroy *v.* Lefroy - - 123. 126
Legal *v.* Miller - - 243, 244
*Legard* v. *Johnson* - iii. 293
Legate *v.* Sewell - - 327
Legeyt *and* Church - ii. 48
Legge *v.* Croker - - 537. 550
Leicester's (Earl of) case, App. 72
Leigh (Lord) *and* Forrester, iii. 251
—— *and* Lutkins - - iii. 208

Page
Leigh *and* Oswald - App. 69
—— *v.* Winter - - iii. 308
*Leigh* and *Smith* - - iii. 140
Leighton *and* Carleton, ii. 43; iii. 430
—— *and* Ovey - iii. 493, 494
Leland *v.* Griffith - 120. 123
Leman *and* Dillon - ii. 320
—— *ex parte* - - iii. 423
—— *v.* Whitley - - iii. 259
Lempster (Lord) *v.* Pomfret (Lord) - - - ii. 111
Lench *v.* Lench, iii. 256. 258, 259. 271
Lenham *v.* May - 391; ii. 430
Le Neve *and* Norris, iii. 244. 454
—— *v.* Le Neve, iii. 372. 453, 454; App. 77
Lennon *v.* Napper - 340. 407
Lennox (Lord George) *and* Storey - - - iii. 482
Leonard *v.* Leonard, 386; ii. 43
Lesley's case - - iii. 231
L'Estrange *and* Molony iii. 238
Lesturgeon *v.* Martin - ii. 18
Le Tavernier *and* De Tastet, iii. 319
Lettson *and* Collison - ii. 495
Lever (Sir Darcy) *v.* Andrews, iii. 256
—— *and* Jackson - 440. 475
—— *and* Page - - iii. 490
Levy *v.* Haw - - 367
—— *v.* Lindo - - 432
Lewes *v.* Fielding - iii. 494
—— *v.* Hill - - iii. 275
Lewin *v.* Guest, 519; ii. 79; iii. 143. 145
Lewis, *ex parte*, 91; iii. 226, n.; App. 25
Lewis *and* Baxter - 375
—— *v.* Bryan - - 346
—— *and* Campbell, ii. 458, 459. 539
—— *v.* Campbell - ii. 458
—— *and* Hutton - - App. 21
—— *and* Jones - - iii. 146
—— *v.* Lane - - iii. 256
—— *v.* Lord Lechmere, 356. 413. 432. 438
—— *v.* Loxham - - iii. 137
—— *v.* Madocks - iii. 272
Liddard *and* Stead - 372
Lifford's case - - ii. 130
Lightbody *and* Goodwin, 274, 275. 418
—— *and* Lubin - - ii. 37
Lightburne *v.* Swift - 102
Lill *v.* Robinson - - iii. 140
—— *and* Stadt - - 160
Lilly *v.* Osborne - - iii. 268
Lincoln *and* Darwin, App. 23. 28
Lindigren *and* Blackbeard, 106
Lindo *and* Levy - - 432
Lindsay *v.* Lynch, 168. 202. 210
—— *v.* Talbot - - iii. 481
Lingood *and* Sir J. Barnardiston - - - 445
Linwood, *ex parte* - iii. 226
Lippingwell *and* Inge - 248
Lister *and* Dale - - 493
—— *and* Foxcraft - 200
*Lister* and *Goodwin* - 321
Lister *v.* Lister - - iii. 240
—— *and* Sikes - - 275. 321
Litchfield *and* Hanbury 493
—— (Lord) *and* Hodges, 369. 371; ii. 51, 52, 53, 54. 86. 405
Little, *ex parte* - - - 64

Page
Littledale *and* Jones - - 83
Littler *and* Clynn - - 289
Liverpool (Corporation of) *and* Bolton - - iii. 482
*Liversidge* and *Bellamy* ii. 103
Livins *and* Shelton - - 40
Llandaff (Lord) *and* Ellard, 337. 341; ii. 42
Llewellyn *and* Evans - 387. 443
Llewellyn *v.* Mackworth, ii. 324. 328
—— *and* Williams - iii. 229
Lloyd, *ex parte* - 62; iii. 434
—— *v.* Baldwin - iii. 154. 156
—— *v.* Collett, 408. 411. 432; iii. 130
—— *v.* Crispe - ii. 3. 152
—— *v.* Griffith - 110; ii. 453
—— *v.* Johnes - - 102
—— *v.* Lloyd - - 405
—— *v.* Read. *See* Loyd, iii. 265. 268
—— *and* Rippingall, 44. 406. 433; ii. 11. 85
—— *and* Smith, 78. 358, 359. 522
—— *v.* Spillet - iii. 256, 257
—— *v.* Tomkies - - ii. 512
Loaring, *ex parte* - - iii. 196
Lock *and* Burrowes, 7. 8. 14. 440; iii. 147. 429
Lockey *v.* Lockey - 200
Lockington's case - ii. 269
Lockley *and* Attorney-General, App. 44
Lockyer *and* Dickenson iii. 177
Locock *and* Staynrode - ii. 544
Lodge *and* Buck - - 359
—— *v.* Lysely - - ii. 388
Loggon *and* Pickett - 444
Lomax *and* Hayward - ii. 432

Page
Londen *and* Vizod - ii. 219
London (City of) *and* Dias - 39
—— (City of) *v.* Richmond, 438; ii. 507
*London* (*City of*) v. *Smith Treasurer of the W. I. D. C.* - - - iii. 254
London *and* Tendring - 346
Long *v.* Collier, 531; ii. 187; iii. 143
—— *v.* Clopton - - ii. 432
—— *v.* Fletcher - - 484
—— *v.* Harrington - ii. 46
—— *and* Reyneli - ii. 104
Longchamps *v.* Fawcett 250
Longdale *and* Vizard - ii. 219
Longstaff *v.* Meagoe - - 62
Lopus *and* Chandelor - - 3
Lord *v.* Lord - - 131
—— *v.* Stephens - 480; iii. 133
Lougher *and* Williams - ii. 458
Loveday *and* Abdy - iii. 425
Loveland *and* Warburton, iii. 282. 356. 364, n., 365, n.
Loveridge *v.* Cooper - iii. 432
Lovell *v.* Hicks, 344. 383. 395; ii. 430
Low *v.* Barchard - - 443
—— *and* Charlton, iii. 76. 95. 419
—— *and* Smith - - iii. 468
Lowe *v.* Manners - ii. 37
—— *and* Roe - - 328
—— *v.* Swift - - 215
Lower *and* Weal - - 326
Lowes *and* Green - iii. 153
—— *v.* Lush, 274; ii. 179. 189. 208
Lowndes *v.* Bray, 377; ii. 55. 190
—— *v.* Lane, 339. 520. 536. 543

Page

Lowten *and* Parkhurst - iii. 482
Lowther (Sir James) *v.* Lady Andover - 427; iii. 98
—— *v.* Carrill - - 184
*Lowther* v. *Carleton*, iii. 424. 448, 449, n., 456
Lowther (Lord) *and* Gaskarth, 165. 308; iii. 131
—— *v.* Lowther, 440; iii. 178. 225
Loxham *and* Lewis - iii. 137
Loyes *v.* Rutherford - 540
Lubin *v.* Lightbody - ii. 37
Lucas, *ex parte* - - 92. 130
Lucas *v.* Bond - - 317
—— *and* Bramwell - iii. 483
Luffkin *and* Doe, iii. 441. 473
Lugar *and* Webb, iii. 468. 474
Lugg *v.* Willie - - 311
Lukey *v.* O'Donnell, 441; iii. 129
Lumley *and* Balmanno, 495; ii. 36. 161
—— *v.* Reisbeck - 314
—— *v.* Wilkinson - iii. 269
—— *and* Lowes, 274; ii. 179. 189. 208
Luther *v.* Kidby - - 284
Lutkins *v.* Leigh - - iii. 208
Lutwych *v.* Winford - 101
Luxton *v.* Robinson - ii. 55
Lyddall *v.* Weston, ii. 183. 186
Lyford and Swannock - iii. 75
Lynch *and* Burnett - 65
—— *and* Lindsay, 168. 202. 210
—— *and* Wilkins - iii. 75
Lynes *v.* Doe - - 487
Lynn *v.* Chaters - - iii. 195
Lyon *and* Eaton - - 255
Lysely *and* Lodge - ii. 388
Lysney *v.* Selby, 5, 6. 390; ii. 44. 141. 426

Page

Lyster *v.* Dolland, ii. 384; iii. 248
Lytton *v.* Lytton - ii. 327

M.

Maberly *v.* Robins, ii. 203; iii. 125
Macartney *v.* Blackwood, iii. 128
Macclesfield (Earl of) *v.* Blake - - - 127
M'Cann *v.* Forbes, 79. 120; iii. 98
—— *v.* O'Farrell - 119
M'Culloch *v.* Cotbach - 126
M'Dermott *and* Murley 47
Macdonald *v.* Hanson - ii. 153
Macdonnell *and* Robinson, ii. 445
Macghee *v.* Morgan - 443
Machell *v.* Clarke - ii. 291
Machin *and* Hickford - ii. 392
Mackenzie *and* York Buildings Company, iii. 225. 227. 232. 240. 244.
—— *and* Neale - 344; iii. 318
Mackintosh *v.* Barber - 95
—— *v.* Townsend - iii. 249, n.
*Macklew* and *Agar* - 466
Macklew *and* Causton - ii. 393
Mackrell *v.* Hunt, 112; ii. 103; iii. 106
Mackreth *and* Fox, iii. 225. 242
—— *v.* Marlar - - 427
—— *v.* Symmons, iii. 183. 188. 190. 192. 197. 204. 215. 218. 419
—— *and* Waring - ii. 141
Mackrill *and* Cordwell - iii. 480
Mackworth *and* Llewellyn, ii. 324. 328
Maclachlan *and* Templer, ii. 417
Maclean *v.* Dunn - 191
M'Lain *and* Hoadly - 172

Page
*M'Leay* and *Edwards*, 382. 387, 388. 396, 397; ii. 430
Macleod *and* Drummond, iii. 179
*Macmahon* and *Gennor* - 269
Macnamara *v.* Arthur, 367; ii. 55
—— *and* Blennerhasset, 117; iii. 115
—— *and* Rigby (6 Ves. jun. 117) 126
—— *and* Rigby (6 Ves. jun. 466) 127
—— *and* Rigby (6 Ves. jun. 515) 101
—— *v.* Williams - - 362
Macfarlan *v.* Moses - 368
Mac Neil *and* Morris - 380
Mac Queen *v.* Farquhar, 507, 508; ii. 185; iii. 130. 141. 477
Maddeford *v.* Austwick - 442
Maddin *and* Pelly - iii. 256
Maddox *v.* Maddox - iii. 453. 481
—— *and* Orrell - - ii. 328
Madison *v.* Andrews, iii. 260; App. 71. 74
Madocks *and* Lewis - iii. 272
Magdalen College case, iii. 285
Magee *v.* Atkinson - 83
Magennis *v.* Fallon, 112. 366. 421, 422. 425. 537, 538. 545; ii. 23. 30. 40. 210; iii. 126. 134. 300.
Magrane *v.* Archbold, 343. 354
Maguire *v.* Armstrong - iii. 444
—— *and* Dowling, 178. 334; iii. 223
Maidment *v.* Jukes - ii. 133
Main *v.* Melbourn, 75. 207. 413
Maitland *and* Farguson 444
Maitland *v.* Wilson - iii. 491

Page
Malachy *v.* Soper - ii. 47
Malcolm *v.* Charlesworth, iii. 357. 427
Malden *and* Menill - iii. 426
Malins *v.* Freeman, 36. 38. 343
Maling *v.* Hill, ii. 168; iii. 142
Mallom *v.* Bringloe - iii. 224
Malpas *v.* Ackland - iii. 474
Maltby *v.* Christie - 71
—— *and* Meux - - iii. 469
Mammon *and* Coote - iii. 454
Man *and* Drury - - ii. 437
Manners *and* Lowe - ii. 37
Manning, *ex parte*, iii. 100. 106
—— *and* Baylis - - ii. 133
—— *and* Doe - - iii. 287
Mansell *v.* Mansell - iii. 440
Manser's case - - ii. 543
Mansfield's case - - ii. 216
Maple *v.* Doe - - ii. 64
Mapes *and* Foster - ii. 511
Marbury *and* Tarback - iii. 308
Marfill *v.* Rudge - - 107
Margareson *v.* Saxton, iii. 314, n.
Margravine of Anspach *v.* Noel, ii. 13. 38; iii. 145
Markant *and* Halcot - iii. 271
Markham *and* Lee - iii. 481
Marlar *and* Mackreth - 427
Marlborough (Duchess of) *and* Brace, ii. 392; iii. 35. 420. 492
—— (Duke of) *and* Neate, ii. 394
Marlow *v.* Smith, ii. 166, 167. 193
Marriot *and* Spencer - ii. 515
Marsh, *ex parte* - - iii. 227
—— *and* Brett - - ii. 432
Marsh *and* Jones - - iii. 294
—— *and* Rex - - 31. 34

Page
Marsh *and* Wade - 316, n.
Marshall *and* Butterfield, ii. 522
—— *v.* Collett - - iii. 427
—— *v.* Frank - - iii. 489
—— *and* Nind - - ii. 529
Marsham *and* Greswold, ii. 385; iii. 463
Martin *and* Botting - 138
—— *and* Burrough - 12
—— *and* Doe - 10; iii. 308
—— *v.* Lesturgeon - ii. 18
—— *v.* Martin - - iii. 299
—— *v.* Mitchell, 161. 330, 331. 333. 337
—— *and* Ormsby, *in re* 94
—— *v.* Smith - 375; ii. 55
—— *and* Style, or Styles, iii. 459
—— *and* Watts - - 126
Martinez *v.* Cooper - iii. 12
Martyn *and* Blakeston - ii. 408
Martyr *and* Doe - iii. 287. 297
—— *and* Powell - iii. 98. 141
Marwood *and* Small - iii. 174
—— *v.* Turner - - ii. 267
Marye *and* Darkin - 107
Maryon *v.* Carter - 318. 406
Mascall *and* Norton - 351
Mason *v.* Armitage, 36. 187. 193. 343
—— *v.* Corder - 485; ii. 152
—— *and* Johnson - ii. 437
Massey *and* Dawson, iii. 233. 484
—— *and* Roberts 79; iii. 98
Massy *v.* Massy - - 121
Mathers *and* Pember, 42. 64. 260. 270. 313; iii. 485
Matthews *v.* Dana, 357; ii. 36
—— *and* Egerton - 160
—— *v.* Hollings - ii. 420. 426
Matthews *v.* Jones iii. 153. 480
Matthews *and* Moss, 65. 80; ii. 35
—— *and* Sainsbury 143. 154
—— *v.* Stubbs - - 101
—— *v.* Wallwyn - 312
*Mattock* v. *Hunt* - - 482
Maule *and* Crawshaw, iii. 249, n.
Maund *and* Watkins - iii. 319
Maunde *and* Walter, 11; ii. 162
Maundrell *v.* Maundrell, iii. 47. 75. 84
May *and* Iggulden 255, 256
—— *and* Lenham, 391; ii. 430
—— *and* Newhan - 365
Mayer *v.* Duncombe - ii. 110
Mayer *and* Wright - iii. 482
Mayfield *v.* Wadsley, 144, 145. 159
Mayhew *and* Bennet - iii. 271
Mayhew *and* More, iii. 448. 491, 492
Maynard *v.* Clare - ii. 48
Maynard's (Serj.) case, ii. 419, 420
Mayon *v.* Nixon - - ii. 116
Mayor *v.* Gowland - 289
Mayor *v.* Steward - ii. 483
Mayoss *and* Spurrier - iii. 128
Mead *v.* Norbury (Lord), ii. 179
—— *and* O'Neal - iii. 208
—— *v.* Lord Orrery, iii. 178. 180
Meadows *v.* Duchess of Kingston, iii. 493
—— *v.* Tanner - - 34
Meagoe *and* Longstaff - 62
Meale *and* Seagood, 166. 175. 205. 208
Mease *v.* Mease - - 218
Mechelem *v.* Wallace, 135, n. 159
Meder *v.* Birt - - iii. 493
Medlicott *v.* O'Donel, 394. 446; ii. 326; iii. 244

Page
Medlicott *and* Toole - 201
Meers *and* Herne - - 444
—— (Sir Thomas) *and* Lord Stourton - - 420
Melbourn *and* Main, 75. 207. 413
Melbourne (Lord) *and* Crompton, ii. 431
Meller *and* Paine, 411. 423. 468; - ii. 25. 133. 160
Mellish *v.* Mellish - 258, n.
—— *v.* Motteux - - 545
Melsington (Lord) *and* Rosamond, 267
Mendham *and* Boswell, ii. 185. 190
Menill *and* Malden - iii. 426
Mercean *and* Preston - 219
Merceron *v.* Dowson - ii. 508
Meredith *and* Goodtitle 285
—— *and* Woodhouse - iii. 225
Meres *v.* Ansell - - 218
Merest *and* Morse - 467
Merry *v.* Abney - - iii. 454
Merryman *and* Elliott, iii. 153. 159. 161. 177. 181
Mertens *v.* Adcock - 65
Mertins *v.* Joliffe, iii. 448. 474. 486
—— *and* Lacon, 200. 206. 306; iii. 115. 183
Mesnard *v.* Aldridge - 43
Metcalf *v.* Clough - 75
—— *v.* Scholey - - ii. 384
Metcalfe v. Pulvertoft, iii. 302. 307. 460
Meux *v.* Maltby - - iii. 469
Meynell *v.* Garraway - iii. 448
Michaux *v.* Grove - iii. 223
Micklem *and* Doe - 258, n.
Middlemore *v.* Goodale, ii. 458, 459
Middleton *and* Lord Cornbury, ii. 487
Page
Middleton *and* Crosby - 269
Middleton (Lord) *v.* Eyre, 168, n.
—— *v.* Hallett - ii. 99. 541
—— *and* Harding - 119
—— *and* Hobson - ii. 520
—— *and* Packhouse - ii. 487
—— (Lord) *and* Pullen 328
—— *v.* Spicer - - 276
*Middleton* (*Lord*) v. *Wilson*, 168
*Midgeley* and *Bradshaw* iii. 130
Mighell *and* Gregory, 200. 465
Milbanke *and* George, iii. 298. 434
Mildmay *v.* Hungerford 538
—— *v.* Huntington - ii. 104
—— *v.* Mildmay - - iii. 491
Miles *v.* Dawson - - ii. 116
—— *v.* Langley - - iii. 470
—— *and* Thomson, 416. 482; ii. 100
Mill *and* Hiern - - iii. 469
—— *and* Portman, 504. 528; ii. 32. 37
Millard's case - iii. 423. 491
Miller *v.* Blandist - 203. 216
—— *and* Doe - - 378
—— *and* Franklin - 405
—— *and* Legal - - 243, 244
—— *and* Rex - - 256
Milligan *v.* Cooke - 493
Millington *and* Williams 73
Mills *v.* Auriol - - ii. 540
—— *and* Crosskey - 78
—— *v.* Harris - - 65
—— *and* Milner - - 279. 305
—— *v.* Oddy - 54. 59. 74
Milner *and* Curwyn - 445
—— *v.* Horton - - ii. 532
—— *v.* Mills - - 279. 305
Milnes *v.* Branch ii. 479. 481
—— *v.* Gery - - 465
Milward *and* Berrisford, iii. 428

Page

Milward *and* Kendar - iii. 271
—— *v.* Earl Thanet - 409. 426
Minchin *and* Whitcomb, iii. 225
Minet, *ex parte* - - 160
Minor, *ex parte* - - 104. 469
Mitchell *and* Boone - ii. 444
Mitchell *and* Buckle - iii. 302
—— *and* Goffe - - 120
—— *v.* Hayne - - 76
—— *and* Martin, 161. 330, 331. 333. 337
—— *v.* Neale, ii. 166. 437, 438
—— *and* Richardson - iii. 489
Mitford *v.* Mitford - iii. 476
Mitton *and* Roe - iii. 290. 296
Moccatta *v.* Murgatroyd, iii. 479
Moggridge *v.* Jones - 374
Molesworth *v.* Opie - 127
Moleyn's (Sir John De) case, ii. 392
Molineux, *ex parte* - iii. 232
Mollett *v.* Brayne - 138
Molloy *and* Ellis - 115
Molony *v.* L'Estrange - iii. 238
Monck *and* Broome, 279. 305, 306, 307, 308
—— *v.* Huskisson - ii. 181
Monmouthshire Canal Company *v.* Harford - - ii. 376
Monnoux *and* Appowel ii. 471
Montague *and* Sir Thomas Harvey, iii. 461
—— *v.* Jeffries - - 290
Montesquieu *v.* Sandys, iii. 238
Montford (Lord) *and* Gibson, 279
—— (Lord) *v.* Lord Cadogan, iii. 434
Monypenny *v.* Bristow - 285
Moody *v.* King - - ii. 60
—— *v.* Walters - - ii. 170
Moore *v.* Bennett - iii. 474

Page

Moore *v.* Edwards - 197
—— *v.* Foley - - 255
—— *and* Frere, iii. 80. 217. 422
—— *and* Jennings - iii. 454
*Moore* and *Pollexfen*, 273; iii. 130. 183, n. 206. 211
Moore *and* Stokes, 168. 181. 184
—— *and* Walker - ii. 49. 86
—— *and* Ward - - 284
—— *and* Wildgoose, iii. 394, 395
Morant *and* Hicks - 10
More *v.* Mayhew, iii. 448. 491, 492
Morehead *and* Lee - 118
Morgan, *ex parte*, iii. 226, n. 239
—— *and* Baker - - 102
—— *and* Barksdale - 532
—— *and* Charlwood - ii. 133
—— *and* Corder - - ii. 189
—— *and* Goodtitle, ii. 44. 426; iii. 41
—— *and* James - - 438
—— *and* M'Ghee - 443
—— *and* Pearson - iii. 428
—— *and* Randall, iii. 252. 294
—— *v.* Shaw - 358; ii. 36
—— *v.* Tedcastle - 533
—— *and* Walters - 197
—— *and* Wynn - 416; iii. 143
Morison *v.* Turnour - 181. 184
Morony *v.* O'Dea - 463
*Morphett* v. *Jones* - 200
Morrel *and* Woodman, iii. 263. 266
Morret *v.* Paske - - ii. 432
Morrice *v.* Bishop of Durham, 124
—— *and* Iseham - iii. 2
—— *and* Leake - - 199. 204
Morris *and* Barber - 318
—— *v.* Barrett - - iii. 248
—— *and* Bowen - - 83. 161
—— *v.* Clarkson - - ii. 193

Page
Morris *and* Doe - - iii. 280
—— *v.* Edgington - ii. 537
—— (*See* Norris) *v.* Howland.
—— *v.* Kearsley - - ii. 5. 79
*Morris* v. *Knight* - 373, n.
—— *and* Landon - - iii. 460
Morris *and* M'Neil - 380
—— *and* Lord Portmore 267
—— *v.* Preston - - 501
—— *v.* Stephenson - 331
—— *and* Staines, 64; ii. 435; iii. 137. 141. 146
—— *and* Twining, 29. 35. 36. 343. 442. 487, 488
Morse *v.* Merest - - 467
—— *v.* Faulkner, ii. 43; iii. 429, 430
—— *v.* Royal, 392. 394. 463; iii. 244, 245
*Morshead* v. *Frederick*, 129; App. 10
Mortimer *v.* Capper - 440. 474
—— *v.* Orchard, 201. 210; iii. 484
Mortley *and* Ramsbottom, 174. 178
*Mortlock* v. *Buller*, 96. 114. 186. 335. 344, 345. 384. 440. 442. 495. 497
—— *v.* Kentish - - ii. 191
Moses *and* Goodright - iii. 288
—— *v.* Macfarlan - 368
Moss *v.* Gallimore - 315
—— *v.* Matthews, 65. 80; ii. 35
Mosse *and* Trevannian - iii. 491
Mostyn *and* Boardman - 212
Moth *v.* Atwood - - 463
Motivos *and* Simon, 78. 188. 192
Motteux *and* Mellish - 545
Moulton *v.* Hutchinson, App. 70
Mountain *and* Beaumont ii. 71

Pag
Mountford *v.* Catesby - ii. 510
—— *v.* Ponten - - iii. 314
—— *v.* Scott - - iii. 456
Moxon *and* Price - 125
Moyse *v.* Gyles - - iii. 247
Mudd *and* Jones - - iii. 116
Muggridge *and* Annesley, 76. 78; iii. 140
Mulgrave (Lord) *and* Sheffield, 420; ii. 167, 178
—— (Lord) *and* Phipps, App. 50
Mullett *and* Leach - 52
Mullins *v.* Townshend - 102
Mumma *v.* Mumma, iii. 262. 265, 266
Munden *v.* Collett - 312
Munn *and* Lee - ii. 52; iii. 121
Munnings *and* Phillips - ii. 363
Munns *and* Nervin, ii. 510. 526
Munt *and* Grant, 540. 542. 550
Murgatroyd *and* Mocatta, iii. 479
Murless *v.* Franklin - iii. 263
Morley *v.* M'Dermott - 47
Murray *and* Ayliffe - iii. 237
—— *v.* Currie - - 72
—— *v.* Palmer, 394, 395, 396. 444. 463, 464; iii. 245
Muschamp *and* Earl of Ardglasse - - - 445
Muscot *v.* Ballet - - ii. 537
*Musuem* (*Trustees of the British*) and *Duke of Bedford* ii. 496; App. 57
Musgrave *v.* Dashwood, 329, 330
—— *and* Saunders - 40
Musgrove *and* Bennet - iii. 301
—— *and* Robinson, 53. 91; ii. 7
Muskerry *v.* Chinnery - iii. 444
Mussell *v.* Cooke - 174
Mutts *v.* Kancie - - iii. 177
Myddleton *v.* Lord Kenyon, iii. 296

Page
Mynd *and* Hardwicke, iii. 155 175
Mynn *v.* Joliffe - 73 ; iii. 484

N.

Nairn *v.* Prowse, iii. 191. 194. 217. 289
Naish *and* Tourville, iii. 431. 447
Nangle *and* Duigeman - 118
Nanney *and* Jones, 23, n. 26. 38, 39. 71
Nannock *v.* Horton - App. 70
Napper *v.* Lord Allington, ii. 541
—— *and* Lennon - 340. 407
Nash *v.* Ashton - ii. 514. 542
—— *v.* Aston - - ii. 537
—— *v.* Coates - - ii. 179
—— *v.* Cocks - - ii. 115
—— *and* Goring, iii. 281 ; App. 73
—— *v.* Palmer - - ii. 512
—— *and* Shelley - 459
—— *v.* Turner - - ii. 102
Neal *and* Viney - - 159
Neale *and* Mitchel, ii. 166. 437, 438
—— *v.* Parkin - - 526
—— *v.* Mackenzie, 344 ; iii. 318
Neate *v.* Marlborough (Duke of) - - - ii. 394
Nedham *v.* Beaumont - iii. 281
Needham *and* Norden, iii. 335, n.
Needler *v.* Wright - iii. 437
Neesom *v.* Clarkson - ii. 115
Nelson *v.* Aldridge - 71
—— *v.* Nelson - 264. 530
—— *and* Reynolds, 366. 381. 434
—— *and* Smith - - 111
Nelthorpe *and* Harding, ii. 428, 429
Nelthrope *v.* Pennyman 130
Nenny *and* Langham - App. 69
Nepean *and* Doe, ii. 322. 345. 349
Nervin *v.* Munns - ii. 510. 526
Nettleship *and* Clerk - iii. 295
Neve (Le) *and* Norris - iii. 244
Neville *v.* Burton - ii. 109
Nevil *and* William 202. 216
Newall *and* Brown - 398
—— *v.* Smith - - iii. 143
Newark (Corporation of) *and* Attorney General - 111
Newbold *v.* Roadknight, 287. 305
Newcombe *and* Trower, 4. 51. 540
Newham *and* May - 365
Newland *v.* —— - iii. 333
—— *and* Fairclaim - iii. 393
Newlyn *and* Pearce - iii. 478
Newman *and* Day - 384. 439
—— *and* Farr - - iii. 179
—— *in re* - - - ii. 286
—— *and* Jones - - 250
—— *v.* Rodgers - - 414
—— *and* Thorn - - iii. 19
Newnham *and* Finch - iii. 460
Newport's (Andrew) case, iii. 297
Newstead *v.* Searles, iii. 288. 453
Newton *and* Baylis - iii. 266
—— *and* Hunt - - 460
—— *v.* Preston, iii. 256, 257, 258
—— *and* Waddy - - 533
—— *and* Wheeler - 331
Nias *v.* N. & E. R. Company, iii. 482
Nicholls *and* Chivall - iii. 372
—— *and* Hardingham - iii. 491
—— *v.* How - ii. 411 ; iii. 72
—— *and* Veal - - ii. 447
Nicholson *v.* Kelsack - ii. 110
Nicloson *v.* Wordsworth, 357 ; ii. 23. 33. 178 ; iii. 137. 174
Nicols *v.* Gould - - 448. 463
Nightingale *and* Farrer, 367. 482
Nind *and* Currie - iii. 281. 288

Page
Nind *v.* Marshall - ii. 529
Nisbitt *and* Scott - 122, 123
Nixon, *ex parte* - - 93
—— *v.* Mayon - - ii. 116
Noakes *and* Warwick - 74
Noble *v.* Durell - - 532
—— *and* Garnett - 89
—— *v.* King - - ii. 525
*Nodder* v. *Ruffin* - - 101
Noel *and* Anspach (Margravine of), ii. 13. 38; iii. 145
—— *v.* Bewley, ii. 196; iii. 431
*Noel* v. *Hoy* - - ii. 32
Noel *v.* Jevon - - ii. 215
—— *and* Ord - - 88. 344
—— *v.* Ward - - ii. 111
—— *v.* Weston - ii. 194. 437
Noke *v.* Awder - - ii. 459
Norbury (Lord) *v.* Mead ii. 179
Norcliffe *v.* Worsley - 327
Norden *v.* Needham, iii. 335, n.
Norfolk (Duke of) *and* Forth, ii. 383; iii. 336
—— (Duke of) *v.* Worthy, 45. 51. 56. 58. 78. 83. 368. 528. 540
Norman *v.* Foster - ii. 531
*Norman* and *Wood* - iii. 251
*Normanby* (*Marquis of*) v. *Devonshire* 180. 216, 351
Norris *and* Howland 502, 503. 521; iii. 98
—— *v.* Le Neve - iii. 244. 454
—— *and* Schneider - 180
North *v.* Langton - iii. 87
N.&E.R.Company *and* Nias, iii. 482
—— *and* Price - 114. 130. 529
Northumberland (Duke of) *and* Jervoise - ii. 166. 177
Northwick (Lord) *and* Tait 126
Norton *and* Crop, 347; ii. 28. 41; iii. 253. 258. 261
Page
Norton *v.* Herron - 83
—— *and* Hobs - - iii. 428
—— *v.* Mascall - - 351
Norwich (Bishop of) *and* Marquis of Townsend, 178. 184
Nosworth *and* Seymour iii. 491
Nosworthy *and* Basset, iii. 418, 491
Nott *v.* Hill - - 445. 462
—— *and* Johnson - ii. 542
—— *v.* Shirley - - 284
Nottle *and* Kingdon, ii. 458, 459
Nouaille *v.* Greenwood, ii. 134. 181. 210
Nourse *v.* Yarworth - iii. 92
Noyes *and* Hall - iii. 225. 244
—— *and* Pickering - ii. 116
Nugent *v.* Gifford iii. 178, 179
—— (Lord) *and* Goss, 220. 238. 241. 248
Nurton *v.* Nurton - iii. 177
Nutt *and* White - - 468
Nuttall *and* Lees - - 73

O.

Oakley *and* Burroughs, 358; ii. 15. 17. 39
Obeen *and* Hawkins - 321
O'Brien *and* Roche, 392. 394. 463; iii. 245
O'Connor *v.* Richards 117. 125
—— *v.* Spaight - - 237
Oddy *and* Mills - 54. 59. 74
Odea *and* Browne - iii. 436
O'Dea *and* Morony - 463
O'Dell *v.* Wake - - iii. 333
Odingsale *and* Coward - 413
O'Donel *and* Medlicott, 394. 446; ii. 326; iii. 244
O'Donnell *and* Lukey, 441; iii. 129

Page
O'Fallon *v.* Dillon - iii. 395
O'Farrell *and* M'Cann - 119
O'Flaherty *and* Hartly, ii. 408; iii. 419. 435
Ogbourne *and* Pitcairne, 243. 268
Ogilvie *v.* Foljambe, 42. 165. 167. 175. 184
Oglander *and* Harmood, ii. 324, 325
O'Gorman *v.* Comyn - iii. 298
O'Hara *v.* O'Neil - iii. 256
O'Herlihy *v.* Hedges, 168. 209, 210. 348
O'Kenden *and* Gould - 444
Oldfield *v.* Round - 32. 537
Oldin *v.* Samborne - iii. 233
Olive *and* Stephens - iii. 296
Oliver *v.* Court - - iii. 226
Omerod *v.* Hardman, 234. 420; iii. 155, n.
O'Neal *v.* Mead - - iii. 208
Oneby *v.* Price - - 321
Onley *v.* Gardiner - ii. 372
O'Neil *and* O'Hara - iii. 256
Onions *v.* Tyrer - - 288
Only *v.* Walker - iii. 485, 486
Opie *and* Molesworth - 127
Orchard *and* Mortimer, 201. 210; iii. 484
Ord *and* Brandling - iii. 448
—— *v.* Noel - - 88. 344
O'Reilly *v.* Thompson - 201
*Orford* and *Cholmondley*, iii. 434
Orlebar *v.* Fletcher, 273; ii. 152; iii. 333
Orme *v.* Broughton, 371; ii. 53. 458
Ormsby *and* Crofton, iii. 298, 440. 469
—— *and* Martin, *in re* 94
Ormond (Lord) *v.* Anderson, 166
O'Rourke *v.* Percival, 161; ii. 42
Orrell *v.* Maddox - ii. 328
Orrery (Lord) *and* Mead, iii. 178. 180
Ortread *v.* Round - 332, 333
Osbaldeston *v.* Askew, ii. 40 185; iii. 140
—— *and* Ewing - - iii. 183
Osborne *and* Daly - ii. 37
—— *and* Roll - - ii. 471
Osborn *v.* Lea - - iii. 429
—— *and* Lilly - - iii. 268
Osbourne *and* Rex - 256
Osgood *v.* Strode, iii. 290; App. 73
O'Shea *and* Roche - 120
*Ossulston* (*Lord*) *v. Deverell*, ii. 143
Oswald *v.* Leigh - - App. 69
Ovey *v.* Leighton iii. 493, 494
—— *and* Pritchard - 351. 465
Owen *v.* Davies, 163. 335; iii. 98. 115
—— *v.* Foulks (6 Ves. jun. 630, n. (*b*)) - - iii. 226
—— *v.* Foulks (9 Ves. jun. 348.) 127
—— *v.* Gooch - - 78
—— *v.* Parry - - 26
—— *v.* Thomas - - 169. 175
Oxenden *and* Doe - 250
*Oxenden* v. *Lord Falmouth*, iii. 118. 143
—— *v.* Skinner - ii. 179. 199
Oxenham *v.* Esdaile - iii. 183
—— and Esdaile, ii. 439. 441
Oxford (Lord) *v.* Alsop ii. 83
*Oxford* (*Lord*) and *Langley*, iii. 154, n. 181
Oxford(Lord) *v.* Lady Rodney, 310
Oxley *v.* Lee - iii. 302
Oxmantoun (Lord) *v.* Cowgill, 422; ii. 178

Page

Oxwick v. Brockett - 530
Oxwith v. Plummer - iii. 473

P.

Pace *and* Collingwood - ii. 233
Packhouse v. Middleton ii. 487
Page v. Lever - - iii. 490
—— *and* Robinson - 232. 248
*Page* and *Sharp* - - ii. 82
Paget v. Foley, ii. 331. 365. 379, n.
Paget *and* Wade - - ii. 540
Paignon *and* Heathcote - 443
Paine *and* Baker - - 269
—— v. Meller, 411. 423. 468; ii. 25. 133. 160
Paine *and* Bishop of Winchester, iii. 141. 458, 459
Pakenham's case - - ii. 473
Palmer *and* Cadell - App. 52
—— *and* Murray, 394, 395, 396. 444. 463, 464; iii. 245
—— *and* Nash - - ii. 512
Palsey v. Freeman - - 6
Papillon v. Voice - - ii. 110
Paradise *and* Andrews - ii. 537
Parker *and* Attorney-General, 256
—— *and* Baldey - - 514
—— v. Blythmore - iii. 495
—— v. Brooke - - iii. 480
—— *and* Colville iii. 288. 294
—— v. Frith - - 414
—— *and* Harvey - - 327
—— *and* Hoare - - iii. 489
—— *and* Propert - 181. 342
—— v. Staniland - - 143. 149
—— v. Serjeant - - iii. 288
—— *awd* Bishop of Worcester, iii. 423
Parkes v. White - - iii 225
—— *ex parte* - - iii. 190

Page

Parkhurst *and* Dormer - ii. 328
—— v. Lowten - - iii. 482
Parkin *and* Neale - 526
*Parkins* v. *Titus* - - ii. 437
Parks v. Wilson - - 354
Parlett *and* Tull - - 218
Parnther v. Gaitskill - 74
Parr v. Eliason - - iii. 297
Parrott v. Sweetland - iii. 789
Parry v. Carwarden - iii. 301
—— v. Deere - - ii. 445
—— v. Frame - - ii. 92
—— *and* Owen - - 26
—— v. Wright - - iii. 438
Parsons v. Freeman (Revocation), 481
—— *and* Conolly, 29. 30. 33
Parteriche v. Powlett - 218
Partington, *ex parte* - 93. 125
—— v. Woodcock - 315
Partridge v. Usborne - - 5
Paske *and* Morret - ii. 432
Paterson *and* Gibson - 408
Paton v. Brebner - - 495
—— v. Rogers, ii. 30. 32. 36; iii. 116
Pattrich *and* Collinson iii. 297
Patten *and* Alsop - 205
Patterson v. Slaughter - iii. 495
Patteson *and* Congleton (Mayor of) - - ii. 495
Paule v. Wilkins - - 275
Pawle v. Gun - - 83
Paxton *and* Cox - - iii. 272
Payne v. Cave 37, 38; App. 2
—— v. Compton - - iii. 496
—— v. Drewe - - iii. 335
—— v. Shedden - - ii. 371
Peace and Lant - - ii. 447
*Peachy's* (*Sir John*) *case* iii. 258
Peacock v. Burt - iii. 420, n.

Page
Peacock v. Evans 448. 451. 463
—— v Thewer - - iii. 312
Peahall and Hartley, ii. 180. 199. 479
Peake, *ex parte* - - iii. 193
Pearce v. Newlyn - iii. 478
—— v. Pearce - - 128
Pearman *and* Blount - ii. 446
—— *and* Ireson - - ii. 417
Pearson v. Morgan - iii. 428
—— v. Pearson - - 126
—— v. Pulley - - ii. 326
Peart v. Bushell - 83; iii. 176
Pechell v. Fowler - 90
Pedder, *ex parte* - - iii. 229
Pedley *and* Rex - - 85
Peering v. Ford - - ii. 110
Pegge *and* Doe - iii. 13. 39
Peles v. Jervies - - ii. 527
Pell v. Stephens - - 83
Pelly v. Maddin - - iii. 256
Pember v. Mathers, 42. 64. 260. 270. 313; iii. 485
Pembroke (Earl of) *and* Baden, 275; iii. 94
—— (Earl of) *and* Cator, ii. 430
Pembroke's (Earl of) case, iii. 94
Pendleton v. Grant - 252
Penhallow *and* Smartle iii. 263
Penhules *and* Treswallen 533
Penn *and* Cuff - - 218. 240
—— v. Glover - - ii. 512
Pennill v. Hallett - iii. 275, 276
Pennington v. Beechey iii. 493
Pennyman *and* Nelthorpe 130
Penpraze *and* Prior, ii. 382; iii. 429
Pensam *and* Humphreys iii. 281
Pentland v. Stokes - iii. 371
Penton *and* Davies - 354
Pepys *and* Jenkinson, 41. 223. 228
Percival *and* Foley 275. 291, n.
Percival *and* O'Rourke, 161; ii. 42
Percy *and* Crosby - ii. 100
Perkins *and* Biddle - ii. 182
—— *and* Biscoe, ii. 171; iii. 440
—— *and* Doe - - 12
Perrin *and* Western - iii. 148
Perry v. Edwards - ii. 512
—— *and* Freebody - 359
—— v. Phelips - - iii. 272
Peters v. Anderson - iii 432
Peterson v. Hickman, iii. 436, 437
Phelips *and* Perry - iii. 272
Philips *and* Bateman, 160. 372; ii. 115
—— v. Bridges - - ii. 267
—— v. Duke of Buckingham, 349
—— *and* Doe - - App. 21
—— v. Fielding - 374; ii. 55
—— v. Redhel - - iii. 474
—— v. Robinson - ii. 91
—— *and* Steele, 102; ii. 387. 393
—— *and* Swan - - - 7
Phillimore v. Barry - 183. 188
Phillips v. Bistolli - 37
—— v. Chamberlain - 258, n.
—— *and* Harvey - ii. 97
—— *and* Sir Harry Hicks, 438. 487
—— v. Munnings - ii. 363
—— v. Phillips - iii. 249, n.
—— *and* Lady Saltoun ii. 145
—— *and* Smith - - iii. 438
—— v. Vaughan - - ii. 432
Philpott and Fector, ii. 413; iii. 219
Phipps v. Lord Mulgrave, App. 50
—— v. Sculthorpe - 138
Phyn *and* Bell - iii. 249, n.
Pickard *and* Twynam - ii. 508
Pickering v. Dowson - 82. 549
—— v. Noyes - - ii. 116
—— v. Lord Stamford - ii. 220

Page
Pickersgill *and* Bartlett, 198; iii. 257. 260, 261
Pickett *v.* Loggon - 444
Pickford *and* Goodall - 128
Pierce *and* Acton - 351
—— *and* Basket - - iii. 2
—— *v.* Scott - - iii. 170
—— *and* Smith - - iii. 2
Pierson *and* Blemerhasset 245
Pigott *v.* Waller, 284, 285; App. 71
Pilling *v.* Armitage - iii. 485
Pilmore *v.* Hood - - 351. 390
Pimm *v.* Goodwin - ii. 328
Pinchard *and* Withers - 331
Pincke *v.* Curteis, 374. 411. 433. 520
Pippin *v.* Ekins - - 261
Pitcairne *v.* Ogbourne - 243. 268
Pitchers *v.* Edney - 77
Pitt *and* Berney - - 445
*Pitt* v. *Cholmondley* - iii. 88
—— *v.* Davis - - 321
—— *v.* Donovan - - ii. 47
—— *and* Langford, 284. 305. 416
—— *v.* Williams - - ii. 484
Pitts *v.* Edelph - - iii. 448
Plant *v.* James - - ii. 537
—— *and* Thursby - ii. 469
Platt *v.* Chester - 334; iii. 223
—— (Lady) *v.* Sleap - iii. 20
Playford *v.* Hoare, ii. 177; iii. 138
Pledwell *and* Thomas - ii. 394
Plowman *v.* Doe - - iii. 65
Plumb *and* Collins - ii. 496
Plummer *and* Oxwith - iii. 473
—— *and* Champion - 166
Plymouth (Mayor of) *and* Blatchford - - ii. 529
Plymouth (Earl of) *v.* Hickman - - - iii. 271
Page
Pocock *and* Drayson - iii. 175
Podmore *and* Birch - iii. 117
Pole *v.* Pole - - iii. 267
Pollard and Cood - iii. 188
*Pollexfen* v. *Moore*, 273; iii. 130. 183, n. 206. 211
Polybank *v.* Hawkins - iii. 20
Pomeroy, *ex parte* - 93
Pomfret (Lord) *v.* Lempster (Lord) - - - ii. 111
—— (Lord) *and* Tribourgh 311
—— (Earl of) *v.* Lord Windsor - - - ii. 325
Ponten *and* Mountford iii. 314
Poole *v.* Rudd - - 78
—— *v.* Shergold, 439, 468. 513; ii. 87; iii. 134
Pope *and* Bevant - ii. 215
—— *v.* Biggs - - 315
—— *and* Goodtitle - 311
—— *v.* Harris - - 341
—— *v.* Root - - 440. 476
—— *v.* Simpson - 413; ii. 152
Popham *and* Eyre, 168. 194. 348. 414
—— *v.* Eyre - - 210
—— *and* Roe - - iii. 260
Pordage *v.* Cole - - 75
Portarlington (Lord) *v.* Soulby, iii. 489. 495
Porter *and* Blakey - 372
—— *and* Eldridge - ii. 36
—— *and* Fry - - iii. 452
—— *and* Richards - 167
Portman *v.* Mill, 504. 528; ii. 32. 37
—— *v.* Jenkins - - 319
Portmore (Lord) *v.* Goring, ii. 115
Portmore (Lord) *v.* Bunn, ii. 459
Portmore (Lord) *v.* Morris 267

Page
Portmore (Lord) *v.* Taylor, 446. 448, 449
Portsmouth (Lord) *v.* Lord Effingham - - - ii. 325
Pott *and* Doe - - 282, n.
Potter *and* Ithel - - 184
—— *v.* Potter - 210. 284. 307, n.
Potts *v.* Curtis - - 453
—— *v.* Webb - - 431
Poulter *v.* Killingbeck - 145
Poultney *v.* Holmes - 141
Pounsett *and* Kirtland, 13. 377; ii. 51
Powell's (Mary) case - iii. 15
Powell *v.* Divett - - 223
—— *v.* Dillon - 170; iii. 469
*Powell* v. *Doubble* - - 52
Powell *v.* Edmunds, 40, 41. 221
*Powell* or *Deem* and *Howorth*, iii. 180. 474
Powells *v.* Martyr iii. 98. 141
—— *v.* Powell - 326. ii.; 194
—— *and* Seabourne - ii. 541
—— *and* Thomas - ii. 428
Power *v.* Sheil - - ii. 221
Powis (Countess of) *and* Doyley - - - 78. 101
Powles and Jones - iii. 417
Powlett *and* Kelly - 252
—— *and* Parteriche - 218
Poyntz *and* Burney - iii. 196
Prankerd *v.* Prankerd - iii. 264
Pratt *v.* Colt - - ii. 386
Pratt *and* Crisp - - iii. 268
Pratt *v.* Thomas - - ii. 446
Prattent *and* Farebrother - 76
Prendergast *v.* Eyre, 107. 117. 488. 504; ii. 156
Prestage *v.* Langford, 507. 509; iii. 230. 233
Page
Preston *v.* Barker - 122
Preston *v.* Carr - - iii. 483
—— *v.* Merceau - - 219
—— *and* Morris - - 501
—— *and* Newton, iii 256, 257, 258
—— *v.* Tubbin - iii. 456. 459
Preswick *and* Walker - iii. 215
Preston *and* Doe - ii. 447
Price *v.* Assheton - 168
Price *and* Baugh, 393. 445. 463; iii. 436
—— *and* Bull - - - 72
—— *v.* Byrn - iii. 232. 244
—— *v.* Copner - - ii. 327
—— *and* Curtis - - 102
*Price* v. *Dyer*, 232. 238. 244. 248. 538
Price *and* Harrington, ii. 90; iii. 219
—— *and* Hyde - - iii. 125
—— *v.* Jones - - 410
Price *v.* Moxon - - 125
—— *v.* North - 114. 133. 529
—— *and* Oneby - - 321
—— *v.* Price, (1 Vern. 185.) iii. 493
—— *v.* Price, (1 Sim. & Stu. 386.) 128
—— *and* Seaman - 141
—— *v.* Strange - ii. 167. 178
—— *v.* Williams - - 376
Priddy *v.* Rose ii. 433
Prideaux *v.* Prideaux - 123
Prideux *v.* Gibbin - 281
Prior *v.* Penpraze ii. 382; iii. 429
Pritchard *and* Carter - iii. 490
—— *v.* Ovey - - 351. 465
—— *v.* Quinchant - 264
Proctor *v.* Johnson - ii. 525

Page
Proctor *and* Kemys - 189
—— *and* White 183. 189. 191
—— v. Warren - - iii. 269
Prodgers v. Langham, iii. 297, 298
Propert v. Parker - 181. 342
Prosser v. Edmunds - ii. 45
Prosser v. Watts - ii. 97, 98
Protheroe *and* Williams ii. 46
Prowse *and* Nairn, iii. 191. 194. 217. 289
Prujean *and* Smart - 286
Pryor *and* Sproule iii. 213, 214
Prytharch v. Havard - 322
Pugh *and* Harris - - ii. 385
Pullen *and* Dalby - 421. 490
—— *and* George - ii. 147
—— v. Lord Middleton 328
Pulley *and* Pearson - ii. 326
Pulteney *and* Lady Cavan, ii. 518
—— *and* Dyer - - 278
Pulvertoft *and* Metcalfe, iii. 302. 307. 460.
—— v. Pulvertoft, iii. 295. 307
Purefoy *and* Jones - iii. 284
Purnell *and* Bartlett - 42. 190
Purrier *and* Harford, 468; iii. 135
*Purvis* v. *Rayer* - ii. 136. 145
Putbury v. Trevalion - 283, n.
*Putland* and *Doe* - iii. 59
Pye, *ex parte* - - iii. 297
—— v. Daubuz - - ii. 542
Pyke v. Williams - - 200
Pyman *and* Walters - ii. 38
Pyncent v. Pyncent - ii. 111

Q.

Quaintrell v. Wright - 250
Quincey *and* Scrafton - iii. 355
Quincey, *ex parte* - - 62
Quinchant *and* Pritchard 264

R.

Rabbett v. Raikes - - 61
Radcliff v Fursman - iii. 482, n., 483
—— v. Warrington, 408. 412. 419; ii. 145
Radd *and* Taylor - 258. 268
Radford v. Bloodworth iii. 315
—— v. Wilson 327, 328; iii. 493
—— *and* Young - - iii. 22
—— (Earl of) v. Shafto, 294. 308
—— v. Vendebendy, or Rotheram, iii. 75, 76
Raffety v. King - ii. 327, 328
Raikes *and* Rabbett - - 61
Raindle *and* Brown - 329
Raine *and* Barclay ii. 123, 124. 178
Rake *and* Thresh - 240
Raleigh's (Sir Walter) case, iii. 266
Ramsbottom v. Gosden 226. 228
—— *and* Hooper - ii. 90; iii. 219
—— v. Mortley - - 174. 178
—— *and* Timson - iii. 433
—— v. Tunbridge - 178
Ramsdon v. Hylton - iii. 294
Randall *and* Burkett - 216
—— v. Errington iii. 240. 243
—— v. Morgan - iii. 252. 294
—— v. Randall - iii. 249, n.
—— v. Rigby - - ii. 480
—— *and* Tappenden - 370

Page

Randall v. Everest - 66. 317
Rann v. Hughes - - 180. 233
Rand v. Tourle - - ii. 112
Rapier *and* Seymour - 252
Rappener v. Wright - ii. 444
Rastall *and* Wilson - iii. 481
Rastel v. Hutchinson 198; iii. 260
Rastron *and* Deane - 441
Ratcliffe *and* Bleasly - ii. 115
Ravald v. Russell - ii. 354
Rawlins v. Burgis - 284
Rawson, *ex parte* - - iii. 423
*Rayer* and *Purvis* ii. 136. 145
Raymond v. Webb - 114
Rayner v, Julian - - 361
Rdgriph *and* Doe - 184, 185
*Rea* v. *Williams,* iii. 247, 248; App. 61
Read *and* Edden - 368
*Read* and *Hosier* - - 233
Read *and* Lloyd - iii. 265. 268
—— *and* Smith - - iii. 395
—— *and* Wagstaff iii. 491, 492
—— v. Ward - - iii. 314
Reade *and* Cripps - ii. 420
—— *and* Roe - iii. 25, 26. 42
Redding v. Wilkes - 200
Redhel *and* Philips - iii. 474
Redington v. Redington, iii. 256. 262, 263, 264, 265, 266
Reed v. Williams - iii. 479
Rees *and* Bennett - ii. 38. 79
Reeves *and* Hardy iii. 480. 494
—— v. Reeves - - ii. 111
Reid *and* Doe - - ii. 479
—— v. Shergold - - iii. 426
—— *and* Watson - 427
Reilly v. Jones - - 317
Reisbeck *and* Lumley - 314
Relfe *and* Frewen - 330

Page

Remington v. Deverall - 313
Render *and* Haller - 143. 145
Renforth *and* Belchier iii. 420
—— v. Ironside - - ib.
Retellick v. Hawkes - 371
Revel v. Hussey - - 337. 468
*Rex* v. *Abbot* - - 17
Rex v. Bellringer - 256
—— v. Boston - 198; iii. 261
—— v. Bullock - - iii. 318
—— v. Cracroft - - 131
—— v. Dalby - - iii. 261
—— v. Ellis - - - 16
—— v. Everard - - 532
—— v. Gregory - - 113
—— v. Inhabitants of Haddenham - - - iii. 222
—— v. Lord of the Manor of Hendon - - - ii. 437
—— v. Hollier - - iii. 73
—— v. Inhabitants of Horndon, 138
—— v. Inhabitants of Laindon, 218
—— v. Lamb - ii. 411; iii. 73
—— v. Marsh - - 31. 34
—— v. Miller - - 256
—— v. Osbourne - 256
—— v. Pedley - - - 84
—— v. Inhabitants of Preston, ii. 444
—— v. Inhabitants of Scammonden - - 218
—— v. Sedgwick - 18. 21
*Rex* v. *Smith* - - ii. 411
Rex v. Inhabitants of Standon, 138
—— v. Snow - - 275
—— v. St. John - - iii. 73
—— v. Varlo - - 256
—— v. Inhabitants of Wickham, 218

Page
Rex *v.* Winstanley - 18
—— *v.* Withers - - iii. 482
Reynell *v.* Long - - ii. 104
Reynolds *v.* Belchier, 354. 464. 466
—— *v.* Blake - - 111, 112
—— *v.* Bullard - - ii. 522
—— *and* Jenkins - - 160
—— *v.* Nelson 366. 381. 434
—— *v.* Waring - - 214
—— *ex parte*, iii. 225, 226, n. 240, 242
Rhodes *and* Ibbotson, 12; iii. 486
—— *and* Selsey (Lord) - iii. 229
Rice *and* Bridger - 89. 344, 345
Rich *v.* Jackson - - 235. 268
—— *v.* Rich (2 Ch. Ca.) iii. 87
—— *v.* Rich (Cro. Eliz.) ii. 535
Richards *v.* Barton, ii. 51, 78, 381, 437
—— *and* Besant - - 224
—— *and* Cock - - 259
—— *and* Compton - 47
—— *and* Fowler - iii. 15, n.
—— *v.* Fry - - - ii. 372
—— *and* Howell - - ii. 528
—— *v.* Jackson - - iii. 483
—— *and* O'Connor - 117. 125
—— *v.* Porter - - 167
Richardson *and* Byewater, 43. 546
—— *v.* Mitchell - - iii. 489
—— *and* Turner - - - 92
—— *and* Warren ii. 11. 14. 22
Richmond *and* City of London, 438; ii. 507
—— *and* Govett - - iii. 428
Ricks *and* Dyke - - iii. 170
Riddle *v.* Emerson - iii. 252
—— *and* Gregson - 430
Rider *v.* Kidder - iii. 256. 260
Ridgard *and* Bonney, iii. 178, 179, 180
Page
Riddell *v.* Riddell ii. 461. 485
Ridler *v.* Ridler - - iii. 223
Rigby *and* Champion, iii. 229. 244
—— *v.* Macnamara (6 Ves. jun. 117) - - - 126
—— *v.* Macnamara (6 Ves. jun. 466) - - - 127
—— *v.* Macnamara (6 Ves jun. 515) - - - 101
—— *and* Randall - ii. 480
Right *v.* Bawden - - iii. 263
—— *v.* Beard - - 378
—— *v.* Bucknell - - iii. 423
Ripley *v.* Waterworth - 292
Rippingall *v.* Lloyd, 44. 406. 433; ii. 11. 85
Risney *v.* Selby - - - 5
Rist *v.* Hobson - - 163
*Rivers* v. *Steele* - - iii. 461
Roach *and* Rowe - - ii. 47
—— *v.* Wadham, ii. 463. 465. 479. 489
Roahde *and* Sharpe, iii. 141. 333
Roadhead *and* Headley, iii. 209, 214
Roadknight *and* Newbold, 287. 305
Roake *v.* Kidd, ii. 166. 177. 187
Rob *v.* Butterwick, 265; ii. 435
Roberdeau *and* Hanson, 78. 80
Roberts *and* Evans, 142. 145. 150
—— *and* Keane - - iii. 179
—— *v.* Massey - 79; iii. 98
—— *v.* Wyatt - 44; ii. 9. 81
—— *v.* Rowlands - 371
Robins *and* Bessonet - - 99
—— *and* Maberley, ii. 203; iii. 125
—— *and* Sherwood - 57. 460
Robinson *v.* Anderton, ii. 419, n.

Page

Robinson *and* Bridges - iii. 119
—— v. Davison - - iii. 426
—— v. Elliot - - - ii. 133
—— *and* Farmer - 187
—— *and* Fletcher - App. 45
*Robinson* v. *Harrington* iii. 330
Robinson *and* Lill - - iii. 140
—— *and* Luxton - - ii. 55
—— v. Macdonnell - ii. 445
—— v. Musgrove 53. 91; iii. 7
—— v. Page - - 232. 248
—— v. Philips - - ii. 91
—— *and* Stanley - 337
—— *and* Stowell, 240. 403. 406. 420
Robotham *and* Hughes iii. 23
*Robson* v. *Brown* 279
Robson v. Kemp - iii. 482, 483
—— v. Stokoe 312
Roche v. O'Brien 392. 394. 463; iii. 245
—— v. O'Shea - 126
Rochfort *and* Baldwin - 462
Rodney (Lady) *and* Lord Oxford, 310
Roe v. Lowe 328
—— v. Mitton - iii. 290. 296
—— v. Popham - iii. 260
—— v. Reade iii. 25, 26, 42
—— v. Rowlston - ii. 322
—— v. Soley - - 311
Roebuck *and* Calcraft 12. 489. 524; ii. 12. 40; iii. 98. 143
—— *and* Hoby 140
Roffey v. Shalleross 490
Rogers v. Boehm - iii. 121
—— *and* Bowles, 67. 273. 428; iii. 216
—— *and* Bruce - - 443
*Rogers* v. *Earl* - 264. 266, n.
—— *and* Fisher - ii. 437
Rogers v. Lambert ii. 169
—— *and* Newman - 414
—— *and* Paton, ii. 30. 32. 36; iii. 116
—— v. Rogers - - iii. 161
—— v. Seale - - iii. 495
—— v. Skillicorne - iii. 155
—— v. Humphreys - 314
*Rokeby* (*Lord*) and *Binks*, 521, 522; ii. 11; iii. 103. 133. 154
Rolfe *and* Doe - iii. 294
Roll v. Osborne - - ii. 471
Romilly (Sir Samuel) v. James, ii. 198. 200
Rondeau v. Wyatt 188. 197
Root *and* Pope - 440. 476
Roots *and* Carrington, 140. 142. 153. 156
—— v. Lord - - 514
Roper v. Coombes - 418
—— v. Halifax - - ii. 275
Rorke v. Webb - iii. 227
Rosamond v. Lord Melsington, 267
Rose v. Calland, 520; ii. 166. 179; iii. 138
—— v. Cunyghame, 166. 175. 281. 285. 366
—— *and* Priddy - iii. 433
Rosewell *and* Smith - iii. 425
Rosher *and* Headen 432
Ross v. Boards 495
*Ross* and *Lord Pengall*, or *Fingal*, 207
Ross v. Ross 325
Rothe *and* Scott 120
Rosswel v. Vaughan, ii. 44. 141. 426
Rotherham *and* Radnor, or Bodmin, iii. 75
Rothschild v. Doloret 337. 414
Round *and* Cason iii. 492

Page
Round *and* Oldfield - 32. 537
—— *and* Ortread - 332, 333
Routledge *and* Doe, iii. 281. 298
Rowe *and* Atkins - iii. 253
—— *and* Doe, ii. 447; iii. 277. 281. 288
—— *and* Jackson (4 Russ. 514), iii. 490
—— *and* Jackson (2 Sim & Stu. 472), iii. 494
—— v. Roach - - ii. 47
—— v. Teed - - 197
Rowlands v. Roberts - 371
Rowley *and* Cornish - 406. 417
Rowlston *and* Roe - - ii. 322
Rowntree v. Jacob - iii. 193, n.
Royal E. A. Office *and* Henkle, 258. 268
—— *and* Morse, 392, 394. 463. iii. 244, 245
Royle *and* Clarke, ii. 183; iii. 185
Royse *and* Hamilton, iii. 456, 475
Rucker v. Cammeyer, 186. 188
Rudd *and* Poole - - 78
Ruffin *and* Hodder - 128
—— *and* Nodder - - 101
Rundal v. Everest - 66. 317
Rushley *and* Houghton, iii. 334, 335, n.
Rushton v. Craven - - ii. 182
Rushworth's case - - 526
Russel *and* Bellew - iii. 229
—— *and* Ravald - - ii. 354
Russell *and* Stokes, ii. 469. 485
—— *and* Webb, ii. 469. 475; iii. 21
—— *and* Western, 160. 171. 184. 307. 440. 492. 510
Rust *and* Canham, ii. 483. 485
Rutherford *and* Loves - 540
Rutland *and* Clerk - - iii. 283

Page
Rutland's (Countess of) case, 245
Rutland (Duchess of), and Wakeman, 110; ii. 193. 453, 454
Rutt *and* Hawkins - - 74
Ryall v. Ryall - - iii. 259. 271
Ryde *and* Jones - - - ii. 420
Rydear *and* Harrington, ii. 538
Ryder v. Gower - - 125
—— v. Wager - - 287, 288
Ryland v. Smith - - iii. 269
Ryle v. Brown - - 448
—— v. Swindells - - 458

S.

*Sabbarton* v. *Sabbarton*, App. 50
Saberton v. Saberton, App. 49
Sachevrel v. Bagnoll - ii. 104
Sacheverell *and* Davie - ii. 512
Sadler *and* Bonnett - - 350
Sadlier *and* Bullock, iii. 281. 491
Sainsbury v. Matthews, 143. 145
Saint Alban's (Duke of) v. Shore, 354. 373. 377; ii. 55
Saint Cross (Master of) v. Lord Howard de Walden, 532
Saint John *and* Biddulph, iii. 372. 479. 485
—— v. Champneys, App. 30
—— (Lord) v. Lady Saint John, iii. 296
—— *and* Rex - - iii. 73
—— v. Bishop of Winton, 230
Saint Paul *and* Brodie - - 168
Saint Paul's (Dean and Chapter of) v. Dr. Retesworth. 351
Sale v. Crompton - - iii. 331
Sales *and* Goodright - iii. 87
*Salisbury* and *Gorman* - 246
Salisbury (Ld.) v. Wilkenson, iii. 121
Salmon v. Bradshaw - - ii. 537

Page
Salter *and* James, ii. 335, 336. 366
Saltoun (Lady) *v.* Philips, ii. 145
Salway *and* Foot - - 222
Samborne *and* Oldin - iii. 233
Sampson *v.* Easterby - ii. 484
—— *v.* Swettenham - ii. 114
Sanders *and* Beale - 65
—— *v.* Deligne - iii. 86. 424
—— *v.* Guy - - 105, n.
Sanderson *v.* Walker, iii. 232. 242
Sandford *and* Campbell, ii. 364
—— *and* Keech - - iii. 231
—— *and* Willet - - 283, n.
Sands *and* Attorney-General, iii. 23. 71. 92. 94
Sandys *and* Hulm - iii. 432
—— *and* Montesquieu, iii. 238
Sangon *v.* Williams - 326
Sanxster *and* Eaton, 276; ii. 392. 437; iii. 173
Sarrell *and* Colman - App. 74
Savage *v.* Carroll, 201. 214, 215. 306, 307; iii. 272
—— *v.* Foster - - iii. 428
—— *v.* Humble - - iii. 177
—— *and* Jordan - ii. 216. 219
*Savage* v. *Taylor*, 289; iii. 436
Savage *v.* Whitbread, ii. 26. 449
Savile *v.* Savile - - 128. 438
Saville *and* Goodtitle, 293, n. 295
Saunders *v.* Lord Annesley, 386. 487, n.; ii. 43. 328
—— *v.* Dehew - - iii. 423
—— *and* Doe - - ii. 191
—— *and* Jerrard, iii. 418, 423, 493. 495
—— *v.* Musgrave - 40
—— Wakefield - - 160
Saunderson *v.* Jackson, 172. 180, 181

Page
*Sawbridge* and *Bret*, iii. 93; App. 47
Sawbridge *and* Wanby - 194
Sawyer *v.* Birchmore - iii. 483
Sawkins *and* Jordan - 237
Saxton *and* Margareson, iii. 314, n.
Say *v.* Barwick - - 340
Say and Seal's (Lord) case, iii. 481. 483
Sayer *and* Doe - - 378
Sayle *v.* Freeland - 325. 327
Scammonden (Inhabitants of) *and* Rex, 218
Scarborough (Lord) *v.* Doe, ii. 277
Scarborough (Earl of) *and* Worsley, iii. 456. 458. 461, 462
Schmaling *v.* Thomlinson - 25
Schneider *v.* Heath - 44. 547
—— *v.* Norris - - 180
Schofield *and* Bayly - iii. 318
—— *and* Kenworthy, 168. 170. 174. 183. 189. 193
Scholes *and* Blackburn - 73
Scholey *and* Metcalf - ii. 384
—— *and* Scott - - ii. 384
Schroeder *and* Fruhling, 370; iii. 125
Shulenburgh *and* Spenceley, iii. 483
Scorbrough *v.* Burton - iii. 137
Scorell *v.* Boxall, 142. 148. 153
*Scott* and *Attorney-General*, iii. 75, n.
Scott *v.* Bell - - iii. 295
—— *and* Doe - iii. 26. 44
—— *v.* Dunbar, 451. 460; iii. 180. 440
—— *v.* Fenhoullett - iii. 89
—— *v.* Hanson - - 4. 537
—— *and* Hoggart - 425
—— *v.* Langstaffe - 350

Page
Scott *and* Mountford - iii. 456
—— *v.* Nisbitt - - 122, 123
—— *and* Pierce - - iii. 170
—— *v.* Rothe - - 120
—— *v.* Scholey - - ii. 384
—— *and* Stapylton, 520; ii. 33. 180. 210
—— *v.* Tyler - - iii. 178
—— *v.* Vickers - - 95
Scrafton *v.* Quincey - iii. 355
Scroope *v.* Scroope - iii. 266
Scrughan *and* Tardiff, iii. 193, 194. 197
Sculthorpe *and* Phipps - 138
Seabourne *v.* Powell - ii. 541
Seaforth (Lord), *ex parte* - 67
Seagood *v.* Meale, 166. 175. 205. 208
Seale *and* Rogers - - iii. 495
Seaman *v.* Price - - 141
—— *v.* Vawdrey, 502; ii. 183. 186
Searles *and* Newstead, iii. 288. 453
Seaton *v.* Booth - - 379. 514
—— *v.* Doe - ii. 438; iii. 482
Seddon *v.* Senate - ii. 512. 525
Sedgwick *v.* Hargrave - 332
—— *and* Hithcox, iii. 69. 419. 464. 467
—— *and* Rex - - 18. 21
Selby *v.* Chute - - ii. 512
—— *and* Lisney, or Risney, 5. 390; ii. 44. 141. 426
*Selby* v. *Selby*, 183; iii. 212. 214
Selkrig *v.* Davies - iii. 249, n.
Sellick *and* Jennings - iii. 424
Selsey (Lord) *v.* Rhoades, iii. 229
Senate *and* Seddon, ii. 512. 525
Senhouse *v.* Christian - iii. 249
—— *v.* Earle - iii. 299. 479
Page
Serjeant *and* Parker - iii. 288
Serra *and* Bascoi - - iii. 476
Seton *v.* Slade, 160. 278. 375. 410. 416. 422. 424. 432
Sevier *v.* Greenaway - 318
Seward *v.* Willock, 375, 376, 377. 419; ii. 55. 436
*Sewell* and *Coussmaker*, ii. 98. 134; App. 31
Sewell *v.* Johnson - 129
—— *and* Legate - - 327
Seymour *v.* Nosworth - iii. 491
—— *v.* Rapier - - 252
Shaftesbury (Lord) *v.* Arrowsmith, ii. 114
Shafto *and* Earl of Radnor, 294. 308
Shales *v.* Shales, iii. 262. 264, 265, 266
Shallcross *and* Roffey - 490
Shalmer *and* Spalding, iii. 153. 154
Shannon *v.* Bradstreet, 96.-215. 335
Shapland *v.* Smith, ii. 166. 177. 265
Sharp *v.* Adcock - - ii. 178
*Sharp* v. *Page* - - ii. 82
*Sharpe* and *Clay*, ii. 189; App. 32
Sharpe *v.* Roahde - iii. 141. 333
Shaw *v.* Borrer - - iii. 160
—— *v.* Botley - - iii. 326
—— *and* Dickenson - iii. 262
—— *v.* Jakeman, 264; ii. 206
—— *and* Morgan - 358; ii. 36
—— *v.* Simpson - - 98
—— *and* Williams - 363
—— *v.* Wright - - ii. 194
Shearley *and* Skeeles - ii. 392
Shearwood *and* Hare, 259. 267
Shedden *and* Payne - ii. 371
Shee *and* Hibbert - 482

Page

Sheffield v. Lord Mulgrave, 420; ii. 167. 178
Sheil *and* Power - ii. 221
Shelburne (Countess) v. Earl of Inchiquin, 253. 259. 268. 269
Sheldon v. Cox - iii. 372. 454
—— *and* Du Hourmelin, iii. 221
Shelly v. Nash - 459
Shelling v. Farmer - 254
Shelmardine v. Harrop - 312
Shelton v. Livins - 40
Shenton v. Jordan - 354
Shepherd v. Hall - ii. 445
—— v. Kain - 549
—— v. Keatley, ii. 3, 4. 79. 148. 149
—— *and* Knollys - 291
Sheppard v. Gosnold - 256
Sherard *and* Floyer - 443
Shergold *and* Poole, 439. 468. 513; ii. 87; iii. 134
—— *and* Reid - iii. 426
Sheriffe *and* Jones - 269
Sherly v. Fagg - iii. 424
Sherman *and* Cockes - iii. 448
Sherwin *and* Earl of Bath - 352
Sherwood v. Robins - 57. 460
Shine v. Gough, iii. 82. 419. 436
Shipman v. Thompson - ii. 438
Shippey v. Derrison - 170. 184
Shirley v. Davies - 537, 538
—— v. Forteblow, 502; ii. 155; iii. 103
—— *and* Hornblow, 502; ii. 154. 158
—— *and* Nott - 284
—— *and* Skipwith - ii. 97
—— v. Stratton, 342. 438. 552
—— v. Watts; ii. 292; iii. 335
Shore *and* Duke of St. Alban's, 354. 373. 377; ii. 55

Page

Shore *and* Bateman - iii. 249, n.
—— v. Collett, ii. 95. 108, 109
—— *and* James - 514
Shovel (Sir C.) v. Bogan - 525
Shoyer *and* Gould - iii. 324
Shrewsbury (Lord) v. Gould, ii. 522
Shrimpton *and* Conway - 438
Shum *and* Taylor - 64
Shuttleworth *and* Curling, ii. 198. 200; iii. 121
Sibson *and* Fletcher - iii. 425
Siddon v. Charnells - iii. 424
Sidley *and* Fletcher - iii. 269
Sidebotham (*ex parte*), 12; ii. 14, 15. 38
Sikes v. Lister - 275. 321
Silcock *and* Snell - ii. 328
Silk *and* Hunt - 367
Sime *and* Graham - ii. 437
Simmons v. Cornelius - 203. 216
—— *and* Farebrother - 191
Simon v. Motivos, 78. 188. 192
Simons *and* Cutler - 359
Simpson *and* Bacon - 468
—— *and* Beevor - ii. 9
—— v. Clayton - - ii. 479
—— *and* Cowell - iii. 192
—— v. Gutteridge - ii. 216
—— *and* Hill - iii. 178
—— *and* Pope - 413; iii. 152
—— *and* Shaw - 98
—— *and* Whorwood - 413. 442
Sims *and* Wiltshire - 73
Singleton *and* Darley - 443
Sitwell *and* Bernard - 95
Skeeles v. Shearley - ii. 392
Skelton *and* Smith - iii. 101
Skelton's case - ii. 37
Skett v. Whitmore - iii. 257
Skillicorne *and* Rogers - iii. 155

Page

Skinner, *in re* - - 92
—— *and* Burrough - - 75
—— *and* Oxenden, ii. 179. 199
—— v. Stacey - - 311
Skipwith v. Shirley - - ii. 97
Slade *and* Seton, 160. 278. 375. 410. 416. 422. 424. 432
Slade *and* Wheatley - 492. 511
—— v. Jendwine - - 366
Slaughter *and* Patterson, iii. 495
Sleap *and* Lady Platt - iii. 20
Slee *and* Croft - - App. 70
*Sloane* v. *Cadogan*, iii. 297; App. 66
Sloman v. Herne - - iii. 482
*Sloper* v. *Fish*, ii. 166. 179; iii. 148. 332
Small v. Atwood, 5. 342. 382. 395. 397, 398, 399, 400. 439. 442; ii. 15. 430; iii. 126, 127. 149. 245
—— v. Churchill - ii. 110
—— v. Jefferys - iii. 248
—— v. Marwood - iii. 174
—— *and* Tasker - 362
Smallcomb v. Buckingham, iii. 335
Smalwood *and* Walker, 90; iii. 158. 458
Smart v. Prujean - - 286
—— *and* Tanner - - 172
Smartle v. Penhallow - iii. 263
Smith v. Baker - - iii. 256
—— *and* Beatniff - iii. 372
—— *and* Bony - iii. 449
—— v. Burnam - - 410. 423
—— v. Lord Camelford, iii. 256
—— v. Clarke - 30, 31. 33
—— v. Compton - ii. 533. 540
—— v. Cooke - - ii. 111
—— *and* Cooper, 167. 173. 181
—— *and* Deacon, iii. 273, 274, 275, 276
Page

Smith v. Dearmer - - 258
—— v. Death - ii. 182. 211
—— *and* De Graves - 6
—— *and* Doe - 378; iii. 175
—— v. Sir Thomas Dolman, 423; iii. 108
—— v. Finch - - 531
—— *and* Fury - iii. 362. 367
—— v. Garland - - iii. 304
—— *and* Green - 273. 307. 337
—— *and* Growsock 375; iii. 113
—— v. Guyon - iii. 153. 168
—— *and* Hartley - ii. 209
—— v. Holcroft (Lady), ii. 119
*Smith* and *Hall*, 11. 412; iii. 474
—— v. *Hibbard*, 275. 321; ii. 103; iii. 130. 183
Smith *and* Hincksman - 451
—— *and* Howarth - 212
—— v. Jackson - - 358
—— v. Jones - - 311
—— v. King - - ii. 325
Smith *and* Kirkham - 327
*Smith* v. *Leigh* - - iii. 140
Smith v. Lloyd, 78. 358, 359. 522
—— v. Low - - iii. 468
—— *and* Marlow, ii. 166, 167. 193
—— *and* Martin - 375; ii. 55
—— v. Nelson - - 111
—— *and* Newall - - iii. 143
—— v. Phillips - - iii. 438
—— v. Pierce - - iii. 2
*Smith* (*Treasurer of the W. I. D. C.*) v. *the City of London*, iii. 254
Smith v. Read - - iii. 395
—— *and* Rex - - ii. 411
—— v. Rosewell - - iii. 425
—— *and* Ryland - - iii. 269
—— *and* Shapland, ii. 166. 177. 265
—— v. Skelton - - iii. 101
—— v. Smith, ii. 220; iii. 433

Page
Smith *v.* Spooner - ii. 47
—— *v.* Surman 142, 143, 144. 156, 157. 165
—— *and* Sweetland, 406; iii. 105
—— (Lady) *and* Symms, ii. 438
—— *and* Thomlinson, iii. 181. 437
—— *v.* Tolcher - - 522, 523
—— *v.* Turner - - 201
—— *and* Vernon - ii. 478
—— *and* Voll - - 203. 216
—— *v.* Watson - - 175
—— (Sir William) *v.* Wheeler, iii. 174
—— *v.* Wilkinson - iii. 256
—— *v.* Woodhouse - 373
—— *and* Yems - - App. 25
Smythe, *in re* - - ii. 307
Snag's case - - - iii. 491
Snaith *and* Brooks - 122
—— *and* Hogg - - 218
Snell *and* Silcock - ii. 328
Snelling *v.* Squint - iii. 463
Snow *and* Rex - - 275
Soley *v.* Roe - - 311
Sollet *and* Dale - - 368
Solomon *v.* Turner - 271
Soltau *and* Cooke - ii. 196
Some *v.* Taylor - - 533
Somerset (Duke of) *and* Gourlay, 464, 465
Soper *v.* Malachy - ii. 47
Sorrell *v.* Carpenter, iii. 458. 461
—— *and* Williams - iii. 370
Soulby *and* Portarlington, iii. 489. 495
Southby *v.* Hutt, 13. 63; ii. 5. 19. 38. 83
—— *v.* Stonehouse - ii. 110
Souter *v.* Drake, ii. 3. 147. 149
Southcote *and* Harrison, iii. 190. 193. 395
Southcote *and* Sweet - iii. 448
Southgate *and* Chaplain, ii. 512
Southouse *and* Browne, iii. 121
S. S. Company *v.* D'Oliff 260
Sowarsby *v.* Lacy - iii. 156
Sowden *v.* Sowden, iii. 273, 274
Sowerby *v.* Brooks, iii. 321. 464
Spaight *and* O'Connor - 237
Spalding *and* Shalmer, iii. 153, 154
Sparkman *v.* Timbrell, ii. 541; iii. 153
Sparrow *v.* Hardcastle - 283, n.
Speldt *v.* Lechmere - iii. 431
Spenceley *v.* Schulenburgh, iii. 483
Spencer *v.* Boyes - - ii. 485
Spencer *and* Fane - ii. 149
—— *v.* Marriott - - ii. 515
—— *v.* Venacre - - iii. 315
Spencer's case, ii. 458. 468. 471
Sperling *v.* Trevor - ii. 188
Spicer *and* Middleton - 276
Spiller *v.* Spiller - - 356
—— *v.* Westlake - 374
Spillet *and* Lloyd, iii. 256, 257
Spittle *v.* Lavender - 83
Spitty *and* Curtis - ii. 508
Spooner *and* Smith - ii. 47
Spottiswoode *and* Capper, iii. 192
Sprateley *v.* Griffiths - 443
Spratt *v.* Jeffery, ii. 3, 4. 145. 148
—— *v.* Hobhouse, iii. 318. 320. 322
Springfield *and* Williams, ii. 432
Sproule *v.* Pryor, iii. 213, 214
Spurrier *v.* Elderton, 75; iii. 123
—— *v.* Fitzgerald - 197
—— *v.* Gibson, 501. 514; ii. 213; iii. 453
—— *v.* Hancock, 413, 414. 473; ii. 152
—— *v.* Mayoss - - iii. 128

Page
Squint *and* Snelling - iii. 463
Squire *v.* Baker - - 439
—— *v.* Campbell - 47
—— *v.* Tod, 367. 371; ii. 54
Stabback *v.* Leatt - ii. 189
Stackhouse *v.* Barnstone, ii. 325
Stace *and* Blackburn - 358
*Stace* and *Doe* - - iii. 49
Stackpoole *v.* Curtis - 103
Stacpoole *and* Gore - 102
Stacy *and* Skinner - 311
Stadd *v.* Cason - - iii. 486
Stadt *v.* Lill - - 160
Staggs *and* Warren - 240
Stainbridge *and* Jolland, ii. 415; iii. 372. 452. 485
Staines *v.* Morris, 64; ii. 435; iii. 137. 141. 146
Stamford *and* Best - iii. 88
—— (Lord) *and* Pickering, ii. 220
Stammers *and* Dixon - 256
Stamion *v.* Doe - - 276. 378
Standen *and* Standen - App. 71
Standley *v.* Hemmington 375
Standon (Inhabitants of) *and* Rex - - - 138
Stanford *and* Walton - iii. 443
Stangroom *and* Marquis of Townsend, 223. 225. 232. 259. 526
Stanhope's (Lord) case - 520
Stanhope *and* Griffin, iii. 294. 308
—— *v.* Earl Verney, iii. 11. 58. 77. 217
Staniland *and* Parker - 143. 149
Staniland *and* Uxbridge (Lord), ii. 478
Stanley, *in re* - - 324, n.
Stanley *and* Jones - iii. 448
*Stanley* v. *Lee* - - App. 50
Stanley *v.* Robinson - 337
Stannard *and* Angier - 95
Page
Stannard *v.* Forbes ii. 526, 527
—— *v.* Ullithorne - ii. 449
Stansfield *v.* Johnson - 189. 193
Stanton *and* Lavender - iii. 156
Stapely *and* Butcher, 200; iii. 452
Staple *and* Doe, iii. 25, 26. 40. 42
Stapylton *v.* Scott, 520; ii. 33. 180. 210
Starr *and* Sturge - - iii. 426
Statham *and* Joynes - 225
*Staughton* v. *Hawley* - 332, n.
Staynrode *v.* Locock - ii. 544
Stead *v.* Liddard - - 372
—— *and* Brown - - iii. 438
*Steadman* v. *Lord Galloway* 429
Stedman *and* Gough, iii. 488, n.
Steed *v.* Whittaker - iii. 456
Steel *and* Wray - - iii. 261
Steele *v.* Philips, 102; ii. 387. 393
*Steele* and *Rivers* - - iii. 461
Steere (or Stare) *and* Toulmin, iii. 438. 454. 457
Stephens *v.* Bateman - 443
*Stephens* v. *Brydges* - iii. 23
Stephens *and* Copeland 92
—— *and* Lord - 480; iii. 133
—— *v.* Olive - - iii. 296
—— *and* Pell - - 83
—— *and* Vernon - - 80
*Stephenson* and *Esdaile*, 420. 503; ii. 30; iii. 116
Stephenson *and* Morris - 331
Sterum *and* Colclough - 102
Stevens *v.* Adamson - 540
—— *v.* Baily - - 321
—— *and* Dobell - 5. 82. 390
—— *and* Guppy, 13. 363; ii. 15. 103
—— *v.* Trueman - - App. 73
Stevenson *v.* Hayward, iii. 286

Page

Stevenson *and* Hesse, 262; ii. 518
—— *v.* Lambard - ii. 508
*Steward, or Seward* and *Denton*, 200. 364
Steward *and* Mayor - ii. 483
—— *and* Wolveridge - 65
Stewart *v.* Alliston, 51. 58. 508; ii. 24
—— *and* Bowles, 8. 10; ii. 110. 328
—— *v.* Careless - - 197
Stibbert *and* Taylor, iii. 440. 442. 474
Stileman *v.* Ashdown - iii. 267
*Stile* and *Taylor* - - iii. 286
Stiles *v.* Cowper - 215
—— *and* How - iii. 24
Stilwell *v.* Wilkins 443
Stockman *v.* Hampton, ii. 104, 105
Stokes *and* Brice - 91
—— *and* Hamil - iii. 433
—— *v.* Moore - 168. 181. 184
—— *and* Pentland - iii. 371
—— *v.* Russell - ii. 469, 485
Stokoe *v.* Robson 312
Stone *and* Sir George Binion, iii. 265
—— *v.* Gwillim - ii. 143
—— *and* Gwillim, 365; ii. 142, 143
—— *v.* Whiting - 138
—— *v.* Yea - ii. 496
Stonehouse *v.* Southby - ii. 110
Stonnard *and* Burting iii. 177
Storey *v.* Lennox, (Lord George), iii. 482
Story *v.* Lord Windsor, iii. 447. 490. 492
Stourton (Lord) *v.* Sir Thomas Meers - - 420
Stowell *v.* Robinson, 340. 403. 406. 420

Page

Stradling *and* Wills - 200, 201
Strange *and* Price ii. 167. 178
Stratford *v.* Bosworth 165
—— *v.* Powell 266
—— *v.* Twynam - iii. 227
Strathmore (Lady) *v.* Bowes, (Term Rep.) 285
—— (Earl of) *and* Davis, ii. 394
Stratton *and* Couch ii. 219
—— *and* Shirley, 342. 438. 552
Street *v.* Brown - 372; ii. 115
Stretton *and* —— 106
Stringer *and* White, iii. 290. 306. 424
Strode *v.* Blackburne, ii. 110. 113
—— *and* Casamajor, 114. 490. 517; ii. 59. 157. 162, 163. 179. 192.
—— Lady Falkland 254
—— *and* Osgood - iii. 290; App. 73
Stuart, *ex parte* - ii. 122
—— *v.* Ferguson, iii. 185. 356
Stubbs *and* Mathews 101
—— *and* Wall - 441
Stuckey *v.* Drew - iii. 314, n.
Studly *and* Fielder, 262; ii. 536
Stukeley *and* Keen 438
Sturge *v.* Starr - iii. 426
Stut *and* Gascoigne, iii. 336, n.
Style (or Stiles) *v.* Martin, iii. 459
Suffolk *and* Harding - 250
Sullivan *v.* Jacob - 339
Surnam *and* Smith, 142, 143, 144. 152. 156, 157. 165
Surry *and* Klinitz 75
Sutton *and* Banks, iii. 75; App. 44, 45
—— *and* Blore, 168. 181. 187. 364

Page
Sutton v. Chetwynd - - iii. 305
—— *and* Hasker - ii. 181. 187
—— *and* Kenyon - - 284
Swaine *and* Zouch - ii. 542
Swan v. Cox - - 374
Swan v. Phillips - - 7
Swanborough *v.* Coventry 47
Swannock v. Lyford - iii. 75
Sweet v. Southcote - iii. 448
Sweetland *and* Parrott, iii. 189
—— v. Smith - 466; iii. 105
Swettenham *v.* Sampson, ii. 114
Swift v. Davies - iii. 263, 264
—— *and* Garnons - 372
—— *and* Lightburne - 102
—— *and* Lowe - - 215
Swindells *v.* Ryle - - 458
Swinnerton *and* Butler - ii. 514
Swymmer *and* Goodright, ii. 196
Sybourn *and* Doe - iii. 25. 42
Sydenham *and* Cothay - iii. 476
Sylvester *and* Dyke - ii. 183
Symes *and* Balch - - ii. 114
Symmons *and* Mackreth, iii. 183. 188. 190. 192. 197. 204. 215. 218. 419.
Symns v. Lady Smith - ii. 438
Symonds *v.* Ball - - 193
—— *and* Davis, 220. 223. 225. 247. 337. 348, n; iii. 147. 250
Symondson v. Tweed - 194. 212

Tabrum *and* Taylor - - 89
Tadman *and* Fergusson - iii. 133
Tait v. Lord Northwick - 126
Talbot *and* Duke of Chandos, 61
—— *and* Lindsay - iii 481
Tankard v. Wade - - iii. 25
Tankerville (Lord) *and* Bennett, 290
Tanner *and* Chapman, iii. 183, n.
—— v. Florence - - iii. 474
—— *and* Meadows - 34
—— *and* Smart - - 172
Tapp v. Lee - 6; iii. 428, n.
Tappenden *v.* Randall - 370
Tarback *v.* Marbury - iii. 308
Tardiff v. Scrughan, iii. 193. 194. 197
Tasburgh *and* Lord Clermont, 338. 342. 500
Tasker v. Small - - 362
Tatem v. Chaplin ii. 458. 471
Taunton *and* Adams, ii. 179. iii. 174
Tawney v. Crowther - 171
Tayler v. Waters - - 138
Taylor v. Alston - - iii. 266
—— *and* Attorney-General, 24
—— v. Baker (1 Dan. 71), iii. 468
—— v. Baker (5 Price 306), iii. 471
—— v. Beech - - 199
—— v. Blacklow - 16; iii. 484
—— v. Debar - - ii. 541
—— *and* Fenner - - iii. 297
—— *and* Freeman - ii. 384, n.
—— *and* Griffin - - 331
—— v. Hawkins - - iii. 181
—— v. Horde - - ii. 323
—— *and* Lord Portmore, 446. 448, 449
—— *and* Radel - 258. 268
*Taylor* and *Savage*, 289; iii. 436
Taylor v. Shum - - 64
—— *and* Some - - 533
—— v. Stibbert, iii. 440. 442. 474
*Taylor* v. *Stile* - - iii. 286
Taylor v. Tabrum - - 89
—— v. Taylor - iii. 262. 264
—— v. Wheeler - - iii. 429

Page
Teal *and* Bramby - - 359
Teall *v.* Auty, 142. 144. 148. 153. 157
Teasdale *v.* Teasdale - iii. 428
Tebbott *v.* Vowles - 288
Tedcastle *and* Morgan - 533
Teed *and* Rowe - - 197
Telford *and* Johnson - 286
Templar *and* Evelyn, iii. 286, 287, 288. 295
—— *and* Hodges - iii. 321
Temple *v.* Brown - ii. 57. 142.
Templer *v.* Maclachlan - ii. 417
Tenant *and* Hearne - 407
*Tenant* v. *Jackson* iii. 154, n.
Tendring *v.* London - 346
Terrel *and* Clarke - 164
Terrie's case - - iii. 23
Terry or Ferry *v.* Williams, ii. 55
Thanet (Lord) *and* Barham, 310
—— (Earl of) *and* Milward, 409. 426
Tharp *and* Wingfield - ii. 192
*Thelluson* v. *Woodford* - 285
Thewer *and* Peacock - iii. 312
Thicknesse *v.* Vernon - iii. 247
Thistlewood, *ex parte*, 443. 449
Thomas *v.* Cook - - 138
—— *and* Davies, iii. 215. 474
*Thomas* v. *Davis* - - 253. 263
Thomas *and* Davis - 271. 318
—— *v.* Dering, 96. 178. 345. 497
Thomas, *ex parte* - - ii. 410
—— *and* Jones - - iii. 492
—— *and* Lord Falmouth, 144. 159
—— *and* Owen - - 169. 175
—— *v.* Pledwell - - ii. 394
—— *v.* Powell - - ii. 428
—— *and* Pratt - - ii. 446
—— *v.* Thomas - - 251
—— *and* Wynne - - ii. 438
Page
Tomlinson *and* Schmaling - 25
—— *v.* Smith - iii. 181. 437
Thompson *and* Collett, 370; ii. 54
—— *and* Doe, ii. 333. 341, 342. 345. 347
—— *v.* Towne - - 276
*Thompson* or *Bonham* and *William*, 429
Thompson *and* Shipman, ii. 438
—— *v.* Warneford - ii. 181
Thomson *v.* Miles, 416. 482; ii. 100
—— *v.* Wilson - - 138
Thorn *v.* Newman - iii. 19
Thorne *and* Bullock - iii. 309
Thornhill *and* Fleaureau, 347. 369. ii. 41. 48. 51; iii. 124
—— *v.* Thornhill - 126
Thornton *v.* Dixon - iii. 249, n.
Thorp *v.* Freer - - iii. 133
Thrale *v.* Cornwall - ii. 468
Thresh *v.* Rake - - 240
Thring *v.* Edgar - - iii. 493
Thruxton *v.* Attorney-General, iii. 92, 93, 94
Thursby *v.* Plant - - ii. 469
Thwaites, *ex parte* - iii. 225
Thwing *and* Gascoigne, iii. 256. 258
Thynn *v.* Thynn - - iii. 252
Tickell *and* Townson - iii. 174
Tickle *v.* Brown - ii. 371. 374
Tickner *v.* Tickner - 284
Tiffin *v.* Tiffin, iii. 87, 88. 92, 93
Tighe *and* Gowan - 107. 117
Tilt *and* Coslake - - 414
Tilsley, *ex parte* - - 127
Timbrell *and* Sparkman, ii. 541; iii. 153
Timson *v.* Ramsbottom, iii. 433

Page
Tindal *and* Cobham - 360
Tindall *and* Colmore - ii. 179
Tinny *v.* Tinny - 218; ii. 219
Tipping *v.* Gartside - 110
Titley *v.* Davis - - 311
*Titus* and *Parkins* - ii. 437
Titterton *v.* Woodroffe - ii. 38
Tod *and* Squire, 367. 371; ii. 54
*Todd* and *Burton*, iii. 115. 140; App. 54
Todd *v.* Hoggart - - ii. 54
*Todd v. Gee*, 364. 523; iii. 140
Todd *v.* Gee - - App. 54
Tolcher *and* Smith - 432, 523
Tollet *and* Fletcher - 327
Tollett *v.* Tollett - 258, n.
Tolson *v.* Kaye - - ii. 320
Tombs *and* Cooke, 159. 172. 175. 177. 200
Tomkies *and* Lloyd - ii. 512
*Tomkins, ex parte*, 92. 130; App. 16
Tomkins *v.* White - 48. 513
Tomlin *and* Lord Bolton - 135
—— *and* Hearne, 13. 377. 482
Tooke *and* Crosbie - 351
Toole *v.* Medlicott - 201
Topham *and* Capp - 24, 25
—— *v.* Constantine - iii. 183
Torkington *and* Wilkinson - 478
Toulmin *and* Hammond, ii. 540
—— *and* Langstroth - 73
—— *v.* Steere, iii. 438. 454. 457
Tourville *v.* Naish, iii. 431. 447
Tourle *v.* Rand - - ii. 112
Towgood *and* Anson, 104. 109. 469
Town, *ex parte* - - iii. 226
Towne *and* Thompson - 276
Townley *v.* Bedwell, 292; iii. 115
Townsend *v.* Champernown, ii. 78; iii. 66. 112. 139, 140. 144
—— (Lord) *and* Gardner, iii. 274
Page
*Townsend* (*Marquis of*) *v. Bishop of Norwich*, 178. 184
Townsend *v.* Townsend (Bro. C. C.), ii. 324
Townshend *v.* Askew - ii. 395
—— (Lord) *v.* Granger - 50
—— *and* Mackintosh, iii. 249, n.
—— *and* Mullins - 102
—— (Marquis of) *v.* Stangroom, 223. 225. 232. 259. 526
*Townshend v. Townshend*, 360, 361; iii. 105
Townson *v.* Tickell - iii. 174
Tracey *and* Jenner - ii. 326
—— *and* Langton - iii. 286
Trail *and* Twyford iii. 15, n.
Trappes *and* Tustall, ii. 385. 387, n. 392; iii. 372. 453
Trecothick *and* Coles, 25. 163, 164. 181, 182. 186, 187. 189. 193. 207. 344. 440. 444; iii. 226. 234.
Tredennick *and* Dunbar, 394; iii. 245. 440.
Trefusis *v.* Clinton, 127; iii. 113
Tregonning *and* Blewett, iii. 332
Trenchard *v.* Hoskins - ii. 534
Trent *v.* Hanning - ii. 167
Tresham *v.* Ekins - 4, 5
Treswallen *v.* Penhules 533
Trevalion *and* Putbury 283
Trevalyan *and* Gordon 168
Trevanion *v.* Mosse - iii. 491
Trevor *v.* Hopson - 354
—— *and* Sperling - ii. 183
Treyne *and* Heron - ii. 542
Tribourgh *v.* Pomfret (Lord), 311
Trimmer *v.* Bayne, iii. 209-214
Trimuel's (Commissioner) case, 279
Tritton *and* Crafts - 314

Page
Trower v. Newcombe, 4. 51. 540
Trueman *and* Stevens - App. 73
Tubbin *and* Preston, iii. 456. 459
Tubbs v. Broadwood - iii. 274
Tuchin *and* Bartlett - 418
Tucker *and* Dare - 63; ii. 119
Tull v. Parlett - - 218
Tunbridge *and* Ramsbottom, 178
Tunstall v. Trappes, ii. 385. 387, n. 392; iii. 372. 453
Turner, *ex parte* - - iii. 155
—— v. Back - - iii. 425
*Turner* v. *Beaurain*, 502; ii. 51
Turner v. Harvey, 8. 89. 92. 344. 382. 396. 441. 484
—— *and* King - 322; ii. 195
—— *and* Marwood - ii. 267
—— *and* Nash - - ii. 102
—— v. Richardson - - 92
—— *and* Smith - - 201
—— *and* Solomon - 271
Turner *and* Coster - 421
Turnour *and* Morison - 181. 184
Turton v. Benson - iii. 433
Tweddell v. Tweddell - ii. 327
Tweed *and* Symondson, 194. 212
Tweedy *and* Evans - iii. 183
Twigg v. Fifield, 107, 108; iii. 114
Twining v. Morris, 29. 35, 36. 343. 442. 487, 488
Twistleton v. Griffith, 445. 463
Twyford v. Trail - iii. 15, n.
—— v. Warcup - - 526
Twynam *and* Stratford - iii. 227
Twynam v. Pickard - ii. 508
Tyler v. Beversham - 531
—— v. Drayton - - ii. 114
—— *and* Scott - - iii. 178
Tyndale v. Warre - 126
Tynman *and* Cooper - iii. 432

Page
Tyrconnel (Earl of) v. Duke of Ancaster - - - 49
*Tyrer* v. *Artingstall*, or *Bailey*, 435
Tyrer *and* Onions - 288
Tyrrell v. Crowe - - ii. 113
—— *and* Windsor - 100

U.

*Ulrich* v. *Ditchfield* - 252
Underhill v. Horwood - 443
Underwood v. Lord Courtown, iii. 372. 447
—— v. Hitchcox - - 440
Ullithorne *and* Stannard, ii. 449
Upcot *and* Coleman, 1Co. 164, 165
Upton v. Basset - - iii. 281
—— *and* Clark - - - 84
—— v. Lord Ferrers - 122. 126
—— *and* Watson - 358
Usborne *and* Partridge - - 5
Uxbridge (Lord) v. Staniland, ii. 478

V.

Vale v. Davenport - 101
Vancouver v. Bliss, 12. 502. 520; ii. 40; iii. 137, 138
Vane v. Lord Barnard, ii. 419. 538; iii. 455
Vansittart v. Barber - ii. 114
—— v. Collier - - 104
Vansommer v. Barber - 446
Varlo *and* Rex - - 256
Vau v. Corpe - - 244. 342
Vaughan *and* Estofte - ii. 104
—— *and* Evans - - ii. 516
—— *and* Phillips - ii. 432
—— *and* Roswell, ii. 44. 141. 426
—— v. Wilson - - iii. 332
Vaudrey *and* Seaman, 502; ii. 183. 186

Page
Vawser *v.* Jeffrey - 287
Veal *v.* Nicholls - - ii. 447
Venacre *and* Spencer - iii. 315
Vendebendy *and* Bodmin, or Radnor - iii. 75, 76. 492
Vermedum *and* Gell - 321
Verney (Lord) *v.* Carding, iii. 440
—— (Earl) *and* Stanhope, iii. 11. 58. 77. 217
Verner *v.* Winstanley, 318. 443
Vernon, *ex parte* - - 321
—— *and* Atcherley, 273. 279, 280
—— *and* Lord Hardwicke, iii. 237. 240
—— *v.* Keys - - - 7
—— *v.* Smith - - ii. 478
—— *v.* Stephens - - - 80
—— *and* Thicknesse - iii. 247
—— *v.* Vernon - - 280
Vickers *v.* Scott - - - 95
Vigor *and* Attorney-General, 286
Villiers *v.* Villiers - iii. 92
Vincent *and* West - 127
Vine *and* Porte - - ii. 512
Viney *and* Neal - - 159
Vizard *v.* Longdale - ii. 219
Vizod *v.* Londen - - - ib.
Voice *v.* Papillon - ii. 110
Voll *v.* Smith - - 203. 216
Vowles *v.* Tebbott - 288
Vyvyan *v.* Arthur - ii. 468. 478

W.

Wace *and* Williams - 101
Waddington *v.* Bristow, 143. 146. 148, 149. 157
Waddilove *v.* Barnett - 315
Waddy *v.* Newton - 533
Wade *and* Averall, ii. 489; iii. 429. 436
—— *and* Beckford, ii. 319. 326
Page
Wade *v.* Marsh - - 316, n.
—— *v.* Paget - - ii. 540
—— *and* Tankard - iii. 25
Wadham *and* Heard - 373. 375
—— *and* Roach, ii. 463. 465. 479. 489
Wadsley *and* Mayfield, 144, 145. 153. 159
Wadsworth *and* Crosby, 133. 140. 142. 147. 149. 150. 155
Wager *and* Ryder - 287, 288
Waghorn *and* Kaye - 245
Wagstaffe *v.* Read, iii. 491, 492
Wain *v.* Warlters - - 160
Wake *and* O'Dell - iii. 333
Wakefield *and* Saunders 160
—— *and* White, iii. 203. 216. 470
Wakeman *v.* Duchess of Rutland, 110; ii. 103. 453, 454
Walden (Lord Howard de) *and* Master of St. Cross - 532
*Waldron* v. *Forcster*, iii. 106. 131
Waldron *and* Honeycomb, iii. 356
Walker *v.* Advocate-General, 23
—— *v.* Barnes - - 314
—— *and* Boothby - 359
—— *and* Bright - - ii. 373
—— *v.* Burrows - - iii. 268
—— *and* Campbell, iii. 225. 232. 239
—— *v.* Constable, 189. 193. 249. 370
—— *v.* Flamstead, iii. 155. 458
—— *v.* Moore - - ii. 49. 86
—— *and* Only - iii. 485, 486
—— *v.* Preswick - - iii. 215
—— *v.* Smallwood, 90; iii. 158. 458
—— *and* Sanderson, iii. 232. 242
—— *v.* Walker - - 225
—— *v.* Wildman - iii. 483

Page
Walker's case - - ii. 466
*Walkley* and *Comer, or Currer*, 291, n.; iii. 98. 101. 120. 130. 168. 196.
Wall *and* Bright - 291; ii. 374
—— *v.* Stubbs - - 441
Wallace *v.* Anderson - 464
—— *v.* Cook - - ii. 438
—— *and* Mechelem, 135, n.; 159
Waller *and* Bowles - 503
—— *and* Doe - - 378
—— *v.* Hendon - - 186
*Waller* and *Hillary*, ii. 97. 181. 186; iii. 25; App. 69
Waller *v.* Horsefall - 372
—— *and* Pigott, 284, 285; App. 71
Wallinger *v.* Hilbert, 520. 522; ii. 37
Wallis *and* Harwood - 260
Wallwyn *v.* Coutts - iii. 285
—— *v.* Lee, ii. 113; iii. 423. 489. 490
—— *and* Matthews - 312
Walmsley *and* Clifton - 256
Walpole (Lord) *v.* Earl of Cholmondeley - 251
Walsh *v.* Whitcomb - ii. 438
Walter *v.* Maunde - 11; ii. 162
Walters *and* Baglehole - 546
—— *and* Moody - - ii. 170
—— *v.* Morgan - - 197
—— *v.* Pyman - - ii. 38
Walton *and* Hitcham - - 62
—— *v.* Hobbs - - iii. 485
—— *v.* Stanford - - iii. 443
Wanby *v.* Sawbridge - 194
Warburton *v.* Loveland, iii. 282. 356. 364, n.; 365, n.
Warcup *and* Twyford - 526
Ward *and* Callaway - 273
—— *and* Casberd, ii. 412; iii. 219
Page
Ward *and* Douglas, iii. 288. 300
—— *and* Garth - - iii. 458
—— *v.* Garnons - - ii. 97
—— *v.* Moore - - 284
—— *and* Noel, ii. 111; iii. 159
—— *and* Read - - iii. 314
—— *and* Waring - 310
Warde *v.* Jeffery - 411. 423. 432
Wardell *and* Farmer - 446
Wardle *v.* Carter - - 457. 460
Waring *v.* Hoggart 45. 48. 56
—— *v.* Mackreth - ii. 141
—— *and* Reynolds - 214
—— *v.* Ward - - 310
Warlters *and* Wain - 160
Warn *v.* Bickford - ii. 542
Warne *and* Carter - - 92
Warneford *and* Thompson, ii. 181
Warner's case - - iii. 221
Warre *v.* Tyndale - 126
Warren *and* Dutch - 368
—— *and* Hall - 335. 348. 464
—— *v.* Howe - - ii. 447
—— *and* Proctor - iii. 269
—— *v.* Richardson, ii. 11. 14. 22
—— *v.* Staggs - - 240
Warrick *v.* Warrick, iii. 456. 479
Warrington *and* Cottle, iii. 348, n.
—— *and* Radcliffe, 408. 412. 419; ii. 145
Warwick *v.* Bruce - 143. 150
—— *v.* Noakes - - - 74
Wase *and* Emery, 330. 332, 333. 442. 464
Washington and Brymer, App. 69
Waterford (Marquess of) *and* Knight - iii. 482, 483
Waterhouse *and* Buller, iii. 308
—— *and* Cass - 170. 177. 530
Waters *and* Chambers - iii. 227
—— *and* Tayler - - 138

Page
Waterworth *and* Ripley, 292
Watkins *and* Allpass, ii. 198. 202
—— *v.* Cheek - - iii. 161
—— *and* Doe - - iii. 484
—— *v.* Hatchet - iii. 490, n.
—— *v.* Maund - - iii. 319
Watlin *and* Aberdeen - 104
Watson *v.* Bawtree - 446. 463
—— *v.* Birch - - 124
—— *and* Gell - 529; iii. 126
—— *and* Gill - - 359
—— *v.* Reid - - 427
—— *and* Smith - - 175
—— *v.* Upton - - 358
Watt *v.* Grove - - iii. 225
Watts *v.* Creswell - iii. 428
—— *v.* Fullarton - 281
—— *and* Hopwood - iii. 332
—— *and* Jenkinson, 281, 282, n.
—— *v.* Kancy - - iii. 177
—— *v.* Martin - - 126
—— *and* Prosser - - ii. 97, 98
—— *and* Shirley - - ii. 392; iii. 335
Way *and* Ballard - - - 50
—— *v.* Yally - - ii. 467
Weakley *v.* Bucknell - iii. 280
Weal *v.* Lower - - 326
Weare *and* Adams - 438
—— *and* Jerritt - - ii. 513
Webb *v.* Bettel - - 375
—— *and* Kirk - iii. 258. 271
—— *v.* Lugar - iii. 468. 474
—— *and* Potts - - 411. 431
—— *and* Raymond - 114
—— *v.* Rorke - - iii. 227
—— *v.* Russell - ii. 469. 475; iii. 21
—— *v.* Webb - - ii. 110
Webber *and* Doe - - iii. 281
Wedderburne *v.* Carr - 186
Page
Weighill *and* Wetherell, ii. 379
Weildon *and* Farlow - 123
Weld *and* Graves - 156
Weldon and How - iii. 424
Welford *v.* Beezley - 175. 181; iii. 479
Welland *and* Balfour - iii. 157
Wellesley *and* Wright - 428
Wells *and* Bally, ii. 458. 470. 482. 489
Welsh *and* Fowle - ii. 512
Wenham *and* Kennedy - 356. 478
West *v.* Berney - - ii. 182
—— *and* Kidder - - ii. 537
—— *v.* Vincent - - 127
*Westcott* and *Beard* - App. 50
Westcott *and* Bradley - App. 70
Western *v.* Perrin - iii. 148
—— *v.* Russell, 160. 171. 184. 307. 440. 492. 510
Westlake *and* Spiller - 374
Weston *and* Barnett - iii. 420
—— *v.* Berkeley - - iii. 492
—— *and* Lyddal, ii. 183. 186
—— *and* Noel - ii. 194. 437
Wetherell *v.* Bellwood - ii. 379
—— *v.* Weighill - - - ib.
Weyland *and* Wildgoose, iii. 452
Whale *v.* Booth - - iii. 179
Whaley *v.* Bagenel, 176. 200
Whalley *v.* Whalley - iii. 436
Wheate *and* Burgess - 477
—— *v.* Hall - ii. 166. 178
Wheatley *v.* Slade - 492. 511
Wheeler *v.* Bramah - - 92
—— *v.* Collier - 31. 33. 162
—— *v.* D'Esterre - 231
—— *and* Doe - - ii. 447
—— *and* Harrington - 413
—— *v.* Newton - - 331
—— *and* Sir William Smith, iii. 174

Page

Wheeler *and* Taylor - iii. 429
Whelpdale *v.* Cookson, iii. 236. 242
Whichcote *v.* Bramston, 449
—— *v.* Lawrence, iii. 225. 232. 244
Whichcott *and* Duckenfield - 4
Whitackre, *v.* Whitackre, 306. 427; iii. 225
Whitaker *and* Steed - iii. 456
Whitbread *v.* Brockhurst 200
—— *v.* Jordan, ii. 86. 95; iii, 471
—— *and* Savage - ii. 26. 449
Whitchurch *v.* Bevis 178. 196. 199. 200
—— *v.* Idem - App. 52
—— *v.* Whitchurch, iii. 87, 88, 89. 92
Whitcomb *v.* Foley - ii. 38
—— *v.* Minchin - - iii. 225
—— *and* Walsh - - ii. 438
White's case - - 341
White *v.* Bartlett - 78
—— *and* Cole - - 200, 201
—— *v.* Damon - - 440
—— *v.* Ewer - - ii. 326
—— *v.* Foljambe, ii. 145. 153; iii. 138
—— *v.* Nutt - - 468
—— *v.* Proctor 183. 189. 191
—— *and* Parkes - - iii. 225
—— *v.* Stringer, iii. 290. 306. 424
—— *and* Tomkins - 48. 513
—— *v.* Wakefield, iii. 203. 216. 470
*White* *v.* *White* - - 284
White *v.* Wilson - 122. 125
Whitehouse *and* Hinde, 167. 176. 174. 188. 193
Whitfield *v.* Fausset, ii. 104; iii. 434
Whiting, or Edwards, *and* Hollis 199
Whting *and* Stone - 138
Whitley *and* Leman - iii. 259
Whitmel *v.* Farrel - 353
Whitmore *and* Skett - iii. 257
Whitmore's case - - 292
Whitrong *and* Douglas - 292
Whittaker *v.* Whittaker 308
Whitton *ex parte* - - 324, n.
Whitworth (Lord) *and* Brookes, 361
—— *v.* Davis - - 274
Whorwood *v.* Simpson, 413. 442
—— *v.* Whorwood, iii. 274, 275, 276
Wickham *v.* Everest - 358
—— inhabitants of, *and* Rex, 218
Widdington *and* Christ's Coll., iii. 486
Wigg *v.* Wigg - - iii. 448
Wightman *and* King - 486
Wightwick *and* Fereday, iii. 249, n.
Wiglesworth *and* Gore, iii. 440
Wigzell *and* Francis - iii. 222
Wilcocks *and* Coke - iii. 493
—— *v.* Wilcocks - iii. 273
Wild *and* Henderson, iii. 193, n.
Wilde *v.* Fort, 406; ii. 23. 52. 199. 200; iii. 116
Wildgoose *v.* Moore, iii. 394. 395
—— *v.* Weyland - - iii. 452
Wildigos *v.* Keeble - iii. 394
Wildman *v.* Beckford - ii. 114
—— *and* Walker - iii. 483
Wilford *and* Bulkley - iii. 238
Wilkenson *and* Lord Salisbury, iii. 121
Wilker *v.* Bodington, iii. 36. 77. 464
Wilkes *and* Redding - 200
Wilkins *v.* Fry - - - 64
—— *and* Jeanes - - iii. 336
—— *v.* Lynch - - iii. 75

Page
Wilkins *and* Paul - - 275
—— *and* Stilwell - 443
Wilkinson *and* Hartley - 195
—— *and* Lush - - iii. 269
—— *and* Smith - - iii. 256
—— *v.* Torkington - 478
—— *and* Wilmot, ii. 2. 436. 444
Wilks *v.* Biscoe, ii. 171; iii. 142. 440
—— *v.* Davis - - 466
—— *v.* Wilks - - iii. 275
Willan *v.* Willan - - 343
Wilcock *and* Hardman - 78, n.
Wilcox *and* Idem - App. 64
Willcox *v.* Bellaers, ii. 41. 177; iii. 138
Willet *v.* Sandford - 283
Willett *v.* Clarke, 416, 417; ii. 7. 204
William *v.* Nevil - - 202. 216
Williams *v.* Attenborough, 109. 123
—— *v.* Boys - - 250
—— *and* Calverley, 531; iii. 141
*Williams* *v.* *Carter* - 347
Willie *and* Lugg - - 311
Williams *v.* Chitty, ii. 219. 221
—— *and* Cornwall, 347; ii. 41
—— *v.* Craddock - ii. 393
—— *and* Cunningham - 105
—— *and* Doe, ii. 333. 345. 347
—— *v.* Edwards, 433. 491; ii. 10; iii. 146. 148
—— *and* Keys - - iii. 485
—— *v.* Lambe - - iii. 495
—— *v.* Llewellyn - iii. 229
—— *v.* Lougher - - ii. 458
—— *and* Macnamara - 362
—— *v.* Millington - - 73
—— *and* Pitt - - ii. 484
—— *v.* Protheroe - ii. 46
—— *and* Pyke - - 200
Page
*Williams* and *Rea*, iii. 247, 248; App. 61
Williams *and* Reed - iii. 479
—— *and* Sangon - - 326
—— *v.* Shaw - - 363
—— *v.* Springfield - ii. 432
—— *v.* Sorrell - - iii. 370
—— *and* Terry, or Ferry ii. 55
*Williams* *v.* *Thompson, or Bonham* 429
Williams *v.* Wace - - 101
—— *v.* Williams - iii. 494
—— *and* Wray - - iii. 75
—— *and* Wynn, ii. 71; iii. 75. 161. 283
Williamson *v.* Curtis - iii. 155
Willis *and* Doe - - ii. 191
—— *v.* the Commissioners of Appeals in Prize Causes, iii. 121
—— *v.* England (Bank of,) iii. 322. 326
—— *v.* Jernegan - - 442
—— *v.* Latham - - iii. 227
—— *v.* Willis - iii. 256. 259
Willock *and* Collyer - iii. 123
—— *and* Seward, 375, 376, 377, 419; ii. 55. 436
Willoughby *and* Fowler 305
—— *v.* Willoughby, iii. 10. 38. 69, 83. 419. 477
Wills *v.* Stradling - 200. 201
Wilmot *v.* Wilkinson, ii. 2. 436. 444
—— *v.* Derby Canal Company, iii. 333
Wilson *v.* Allen - - iii. 143
*Wilson* *v.* *Bennet* - - 279
—— *v.* *Clapham* - - iii. 115
Wilson *and* Clark - 358
—— *and* Colton - - ii. 103
—— *and* Duffell - - 482
—— *and* Foord - - ii. 529

Page
Wilson v. Foreman - iii. 271
—— v. Forster - - ii. 114
—— v. Hart - - 187
—— *and* Hastings - - 93
—— *and* Horford - - 84
—— *in re* - - - 325, n.
—— *and* Jourdan ii. 478, n.
—— v. Keane - - 336
—— v. Knubley - ii. 540
—— *and* Maitland - iii. 491
*Wilson* and *Lord Middleton*, 168
Wilson *and* Parks - 354
—— *and* Radford, 327, 328; iii. 493
—— v. Rastall - - iii. 481
—— *and* Thompson - 138
—— *and* Vaughan - iii. 332
—— *and* White - - 122. 125
—— v. Wormol, ii. 392; iii. 297, 335
—— *and* Wright - 56. 58, 59
Wilsons *and* Hunter - 469, n.
Wilton (Lord) *and* Clayt on iii. 91
Wiltshire *and* Doran - iii. 157
—— v. Sims - - - 73
Winch v. Winchester 229. 527. 529; iii. 138
Winchelsea (Earl of) *and* Finch ii. 382
Winchester (Bishop of) v. Fournier - - - iii. 481
—— (Bishop of) v. Paine, iii. 141. 458. 459
—— *and* Winch, 229. 527. 529; iii. 138
Windsor (Lord) *and* Earl of Pomfret - - ii. 325
—— (Lord) *and* Story, iii. 447. 490. 492
—— *and* Tyrrell - - 100
Winford *and* Lutwych - 101
Page
Wing v. Earle - - 533
Winged v. Lefebury, 275. 351; iii. 440
Wingfield v. Tharp - ii. 192
Winstanley *and* Rex - - 18
—— *and* Blankley - 256
—— *and* Verner - - 318. 443
*Winter* v. *Lord Anson*, iii. 183, 184. 190. 215, 456
Winter v. Blades - - iii. 99
—— v. Brockwell - 138. 140
—— *and* Crockford - iii. 124
—— v. Devreux - - 331
—— *and* Leigh - - iii. 308
Winton (Bishop of) *and* St. John - - - 280
Wirdman v. Kent - 489
Wiseman's case - - iii. 285
Wiseman v. Beake - 446
Wise v. Knott - - ii. 111
Withers v. Pinchard - 331
—— *and* Rex - - iii. 482
—— v. Withers - - iii. 256
Withy v. Cottle, 337. 356; ii. 36
Wittenoom *and* Crespigny, App. 21
Wolf *and* Burgh - - iii. 425
Wolveridge v. Steward - 65
Wornack *and* Bennett - 49
Wood v. Abrey - - 460. 463
*Wood* v. *Birch* - - iii. 251
Wood v. Bernal - - 424
—— *and* Boehm, 380. 433; ii. 36
—— *and* De Bernales - iii. 125
—— v. Downes, 392. 394; iii. 238
*Wood* v. *Griffith*, 278. 314. 492; ii. 46
Wood *and* Green - - 413
—— *in re* - - ii. 286, 287
—— v. Lake - - 138. 140
—— v. Norman - - iii. 251

Page

*Woodford* and *Thellusson*, 285
*Woodgate* v. *Woodgate* - iii. 153
Woodhouse *and* Harvy - iii. 423
—— v. Jenkins - - ii. 520
—— v. Meredith - - iii. 225
—— *and* Smith - - 373
Woodcock v. Partington, 315
Woodman v. Morrell, iii. 263. 266
Woodroff v. Greenwood, ii. 512
Woodroffe v. Titterton, ii. 38
Woodrow *and* Glazebrook, 373
Woods v. Huntingford - 310
Woodyatt v. Gresley - iii. 476
Woollam v. Hearn - 225
Woollaston *and* Collet - 440
Worcester (Bishop of) v. Parker - - - iii. 423
Wordsworth *and* Nicloson, 357; ii. 23. 33. 178; iii. 137. 174
Worley *and* Hamilton - 310
Wormol *and* Wilson, ii. 392; iii. 97. 335
Worms *and* Granger - 48
Worsley *and* Cavendish 325
—— *and* Hill - - iii. 458
—— *and* Norcliffe - 327
—— v. Earl of Scarborough, iii. 456. 458. 461, 462
Worthy *and* Duke of Norfolk, 45. 51. 56. 58. 78. 83. 368. 528. 540
Wotton v. Cooke - - ii. 544
Wray v. Steel - - iii. 261
—— v. Williams - - iii. 75
Wren v. Kirton, 35. 109; iii. 232
Wright, *ex parte* - - iii. 431
—— v. Bond - - ii. 35
—— *and* Browning, 262; ii. 510. 526
—— *and* Birch - - 314

Page

Wright *and* Clerk - 167. 200
—— v. Dannah - - 191
—— *and* Doe - - iii. 48
—— v. Fearnley - - iii. 326
—— *and* Fox - - 459
—— *and* Freme - - 43; ii. 3
—— *and* Harrison - 354
—— v. Howard, 414. 487; iii. 347
—— v. Mayer - - iii. 482
—— *and* Needler - iii. 437
—— *and* Parry - - iii. 438
—— *and* Quaintrell - 250
—— *and* Rappener - ii. 444
—— *and* Shaw - - ii. 194
—— v. Wellesley - 428
—— v. Wilson - 56. 58. 59
Wrightson v. Hudson - iii. 369
Wrigley *and* Andrew, iii. 177, 178. 180, 181. 448, 449
Wroot *and* Doe - - iii. 13
Wroughton *and* Hyde - ii. 37
*Wyatt* v. *Allan*, 73. 186; App. 10
—— v. Barwell - - iii. 373
—— *and* Roberts, 44; ii. 9. 81
—— *and* Rondeau - 188. 197
Wynn v. Morgan - 416; iii. 143
—— v. Williams, ii. 71; iii. 75. 161. 283
Wynne v. Griffith - 361; ii. 39
—— v. Hughes - - ii. 83
—— v. Thomas - - ii. 438
Wythe *and* Henniker, iii. 212. 214
Wyvill v. Bishop of Exeter, 470. 474; iii. 145

Y.

Yallop, *ex parte* - - iii. 431
—— *and* Douglas - ii. 417
Yally *and* Way - - ii. 467
Yardly *and* Drapers' Company - - - iii. 474

Page

Yarworth *and* Nourse - iii. 92
Yates *v.* Farebrother - 76
Yea *v.* Field - - ii. 105
—— *and* Grant - - ii. 286
—— *and* Stone - - ii. 496
Yeavely *v.* Yeavely - iii. 458
Yems *v.* Smith - - App. 25
Yielding *and* Harnett, 337. 341. 343. 347. 496; ii. 41
York *v.* Eaton - - iii. 247
York B. Company *v.* Mackenzie, iii. 225. 227. 232. 240. 244
—— B. Company *and* Higgins - - - ii. 385
Young *and* Berry, 63. 75. 402. 410; ii. 119. 122
—— *v.* Clark - 7. 342. 440, 441
*Young* and *Crosse*, ii. 510. 512
Young *v.* Duncombe - 358
—— *and* Fountain - iii. 483
—— *and* Harvey - - - 4
*Young* and *Kingsley* - ii. 190
Young *v.* Radford - iii. 22
—— *v.* Young - - 263


YEAR BOOKS.


14 E. pl. 8 - - - 315, n.
30 E. 324 a - - ii. 392
42 E. 3. 11 a - - ib.
47 E. 3. 18 a. pl. 35 - 532, 533
42 Ass. pl. 17 - - ii. 392
14 H. 3. p. 8 - - 315, n.
2 H. 4. 8 b. pl. 42 - ib.
14 a. pl. 5 - ib.
2 E. 4. pl. 11 - - 315, n.
7 E. 4. 14 b. - - 330
26 H. 8. T. pl. 11 - ii. 511
4 H. 7. 10 - - ii. 110
5 H. 7. 18 b. pl. 12, ii. 466, 467
6 H. 4. 1 pl. 5 - - ii. 477


Z.


Zagury *v.* Furnell - 469
Zouch *v.* Swaine - - ii. 542

# TABLE OF STATUTES CITED.


EDWARD I.

| | | Page |
|---|---|---|
| 3. c. 19. | Administration, | iii. 152 |
| 33. - | Measures - - | 532 |

HENRY VII.

| | | |
|---|---|---|
| 11. c. 20. | Estates Tail, | ii. 271. 279 |

HENRY VIII.

| | | |
|---|---|---|
| 24. c. 4. | Measures - - | 532 |
| 27. c. 10. s. 3. | Uses: Merger - | iii. 23 |
| s. 7. | Jointure - - | ii. 215 |
| 32. c. 2. | Limitation of Time - | ii. 132. 319 |
| c. 9. | Sale of pretended Title | ii. 44 |
| c. 34. | Conditions: Reversions - | ii. 467 |
| 33. c. 39. | Specialties to the Crown - | ii. 411; iii. 410 |

ELIZABETH.

| | | |
|---|---|---|
| 13. c. 4. | Crown Debtors, | ii. 411; iii. 411 |
| c. 5. | Fraudulent Conveyances: Creditors - | iii. 267 |
| c. 7. | Bankruptcy - | iii. 313 |

ELIZABETH—*continued.*

| | | Page |
|---|---|---|
| 27. c. 4. 30. c. 18. s. 3. | Fraudulent Conveyances. Purchasers - | iii. 268 280 |
| 43. c. 4. | Charitable Uses, | iii. 311. 452 |

JAMES I.

| | | |
|---|---|---|
| 21. c. 15. s. 5. | Purchases by Traders - | iii. 268 |
| c. 16. | Limitation of Time - | ii. 132. 319 |
| c. 19. | Bankrupts: Plant - | iii. 217 |
| c. 19. s. 9. | Judgments against Bankrupts | iii. 332 |
| s. 14. | Purchasers from Bankrupts - | iii. 314. 323 |
| c. 24. | Debtors dying in Execution - | iii. 334 |

CHARLES II.

| | | |
|---|---|---|
| 16 & 17. c. 5. | Execution: Contribution | ii. 408 |
| c. 19. s. 14. | Purchasers from Bankrupts - | iii. 314 |
| 29. c. 3. s. 1. | Leases - - | 132. 186 |
| s. 2. | Leases - - - | 132 |

CHARLES II.—*continued.*

| | | Page |
|---|---|---|
| 29. c. 3. s. 3 | Grants | 132. 186 |
| s. 4. | Parol Agreements | 132. 186 n. 188 |
| s. 7. | Declaration of Trusts | iii. 252 |
| s. 8. | Resulting Trusts, | iii. 256 |
| s. 14. s. 15. | Judgments | iii. 329 |
| s. 16. | Execution | iii. 334 |
| s. 17. | Sale of Goods | 144 |
| s. 18. | Recognizances, | iii. 336 |

WILLIAM and MARY.

| | | |
|---|---|---|
| 3. c. 14. | Fraudulent Devises | ii. 151. 540; iii. 151. 153 |
| 4 & 5. c. 20. | Judgments | iii. 330 |

WILLIAM III.

| | | |
|---|---|---|
| 7. c. 12. s. 2. | Parol Agreements, Ireland | 154 |
| s. 13. | Sale of Goods, Ireland | ib. |
| 7 & 8. c. 36. s. 3. | Judgments | iii. 330 |
| 11 & 12. c. 4. | Papist Purchasers | iii. 223. 392 |

ANNE.

| | | |
|---|---|---|
| 2 & 3. c. 4. | Registry | iii. 346 |
| 5. c. 18. 6. c. 35. | Registry, | ii. 416; iii. 346 |
| c. 2. s. 14. | Registry, Ireland | iii. 356. 367 |
| 7. c. 19. | Infant Trustees | 321 |
| c. 20. | Registry | iii. 346 |
| s. 7. | Registry: Parcels | iii. 355 |

GEORGE I.

| | | |
|---|---|---|
| 3. c. 18. | Papist Vendors, | iii. 392 |
| 8. c. 25. s. 6. | Judgments, | iii. 329 |
| 9. c. 7. s. 4. | Churchwardens, | iii. 221 |

GEORGE II.

| | | Page |
|---|---|---|
| 5. c. 30. s. 41. | Bankruptcy: Enrolment | ii. 409 |
| 8. c. 6. | Registry, | ii. 446; iii. 346 |
| 14. c. 20. s. 4. | Recoverics: Purchasers | iii. 396 |
| s. 5. | Recoveries: Tenant to precipe | ii. 97; iii. 397 |

GEORGE III.

| | | |
|---|---|---|
| 17. c. 26. | Life Annuities, | App. 20 |
| 17. c. 50. s. 8. | Auctions. | 38 |
| 19. c. 56. s. 3. | Auctions. | 23 |
| s. 5. | Auctions. | 15 |
| s. 11. | Auctions. | 27 |
| s. 12. | Auctions. | 21 |
| s. 13. | Auctions. | 15 |
| s. 14. | Auctions. | 16 |
| s. 15. | Auctions. | 16. 20 |
| 25. c. 35. | Extents | ii. 411 |
| 27. c. 13. s. 36. | Auctions. | 15 |
| 28. c. 37. s. 19. | Auctions. | 27 |
| s. 20. | Auctions. | 21 |
| 29. c. 36. s. 4. | Papist Vendors | iii. 392 |
| 31. c. 32. | Papists | iii. 223 |
| 37. c. 14. | Auctions | 15 |
| 41. c. 109. s. 2. | Commissioners of Inclosure | iii. 227 |
| s. 16. | Inclosure | ii. 192 |
| 42. c. 93. s. 1. | Auctions. | 22 |
| s. 2. | Auctions. | 22 |
| s. 14. | Auctions. | 23 |
| c. 116. s. 113. | Auctions: Land-Tax | 16 |
| 43. c. 30. | Papists | iii. 223 |
| c. 69. | Sched. Auctions: Fixtures | 16 |

GEORGE III.—*continued.*

Page

45. c. 30. Auctions - - 15

46. c. 135. Purchasers from Bankrupts - iii. 315, 320

47. c. 74. Debts of Traders - iii. 153, 154. 160

48. c. 149. Stamps: Consideration - ii. 445

49. c. 121. Docket: Notice, iii. 318

s. 2. Executions, &c. against Bankrupts - iii. 315. 320

53. c. 141. Life Annuities, App. 20

54. c. 82. Auctions: Ireland 16

c. 137. s. 74. Auctions: Scotland, ib.

c. 145. Attainder - ii. 236, n.

c. 173. s. 12. Defects in Sales for Land-Tax - iii. 401

55. c. 55. s. 12. Auctions: Crown - 16

c. 184. Stamps: Agreement - - 165, n.

Stamps: Appraisement - - 85

Stamps: Consideration - ii. 445

Stamps: Conveyance - - ii. 446

Stamps: Mortgage, ii. 447

c. 192. Surrenders to Will, 287

56. c. 50. s. 11. Husbandry Crops - 158

57. c. 100. s. 22. Defects in Sales for Land-Tax iii. 403

s. 23. iii. 405

s. 24. iii. 406

s. 25. iii. 407

s. 26. iii. 408

GEORGE IV.

Page

1 & 2. c. 23. Inclosures - ii. 192

c. 121. s. 10. Crown Debts ii. 412, iii. 409

3. c. 92. Life Annuities, App. 28

c. 117. Stamps: Mortgages - ii. 447

5. c. 74. s. 1. s. 2. s. 15. s. 23. 6. c. 12. Measures, 534, 535.

c. 16. s. 4. Conveyance by Trader - iii. 324

s. 6. Concerted Commission - ii. 409

s. 73. Purchase by Bankrupts iii. 268

s. 75. Lease in Bankrupt - - 64. 93

s. 76. Purchases by Bankrupt - 274

s. 81. Purchase from him - iii. 319. 326

s. 82. Payment to him - 274; iii. 320. 326

s. 83. Commission: Notice - iii. 320. 467

s. 85. Notice to Agent - iii. 321, n. 467

s. 86. Purchaser with Notice - iii. 323. 467

c. 16. s. 87. Defect in Commission, &c. iii. 324. 327

s. 98. Auction Duty - 18

s. 108. Judgments - iii. 332

c. 74. Infant Trustees - 322

s. 5. Mortgagees - 323, n.

7. c. 57. s. 87. Insolvents. Auctions - - 16

GEORGE IV.—*continued.*

| | | Page |
|---|---|---|
| 9. c. 14. s. 6. | Written Undertaking - | 7 |
| c. 35. | Judgments in Ireland - | ii. 382, n. |
| 10. c. 7. s. 23. | Roman-catholic Relief - | iii. 224. 395 |

WILLIAM IV.

| | | |
|---|---|---|
| 1. c. 7. | Judgments - | iii. 332 |
| c. 36. s. 15. | Contempts - | 326 |
| c. 40. | Executors - | ii. 70 |
| c. 46. | Illusory Appointments - - | ib. |
| c. 47. | Payment of Debts. Real Estate - | ii. 195, n. |
| c. 60. | Trustees and Mortgagees | 287. 324, n; ii. 195. |
| s. 8. | Mortgagees - | 323, n. |
| s. 15. | Trustees - | 322 |
| s. 16. | Heir of nominal Purchaser - | 322; iii. 256 |
| s. 17. | Tenant for Life, &c., | 323 |
| s. 18. | Constructive Trusts, | ib. |
| c. 65. s. 7. | Lunacy. Sale - | 335 |
| 1 & 2. c. 56. s. 13. 27. 29. | Bankrupt: Enrolment | ii. 409 |
| s. 42. | Bankrupt - - | ib. |
| s. 26. | Vesting in Assignees | ii. 66. 409 iii. 319 |
| c. 58. | Interpleading - | 76 |
| 2 & 3. c. 71. | Time of Prescription - | ii. 370 |
| s. 1. | Right of Common, &c. - | ib. |
| s. 2. | Right of Way, &c. | ii. 371 |
| s. 3. | Lights - - | ib. |

WILLIAM IV.—*continued.*

| | | Page |
|---|---|---|
| 2 & 3. c. 74. s. 4. | Time - - | ii. 372 |
| s. 5. | Pleadings - | ii. 374 |
| s. 6. | Time - | ii. 372 |
| s. 7. | Disability - - | ib. |
| s. 8. | Time - | ii. 373 |
| c. 100. | Tithes: Limitation of Time - | ii. 376 |
| s. 1. | Modus or Exemption - | ii. 377 |
| s. 2. | Decrees - - | ii. 378 |
| s. 5. | Time - - | ib. |
| s. 6. | Disability - | ii. 379 |
| s. 7. | Pleadings - | ib. |
| s. 8. | Time - - | ib. |
| c. 114. | Bankrupt: Enrolment - | ii. 409. 410 |
| 3 & 4. c. 27. | Limitation of Actions - | ii. 70. 132 iii. 28 |
| s. 1. | Definition - | ii. 331, n. |
| s. 2. | (1) Time, 20 Years - | ii. 331. 360. 366 |
| c. 27. | Accruer of | ii. 332, 333. |
| s. 3. | Right - | 339. 353 |
| s. 4. | Forfeiture: Reversion - | ii. 339 |
| s. 5. | Accruer of Right, | ii. 341 |
| s. 6. | Administrator, | ii. 341 |
| s. 7. | Tenancy at Will, | ib. 350 |
| s. 8. | Tenancy without Lease, | ii. 342. 350. 352 |
| s. 9. | Lease in writing - | ii. 343. |
| s. 10. | Entry - - | ii. 343 |
| s. 11. | Continual Claim, | ii. 330 |
| s. 12. | Coparceners, &c. | ii. 344 |
| s. 13. | Younger Brother, &c. - - | ib. |


(1) Add a reference to sec. 2 in p. 331, and to sec. 3 in p. 332, 333.

WILLIAM IV.—*continued.*

| | | Page |
|---|---|---|
| 3 & 4. | | |
| c. 27. s. 14. | Acknowledgment of Title | ii. 344 351 |
| s. 15. | Adverse Possession | ii. 329. 345. 347. 349 |
| s. 16. | Disabilities, | ii. 345. 360 |
| s. 17. | Forty Years | ii. 345. 348. 360 |
| s. 18. | Disabilities, | ii. 346. 360 |
| s. 19. | Beyond the Seas, | ii. 346 |
| s. 20. | Distinct Rights, | ii. 340 |
| s. 21. | Estate-tail and Remainder | ii. 355 |
| s. 22. | Estate-tail and Remainder | ib. |
| s. 23. | The like | ib. 356 |
| s. 24. | Suits in Equity, | ii. 360 |
| s. 25. | Trusts | ii. 361 |
| s. 26. | Concealed Fraud, | ib. |
| s. 27. | Acquiescence, | ib. |
| s. 28. | Mortgagor | ib. |
| s. 29. | Church Property, | ii. 368 |
| s. 30. | Advowson | ib. |
| s. 31. | Lapse. Promotion, | ib. |
| s. 32. | Estate Tail. Advowson. | ii. 369 |
| s. 33. | Advowson: 100 Years | ib. |
| s. 34. | Right extinguished | ii. 330 |
| s. 35. | Rents. Lessee, | ii. 341. 350 |
| s. 36. | Actions abolished, | ii. 329 |
| s. 37. | Rights saved | ib. |
| s. 38. | The like | ib. |
| s. 39. | Descent, cast, &c. | ii. 330 |
| s. 40. | Money | ii. 362 |
| s. 41. | Dower | ii. 365 |
| s. 42. | Rent. Interest. Legacy | ii. 331. 365 |
| s. 43. | Spiritual Court, | ii. 369 |

WILLIAM IV.—*continued.*

| | | Page |
|---|---|---|
| 3. & 4. | c. 27. | |
| s. 44. | Scotland. Ireland. | ii. 369 |
| c. 23. | Escheat | ii. 70 |
| c. 40. | Executors | ib. |
| c. 42. s. 1. | Entry of Judgments | iii. 332 |
| s. 3. s. 4. s. 5. s. 7. | Limitation of Time. Rent. Specialty. | ii. 366 379 |
| s. 28. | Interest | 370; iii. 125. 130 |
| c. 46. | Illusory Appointments | ii. 70 |
| c. 47. | Bankruptcy Court | iii. 319 |
| c. 74. | Fines and Recoveries | ii. 70 |
| s. 1. | Definitions | ii. 272. 278. 280. 293 |
| s. 2. | Abolition | ii. 271 |
| s. 3. | Existing Agreements | ib. |
| s. 4. s. 5. s. 6. | Ancient Demesne | ii. 268, 269 |
| s. 7. | Errors in Fines | ib. |
| s. 8. | Errors in Recoveries, | ib. |
| s. 9. | Jurisdiction | ib. |
| s. 10. | Recoveries made valid | ii. 270 |
| s. 11. | The like. Legal Estate | ib. |
| s. 12. | Exceptions thereon, | ib. |
| s. 14. | Warranties | ii. 271 |
| s. 15. | Power of Tenant in Tail | ii. 272. 278 |
| s. 17. | Repeal of 11 H. 7, | ii. 271 |
| s. 18. | Tenants in Tail restrained | ii. 279 |
| s. 19. | Base Fee enlarged | ii. 280 |

WILLIAM IV.—*continued.*

| | | Page |
|---|---|---|
| 3 & 4. c. 74. s. 20. | Hope of Succession | ii. 280 |
| s. 21. | Partial bars, | ii. 279. 281 |
| s. 22. | Protector, | ii. 282. 296 |
| s. 23. | The like | ii. 283 |
| s. 24. | The like | ib. |
| s. 25. | The like | ib. |
| s. 26. | The like | ib. 299 |
| s. 27. | The like | ii. 283. 294. 296 |
| s. 28. | The like | ib. 283. 295 |
| s. 29. | Protector: | ii. 284. |
| s. 30. | Right saved | 297 |
| s. 31. | The like. Trustees | ii. 285. 292. 299 |
| s. 32. | Exclusion of Protector | ii. 285 |
| s. 33. | Lunatics | ib. 297 |
| s. 34. | Power of Protector | ii. 287 |
| s. 35. | The like | ib. |
| s. 36. | Equity excluded, | ii. 288 |
| s. 37. | The like | ib. |
| s. 38. | Voidable Fee. Purchaser | ii. 280. 310 |
| s. 39. | Base Fee enlarged | ii. 288; iii. 397. 440 |
| s. 40. | Deeds. Contracts | ii. 278. 289 |
| s. 41. | Enrolment, | ii. 289, 290 |
| s. 42. | (I) Protector's consent | ii. 288 |
| s. 43. | The like | ii. 289 |
| s. 44. | Consent not revocable (II) | ii. 288 |
| s. 45. | Married Woman | ib. |
| s. 46. | Consent; Enrolment | ii. 289 |

WILLIAM IV.—*continued.*

| | | Page |
|---|---|---|
| 3 & 4. c. 74. s. 47. | Equitable Jurisdiction | ii. 291 iii. 400 |
| s. 48. | Lunatics | ii. 285 |
| s. 49. | The like | ib. |
| s. 50. | Copyholds, 329; | ii. 302 |
| s. 51. s. 52. | The like: Protector | ib. |
| s. 53. | The like: Deeds, | ii. 303 |
| s. 54. | The like: Court Rolls | ib. |
| s. 55. | Bankrupts: Saving | ii. 304 |
| s. 56. | Commissioner's power | ib. |
| s. 57. | The like: Base Fee, | ib. |
| s. 58. | The like: Protector, | ib. |
| s. 59. | Deeds: Enrolment, | ib. |
| s. 60. | Commissioner's power. | ii. 305 |
| s. 61. | Base Fee enlarged | iii. 398 |
| s. 62. | Voidable Fee | ib |
| s. 63. | Protection to Purchaser | ib. |
| s. 64. | Bankrupt's power, | ib. |
| s. 65. | Death of Bankrupt | ii. 305 |
| s. 67. | Rents, &c. of Copyholds | ii. 306 |
| s. 68. s. 69. | Lands in Ireland, | ib. |
| s. 71. | Money entailed, | ii. 306 |
| s. 72. | Provisions as to Ireland | ii. 307 |
| s. 73. | Acknowledgment, | ii. 309 |
| s. 74. | Enrolment | ii. 290. 309. 311; iii. 350 |
| s. 77. | Married Woman | 333; ii. 307 |


(I) Add a reference to sections 42, 43. 46, in p. 289.
(II) Misprinted in p. 288, 42.

WILLIAM IV.—*continued.*

| | | Page |
|---|---|---|
| 3 & 4. c. 74. s. 78. | Married Woman: Powers - - | ii. 308 |
| s. 79. | The like: Deeds, | ib. |
| s. 80. | The like - - | ib. |
| s. 81–89. | Separate Examination - | ib. |
| s. 87. | The like: Index of Acknowledgments - | ii. 414 |
| s. 90. | Married Woman: Surrenders - | ii. 308 |
| s. 91. | The like: Power of C. P. - | ib. |
| c. 87. | Enrolment of Awards - | ii. 59. 192 |
| c. 94. | Sales by a Master, | 100 |
| s. 10. | Office Copies - | 103 |
| c. 104. | Simple Contract Debts, | ii. 95. 160. 214. 386. 541; iii. 153. 214 |
| c. 105. | Dower - | ii. 70. 308; iii. 277. 296 |
| s. 1. | Definitions - | ii. 223 |
| s. 2. | Dower enlarged | 305 ii. 224 |
| s. 4. s. 5. s. 6. s. 7. s. 8. | Dower in Husband's power | ii. 226 |
| s. 9. s. 10. | Devises a bar - | ib. |
| s. 11. s. 12. | Equity of Widow, | ii. 227 |
| s. 13. | Dowers abolished, | ib. |
| s. 14. | Savings - | ii. 222 |

WILLIAM IV.—*continued.*

| | | Page |
|---|---|---|
| 3 & 4. c. 106. | (1) Inheritance | ii. 65. 70. 228 |
| s. 1. | Definitions - | ii. 228, n. |
| s. 2. | Tracing Descent: Purchaser - | ii. 228 |
| s. 3. | Devise to Heir. Heirs Purchasers. | ii. 232 |
| s. 4. | Limitations: Ancestors Purchasers | ii. 233 |
| s. 5. | Brothers and Sisters, | ib. |
| s. 6. | Lineal Ancestors, | ii. 234 |
| s. 7. | Males preferred - - | ii. 234. 240 |
| s. 8. | Female paternal Ancestors - | ii. 235 |
| s. 9. | Half Blood - | ib. 240 |
| s. 10. | Attainder - | ii. 235 |
| s. 11. | Commencement, | ii. 236 |
| s. 12. | Saving - - | ib. |
| c. 30. s. 24. s. 25. | Exchange: Common Fields. | ii. 260 |
| 4 & 5. c. 22. | Apportionment of Rents - - | 316 |
| c. 23. | Escheat - | 323, n. 477 ii. 70. 379 |
| c. 83. | Tithes - - | ii. 379 |
| c. 92. | Fines and Recoveries, Ireland - - | ii. 280. 309. 312 |
| 5. c. 74. s. 2. s. 15. | Measures - | 534 |
| s. 23. | Repeal of Statutes | 535 |
| 6 & 7. c. 71. | Commutation of Tithe - - | 523 ii. 379 |


(1) In vol. ii. p. 228, the reference to "3 & 4 W. 4, c. 106," is omitted before sect. 1.

WILLIAM IV.—*continued.*

Page

6 & 7. c. 71.
s. 44. s. 45. Moduses - ii. 379
s. 71. Merger of Tithes - 523; ii. 84
c. 85. Marriage - ii. 75
c. 86. Registering Births - ib.
7. & 1 Vict.
c. 28. Mortgagees - ii. 334

VICTORIA.

1. c. 26. Wills, 295. 308; ii. 70. 244; iii. 92. 210. 214.
s. 1. Definitions - ii. 244, n.
s. 2. Statutes repealed - ib.
s. 3. What devisable - ii. 245
s. 4. s. 5. Customary and Copyhold - ii. 248, n.
s. 6. Estate pur autre vie, ib.
s. 7. Infants - - ii. 250
s. 8. Married Woman - ib.
s. 9. Mode of Execution, ii. 251
s. 10. Appointments - - ib.
s. 11. s. 12. Soldiers and (I) Sailors - ib. n.
s. 13. Publication - ii. 252
s. 14. Incompetent Witness, ib.
s. 15. s. 16. s. 17. Witness: Interest - ii. 252, n.
s. 18. Revocation: Marriage - ii. 253
s. 19. Revocation: Presumption - 296 ii. 254
s. 20. Revocation: Act done - - ib.
s. 21. Alteration, &c. - ii. 254
s. 22. Revival - - - ib.

VICTORIA—*continued.*

Page

1. c. 26.
s. 23. Conveyance 296; ii. 255
s. 24. Speaking as at Death - 295, 296, 297 ii. 255
s. 25. Lapsed Devise - ii. 256
s. 26. Copyholds: Leaseholds - - - ib.
s. 27. Powers - - ii. 257
s. 28. Fee - 258. 300; ii. 258
s. 29. Die without Issue ii. 258
s. 30. Fee: Trustees - - ib.
s. 32. The like - - ii. 259
s. 33. Estate Tail: Children: Lapse (I) - ib. 260 ii. 244, n.
s. 34. Savings - - ii. 244, n.
s. 35. Scotland excepted - ib.
c. 28. Mortgagees - ii. 334
1 & 2. c. 64. Merger of Tithes 523 ii. 84
c. 69. Mortgagees - 323, n. 523
c. 109. Tithes in Ireland - 523
c. 110. Imprisonment for Debt - ii. 395 iii. 337
s. 8. Affidavit of Debt ii. 409
s. 9. Judgments: Entirety - - ii. 395
s. 11. The like - - ib. 398
s. 13. The like; A Charge ib. 406 iii. 334. 398
s. 18. Decrees: Orders - - ii. 396 iii. 340
s. 19. Judgments; Registry, ib.
s. 22. Judgments; Inferior Courts - ii. 406 iii. 341
s. 42. Sale by Auction - 87
s. 46. Assignees of Insolvents; Registry - iii. 348
s. 47. s. 48. Sale - - - 87


(I) By mistake s. 12 is printed s. 32.

VICTORIA—*continued.*

| | | Page |
|---|---|---|
| 1 & 2 c. 110. | | |
| s. 50. | Leases in Insolvents | 93 |
| s. 116. | Auctions: Insolvents | 16 |
| s. 123. | Judgments: Purchasers | ii. 395<br>iii. 338 |
| 2. c. 11. | Purchaser's Protection | ii. 395. 401. 410<br>iii. 325. 391 |
| s. 1. | Judgments: Old Dockets | ii. 401<br>iii. 343 |
| s. 2. | The like: Registry | ib. |
| s. 3. | | |
| s. 4. | The like: Registry | ii. 404<br>iii. 344 |
| s. 5. | The like: Purchasers without Notice | ii. 397<br>400, 401 |

VICTORIA—*continued.*

| | | Page |
|---|---|---|
| 2. c. 11. | | |
| s. 6. | Judgments | iii. 345 |
| s. 7. | Lis Pendens: Registry | ii. 410<br>iii. 314 |
| s. 8. | Crown Debts: Registry | ii. 401<br>iii. 410 |
| s. 9. | Quietus: Registry | ib. |
| s. 10. | Crown Debts: Treasury | ii. 412 |
| s. 12. | Purchaser from Bankrupt | iii. 325 |
| s. 13. | The like, with Notice, | ib. |
| s. 14. | Ireland | ib. |
| 2 & 3. c. 29. | Contracts with Bankrupts | ii. 189. 409<br>iii. 325. 327, n. |
| 3. c. 60. | Mortgages: Debts | ii. 195, n. |

ERRATUM.

Vol. ii. p. 179, *for* "2 Sim. & Stu. 435," *insert* "5 Madd. 435."

# THE LAW

OF

# *VENDORS AND PURCHASERS*

OF

# ESTATES.

## INTRODUCTION.


1. *Vendors' liability to disclose defects.*
2. *Unnecessary where the purchaser has knowledge.*
4. *Or they are patent.*
6. *But they must not be concealed.*
7. *Sale subject to all faults.*
9, 10. *Random praise by vendor.*
11. *False statement of value; small fine; speedy vacancy; rich meadow.*
12. *No deceit unless party off his guard.*
13. *False statement of valuation fatal.*
14. *So of rent.*
15. *Misrepresentations by a stranger.*
18. *Misrepresentations and non-disclosures by a purchaser.*
19. *Must not mislead the seller.*
20. *Nor conceal a death which adds to value.*
21. *Concealment of incumbrances and defects in title.*
22. *Attorney's liability in such cases.*
23. *Same attorney for both sides.*
26. *Attorney may not disclose defect to party interested.*
28. *Obligation of grantor of annuity.*
29. *Necessity for investigation of title.*
30. *Result.*
31. *Purchasers bound by covenants in lease.*
32. *Inquiry after incumbrances.*
34. *Where a purchaser may take possession.*
36. *Purchaser of equitable rights.*
37. *Auctioneers not to prepare conditions.*
38. *Title to be investigated before sale.*


1. MORAL writers insist (*a*), that a vendor is bound, *in foro conscientiæ*, to acquaint a purchaser with the

(*a*) Cic. de Off. 3. 13; Grotius de Jure Belli ac Pacis, l. 2. c. 12. s. 9; Puffendorf de Jure Naturæ et Gentium, l. 5. c. 3. s. 2;

defects of the subject of the contract. Arguments of some force have, however, been advanced in favour of the contrary doctrine; and our law does not entirely coincide with this strict precept of morality (*b*).

2. If a person enter into a contract, with full knowledge of all the defects in the estate, the question cannot arise: *scientia enim utrinque par pares facit contrahentes* (*c*).

3. So if, at the time of the contract, the vendor himself was not aware of any defect in the estate, it seems that the purchaser must take the estate with all its faults, and cannot claim any compensation for them.

4. And even if the purchaser was, at the time of the contract, ignorant of the defects, and the vendor was acquainted with them, and did not disclose them to the purchaser; yet, if they were *patent,* and could have been discovered by a vigilant man, no relief will be granted against the vendor.

5. The disclosure of even *patent* defects in the subject of a contract, may be allowed to be a moral duty; but it is what the civilians term a duty of imperfect obligation. *Vigilantibus, non dormientibus jura subveniunt,* is an ancient maxim of our law, and forms an insurmountable barrier against the claims of an improvident purchaser.

6. In this respect, equity follows the law. But it has been decided, that if a vendor, during the treaty, industriously prevent the purchaser from seeing a defect which might otherwise have easily been discovered, he is not entitled to the extraordinary aid of a court of equity: and it is conceived, that he could not even sus-

Puffendorf de Off. l. 1. c. 15. s. 3; Valerius Maximus, l. 8. c. 11; et vide Deuteronomy xxv. 14; Paley's Moral Philosophy, vol. 1. b. 3. ch. 7.

(*b*) *Vide infra,* ch. 7.

(*c*) Grotius de Jure Belli ac Pacis, l. 2. c. 12. s. 9. 3; Puffendorf de Jure Naturæ et Gentium, l. 5. c. 3. s. 5.

tain an action against the purchaser for a breach of the contract.

7. And if a vendor know that there is a *latent* defect in his estate, which the purchaser could not, by any attention whatever, possibly discover, it is not clear that he is not bound to disclose his knowledge, although the estate be sold, expressly subject to all its faults (*d*).

8. By the civil law, vendors were bound to warrant both the title and estate against all defects, whether they were or were not conusant of them. To prevent the inconveniences which inevitably would have resulted from this general doctrine, it was qualified by holding, that if the defects of the subject of the contract were evident, or the buyer might have known them by proper precaution, he could not obtain any relief against the vendor.

9. The rule of the civil law also was, "*simplex commendatio non obligat.*" If the seller merely made use of those expressions, which are usual to sellers, who praise at random the goods which they are desirous to sell, the buyer, who ought not to have relied upon such vague expressions, could not, upon this pretext, procure the sale to be dissolved (*e*).

10. The same rule prevails in our law (*f*), and has received a very lax construction in favour of vendors. It has been decided, that an action of deceit cannot be maintained against a vendor for having falsely affirmed, that a person bid a particular sum for the estate, although the person to whom the representation was made was thereby induced to purchase it, and was deceived in the value (*g*).

(*d*) See *post.* ch. 7. s. 4.

(*e*) 1 Dom. 85.

(*f*) Chandelor *v.* Lopus, Cro. Jac. 4.

(*g*) 1 Rol. Abr. 101. pl. 16. See 1 Sid. 146; Kinnaird *v.* Lord Dean, stated *infra*, n.

11. Neither can a purchaser obtain any relief against a vendor for false affirmation of value (*h*); it being deemed the purchaser's own folly to credit a nude assertion of that nature. Besides, value consists in judgment and estimation, in which many men differ. So, where a church lease was described in the particulars of sale, as being nearly of equal value with a freehold, and renewable every ten years, upon payment of a *small fine*, the purchaser was not allowed any abatement in his purchase-money, although the fine was very considerable, and it was proved that the steward of the estate had remonstrated with the vendor, before the sale, upon his false description (*i*). And a statement in the particulars of an advowson, that an avoidance of the preferment was likely to occur soon, was held to be so vague and indefinite, that the Court could not take notice of it judicially; and that its only effect ought to have been, to put the purchaser upon making inquiries respecting the circumstances under which the alleged avoidance was likely to take place, previous to his becoming the purchaser (*k*). So a statement, that the property is uncommonly rich water meadow land, will not annul the contract, although the land is imperfectly watered (*l*).

12. And in an action of deceit, it is not sufficient to show that the vendor was guilty of a misrepresentation—for example, represented the grantor of an annuity, which was offered for sale, as a man of large property, and that the purchaser need be under no

(*h*) Harvey *v.* Young, Yelv. 20. See Duckenfield *v.* Whichcott, 2 Cha. Ca. 204; see Ekins *v.* Tresham, 1 Lev. 102; reported 1 Sid. 146, by the name of Leakins *v.* Clissel.

(*i*) Brown *v.* Fenton, Rolls, 23 June 1807, MS.; S. C. 14 Ves. jun. 144.

(*k*) Trower *v.* Newcome, 3 Mer. 704.

(*l*) Scott *v.* Hanson, 1 Sim. 13.

apprehension as to his responsibility, whilst, in point of fact, he was in confinement for debt, and had been so for some time—but it must be shown that some deceit was practised for the purpose of throwing the party off his guard, and preventing him from being watchful (*m*).

13. But if a vendor affirm, that the estate was valued by persons of judgment, at a greater price than it actually was, and the purchaser act upon such misrepresentation, the vendor cannot compel the execution of the contract in equity (*n*), nor would he, it should seem, be permitted to maintain an action at law for non-performance of the agreement.

14. And a remedy will lie against a vendor, for falsely affirming that a greater rent is paid for the estate than is actually reserved (*o*) (I); because that is a circum-

(*m*) Dawes *v.* King, 1 Stark. Ca. 75.

(*n*) Buxton *v.* Cooper, 3 Atk. 383; S. C. MS.; see Partridge *v.* Usborne, 5 Russ. 195; Small *v.* Attwood, 1 You. 407. In D. P. upon appeal, the purchasers held to be bound.

(*o*) Ekins *v.* Tresham, *ubi sup.*; Lysney *v.* Selby, 2 Lord Raym. 1118; 1 Salk. 211, S. C. nom. Risney *v.* Selby; Dobell *v.* Stevens, 3 Barn. & Cress. 623; Small *v.* Attwood, 1 You. 407.

(I) In the 1st vol. of Coll. of Decis. p. 332, the following case is reported: — An heritor having solemnly affirmed to his tacksman at setting the lands, that there was paid, by the preceding tenants, for each acre, a great deal more than really was paid, and thereby induced him to take it at a very exorbitant rate, whereby he was leased *ultra dimidium*; yet continued to possess two years before he complained. The Lords found the allegiance of circumvention and fraud, both in *consilio* and in *eventu*, not sufficient to reduce the tack, *and that the tenant should have informed himself better what was the true rent, and not have relied on the setter's assertion, and ought to have tried the quality of the ground, and, his eye being his merchant, he had none to blame but himself*, especially now that he had acquiesced two years. Kinnaird *v.* Lord Dean.

stance within his own knowledge. The purchaser is not bound to inquire further: for the leases may be made by parol, and the tenants may refuse to inform the purchaser what rent they pay; or the tenants may combine with the landlord, under whose power they frequently are, and so misinform and cheat the purchaser. It has been decided also, after great consideration (*p*), that a purchaser may recover against a vendor for false affirmation of rent, although he did not depend upon the statement, but inquired what the estate let for. Where it can be satisfactorily proved that the purchaser did not rely upon the vendor's assertion, a jury would undoubtedly give but trifling damages.

15. It seems that the same remedy will lie against a person *not interested in the property*, for making a false representation to a purchaser of value or rent, as might be resorted to in case such person were owner of the estate (*q*); but the statement must be made *fraudulently*, that is, with an intention to deceive; whether it be to favour the owner, or from an expectation of advantage to the party himself, or from ill-will towards the other, or from mere wantonness, appears to be immaterial (*r*).

16. And in cases of this nature it will be sufficient proof of fraud to show, first, that the fact, as represented, is false: secondly, that the person making the representation had a knowledge of a fact contrary to

(*p*) Lysney *v.* Selby, *ubi sup.*

(*q*) Pasley *v.* Freemen, 3 Term Rep. 51; Eyre *v.* Dunsford, 1 East, 318; Ex parte Carr, 3 Ves. & Bea. 108.

(*r*) Haycraft *v.* Creasy, 2 East, 92; Tapp. *v.* Lee, 3 Bos. & Pull. 367; and see 6 Ves. jun. 186; 13 Ves. jun. 134; 12 East, 634, n.; Hutchinson *v.* Bell, 1 Taunt, 558; De Graves *v.* Smith, 2 Camp. Ca. 533; Foster *v.* Charles, 7 Bing. 106; 4 Moo. & P. 61 and 741; Corbett *v.* Brown, 2 Mood. & Malk. 108; 5 Carr. & P. 363; Freeman *v.* Baker, 5 Barn. & Adol. 797.

it. The injured party cannot dive into the secret recesses of the other's heart, so as to know whether he did or did not recollect the fact; and therefore, it is no excuse in the party, who made the representation, to say, that though he had received information of the fact, he did not at that time recollect it (*s*).

17. But if the representation amount to an assurance only of a man's ability to answer an obligation, it must, to be binding, be in writing (*t*).

18. A *purchaser* is not liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers (*u*). Nor is a purchaser bound to acquaint the vendor with any *latent* advantage in the estate: for instance, if a purchaser has discovered that there is a mine under the estate, he is not bound to disclose that circumstance to the vendor, although he knows the vendor is ignorant of it (*x*).

19. Equity will not, however, interfere in favour of a purchaser who has misrepresented the estate to any person who had a desire of purchasing it (*y*). And a very little is sufficient to affect the application of this principle. If, it has been said, a word, a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate (*z*).

20. And if a purchaser conceal the fact of the death of a person of which the seller is ignorant, and by which

(*s*) Burrowes *v.* Lock, 10 Ves. jun. 470, per Sir Wm. Grant.

(*t*) 9 Geo. 4, c. 14, s. 6; Swan *v.* Philips, 3 Nev. & Per. 447.

(*u*) See Vernon *v.* Keys, 12 East, 632.

(*x*) See 2 Bro. C. C. 420.

(*y*) See Howard *v.* Hopkyns, 2 Atk. 371; Young *v.* Clerk, Prec. Cha. 538.

(*z*) *Per* Lord Eldon, 1 Jac. 178.

the value of the property is increased, equity will set aside the contract (*a*).

21. The same rules apply to incumbrances and defects in the title to an estate, as to defects in the estate itself. Both law and equity require the vendor to deliver to the purchaser the instrument by which the incumbrances were created, or on which the defects arise; or to acquaint him with the facts, if they do not appear on the title-deeds. If a vendor neglect this, he is guilty of a direct fraud, which the purchaser, however vigilant, has no means of discovering. If therefore a seller knows and conceals a fact material to the title, there is no principle upon which relief can be refused to the purchaser (*b*).

22. And Lord Hardwicke laid it down (*c*), "that even if an attorney of a vendor of an estate, knowing of incumbrances thereon, treat for his client in the sale thereof, without disclosing them to the purchaser or contractor, knowing him a stranger thereto, but represents it so as to induce a buyer to trust his money upon it, a remedy lies against him in *equity* (*d*): to which principle it is necessary for the court to adhere, to preserve integrity and fair dealing between man and man; most transactions being by the intervention of an attorney or solicitor."

23. The same observation applies, and indeed with much greater force, to the attorney or agent of the purchaser. It can seldom happen that the attorney or agent

(*a*) Turner *v.* Harvey, 1 Jac. 169; and as to concealment generally, see Harris *v.* Kemble, 1 Sim. 128, reversed by L. C. and in D. P.

(*b*) *Per* Sir W. Grant, Coop. 312.

(*c*) *Per* Lord Hardwicke, 1 Ves. 96; and see 6 Ves. jun. 193; Burrowes *v.* Lock, 10 Ves. jun. 470; and Bowles *v.* Stewart, 1 Sch. and Lef. 227.

(*d*) It seems clear that relief might now be obtained at law.

of the purchaser is conusant of any incumbrance on the estate intended to be purchased, unless he be employed by both parties; which the same person frequently is, in order to save expense. This practice has been discountenanced by the courts (*e*), and is often productive of the most serious consequences; for it not rarely happens, that there are incumbrances on an estate which can be sustained in equity only, and which will not bind a purchaser who obtains the legal estate, unless he had notice of them previously to completing his purchase. Now notice (*f*) to an agent, although one concerned for both parties, is treated in equity as notice to the purchaser himself; and, therefore, if the attorney know of any equitable incumbrance, the purchaser will be bound by it, although he himself was not aware of its existence.

24. And by these means, a purchaser may even deprive himself of the benefit to be derived from the estate lying in a register county: the register may be searched, and no incumbrance appear; yet, if the attorney have notice of any unregistered incumbrance, equity will assist the incumbrancer in establishing his demand against the purchaser (*g*) (I).

25. Another powerful reason why a purchaser should not employ the vendor's attorney is, that if the vendor be guilty of a fraud in the sale of the estate, to which the attorney is privy, the purchaser, although it be proved that he was innocent, will be responsible for the miscon-

(*e*) See 6 Ves. jun 631, n.
(*f*) See *infra*, ch. 23.
(*g*) See *infra*, ch. 21, 22, 23.

(1) Whenever in any proceeding before a Master the same solicitor is employed for two or more parties, such Master may, in his discretion, require that any of the said parties shall be represented before him by a distinct solicitor, and may refuse to proceed until such party is so represented.—General orders, 23d Nov. 1831, 77.

duct of his agent (*h*). In one case (*i*), a purchaser lost an estate, for which he gave nearly 8000 *l.*, merely by employing the vendor's attorney, who was privy to a fraudulent disposition of the purchase-money.

26. Of course a man's attorney is not at liberty to disclose any defect which he has discovered to the party entitled to take advantage of it, although that party is also his client; and it is no defence that the owner was aware that the attorney was also concerned for the other party (*k*).

27. The seller's attorney, too, should be cautious not to obtain any undue advantage of the purchaser behind his solicitor's back; for not only cannot such an advantage be retained, but it may, if deemed fraudulent, induce the court to rescind the contract altogether (*l*).

28. But to return, it has been decided that the grantor of an annuity is not bound to lay open to the intended grantee all the circumstances of his situation: he is only bound to give honest answers to questions put to him by the intended grantee. If the grantee employ the grantor's attorney to prepare the deeds, the mere preparation of the deeds does not place him in a confidential relation towards the grantee; but as the agent of the grantor he stands in his situation, and is not bound to do more than his principal (*m*).

29. With the exception of a vendor, or his agent, suppressing an incumbrance, or a defect in the title, it seems clear, that a purchaser cannot obtain relief against a vendor for any incumbrance, or defect in the title, to

(*h*) See Bowles *v.* Stewart, 1 Sch. & Lef. 227.

(*i*) Doe *v.* Martin, 4 Term Rep. 39: Hicks *v.* Morant, 3 You. & Jerv. 286; 2 Dow & Clark, 414.

(*k*) Taylor *v.* Blacklow, 3 Bing. N. C. 235.

(*l*) Berry *v.* Armistead, 2 Kee. 221.

(*m*) Adamson v. Evitt, 2 Russ. & Myl. 66.

which his covenants do not extend; and therefore if a purchaser neglect to have the title investigated, or his counsel overlook any defect in it, he appears to be without a remedy (*n*).

30. To sum up the foregoing observations,—a purchaser is entitled to relief, on account of any *latent* defects in the estate, or in the title to the estate, which were not disclosed to him, and of which the vendor, or his agent, was aware. In addition to this protection afforded him by the law, a provident purchaser will examine and ascertain the quality and value of the estate, and not trust to the description and representation of the vendor, or his agents; he will employ an agent and attorney not concerned for the vendor, and will have the title to the estate inspected by counsel.

31. Where it is stated upon a sale, even by auction, that the estate is in lease, and there is no *misrepresentation*, the purchaser will not be entitled to any compensation, although there are covenants in the lease contrary to the custom of the country; because, whoever buys with notice of a lease, is held conusant of all its contents (*o*). This rule, it should seem, ought, as between a vendor and purchaser, to have been confined to a contract actually executed by the conveyance of the estate and payment of the purchase-money; but as the point has been thus decided, no person having notice of any lease, or that the estate is in the occupation of tenants, should sign a contract for purchase of the estate without first seeing the leases, unless the vendor will stipulate that they contain such covenants only as are justified by the custom of the country.

32. With respect to incumbrances, it remains to re-

(*n*) See *post*, ch. 12.

(*o*) Hall *v.* Smith, Rolls, 18 Dec. 1807, MS.; S. C. 14 Ves. jun. 426; Walter *v.* Maunde, 1 Jac. & Walk. 181; Barraud *v.* Archer, 2 Sim. 437.

mark, that if a purchaser suspect any person has a claim on the estate which he has contracted to buy, he should inquire the fact of him, *at the same time stating that he intends to purchase the estate;* and if the person of whom the inquiry is made has an incumbrance on the estate, and deny it, equity would not afterwards permit him to enforce his demand against the purchaser (*p*).

33. The inquiry should be made before proper witnesses; and as a witness may refresh his memory by looking at any paper if he can afterwards swear to the facts from his own memory, it seems advisable that the witnesses should take a note of what passes (*q*).

34. Where difficulties arise in making out a good title, the purchaser should not take possession of the estate until every obstacle is removed. Purchasers frequently take this step, under an impression, that it gives them an advantage over the vendor; but this is a false notion; such a measure would, in many cases, be deemed an acceptance of the title (*r*), or would at least be a ground to leave it to a jury, to consider whether the party had not taken possession with an intention to wave all objections. Where a purchaser, after delivery to him of the abstract, which disclosed a reservation of a right of sporting not noticed in the particulars by which he purchased, upon his application was let into possession, and paid the greater part of the purchase-money, without objecting to the right reserved, and apo-

(*p*) Ibbetson *v.* Rhodes, 2 Vern. 554; Amy's case, 2 Cha. Ca. 128, cited; Hickson *v.* Aylward, 3 Molloy, 1.

(*q*) See Doe *v.* Perkins, 3 Term Rep. 749, and the cases there cited; Burrough *v.* Martin, 2 Camp. Ca. 112.

(*r*) See 3 P.Wms. 193; Calcraft *v.* Roebuck, 1 Ves. jun. 226; 12 Ves. jun. 27; and Vancouver *v.* Bliss, 11 Ves. jun. 464; Ex parte Sidebotham, 1 Mont. & Ayr. 655; 2 Mont. & Ayr. 146, vide *post*, ch. 8.

logized for not sending the draft of the conveyance, and afterwards raised the objection, he was held bound by his conduct, which was considered as a waver of the objection; and although a clerk of the seller's solicitor wrote in answer to the purchaser's application for compensation, that a reasonable compensation would be allowed, yet this was not deemed binding, as he had no authority to make such an offer (*s*).

35. If, however, the objections to the title be remediable, and the purchaser be desirous to enter on the estate, he may in most cases venture to do so; provided the vendor will sign a memorandum, importing that the possession taken by the purchaser, shall not be deemed a waver of the objections to the title, or be made a ground for compelling him to pay the purchase-money into court, in case a bill be filed, before the conveyance to him is executed. And a purchaser may, with the concurrence of the vendor, safely take possession of the estate at the time the contract is entered into, as he cannot be held to have waved objections, of which he was not aware; and if the purchase cannot be completed on account of objections to the title, he will not be bound to pay any rent for the estate, unless perhaps the occupation of it has been beneficial to him (*t*).

36. A purchaser of any equitable right, of which immediate possession cannot be obtained, should, previously to completing his contract, inquire of the trustee, in whom the property is vested, whether it is liable to any incumbrance. If the trustee make a false representation, equity would compel him to make good the loss sustained by the purchaser, in consequence of the

(*s*) Burnell *v.* Brown, 1 Jac. & Walk. 168; see Southby *v.* Hutt, 2 Myl. & Cra. 207.

(*t*) Hearne *v.* Tomlin, Peake's Ca. 192; see Kirtland *v.* Pounsett, 2 Taunt. 145; Stevens *v.* Guppy, 3 Russ. 171.

fraudulent statement (*u*). When the contract is completed, the purchaser should give notice of the sale to the trustee. The notice would certainly affect the conscience of the trustee, so as to make him liable in equity, should he convey the legal estate to any subsequent purchaser; and it would also give the purchaser a priority over any former purchaser, or incumbrancer, who had neglected the same precaution (*x*).

37. Auctioneers usually prepare the particulars and conditions of sale; but this a vendor should not permit, as continual disputes arise from the mis-statements consequent upon their ignorance of the title to the estate.

38. Where an estate has been in a family for a long time, or the title has not been recently investigated, it will be advisable for the owner to have an abstract of his title submitted to counsel, and any objections which occur to it cleared up, previously to a contract being entered into for sale of the estate. By this precaution, the vendor will prevent any delay on his part, which might impede the sale from being carried into effect by the time stipulated; and will, in many cases, avoid the expense necessarily attending tedious discussions of a title. Another advantage is, that if there should be any defect in the title which cannot be cured, it would be known only to the agents and counsel of the vendor. It is of the utmost importance to keep defects in a title from the knowledge of persons not concerned for the owner. It has frequently happened, that persons concerned for purchasers, have communicated fatal defects in a vendor's title, to the person interested in taking advantage of them, by which many titles have been disturbed.

(*u*) Burrowes *v.* Lock, 10 Ves. jun. 470.

(*x*) *Vide infra*, ch. 22.

# CHAPTER I.

## OF SALES BY AUCTION AND PRIVATE CONTRACT.

### SECTION I.

### OF THE AUCTION DUTY.


1. *Amount of duty.*
2. *Exemptions.*
3. *Duty in Ireland.*
4. *Duty on fixtures.*
5. *Sales of bankrupts' estates in mortgage.*
8. *Sale of equity of redemption.*
9. *Auctioneer to pay the duty.*
10. *No duty if estates bought in.*
13. *What is an auction.*
15. *Dumb bidding.*
16. *Candlestick bidding.*
17. *Marked paper bidding.*
18. *Glass of liquor bidding.*
19. *Putting up an estate not a bidding.*
20. *Auctioneer must sell.*
21. *Duty, if not proper notices of buying in.*
22. *Warranty by auctioneer.*
24. *Bad title, duty to be returned.*


1. BY three acts (*a*) of the reign of George the 3rd, a duty is imposed of 7*d.* for every twenty shillings of the purchase-money, and so in proportion for any greater or lesser sum (*b*), which shall arise or be payable by virtue of any sale at auction in Great Britain, of any interest in possession or reversion, in any freehold, copyhold, or leasehold lands, tenements, houses, or hereditaments.

2. But sales by way of auction, of estates under the decree of the Court of Chancery, or Exchequer, in England; or of the Court of Session, or Exchequer, in Scotland (*c*), are not liable to the duty; nor do the acts extend to auctions held on the account of the lord or lady

(*a*) 27 Geo. III. c. 13. s. 36; 37 Geo. III. c. 14; and 45 Geo. III. c. 30.

(*b*) 19 Geo. III. c. 56. s. 5.

(*c*) 19 Geo. III. c. 56. s. 13.

of any manor, for granting copyhold or customary lands, for lives or years; or to any auction held for the letting any lands or tenements for lives or years to be created by the persons on whose accounts such auctions shall be held (*d*), which includes tithes not severed (*e*) (1): neither does the duty attach upon the purchase-money of any estate sold under a sheriff's authority, for the benefit of creditors, in execution of any judgment; nor to the purchase-money of any bankrupt's estate, sold by order of the assignees under any commission of bankruptcy (*f*). And, lastly, no auction duty is payable in respect of monies produced by sale of estates, sold by auction, for the redemption of land tax (*g*), nor upon any sale of any estate of any debtor for the benefit of creditors under the Insolvent Debtors' Act (*h*), or any sale under order of the Commissioners of Woods and Forests belonging to the Crown (*i*).

3. Sales by auction in Ireland of estates are charged with a duty of 6*d*. in the pound only (*k*).

4. The duty on fixtures is 10*d*. in the pound both in England (*l*) and Ireland (*m*).

5. By an order of Lord Rosslyn's (*n*), it is directed, that upon application by a mortgagee of a bankrupt's estate, the mortgaged estate shall be sold before the commissioners, or by public auction, if they shall think fit. And it has been decided (*o*), that a sale of a mortgaged

(*d*) 19 Geo. III. c. 56, s. 14.
(*e*) Rex *v.* Ellis, 3 Price, 323.
(*f*) 19 Geo. III. c. 56, s. 15.
(*g*) 42 Geo. III. c. 116. s. 113.
(*h*) 7 Geo. IV. c. 57. s. 87, 1 & 2. Vict. c. 110. s. 116, nor in Scotland, 54 Geo. III. c. 137. s. 74.
(*i*) 55 Geo. III. c. 55. s. 12
(*k*) 54 Geo. III. c. 82. sched.
(*l*) 43 Geo. III. c. 69. sched. A.
(*m*) 54 Geo. III. c. 82. sched.
(*n*) 4 Bro. C. C. at the end.
(*o*) Coare *v.* Creed, 2 Esp. Ca. 699.

(1) This mode of letting estates is adopted by the City of London and some other public bodies.

estate by auction, under this order, is liable to the auction duty, and is not within the exception in the acts of sales of bankrupts estates *by the order of the assignees*. This decision was made at *nisi prius*, and, perhaps, cannot be supported. The Legislature intended that the creditors of bankrupts should have the advantage of selling the estates by auction without being charged with the auction duty. Now this intention is, in the case under consideration, clearly subverted by the decision in Coare *v.* Creed. The argument was, that the sale was by the mortgagee, and so not part of the bankrupt's estate. But if the money produced by sale of the pledge is insufficient to cover the mortgagee's debt, he of course resorts to the general effects for a dividend on the residue. If the pledge produce more, the surplus sinks into the general fund; so that assuming, as the Legislature clearly did, that the auction duty is in substance a charge on the land, it in this case takes so much from the bankrupt's property, distributable for the benefit of his creditors.

It was considered to be clear, however, that where the estate was sold by order of the assignees, with the consent of the mortgagee, no duty would be payable. But it has been decided, that a sale by assignees of an estate in fee, which was in mortgage for a term of years, was liable to the auction duty, because the assignees sold the whole estate, and they had only the equity of redemption (*p*). But the act of Parliament draws no such distinction. Most bankrupts estates are in mortgage; and the exception would indeed be illusory, if it only extended to estates upon which there was no incumbrance. The simple question, however, is, whether such a sale is not a *bonâ fide* sale by order of the assignees? It seems, indeed, to have been considered, that the mortgagee had

(*p*) Rex *v.* Abbott, Exchcq. Mich. T. 1816, MS.; 3 Price, 178.

the property, and the bankrupt had only the equity of redemption. But, even at law, the bankrupt had the fee-simple in reversion expectant upon the term of years in the mortgage, and in equity he was owner of the fee in possession, subject to the debt. The case of the King *v.* Abbott went far beyond the case of Coare *v.* Creed. The effect of these decisions might have been avoided by the assignees selling the estate *subject to the mortgage.* The purchaser would, of course, pay off the mortgage; and thus, by the insertion of a few words in the particulars, the creditors might have obtained the relief which the Legislature intended to grant them.

6. The late bankrupt act (*q*), provides for this subject in these words: that "all sales of any real or personal estate of any bankrupt or bankrupts shall not be liable to any auction duty," which may probably remove all difficulty upon this point. Since that act, the point came before the Court of Exchequer upon a sale by auction, *by assignees,* of the absolute interest in fee of an estate of the bankrupt in mortgage; and it was held, that the duty was not payable (*r*). Upon a writ of error in the Exchequer Chamber the judges were divided in opinion, and the judgment below was affirmed, in order that the question might be disposed of in the House of Lords (*s*), and there the judgment was affirmed (*t*). Two questions were put to the judges: 1st. Whether, when a trader, having real estates under mortgage, becomes a bankrupt, and the whole interests in the estates are sold, by order of the assignees, for the benefit of the creditors, *and no concurrence on the part of the mortgagees appears,* the auction duty is payable on the whole of the sum re-

(*q*) 6 Geo. IV. c. 16. s. 98.

(*r*) Rex *v.* Winstanley, 3 You. & Jerv. 124. 2 Dow & Clark, 302.

(*s*) 3 You. & Jerv. 126.

(*t*) 2 Crompt. & Jerv. 434; 2 Dow & Clark, 302; see Rex *v.* Sedgwick, 2 Crompt. & Mees. 603.

ceived for the estates, or on any and what part of it: 2dly. Whether, when a trader, having estates in mortgage, afterwards conveys the estates to trustees, and then becomes bankrupt, and the whole interests in the estates are sold by the assignees, with the concurrence of the trustees, *it not appearing that the mortgagees were consulted,* the auction duty is payable on the whole or any part of the sum received for the estates.

Mr. Justice Bayley delivered the unanimous opinion of the judges, in answer to both questions, that the auction duty was not payable on the whole or any part of the sum; observing, that if this had been a sale by the mortgagee, the matter might have stood on a different footing. Lord Wynford observed that he was in the court below when this case was decided there, and he differed in opinion from the rest of the judges. He was happy to say, however, that, upon fuller consideration, he was convinced that they were right and he was wrong. His puzzle was about the word *estate,* and whether the estate in question, being in mortgage, could be considered as the estate of the bankrupt. But he was now satisfied that, speaking in ordinary language, this is the estate of the bankrupt, clogged with the debt of the creditor. The mortgage is merely a security, and every other interest is in the bankrupt; and therefore, upon a sale of the estate by the commissioners or assignees, the sale is exempt, under these acts of Parliament, from payment of the auction duty. Suppose the bankrupt's funds should not be sufficient to pay the creditors, after paying off the mortgage, the loss must fall on the bankrupt's funds. Suppose the whole subject should be swallowed up by the mortgage, the mortgagee might say that he derived no advantage from the sale beyond the mere payment of his debt. Suppose a third case: that the funds, after payment of the mortgagee and the rest

of the creditors, should afford some small surplus for the unfortunate bankrupt, yet the sale being a forced sale, came in principle within the exemption under these acts. He had his doubts as to the soundness of the present judgment, looking to the decision in the case of the King and Abbott; but he was now satisfied that the judgment ought to be affirmed. Lord Tenterden observed that he entirely agreed in the opinion of the judges. There was some difference in the language of the different acts relating to this subject, which occasioned some doubts; but the words of the statute of 19 Geo. 3. c. 56. s. 15. are, "that nothing therein contained shall extend to charge with auction duty *any estate or effects* of bankrupts sold by order of the assignees under a commission of bankruptcy." The words of the 43 Geo. 3. are much the same; and then came the case of the King and Abbott. Then followed the Act of the 6 Geo. 4, which enacted, "that all sales of *any real or personal estate* of any bankrupt or bankrupts shall not be liable to any auction duty;" and the question is, whether the estate sold in this case was the estate of the bankrupt within the meaning of these acts. Now, when we look at the words of an act of Parliament, which are not applied to any particular science or art, we are to construe them as they are understood in common language; and in ordinary speech, the estate, although mortgaged, is still considered as the estate of the mortgagor, and the interest of the mortgagee as merely a security; and, therefore, it appeared to him, that, according to the true construction of the words, this was the estate of the bankrupt within the meaning of the act. If they were to be taken in any other sense, the effect would be to diminish the bankrupt's estate applicable to the payment of the creditors, by the amount of the duty. Upon the whole, it appeared to him, that

according to the intention and the words of the Act of the 6 Geo. 4, no auction duty was payable on estates sold under such circumstances as the present.

7. The point therefore is decided against the liability to duty where even the whole estate is sold, provided the mortgagee do not join in the sale; of course, his concurrence in the conveyance will not render the sale liable. The point is still open where the mortgagee does concur in the sale; although the words of the late act are more in favour of the nonliability than those of the former acts. But of course where the property is sufficient in value to pay off the mortgage, the sale should be by the assignees alone, without the mortagee's concurrence.

8. In the case of a sale by a solvent person of an estate in mortgage, if the equity of redemption only is sold, subject to the mortgage, which is not to be paid off, the duty will be payable only on the purchase-money, and not on the aggregate of that and the mortgage money. It is, of course, otherwise where the mortgagor and mortgagee concur in the sale; for there the whole interest is sold, and the duty must be paid on the whole amount of the money paid (*u*).

9. The auctioneer, agent, or seller by commission, is bound to pay the auction duty, which he may deduct out of the money he receives at the sale. If he receive none, he may recover it from the vendor by action.

10. But if the owner of estates sold by auction, or any other person on his behalf, buy in the same, without fraud or collusion, no auction duty will become payable (*x*); provided notice be given in writing (*y*) to the auctioneer before such bidding, signed by the owner and the person intended to be the bidder, of the latter being appointed by the former, and having agreed accordingly

(*u*) Rex *v.* Sedgwick, 2 Crompt. & Mees. 603.

(*x*) 19 Geo. III. c. 56. s. 12.

(*y*) 28 Geo. III. c. 37. s. 20.

to bid at the sale for his use (*z*); and provided the delivery of such notice be verified by the oath of the auctioneer, as also the fairness of the transaction, to the best of his knowledge.

11. Neither will the duty be payable where the estate is bought in by or by the order of the steward (*a*) or known agent of the owner, actually employed in the management of the sale of such estate; but notice in writing of his intention must be given by the steward or agent, if he himself bid, or by him and the bidder, if he appoint a person to bid (*b*); and the delivery of such notice must be verified in the same manner as the delivery of a notice given by the owner. And to exempt a vendor from payment of the duty, every notice must, at the time appointed by law for the auctioneer's passing his account of the sale, be produced by the auctioneer to the officer authorized to pass the account of such sale; and also be left with the officer (*c*).

12. There must, it seems, be distinct parties in the transaction—the owner or person appointed to buy in on his behalf, and the auctioneer. If the auctioneer put up his own property for sale and buy it in himself, the duty is considered to attach (*d*).

13. It is not necessary that the sale should be a regular auction. The acts apply to every mode of sale, whereby the highest bidder is deemed to be the purchaser. Therefore, where after an auction at which there was no bidding, the seller's agent stated that he should be ready to treat for the sale by private bargain, and the meeting broke up; and the agent shortly afterwards went into a private room, with several of the per-

(*z*) See a form of such notice, Appendix, No. 1.

(*a*) 42 Geo. III. c. 93. s. 1.

(*b*) See forms of such notices, Appendix, Nos. 2 and 3.

(*c*) 42 Geo. III. c. 93. s. 2.

(*d*) Order of the Board.

sons who attended the sale, and he stated that the highest offer above 50,000*l.* would be accepted; and offers were accordingly made to him, and he having opened them, said that the one which was the highest *would be accepted, provided the terms of payment could be adjusted, and these terms having been adjusted, the bargain was concluded the following day;* this was held to be within the act. The agent put himself under an obligation to treat with all the persons assembled, and to give the estate to the highest bidder. The question was not, whether this was what was usually called a sale by auction, but whether for the purpose of this act every thing must not be considered as such a sale where the contract was with various persons, with an engagement to let the highest bidder be the purchaser. He might have taken any individual he pleased and concluded a bargain with him; that would have been a transaction of a different kind: but here he treated with a number, and came under an engagement to accept the highest offer (*e*).

14. The acts of Parliament, in directing every auctioneer to take out a licence, extend that liability to every person exercising the trade of an auctioneer or seller by commission at any sale of any estate, goods, &c., by outcry, knocking down of hammer, by candle, by lot, by parcel, or by any mode of sale at auction, or whereby the highest bidder is deemed to be the purchaser (*f*); which description seems to embrace all the modes of sale by auction upon which duty is imposed (I).

(*e*) Walker *v.* Advocate-General, 1 Dow, 111.

(*f*) 19 Geo. III. c. 56. s. 3.; 42 Geo. III. c. 93. s. 14.

(I) As to duty being payable upon an imperfect sale, although the lot is knocked down, see Jones *v.* Nanney, 13 Price, 76.

15. Any thing in the nature of a bidding is within the acts; and therefore where the owner put the price under a candlestick in the room (which is called a dumb bidding), and it was agreed that no bidding should avail if not equal to that, it was holden (*g*) to be within the acts; as being in effect an actual bidding of so much, for the purpose of superseding smaller biddings at the auction.

16. Upon such a sale by candlestick biddings, as they are denominated, where the several bidders do not know what the others have offered, a bidding of so much per cent. more than any other person has offered would be binding on the person who makes it (*h*).

17. So biddings by several persons of sums marked upon a paper are within the act (*i*).

18. So in the case of a female auctioneer who continued silent during the whole time of the sale, but whenever any one bid, she gave him a glass of brandy: the sale broke up, and in a private room he that got the last glass of brandy was declared to be the purchaser. This was decided to be an auction (*k*).

19. But to bring a bidding within the acts, the sum must be named by the party *eo intuitu*, with a view to the purchase of the estate. Therefore, in the case of Cruso *v.* Crisp (*l*), it was decided, that *putting up* an estate in lots at certain prices was not a bidding within the acts; but this has since been doubted by Lord Eldon (*m*); and although it would be difficult to hold the transaction to be a sale within the act, yet of course, a previous notice of the intention should be given,

(*g*) See the case cited, 3 East, 340. Capp *v.* Topham, *infra*.

(*h*) 3 Mer. 483, *per* Lord Eldon.

(*i*) Attorney-General *v.* Taylor, 13 Price, 636.

(*k*) 1 Dow, 115.

(*l*) 3 East, 337.

(*m*) 1 Dow, 114.

notwithstanding that the owner intends only to put up the estate at a certain price, and not to bid for it in case of an advance.

20. The auctioneer must himself sell the estate, and cannot, without a special authority, delegate the sale to another (*n*).

21. If an estate be bought in by the owner, and proper notices were not given of his intention to bid, the sale will be held real, and the duty must be paid, however fair the transaction may be. The duty is made a *charge* on the auctioneer, which he must pay if the proper notices were not given. It is not given by way of *penalty*. In one case, an auctioneer who had neglected to require proper notices was compelled to pay 5,000*l.* or 6,000*l.* out of his own pocket for the duty, although he had not received any part of it from the owners, nor had charged any commission, as the estates were not actually sold (*o*).

22. And a statement by an auctioneer to the vendor or his agent, that he has done what is necessary to avoid payment of the duty, will amount to a warranty, although the duty become payable, not by the default, but by the ignorance or mistake of the auctioneer.

23. Thus, in the late case of Capp *v.* Topham (*p*) an auctioneer put up an estate, and by the conditions of sale reserved a dumb bidding (*q*) to the owner, which was his mode of saving the payment of the auction duty. The owner's solicitor, with the privity of the auctioneer, placed a ticket containing the price in figures, under a

(*n*) See Cockran *v.* Irlam, 2 Man. & Selw. 301; Cablin *v.* Bell, 4 Camp. Ca. 183; Schmuling *v.* Thomlinson, 6 Taunt. 147; Coles *v.* Trecothick, 9 Ves. jun. 251.

(*o*) Christie *v.* Attorney-General, 6 Bro. P. C. by Toml. 520; see 3 Ves. jun. 625, n.

(*p*) 6 East, 392; 2 Smith, 443.

(*q*) *Vide supra.*

candlestick, on a table in the auction-room. A person who attended on behalf of the owner asked the auctioneer if he had taken the proper precaution to avoid the duty if there was no sale. The auctioneer said, it was his mode to fix a price under the candlestick, and if the bidding should not come up to the price there was no sale or duty. There were several biddings, but under the price fixed, and the auctioneer was compelled to pay the duty (*r*). He then brought an action against the owner for recovery of the money as paid to his use; but the statements by the auctioneer were holden to amount to a warranty, and judgment was given for the defendant. Lord Ellenborough said, that even if there was no warranty on the part of the auctioneer, and it was only a mutual error between him and the vendor, he could not call upon his companion in error for a contribution (*s*). So that in cases of this nature the burden will remain upon the person upon whom it is charged. And it even seems to have been considered, that if an auctioneer, through ignorance, adopt an improper mode of saving the duty, upon an undertaking by the seller to save him harmless, the duty must be paid by the auctioneer, and he cannot recover under the undertaking, because it is illegal to indemnify against *penalties* (*t*). But to this it may be objected, that the duty attaches as a charge, and is not imposed as a penalty (*u*).

24. If the vendor's title prove bad, the auction duty will be allowed; provided complaint thereof be made before the Commissioners of Excise, or two justices

(*r*) See Christie *v.* Attorney-General, *ubi sup.*

(*s*) See Farebrother *v.* Ansley, 1 Camp. Ca. 343. Jones *v.* Nanney, 13 Price, 76.

(*t*) Owen *v.* Parry, Sitt. West. Dec. 6, cor. Lord Ellenborough.

(*u*) Christie *v.* Attorney-General, 6 Bro. P. C. by Toml. 520. *et supra.*

of the peace within whose jurisdiction such sale was made (*x*), within twelve calendar months after the sale, if the same shall be rendered void in that time; or otherwise within three months after the discovery of the owner having no title (*y*). But the commissioners will not allow the duty unless they think that the vendor has used his *utmost exertions* to make a good title. An appeal, however, lies from the judgment of the commissioners: but as the King never pays costs, they fall upon the vendor, and in many cases would amount to more than the duty itself. Where the case is a *bonâ fide* one, and the title has been rejected, the commissioners are bound to put a liberal interpretation on the act.

(*x*) 19 Geo. III. c. 56. s. 11. (*y*) 28 Geo. III. c. 37. s. 19.

## SECTION II.

### OF PUFFING.

1. *Civil law.*
2. *Lord Mansfield against: Bexwell* v. *Christie.*
3. *Lord Kenyon against: Howard* v. *Castle.*
4. *Lord Rosslyn for: Conolly* v. *Parsons.*
5. *Lord Alvanley for: Bramley* v. *Alt.*
6. *Sir W. Grant for: Smith* v. *Clarke.*
8. *Later authorities against.*
9. *Result favourable.*
10, 17. *Public notice.*
11. *Appointment to run up price, bad.*
12. *So appointment of more than one puffer.*
14. *Or where an implied condition against it.*
15. *Or sale is without reserve.*
16. *Effect on sub-purchaser.*
18. *Purchaser not to deter bidders.*
19. *Sale damaged by supposed puffers, not enforced.*
20. *Puffer bidding for the wrong estate not bound in equity.*

1. ACCORDING to Cicero (*a*), a vendor ought not to appoint a puffer to raise the price, nor ought a purchaser

(*a*) De Off. l. 3.

to appoint a person to depreciate the value of an estate intended to be sold. And Huber lays it down (*b*), that if a vendor employs a puffer he shall be compelled to sell the estate to the highest *bonâ fide* bidder; because it is against the faith of the agreement, by which it is stipulated that the highest bidder shall be the buyer.

2. In Bexwell *v.* Christie (*c*), Lord Mansfield and the other Judges of B. R. followed the rule of the civil law, and treated a *private* bidding, by or on the behalf of the vendor, as a fraud; but the Legislature, by the subsequent statutes imposing a duty on sales of estates by auction, seems to have been of a different opinion, and even to have sanctioned it. Lord Rosslyn, who was present at the making of the act, remarked in the case of Conolly *v.* Parsons, that (*d*) the acts of Parliament go upon its being an usual thing and a fair thing for the owner to bid. The pressure, when the tax was imposed, was by embarrassing people, who chose to dispose of their goods by auction if they chose to be purchasers, by the tax falling upon them. His Lordship added, that he thought it would have occurred either to Lord Thurlow or to him, when the exception in favour of the owner was proposed, that the case would not exist, as the owner could not be a bidder; or that, for his attempting to do what he could not by law, it would be just that he should pay the duty. It was very wrong to the public to let that clause stand, if at the time it was understood that the owner bidding was doing an illegal thing. The acts do not require an open notice, but only a private notice to the auctioneer, and an oath to prevent the setting up a bidding for the owner that the bidder might evade paying the duty.

3. Lord Kenyon, however, in the case of Howard *v.*

(*b*) Prælectiones, xviii. 2. 7.

(*c*) H. 16 Geo. III. Cowp. 395.

(*d*) See 3 Ves. jun. 628.

Castle, where the purchaser was the only real bidder, and there were several puffers (*e*), clearly coincided with Lord Mansfield's opinion; and held, that unless it was publicly known that the owner intended to bid, it was a fraud upon the purchaser, and consequently no action would lie against him for non-performance of his agreement. The acts of Parliament, he thought, did not intend to interfere with this point, but to leave the civil rights of mankind to be judged of as they were before. And Grose, J. also expressed his opinion, that the doctrine was not in the least impeached by the acts of Parliament.

4. But in the case of Conolly *v.* Parsons (*f*), Lord Rosslyn said, he fancied the foregoing case turned on the circumstance that there was no real bidder; and the person refused instantly. It was one of those trap auctions which are so frequent in this city. The reasoning went large, certainly, and did not at all convince him. He said, he should wish it to undergo a re-consideration: for if it was law, it would reduce every thing to a Dutch auction, by bidding downwards (I). He felt vast difficulty

(*e*) 36 Geo. III.; 6 Term Rep. 642. See Twining *v.* Morris, 2 Bro. C. C. 326; and see 3 Term Rep. 93, 95.

(*f*) 3 Ves. jun. 625, n.

(I) A sale of this nature is thus conducted: The estate is put up at a high price, and if nobody accept the offer, a lower is named, and so the sum first required is gradually decreased, till some person close with the offer. Thus there is of necessity only one bidding for the estate, a mode of sale which, in this country, would attract few bidders. In some counties in England a singular mode of sale of estates for redemption of land-tax is adopted; the auctioneer states the sum of money wanted, and the number of acres to be disposed of, and the person who will accept the least quantity of land for the sum required, is declared the purchaser; so that the persons bid downwards, until some one name a quantity of land less than any other will take.

The

to compass the reasoning, that a person does not follow his own judgment because other persons bid; that the judgment of one person is deluded and influenced by the biddings of others. The facts of the case of Conolly *v.* Parsons do not appear in the report; but I learn, that there was a contest between real bidders, after the person employed to bid on the part of the vendors had desisted from bidding. The suit was compromised by the purchaser paying a considerable sum of money to the vendor to release him from the contract; and consequently Lord Rosslyn did not give judgment; but it seems he was clearly of opinion that the sale was valid.

5. And in the later case of Bramley *v.* Alt (*g*), where an estate was put up to sale by public auction, and an agent for the vendor bid to 75*l.* an acre, without public notice of his intention to do so; and after a contest with real bidders the estate was bought at 101*l.* 17*s.* an acre; Lord Alvanley, then Master of the Rolls, decreed a specific performance with costs. And he concurred with Lord Rosslyn in considering the case of Howard *v.* Castle only as a decision, that where all the bidders except the purchaser are puffers, the sale shall be void.

6. In a subsequent case (*h*), it appeared that assignees of a bankrupt had put up the estate to sale by auction. It was proved that a bidder was employed on their parts to bid up to, but not to exceed 750*l.*, the sum for which

(*g*) 3 Ves. jun. 620.

(*h*) Smith *v.* Clarke, 12 Ves. jun. 477.

---

The manner of conducting sales by auction of the post-horse duties is at once Dutch and English. The duties are put up at a large sum, named in the particulars, and the sale is then conducted in the same manner as a Dutch auction: but when any person actually bids, others may advance on that bidding, and the highest bidder is declared the purchaser; just as if the sale had been conducted in the usual way.

the estate was actually sold. The Master of the Rolls held, that the assignees had not committed any fraud, they did not employ the bidder for the purpose, generally, of enhancing the price, but merely to prevent a sale at an undervalue, and they stated, previously, what they conceived to be the true value, below which the lot ought not to be sold. He treated the case of Howard *v.* Castle as having proceeded on the ground of plain and direct fraud, and said, that in a similar case he should come to a similar conclusion.

7. By these decisions, therefore, it was ruled, that a bidder may be privately appointed by the owner in order to prevent the estate from being sold at an undervalue; and that if there were real bidders at a sale, it must be supported, although the bidding immediately preceding that of the purchaser was a fictitious one (*i*).

8. But Lord Tenterden again opened the question at *nisi prius*, and expressed extrajudicially the strong inclination of his opinion, that if a person be employed with a view to save the auction duty (I), the sale is void, unless it be announced that there is a person bidding for the owner; the act itself is fraudulent. The statute was made for a different purpose, with a view to the duty only, and could not be made to sanction what was in itself fraudulent (*k*). And in a late case, C. B. Alexander treated it as clear, that the employment of a puffer vitiated the sale (*l*), but it was not

(*i*) Smith *v.* Clarke, 12 Ves. jun. 477.

(*k*) Wheeler *v.* Collier, 1 Camp. Ca. 123.

(*l*) Rex *v.* Marsh, 3 You. & Jerv. 331, *vide post*. This was rather a mis-statement of the rule than a judicial opinion against it.

(I) The appointment is with a view to prevent the estate from going below a fixed sum; or, in some cases, to run up the price fraudulently. The auction duty is saved by giving a proper notice.

necessary to decide that point. And in Crowder *v.* Austin (a horse cause), after a *bonâ fide* bidding of 12*l.* the owner's servant made repeated biddings up to 23*l.* That appears to have been a mere fraud, but the court is reported to have been inclined to adhere to Lord Mansfield's opinion in Bexwell *v.* Christie (*m*).

9. The authorities, however, preponderate in favour of the validity of a person privately bidding, and the practice is universally adopted, and ought not to be lightly disturbed. It would require a decision of the House of Lords to overrule the decisions, and it would be better to leave them undisturbed, restricted as the power now is.

10. Where public notice has been given, the contract will be binding on the purchaser, although there was no contest between real bidders; but only the purchaser and the person employed to bid, bid against each other (*n*). Consistently with the above authorities, the rule, it should seem, would be the same, even where public notice had not been given, provided the bidder was appointed only to protect the vendor's interest.

11. But where a person is employed, not for the defensive precaution, with a view to prevent a sale at an under-value, but to take advantage of the eagerness of bidders to screw up the price, that will be deemed a fraud (*o*).

12. Neither do the cases authorize the vendor to appoint more than one person on his behalf. It seems highly proper that a vendor should be permitted to appoint a person to *guard* his interests against the in-

(*m*) 3 Bing. 368.

(*n*) Oldfield *v.* Round, 5 Ves. jun. 508.

(*o*) See 12 Ves. jun. 483. In Fitzgerald *v.* Forster, 31st July, 1813, the Vice-Chancellor seemed rather to be of opinion that the appointment of one puffer was, in no case, bad. Crowder *v.* Austin, 3 Bing. 368.

trigues of bidders; but it does not follow that he may appoint more than one. The only possible object of such a proceeding is fraud. It is simply a mock auction; and, notwithstanding Lord Rosslyn's impression, it is universally felt and acknowledged, that the judgments of most men are deluded and influenced by the biddings of others. And if a man believe the other bidders to be real ones, he advances under the apprehension that he shall let slip the opportunity of buying. As far as any aid is sought from the auction-duty acts, in support of private biddings on behalf of the owner, it is clear that they do not authorize or sanction the appointment of more than one person. In the report of Conolly *v.* Parsons it is stated, that *persons* were employed to bid, and did bid for the vendors; but the fact is, that one person only was employed by them, and actually bid on their behalf. The Master of the Rolls observed, in the late case of Smith *v.* Clarke, that he did not see, that if several bidders were employed by the vendor, in that case, a court of equity would compel the purchaser to carry the agreement into execution; for that must be done merely to enhance the price. It was not necessary for the defensive purpose of protection against a sale at an undervalue (*p*).

13. In a later case upon this subject, Lord Tenterden held clearly that the sale was void in point of law, as two persons had been employed to bid, although they were both limited not to go beyond the same fixed sum. The current of authority, therefore, is clearly against the validity of such a sale (*q*).

14. In a late case upon a sale by the Crown of an estate seized under an extent, it was stipulated, that "on the part of the Crown, Mr. E. Driver should be at

(*p*) See 12 Ves. jun. 483; and see 8 Term Rep. 93. 95.

(*q*) Wheeler *v.* Collier, 1 Mood. & Malk. 123.

liberty to make one bidding, but no more, and if the highest bidder, the sale to be void;" and a puffer was employed at the auction by Mr. Driver, the agent for the Crown; the court held that the sale was not binding upon the purchaser (*r*). We cannot fail to perceive that in this last case the condition was pregnant with a negative, that no puffer should be employed. Mr. Driver was there, not simply as the auctioneer, but as the known person to protect at any moment the estate by his bidding; the other person was merely a puffer, to give to the sale the appearance of a contest; a real bidder must have been misled by the conditions.

15. If the particulars or advertisements state (as they frequently do) that the estate is to be sold *without reserve*, it seems clear that the sale would be void against a purchaser, if any person were employed as a puffer, and actually bid at the sale. This was decided in the late case of Meadows *v.* Tanner (*s*). The Vice-Chancellor said, that the plain meaning of the words *without reserve*, in a particular of sale, is, that no person will be employed to bid on behalf of the vendor for the purpose of keeping up the price; and that the vendor could have no claim to the aid of a court of equity to enforce a contract against the purchaser, into which he might have been drawn by the vendor's want of faith.

16. Although an original purchaser will not be bound where a fraud has been practised in the biddings, yet if he transfer his contract, a strong case of fraud must be made out against the original purchaser, to enable the court to give the benefit of it to his assignee, who was not induced through competition to give the price (*t*).

17. Where public notice is given, the mode least

(*r*) Rex *v.* Marsh, 3 You. & Jer. 331; and see Crowder *v.* Austin, 3 Bing. 368, 11 Moo. 283.

(*s*) 5 Madd. 34.

(*t*) See 12 Ves. jun. 484.

liable to objection seems to be that of reserving a bidding, or stipulating in the conditions of sale, that the owner may bid once in the course of the sale (*u*). It may here, however, be proper to observe, that buying-in an estate, especially where it is done without public notice, mostly prejudices a future sale. This was exemplified in the sale of an estate before one of the Masters in Chancery, where 23,000 *l.* was *bonâ fide* bid, and the estate was bought in by the agent of the vendor; afterwards there were three other sales in the Master's office; and the consequence of the estate having been bought-in deterring others from bidding, was, that on the two first occasions no more was offered than 12,000 *l.* and 6,000 *l.*; and the estate finally sold for 15,000 *l.* (*x*).

18. As on the one hand a seller cannot appoint puffers to delude the purchaser, so on the other, if a purchaser by his conduct deter other persons from bidding, the sale will not be binding. Thus, where upon a sale by auction of a barge, a bidder addressed the company present, saying he had a claim against the late owner, by whom he said he had been ill used, whereupon no one offered to bid against him; but the auctioneer refusing to knock down the property to a single bidding, a friend of the bidder's bade a guinea more, and the first bidder then made a second and higher bidding, amounting, however, to only one fourth of the prime cost of the barge; it was held that there was no legal sale (*y*).

19. And where the seller's known agent bid at the sale for the purchaser, and was considered as a puffer, which deterred other bidders, a specific performance was

(*u*) See Cowp. 397; Jervoise *v.* Clarke, 1 Jac. & Walk. 389.

(*x*) See 6 Ves. jun. 629; Wren *v.* Kirton, 8 Ves. jun. 502; and see Twining *v.* Morris, 2 Bro. C. C. 326.

(*y*) Fuller *v.* Abrahams, 3 Brod. & Bing. 116; 6 Moo. 316.

refused (*z*), so even where a real purchaser was considered as a puffer, and the actual puffer neglected to bid the appointed sum, the court refused to interfere (*a*).

20. These instances are in favour of the *seller*. Where a puffer by mistake bid for the wrong estate, which was knocked down to him, equity left the seller to his remedy at law (*b*).

(*z*) Twining *v.* Morris, 2 Bro. C. C. 326, see *post*, ch. 4. s. 3.

(*a*) Mason *v.* Armitage, 13 Ves. jun. 25, *post*, ch. 4. s. 3.

(*b*) Malins *v.* Freeman, 2 Kee. 25.

## SECTION III.

### OF THE PARTICULARS AND CONDITIONS OF SALE.

1. *Bidding may be countermanded.*
2. *Condition against it.*
6. *Auction duty.*
7. *Conditions favourably construed.*
9. *Cannot be contradicted at sale.*
15. *Purchaser bound by previous knowledge.*
17. *Condition to take a defective title.*
20. *Condition to avoid sale if title defective.*
21. *Effect of condition to avoid sale.*
22. *Description of estate.*
24, 34. *Free public-house.*
25. *Rights of way.*
26. *Plan of new street.*
27. *Lights.*
29. *Reading of lease at auction.*
30. *Buildings removed.*
31. *Covenant against trades.*
32. *Clear yearly rent.*
33. *Covenants in lease.*
36. *Waterloo Bridge annuity: power to redeem not stated.*
37. *Power of purchase not stated.*
38. *Condition that misdescription not to avoid sale.*
39. *Does not extend to fraudulent description.*
40. *Equitable doctrine thereon.*
41. *Nor to want of title to material part.*
46. *Nor to unintentional error where purchaser misled.*
49. *Or the value cannot be estimated.*

52, 55. *Effect, generally, of error not fraudulent upon the condition.*
56. *Timber.*
58. *Timber-like trees to be paid for.*
59. *Fixtures.*
60. *Deeds not to be produced.*
61. *Assignments of terms, &c.*
62. *Attested copies.*
63. *Landlord's title.*
64. *Liability of purchaser of leaseholds.*
68. *Preparation of conveyance.*
69. *Forfeiture of deposit and right to re-sell.*
70. *Stipulated damages.*
72. *Re-sale after bankruptcy.*
73. *Seller's lien.*
74. *Time allowed to purchaser.*
76. *Unusual conditions.*
77. *Agreements to be signed.*
78. *Auctioneer may bind purchaser and seller.*

---

The particulars and conditions of sale (*a*) next claim our attention.

1. A bidding at a sale by auction may be countermanded at any time before the lot is actually knocked down (*b*); because the assent of both parties is necessary to make the contract binding; that is signified, on the part of the seller, by knocking down the hammer. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. If a bidding was binding on the bidder before the hammer is down, he would be bound by his offer, and the vendor would not, which can never be allowed.

2. The countermand of a bidding would, in some cases, prove of the most serious consequences; and it might therefore be advisable to stipulate in the conditions of sale, that no persons shall retract their biddings.

3. If the bidding be retracted, the retractation must be made loud enough to be heard by the auctioneer, other-

(*a*) See a form of them, App. No. 4.

(*b*) Payne *v.* Cave, 3 Term. Rep. 148; see Routledge *v.* Grant, 4 Bing. 653; 1 Moo. & Pay. 717. As to goods, see Phillips *v.* Bistolli, 3 Dowl. & Ry. 822.

wise it amounts to nothing, and is the same as a thought confined to the person's own breast (*c*).

4. This condition was originally suggested to me by the case of Payne *v.* Cave, and it has now become a common condition. But I always thought it one that could not be enforced. In Jones *v.* Nanney (*d*), Mr. Baron Wood suggested the difficulties, that to hold that an action would lie on an implied undertaking not to retract would be an evasion of the statute of frauds, and he asked whether, if there had been an express condition of sale, that the statute of frauds should have no operation on the transaction between the parties, it could be contended to be an efficient condition so as to avoid the statute.

5. Although the duty is, by the acts, imposed on the vendor, yet he is not restrained from making it a condition of sale, that the duty, or any certain portion thereof, shall be paid by the purchaser over and above the price bidden at the sale by auction: and in such case the auctioneer is required to demand payment of the duty from the purchaser, or such portion thereof as is payable by him under the condition: and, upon neglect or refusal to pay the same, such bidding is declared by the act to be null and void to all intents and purposes (*e*). But it has properly been held that the nonpayment makes the contract void only at the option of the vendor. The object of the provision is to protect the revenue, and that, it was observed, would be sufficiently accomplished by this construction (*f*).

6. It is usual to make some provision respecting the payment of the auction duty, as that the vendor and

(*c*) Jones *v.* Nanney, M'Clel. 39; 13 Price, 102, 103.

(*d*) 13 Price, 99.

(*e*) 17 Geo. III. c. 50. s. 8. See 7 Ves. jun. 345.

(*f*) Malins *v.* Freeman, 4 Bing. N. C. 395; 6 Scott, 187.

purchaser shall pay it in equal moieties; and indeed, where the purchase-money is liable to the duty, a stipulation of this nature should never be omitted, unless the vendor intend to pay the whole duty himself. If the seller cannot make a title, the purchaser can recover from him the auction duty which he has paid, although the auctioneer has paid it over to the Crown (*g*). And if the sale be not binding the auctioneer, although he has paid the duty, cannot, under the common condition, recover it from the *purchaser* as he is called, because, although the highest bidder, he is *not* the purchaser (*h*).

7. The Judges will so construe conditions of sale as to endeavour to collect the meaning of the parties, without encumbering themselves with the technical meaning of the words.

Thus where (*i*) the city of London let an estate by auction for a term of years, according to certain conditions of sale, by which it was stipulated that the purchaser should pay a certain *rent* before the lease was granted, which he accordingly agreed to do, the Court of King's Bench held that although the money to be paid could not be strictly called a rent, the relation of landlord and tenant not having then commenced, yet the parties intended the money should be paid, and it must be paid accordingly. Lord Kenyon said, he had always admired an expression of Lord Hardwicke's, "that there is no magic in words." But under an agreement for purchase, with a stipulation, that until the conveyance is made the purchaser shall pay and allow to the seller at the rate of a fixed sum per annum, three half-yearly

(*g*) Cave *v.* Baldwin, 1 Stark. 65. See 2 Kee. 228.

(*h*) Jones *v.* Nanney, 13 Price, 76; M'Clell. 25.

(*i*) City of London *v.* Dias, Woodfall's L. & T. 301.

payments will create the relation of landlord and tenant, and the sum payable will be recoverable as rent (*k*).

8. Great care, however, should be taken to make the particulars and conditions accurate; for the auctioneer cannot contradict them at the time of sale, such verbal declarations,—the babble of the auction-room, as Lord Eldon termed them (*l*)—being inadmissible as evidence.

9. Thus, where estates were put up to sale by auction (*m*), and in the printed particulars of sale were stated *to be free from all incumbrances*, they were bought by a person who, discovering that there was a charge on the estate of 17*l.* per annum, refused to complete the purchase, in consequence of which, an action was brought by the vendor; and although he offered to give in evidence, that the auctioneer had publicly declared from his pulpit in the auction-room, when the estate was put up, that it was charged in the manner above specified, yet the court of C. B. refused to admit the evidence, as it would open a door to fraud and inconvenience, if an auctioneer were permitted to make verbal declarations in the auction-room, contrary to the printed conditions of sale; and the plaintiff was nonsuited. And this rule prevails in favour as well of the seller as of the purchaser (*n*), and it equally applies to a sub-sale; therefore, if A. buy at a sale after a formal explanation at the sale, which was heard by B., and then re-sell to B., the first declaration is no more binding upon B. than A., and therefore A. cannot enforce the contract, as explained by the auctioneer, against B. (*o*).

(*k*) Saunders *v.* Musgrave, 6 Barn. & Cres. 524; 9 Dowl. & R. 529.

(*l*) See 1 Jac. & Walk. 639.

(*m*) Gunnis *v.* Erhart, 1 H. Black. 289; see Jones *v.* Edney, 3 Camp. Ca. 285, 6; Bradshaw *v.* Bennett, 5 Carr. & Pay. 48.

(*n*) Powell *v.* Edmunds, 12 East, 6.

(*o*) Shelton *v.* Livins, 2 Crompt. & Jer. 411.

10. The same rule of course prevails in equity, where the person setting up the parol evidence is plaintiff. Upon the sale of an estate by auction the particular was equivocal as to the words: but it was clear the purchaser was to pay for timber and timber-like trees. There was a large underwood upon the estate. At the sale, the article being ambiguous, the auctioneer declared he was only to sell the land; and every thing growing upon the land must be paid for. The *defendant*, the purchaser, insisted he was only to pay for timber and timber-like trees, not for plantation and underwood. The declaration at the sale was distinctly proved; but it was determined by the Court of Exchequer that the parol evidence was not admissible (*p*).

11. Nor when the seller is plaintiff can parol evidence be admitted on his behalf, of the declarations at the sale, although the purchaser by the written agreement bind himself to abide by *the conditions and declarations made at the sale* (*q*).

12. So if the particulars of sale state the estate to be held for three lives, but one drop before the sale, and the auctioneer state the fact, evidence of his statement cannot be received (*r*). The Court observed, that before the sale, the auctioneer ought to have altered the particulars with respect to the lives so as to have made them conformable to the fact.

13. But a question has been raised, whether, if by a collateral representation a party be induced to enter into a written agreement, different from such representation, he may not have an action on the case for the fraud practised to lay asleep his prudence (*s*).

(*p*) Jenkinson *v.* Pepys, 6 Ves. jun. 330, cited; 15 Ves. jun. 521, stated.

(*q*) Higginson *v.* Clowes, 15 Ves. jun. 515, *vide infra*.

(*r*) Bradshaw *v.* Bennett, 5 Carr. & Payn. 48.

(*s*) See Powell *v.* Edmunds, 12 East, 6.

14. And if in truth the party do not purchase under the conditions of sale, although he do bid at the auction, the conditions are not binding upon him: as where, before the sale of goods, an executor agreed that a legatee might bid at the auction to the amount of his legacy, and set off the purchase-money to that extent; it was held that the legatee so becoming a purchaser, was not bound by the condition of sale requiring every purchaser to pay his purchase-money (*t*).

15. And if the purchaser have particular personal information given him of an incumbrance, or of the nature of the title, it seems that the parol evidence may be admitted (*u*). It may therefore be proved that the purchaser perused the original lease before the sale (*x*), as that does not contradict the particulars of sale; but after such evidence is received, it would be difficult to act upon it at law, against a direct statement in the particulars that is to bind the purchaser to the knowledge of a fact contrary to the written statement. For the reading the lease at an auction by the auctioneer, is no excuse for a misdescription of the terms of the lease in the particulars of sale (*y*). Such evidence may be used in equity as a *defence* against the specific performance, if the parol variation was in favour of the defendant, and the plaintiff seek a performance in specie according to the written agreement (*z*).

16. It should be borne in mind that in contracts for the sale of real estate, an agreement to make a good

(*t*) Bartlett *v.* Purnell, 4 Adol. & Ell. 792; a case of goods, the seller was plaintiff.

(*u*) Gunnis *v.* Erhart, 1 H. Black. 289; and see Pember *v.* Mathers, 1 Bro. C. C. 52; Fife *v.* Clayton, 13 Ves. jun. 546, where the particular was altered before the sale. Ogilvie *v.* Foljambe, 3 Mer. 53.

(*x*) Bradshaw *v.* Bennett, 5 Carr. & Pay. 48.

(*y*) See 1 Bing. N. C. 379.

(*z*) Higginson *v.* Clowes, *ubi sup.*

title is always implied unless the liability is expressly excluded (*a*).

17. A condition upon a sale by assignees who had a defective title, that the purchaser should have an assignment of the bankrupt's interest under such title as he lately held the same, an abstract of which might be seen, was held to be a sale only of such title as the assignees had (*b*).

18. But the mere statement in a condition that the seller shall deliver up certain deeds, which are all the title deeds in his possession, will not prevent the purchaser from requiring a good title (*c*).

19. If it be the custom in a public auction-room to paste up the conditions of sale in the room, and the auctioneer announce that the conditions are as usual, they will, if pasted up according to the usual custom, be binding on the purchaser, although he did not see them (*d*). This can seldom, however, happen upon a sale of estates.

20. The late Mr. Bradley recommended, that where it is understood, at the time of sale, that the vendor has only a doubtful title, a provisional clause, to the following effect, should be inserted in the conditions of sale and articles of purchase; which would be sufficient, he thought, to obviate any doubt that might otherwise arise at the sale:

"That if the counsel of the purchaser shall, on the examination of the title, be of opinion that a good title and conveyance cannot be made of the purchased premises, within the time limited by the articles for carry-

(*a*) See 1 Mees. & Wels. 701.

(*b*) Freme *v.* Wright, 4 Madd. 364; *post*, ch. 8.

(*c*) Dick *v.* Donald, 1 Bligh, N. S. 655.

(*d*) Mesnard *v.* Aldridge, 3 Esp. Ca. 271; Bywater *v.* Richardson, 1 Adol. & Ell. 508.

ing the same into execution; in that case, the same articles shall be discharged, and not further proceeded in on either side."

21. A stipulation in a contract, that in case the vendor cannot deduce a good title, or if the purchaser shall not pay the money on the appointed day, the agreement shall be void, does not enable either party to vitiate the agreement, by refusing to perform his part of it: the seller may avoid the contract, if the purchaser do not pay the money; the purchaser may avoid it, if the seller do not make a title; or the contract will be void, if the seller *cannot* make a title; but it is not sufficient for him to *say* that he cannot (*e*).

22. The estate cannot be too minutely described in the particulars; for although, as Lord Thurlow observed, it is impossible that all the little particulars relative to the quantity, the situation, &c. should be so specifically laid down, as not to call for some allowance and consideration, when the bargain comes to be executed (*f*); yet, if a person, however unconversant in the actual situation of his estate, will give a description, he must be bound by that, whether conusant of it or not (*g*).

23. Lord Ellenborough has observed, that a little more fairness on the part of auctioneers, in the forming of their particulars, would avoid many inconveniences. There is always either a suppression of the fair description of the premises, or there is something stated which does not belong to them; and in favour of justice, considering how little knowledge the parties have of the thing sold, much more particularity and fairness might

(*e*) Roberts *v.* Wyatt, 2 Tau. 268; Rippingall *v.* Lloyd, 2 Nev. & Mann. 410.

(*f*) See 1 Ves. jun. 224, *per* Lord Thurlow.

(*g*) See 1 Ves. jun. 213, *per* Lord Thurlow; Schneider *v.* Heath, 3 Camp. Ca. 506. See ch. 7. s. 3, 4. *infra*.

be expected. The particulars, he added, are in truth like the description in a policy of insurance, and the buyer knows nothing but what the party communicates (*h*).

24. In one case (*i*) the conditions of sale stated a house to be "a free public-house." The lease contained a covenant to take beer from the lessors; the auctioneer read over the whole lease in the hearing of the bidders, but he stated erroneously that the covenant had been decided to be bad. The purchaser brought an action to recover his deposit. Lord Ellenborough said, that in the conditions of sale this is stated to be "a free public-house." Had the auctioneer afterwards verbally contradicted this, he should have paid very little attention to what he said from his pulpit. Men cannot tell what contracts they enter into if the written conditions of sale are to be controlled by the babble of the auction-room. But here the auctioneer, at the time of the sale, declared, that he warranted and sold this a free public-house. Under these circumstances, a bidder was not bound to attend to the clauses of the lease, or to consider their legal operation.

25. Where (*k*) a lot was described on a plan with others, and the particulars stated that this lot was to be subject to the same rights of way and passage, and other rights and easements over the same, as were then enjoyed under the existing leases of the Crescent houses, it was held, that the sale was not binding upon the purchaser, because a way over the lot did exist for the Crescent houses; but a reference to the other part of the particulars, so far

(*h*) See 3 Smith, 439; and see Duke of Norfolk *v.* Worthy, 1 Camp. Ca. 337, and *post*. Waring *v.* Hoggart, 1 Ry. & Mood. 39.

(*i*) Jones *v.* Edney, 3 Camp. Ca. 284; Flight *v.* Booth, 1 Bing. N. S. 370.

(*k*) Dykes *v.* Blake, 4 Bing. N. C. 463.

from throwing any light upon the existence of the way, would tend to mislead the bidder at the auction; for the description of the Crescent houses noticed a right of way over another part of the estate, but not this right of way; and although the plan was referred to, it contained no trace of any right of way over this lot for the use of the Crescent houses, except a carriage sweep, for which provision was made. There was a way over the lot for the use of another lot, clearly marked upon the plan, and the presence of this was considered to add strength to the conclusion that none other was intended to be reserved. The description referred to of the Crescent houses, stated that the lease of one of them might be seen at the attorney's office, and would be produced at the sale.

But the court was of opinion that the exception of the rights and easements in this particular lot, and the above reference to the lease, did not impose an obligation on the bidder to refer to the lease itself. Whatever might have been the case, if the particulars had been confined to matter of description only, the court thought that as there was a direct reference and appeal to the plan, and the plan, whilst it disclosed one way altogether omitted any trace of the way in question, the bidder at the auction could not be bound, in the exercise of ordinary prudence and vigilance, to look further; that the inspection of the plan would lull all suspicion to sleep, and that it was calculated not simply to give no information, but actually to mislead. Particulars and plans of this nature should be so framed as to convey clear information to the ordinary class of persons who frequent sales by auction, and they would only become a snare to the purchaser, if, after the bidder has been misled by them, the seller should be able to avail himself of expressions which none but lawyers could understand or attend

to. The existence of the way was not sufficiently disclosed to make it clear to persons of ordinary vigilance and caution, and the contract was not binding upon the bidder.

26. The mere exhibition of the plan of a new street, at the time of the sale of a piece of ground to build a house in the line of the intended street, does not amount to an implied contract to execute the improvements exhibited on the plan where the written contract is silent on that head (*l*).

27. If a house be sold with all the lights belonging to it, and it is intended to build upon the adjoining ground belonging to the same owner, so as to interfere with the lights, a right so to build should be expressly reserved; it will not do to describe the house as abutting on building ground belonging to the seller (*m*).

28. Where there is a dispute between two purchasers at a sale, who have obtained their conveyances, as to which a wall, for example, belongs, a handbill advertising the properties for sale, which was circulated in the saleroom before and at the time of sale, and was seen by the party against whom it is sought to be used, or his agent who bought for him, is admissible in evidence to prove that the wall was reputed to belong to the property of the other purchaser (*n*).

29. The reading the lease at the auction by the auctioneer, is, as we have seen, no excuse for a misdescription of the terms of the lease in the particulars of sale (*o*).

(*l*) Feoffees of Heriot's Hospital *v.* Gibson, 2 Dow. 301; see Compton *v.* Richards, 1 Price, 27; Beaumont *v.* Dukes, Jac. 422; Blanchard *v.* Bridges, 4 Adol. & Ell. 176; Squire *v.* Campbell, 1 Myl. & Kee. 459.

(*m*) Swanborough *v.* Coventry, 9 Bing. 305, 2 Moo. & S. 362.

(*n*) Murley *v.* M'Dermott, 3 Nev. & Per. 356.

(*o*) 1 Bing. N. C. 379; Jones *v.* Edney, *supra*, p. 45.

30. And where a lease is sold by auction, the purchaser is not bound to complete his purchase if any part of the buildings demised have been removed, although he heard the lease read, and the particulars did not comprise the building in question (*p*).

31. In a case where the original lease contained a power of re-entry if certain trades were carried on upon the property, and the lessee granted under-leases containing no such stipulation, and upon a sale by the assignee of the original lessee, the conditions of sale stated the covenant in the original lease, and that such covenant would be inserted in the under-leases to be granted to the purchasers, but no mention was made whether the covenant was inserted in the under-leases already granted, the purchaser was allowed to recover his deposit from the auctioneer (*q*). Lord Tenterden observed, that he was of opinion that it is the duty of every person truly and honestly to represent that which he is to sell. A careful man and a lawyer looking at these conditions of sale might ask what were the terms of the leases which had been granted: The purchaser is informed by the statement in the conditions, that the original lessee is restrained from carrying on these obnoxious trades, and that in the leases to be granted to him a similar covenant is to be entered into. None but a very careful person would suppose that it could be doubtful whether the persons to whom under-leases had already been granted were bound in the same manner. He was, therefore, clearly of opinion that the plaintiff could not be bound to take the title.

32. In stating an estate to be of any given "clear"

(*p*) Granger *v.* Worms, 4 Camp. Ca. 83; see 1 Bing. N. C. 379; and see Tomkins *v.* White, 3 Smith, 435.

(*q*) Waring *v.* Hoggart, 1 Ry. & Mood. 39; see Flight *v.* Booth, 1 Bing. N. C. 370.

yearly rent, the parties should attend to the meaning of the word "clear," in an agreement between buyer and seller; which is clear of all outgoings, incumbrances, and extraordinary charges, not according to the custom of the country, as tithes, poor-rates, church-rates, &c., which are natural charges on the tenant (*r*).

33. As we have already seen, the statement that the property is in lease binds the purchaser to the covenants in the lease (*s*); but unusual ones should of course be stated.

34. Where the agreement was to sell the lease of a *public house*, described as held at a certain net annual rent under *common and usual covenants*, it was held that the contract was binding upon the purchaser, although the lease contained a covenant to pay the land-tax, sewers rate, and all other taxes, and a proviso for re-entry if any business but that of a victualler should be carried on in the house (*t*).

35. And in Barraud *v.* Archer (*u*), where the particulars of sale described the estate, which was in the Isle of Ely, as consisting of fen land, and as being let to a tenant at the yearly rent of 165*l.*, and stated that the lessor allowed the eau-brink tax and land-tax: it appeared that the estate was also subject to other taxes for embanking and draining, under a local public act of Parliament, and as they were not mentioned in the particulars, the purchaser claimed a compensation for them. On the part of the seller, it was insisted that there was no misrepresentation, and that the particular expressly mentioned that the estate was fen land, and enumerated all the taxes which the landlord allowed to the tenant,

(*r*) Earl of Tyrconnel *v.* Duke of Ancaster, Ambl. 237; 2 Ves. 500.

(*s*) *Supra*, p. 17.

(*t*) Bennett *v.* Wornack, 7 Barn. Cress. 627; 1 Man. & Ry. 644.

(*u*) 2 Sim. 433; 2 Russ. & Myl. 751.

and that it was not usual to state the taxes which the tenant paid. The Vice-Chancellor held that the purchaser was not entitled to a compensation (*x*).

But if there be a misrepresentation, of course the purchaser would be entitled to a compensation.

36. Where the particulars did not state that the annuity offered for sale, which was payable out of the tolls of Waterloo-bridge, was, as in fact it was, redeemable, and the bridge act had no such provision, the purchaser was held entitled to recover his deposit, for sellers should be strictly bound to disclose the real nature of the subject of the contract (*y*).

37. So where leasehold houses were sold by auction and described as a well-secured rental for about fifteen years, with reversionary interest, and no notice was taken of an act of Parliament which gave power to a company to purchase the property, the purchaser was held not to be bound by the sale, for he never intended to contract, and did not contract to purchase the mere right to compensation (*z*).

38. We have hitherto considered cases of alleged misdescription, where the question simply was whether the property was properly described. But it is common for sellers to guard against misdescriptions and errors by an express condition that they shall not annul the sale, but that a compensation shall be given for the difference in value. Such a condition however does not extend to fraudulent errors.

39. This was decided by Lord Ellenborough in a case where the estate was stated in the particulars to be *about one mile* from Horsham. It turned out that the estate was between three and four miles from that place. Upon an action brought by the purchaser for recovery of the

(*x*) See Lord Townsend *v.* Granger, 2 Sim. 436, cited.

(*y*) Coverley *v.* Burrell, *post.* c. 7.

(*z*) Ballard *v.* Way, 1 Mees. & Wels. 520.

deposit, it was insisted that the effect of the misdescription was saved by the condition, which provided that no error or misstatement should vitiate the sale. But Lord Ellenborough said, that in cases of this sort he should always require an ample and substantial performance of the particulars of sale unless they were specifically qualified. Here there was a clause inserted, providing that an error in the description of the premises should not vitiate the sale, but an allowance should be made for it. This he conceived was meant to guard against unintentional errors, not to compel the purchaser to complete the contract if he had been designedly misled. He therefore left it to the jury, whether this was merely an erroneous statement, or the misdescription was wilfully introduced, to make the land appear more valuable from being in the neighbourhood of a borough town. In the former case, the contract remained in force, but in the latter case the plaintiff was to be relieved from it, and was entitled to recover back his deposit. The plaintiff had a verdict; so that the jury must have thought the misdescription fraudulent (*a*).

40. And of course in equity, if the error be not a fair subject for compensation, a specific performance will be refused, although the misdescription arose simply from negligence; for equity will enforce a sale with a compensation for a slight unintentional misdescription, although there is no such condition, and will not assist the seller, where there is such a condition, if the misdescription is an important one. In Stewart *v.* Allerton (*b*), where a lease at rack-rent was described as one at a ground-rent, Lord Eldon treated the case just as if there had been no such condition. The subject of the contract, he ob-

(*a*) Duke of Norfolk *v.* Worthy, 1 Camp. Ca. 337; see Fenton *v.* Brown, 14 Ves. jun. 144; 1 Ves. & Bea. 377; Stewart *v.* Alliston, 1 Mer. 26; Trower *v.* Newcome, 3 Mer. 704.

(*b*) 1 Mer. 26.

served, did not answer the vendor's description of it, and that in a point so material as to exclude the doctrine of compensation, which ought never to be applied to a case like the present. He refused an injunction; and added, that even if a court of law should judge otherwise as to the representation, he should have great difficulty in decreeing a specific performance, where the description was, at the best, of so ambiguous a nature, that it could not with certainty be known what it was that the purchaser imagined himself to be contracting for.

41. So in the case of Powell *v.* Doubble (*c*), a house was described in the particulars of sale as a brick-built dwelling-house. It turned out that the house was built partly of brick and partly of timber, and that some parts of the exterior were composed of only lath and plaster, and that there was no party-wall to the house. Shortly after the sale the ancient chimneys fell inwards through the house, but it was not proved to what this was attributable. There was the usual condition, that misdescriptions should be the subject of allowance. The case was heard upon bill and answer, and the bill was dismissed with costs, as the Vice-Chancellor was of opinion that such a description means that the house was brick-built in the ordinary sense, and that it was not a subject for compensation.

42. And even at law, if the description be of property not wholly belonging to the seller, and the part not belonging to him is an essential part, the case will not fall within the condition, although there be no fraud, but mere error; neither can a purchaser be compelled to take another property, with a compensation, in lieu of that by error described in the particulars.

43. Thus in a case at *nisi prius* (*d*), where the parti-

(*c*) MS. V. C. 15 June 1832.

(*d*) Leach *v.* Mullett, 3 Car. & Pay. 115.

culars stated one of the houses to be No. 4 instead of No. 2, although the names of the occupiers were correctly stated, and the houses Nos. 2 and 4 were of the same description, but the latter was in rather better repair than the former, the purchaser brought an action for his deposit, insisting upon his right to rescind the contract, notwithstanding the condition under consideration. Best, C. J., agreed with the rule as laid down by Lord Ellenborough, and said that if it was a mere error, or misstatement from error, it was cured by the conditions. If it was pure mistake, not prejudicing the party, it would be cured by the conditions; but he thought that auctioneers ought to be narrowly watched, lest, under the idea of mistake, they covered material matters; but if the description was *of any other property* than that intended to be sold, though it was made by error, the conditions did not cure it. If the purchaser had intended to buy the house sold, notwithstanding the misdescription, he should have thought that the jury would be justified in finding a verdict for the defendant, for he should not suffer the purchaser to take advantage of a mistake by which he was not prejudiced.

44. In a case (*e*) in which a sale by auction was made under a power in an annuity deed, and the estate was described as a substantial brick building and two plots of ground, the whole estimated to let at 35*l.* per annum, and the conditions stated that one of the plots could not be properly identified by the seller, but the purchaser was to accept by the description only contained in the conveyance of it, and there was the common condition as to errors,—the plot not identified could not be found, and the property was not what is called a substantial brick building, and would not fetch the rent stated,—the purchaser was allowed to recover his

(*e*) Robinson *v.* Musgrove, 2 Mood. & Rob. 92.

deposit. The Chief Justice was of opinion, that if any substantial part of the property had no existence or could not be found, the purchaser might rescind the contract *in toto*, even if the seller was not guilty of any fraudulent misrepresentation in that respect: deficiency in value might be fit matter for compensation, but not the total absence of one of the things sold. With reference to the general description, was that, the learned judge asked the jury, a *bonâ fide* description or not? If they thought it an exaggerated description, quite beyond the truth, and that the seller was not acting *bonâ fide* when he gave it, that circumstance alone would entitle the purchaser to rescind the contract, notwithstanding the language of the condition as to errors.

45. In another recent case (*f*), where, upon a sale by auction, the above-mentioned condition was inserted in the conditions of sale, it appeared that the house was leasehold, but that a small yard mentioned in the particulars was not included in the lease, but was held from year to year at a separate rent; and, although it did not appear that the sellers, who had recently acquired the premises, were aware of the fact; yet, as the yard was proved to be an essential part of the premises, and was held only from year to year, instead of for the term in the house as stated in the particulars, and at a separate rent, the Court held clearly that the defect was not matter of compensation.

46. And where the misdescription, although an unintentional one, is such as would induce a person to bid who really wanted the subject as described, and not the subject as it exists, or perhaps in other words, where there is a substantial misdescription, it will not fall within the condition.

(*f*) Dobell *v.* Hutchinson, 3 Adol. & Ell. 355; and see Mills *v.* Oddy, 2 Crompt. & Mees. 103.

47. Thus in a late case (*g*), where the premises were described in the printed particulars of sale, on the back of which the purchaser had signed the memorandum of the contract, as calculated for an extensive business in carpets, haberdashery, drapery, paper, floor-cloth, upholstery, grocery, tea-trade, or coach-building. The premises were situated in the Piazza, Covent-garden. The particulars also stated, "that no offensive trade is to be carried on: they cannot be let to a coffee-house keeper or working hatter." There was the usual condition as to mistakes, &c. not vitiating the contract. The lease was produced at the sale, and the proviso for re-entry partially read: which circumstance was used only to negative any wilful concealment or misrepresentation by the seller of the terms of the lease. The proviso for re-entry extended, amongst other things, to the premises being used for various specified trades, or as a shop or place for the sale of any provisions whatever. It was held that the purchaser might rescind the contract. The Court treated the case as standing clear from any fraud, and took the description to have originated either from ignorance, inadvertence, or accident. The question therefore simply was, whether the misdescription fell within the condition. It was extremely difficult, the Chief Justice observed, to lay down from the decided cases any certain definite rule which should determine what misstatement or misdescription in the particulars should justify a rescinding of the contract, and what should be the ground of compensation only. All the cases concur in this, that where the misstatement is wilful or designed it amounts to fraud, and such fraud, upon general principles of law, avoids the contract altogether. But with respect to misstatements which stand clear of fraud, it is impos-

(*g*) Flight *v.* Booth, 1 Bing. N. S. 370.

sible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; Duke of Norfolk *v.* Worthy, Wright *v.* Wilson; whilst other cases lay down the rule, that a misdescription in a material point, although not proceeding from fraud, is, in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all; in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased that which was really the subject of the sale, as in Jones *v.* Edney, where the misdescription was held to be fatal (I). It appeared to the Court that a lease which was described as containing a restriction against offensive trades, and a lease containing restrictions not only against offensive trades, but also against some trades that are inoffensive, were not one and the same thing, but a different subject matter of contract; and that where a man purchases by the former description, it may very well be supposed that he would not have become the purchaser, whether he bought for the purpose of carrying on trade upon the premises himself or for money investment, if he had known the lease had contained the larger and more extensive restrictions, and the purchaser was held not to be bound by the sale, but entitled to recover his deposit.

(I) The Chief Justice referred to Jones *v.* Edney, and Waring *v.* Hoggart, as authorities that misdescription by negligence only would vitiate the sale; but in neither of these cases does there appear to have been the above condition.

48. And in the case of Dykes *v.* Blake (*h*) already referred to, where a right of way over the lot sold was not described so as to bind the purchaser, there was the usual condition as to misdescriptions, &c. The lot was described as "a first-rate building plot of ground," and as having an extended frontage; and it was held that this was not a subject of compensation within the condition. The Court observed that the purchaser might safely conclude, as the seller intended him to conclude, that he might purchase the whole lot for the purposes of building. But the direction of the way claimed would render the close altogether useless for the very purpose for which it was known to be purchased.

49. And although there be this condition providing a compensation, yet the sale will be void if from the nature of the case no estimate can be made of the diminution in value. Thus where a reversion was sold after the death of a person aged 66, in case he should not have children, and it turned out that he was only 64, Lord Tenterden held that the sale was void. He said that in the case of a reversion simply expectant on the death of an individual, if a mistake be made in his age, a compensation may be made under the condition, for the difference of value may be computed; but where there is an additional contingency, such as that of the birth of future children, in this case the difference of age alters the likelihood of the contingency, and in such a case therefore no estimate can possibly be made of the difference in value between the thing described and the thing sold, and the contract itself must be vacated (*i*).

50. And in Flight *v.* Booth (*k*), where the covenants restricting the trades were not truly stated, the Chief

(*h*) *Supra*, p. 45; 4 Bing. N. C. 476.

(*i*) Sherwood *v.* Robins, 1 Mood. & Malk. 194; 3 Carr. & Pay. 339.

(*k*) 1 Bing. N. C. 378, 379.

Justice asked how the condition could govern such a misstatement as that, what action at law could be framed upon it? It would at least, he added, involve the purchaser in great difficulty.

51. And the case of Stewart *v.* Allerton, before quoted, may perhaps also be referred to this head, for Lord Eldon thought the difference between an estate let upon a ground rent and one let at rack rent was not a subject for compensation (*l*).

52. So far the points appear to be settled, but as the reader will have observed, a difference of opinion seems to have prevailed upon this *general* point, viz., whether a misdescription in an important respect is fatal where it is occasioned by carelessness or error and not by fraud. In addition to the opinions expressed in the cases already quoted there are other authorities on this head.

53. Thus in Wright *v.* Wilson (*m*), where the action was brought to recover the deposit on account of a misdescription, and there was the usual clause as to misdescriptions, it appeared that the particulars of sale referred to a map as containing the description of the estate, and in that map a turnpike road was set out immediately adjoining the premises; whereas it turned out that there was no turnpike road within a quarter of a mile, and that what on the face of the map appeared as a turnpike-road was, in fact, a mere footpath.

There was no evidence on either side to show how the misdescription had originated, although it is said to have arisen from the miscopying of a map (*n*). Mr. Justice Park, after referring to the case of the Duke of Norfolk *v.* Worthy, said that he should direct the jury that if the misdescription was a wilful and designed one, and had been inserted by any one employed to make the

(*l*) *Supra*, p. 51; 1 Mer. 26.
(*m*) 1 Mood. & Rob. 207.
(*n*) See 6 Carr. & Pay. 734.

plan or connected with the sale, that would be a fraud adopted by the vendors, and consequently would annul the bargain altogether, although the vendors themselves might not have been aware of the misdescription. But if the jury thought that the misdescription had originated in *error*, then *however gross the negligence of the vendors might be*, he was of opinion that they were bound to find their verdict for the vendors. Supposing even that the mistake were so important as the purchaser's counsel offered to prove it to be, still the purchaser must abide the event of having bought an estate without looking at it, and subject to the condition in question. He was further of opinion, that the onus of proving the fraud lay on the purchaser, the presumption of law being against fraud.

54. Again (*o*), where a house was sold by auction as held by a low ground rent, viz., at a ground rent of 15*l.* per annum, and in truth the house and three others were comprised in an original lease at 35*l.* a year, and there was the usual clause as to errors of description, the Learned Judge at *nisi prius* put the question as being whether this was a wilful misdescription by the sellers or by some of their agents, or a mistake. He should say that it was a wilful misdescription, and that there was no doubt about it. The purchaser had a right to avoid the sale unless the jury should think the misdescription arose from mistake. This was a misdescription which would materially enhance the value.

55. We cannot fail to perceive that the strong leaning of the Courts is properly against the seller where the misdescription is an important one, and not fairly a subject for compensation. The opinion expressed in Wright *v.* Wilson, that if there be error only, the purchaser will be bound, however gross the negligence of

(*o*) Mills *v.* Oddy, 6 Carr. & Payn. 728.

the seller may have been, has not been followed, nor can the onus of proving the fraud altogether be thrown upon the purchaser where there is a gross misdescription. For gross negligence may well be held tantamount to fraud, where a seller issues an actual description of his property, and limits his responsibility by such a condition, and a jury would be warranted in coming to the conclusion that there was fraud, from the facts, viz. the means of knowledge, the duty imposed upon the seller to use due diligence, the description varying in important matters from the actual state of the property, and the tendency of the misdescription to mislead a purchaser whom it may be said compensation would not compensate. It is not like a case where the seller should say, 'I do not choose to inquire; I have described the property as I believe it to be, and if any one buy, he must take it whether it answer the description or not, only with a compensation.' But in these cases the purchaser has a right to presume that the seller is acting *bonâ fide*, and has used due diligence. The condition, as the Court observed in Flight *v.* Booth, will comprehend a case where there is half an acre more or less than is described, or cases which resolve themselves into simple cases of that nature (*p*). This is no doubt clearer, where the condition provides for a compensation to be paid to either the purchaser or the seller, as the case may be, than where it applies only to a compensation to the purchaser; for the former condition, which is the usual one, forbids the construction that the seller is, by gross negligence, to misdescribe the property and then to claim an additional price for some advantage which he has omitted to mention; and the like construction must prevail, whether the compensation be payable to the purchaser or to the seller.

(*p*) 1 Bing. N. C. 378.

56. Where the timber and other trees are to be taken by the purchaser at a valuation, it should be stated accurately for what trees he is to pay.

57. In a case where there were several lots, it was stated after two of them, that the timber on them was to be paid for. The particulars were silent as to the timber on the other lots, which was of considerably greater value; but there was a general condition that all the timber and timber-like trees, down to 1*s.* per stick inclusive, should be taken at a fair valuation. The purchaser of the lots, to which no statement was annexed, claimed the timber without paying for it; and the Master of the Rolls thought that a purchaser might be so fairly impressed with that idea, notwithstanding the general condition, that he refused to compel him to perform the contract according to the seller's construction (*q*).

58. But although it should be merely stipulated that the purchaser shall pay for *timber*, yet he must pay for trees not strictly timber, if considered so, according to the custom of the country (*r*); and in one case, where by the condition it was expressed that all timber and timber-like trees should be taken at a valuation, the purchaser was held liable to pay for certain pollards (*s*).

59. It is proper, also, to make some provision as to articles not properly fixtures. Lord Hardwicke said, that if a man sells a house where there is a copper, or a brewhouse where there are utensils, unless there was some consideration given for them, and a valuation set

(*q*) Higginson *v.* Clowes, 15 Ves. jun. 516.

(*r*) Duke of Chandos *v.* Talbot, 2 P. Wms. 601; Anon. Ch. 25 July 1808.

(*s*) Rabbett *v.* Raikes, Woodfall L. & T. 224, 6th ed.; and see Aubrey *v.* Fisher, 10 East, 446.

upon them, they would not pass (*t*). But in the absence of any stipulation, common fixtures would pass to the purchaser under the common conveyance (*u*); unless it could be collected from the context that they were not intended to pass: as if a conveyance be made of an iron-foundry and a dwelling-house, together with all grates, boilers, bells, and other fixtures in and about the dwelling-house; the enumeration of the fixtures in the house will prevent the fixtures in the foundry from passing (*x*).

60. If a seller wish to protect himself against the production of deeds not in his possession, he must state distinctly his intention, for a condition that the seller should deliver an abstract and deduce a good title was held to authorise the purchaser to require the deeds to be produced to verify the abstract, although they were not all in the seller's possession; and in the condition to deliver up to the purchaser all the title deeds and copies of deeds or other documents in the seller's custody, it was expressed, "but that he should not be bound to produce any original deed or other documents than those in his possession and set forth in the abstract." It was observed, that it by no means follows that the vendor cannot prove his title because he has not in his possession all the deeds necessary for that purpose. It could not therefore have been inferred by the purchaser that the restriction as to the liability to deliver up certain deeds, was to apply to the liability to produce them for the purpose of proving the title, and if that inference

(*t*) *Ex parte* Quincey, 1 Atk. 478.

(*u*) Colegrave *v.* Dias Santos, 2 Barn. & Cress. 76; 3 Dowl. & R. 255; *Ex parte* Lloyd, 1 Mont. & Ayr. 494; Longstaff *v.* Meagoe, 2 Adol. & Ell. 167; Hitchman *v.* Walton, 4 Mees. & Wels. 409.

(*x*) Hare *v.* Horton, 5 Barn. & Adol. 715; see Birch *v.* Dawson, 2 Adol. & Ell. 37; a case upon a will.

was not obviously to be drawn from the conditions, a court of equity ought not to compel a purchaser to take the estate without a title. There was nothing in the conditions of sale sufficient to lead the purchaser to understand that he would have no right to have any evidence of any title to the land sold, unless the vendor should happen to be in possession of deeds sufficient for that purpose, a circumstance of which the purchaser could know nothing. Whether that was the intention of the vendor or not was immaterial, if he did not take proper means to explain such intention to the purchaser (*y*).

61. And there must be express conditions where the seller intends to throw upon the purchaser the expense of searches, of making out the representation to attendant terms, or of the assignment of them, or the expense of travelling to a distant place to examine the abstract with the deeds or the like.

62. Where the title-deeds cannot be delivered up, some provision should be made as to the expense of the attested copies, and the covenants to produce them, which will otherwise fall upon the vendor (*z*); and where the estate is sold in many lots, and the title-deeds are numerous, nearly the whole purchase-money may, perhaps, be exhausted. In one case, the lots were more than 200, and the copies came to 2000*l.*

63. If the estate is leasehold, and the vendor cannot procure an abstract of the lessor's title, this fact should be stated in the conditions (*a*).

64. A purchaser of a leasehold estate must covenant

(*y*) Southby *v.* Hutt, 2 Myl. & Cra. 207.

(*z*) Dare *v.* Tucker, 6 Ves. jun. 460; and Berry *v.* Young, 2 Esp. Ca. 640, n. See *post.* c. 9.

(*a*) See *post.* ch. 10; and see Denew *v.* Deverell, 3 Camp. 451.

with the vendor to indemnify him against the rent and covenants in the lease, although he is not expressly required to do so by the conditions of sale (*b*); and it will not vary the case that he is not entitled to any covenants for title; for example, where the sale is by an executor of an assignee (*c*); but assignees of a bankrupt selling a lease which was vested in him, cannot require the purchaser to enter into such a covenant for their indemnity or the indemnity of the bankrupt (*d*).

65. And although a purchaser is not required by the conditions of sale to give an indemnity against the rent and covenants, and an assignment is actually executed without any indemnity being given; yet, even a verbal agreement by the purchaser, before the sale, to secure such indemnity, will be carried into a specific execution, if it be distinctly proved (*e*).

66. Where a vendor is only an assignee of a leasehold estate, and is not bound by covenant to pay the rent, and perform the covenants in the lease, his liability to to do so ceases upon his assigning the estate over (*f*), and consequently, in such case, there is not anything for a purchaser to indemnify against. It has lately been decided that the assignee is liable to indemnify the lessee who assigned to him against breaches *during the time he (the assignee) is in possession*, although he has

(*b*) See Pember *v.* Mathers, 1 Bro. C. C. 52; *Ex parte* Little, 3 Molloy, 67; and see *post.* ch. 4, as to the obligation of a purchaser of an equity of redemption to indemnify the vendor against the mortgage-money.

(*c*) Staines *v.* Morris, 1 Ves. & Beam. 8.

(*d*) Wilkins *v.* Fry, 1 Mer. 244. See 6 Geo. IV. c. 16. s. 75, *post.*

(*e*) Pember *v.* Mathers, 1 Bro. C. C. 52; and see *post.* ch. 3.

(*f*) See 1 Treat. Eq. 2d. ed. p. 350; and Fonbl. n. (*y*) *ibid.*; and see Taylor *v.* Shum, 1 Bos. & Pull. 21; Fagg *v.* Dobie, 3 You. & Col. 96.

not covenanted to indemnify the lessee (*g*), but not further (*h*).

67. And an assignment to hold subject to the payment of the rent and to the performance of the covenants in the lease, will not operate as a covenant so as to bind the assignee after he has assigned over (*i*).

68. It should always be stated in the conditions, that the conveyance shall be prepared *by* and at the expense of the purchaser (*k*).

69. The usual condition, "that if the purchaser shall fail to comply with the conditions, the deposit shall be forfeited, and the proprietors be at liberty to re-sell the estate; and the deficiency, if any, by such sale, together with all charges attending the same, shall be made good by the defaulter," should never be omitted. It forms a lien on the estate for the purchase-money, &c., and if the purchaser do not comply with the conditions, the vendor may, by virtue of this stipulation, re-sell the estate, and recover the deficiency and charges from the purchaser (*l*). And if the money produced by the second sale exceed the original purchase-money, the purchaser who has violated the agreement will not be entitled to the surplus, but the vendor himself will be entitled to retain it.

70. It is now usual to stipulate, that in case of default by the purchaser he shall forfeit the deposit, and that the amount of the expenses of a re-sale, &c., shall be recoverable *as stipulated damages*. Upon such a stipulation

(*g*) Burnett *v.* Lynch, 5 Barn. & Cress. 589; 8 Dowl. & R. 368.

(*h*) Mills *v.* Harris, 1 Nev. & Per. 569, cited; see Beale *v.* Sanders, 3 Bing. N. C. 850.

(*i*) Wolveridge *v.* Steward, 3 Nev. & Scott, 561.

(*k*) See *post*. ch. 4, 13.

(*l*) *Ex parte* Hunter, 6 Ves. jun. 94; and see Moss *v.* Matthews, 3 Ves. jun. 279; Mertens *v.* Adcock, 4 Esp. Cas. 251; *sed vide* 7 Ves. jun. 275. See Greaves *v.* Ashlin, 3 Camp. Ca. 466.

Lord Tenterden held at *nisi prius*, that whether the term used was penalty or liquidated damages, a party who claims compensation for default should only be allowed to recover what damage he had really sustained. He confined his opinion to contracts not under seal; instruments in that form might, perhaps, receive a different construction (*m*). But in a later case before Best, C. J., he expressed a different opinion,—that whether a contract be under seal or not, if it clearly states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in an action for the breach of it should be the stipulated sum (*n*). But whichever be the correct opinion, a jury may, without proof of damage, give the whole sum named. This observation applies to a stipulation that the deposit shall be forfeited and belong to the seller as stipulated damages. Where the expenses of the re-sale, &c., are stipulated for, the measure of damages would be those expenses, &c.

71. But a condition, that if the purchaser shall neglect or fail to comply with any of the conditions, the deposit shall be forfeited as liquidated damages, to be retained by the seller, with power to him to rescind the contract and re-sell, and the deficiency to be made good by the purchaser, does not preclude the seller from maintaining an action for general damages, where the purchaser breaks off from the contract altogether. It applies in case of a breach of any of the particular conditions (*o*).

72. If the purchaser, after breaking the condition, become bankrupt, and the estate is re-sold at a loss, the expenses of the sale, &c., being in the nature of unliquidated damages, cannot be proved under the commission; but as the vendor has a lien on the estate, he may apply

(*m*) Rundal *v.* Everest, 1 Mood. & Malk. 41.

(*n*) Crisdee *v.* Bolton, 3 Carr. & Payn. 240.

(*o*) Icely *v.* Grew, 6 Nev. & Man. 467.

the money produced by the last sale of the estate, first, in payment of those articles which it is just he should receive, but which he could not prove under the bankruptcy; then towards payment of the original purchase-money; and the balance may be proved under the commission (*p*).

73. In a recent case (*q*), a leasehold house and furniture had been sold for 4,370 *l.* *and the assignment was executed*, but neither it nor the lease, nor possession, had been delivered; and the purchaser declining to complete the contract, the sellers brought an action and recovered the whole amount of the purchase-money and costs. The purchaser became a bankrupt, and the assignees took possession of the house. The seller then sold the house and furniture at a considerable loss; and Lord Eldon considered that they were entitled to a lien for the amount of the sale and costs, and to a proof for the difference, although it was insisted that they were concluded by their action.

74. Where a time is allowed by the conditions obviously for the purchaser's convenience, although not so expressed, it will be held to be confined to him. This was decided upon the sale of goods—hemp—by auction, where the condition was, that the goods were to be cleared in fourteen days at the purchaser's expense; and it was held that this was an allowance to the purchaser, and that the seller was bound to deliver the hemp immediately on demand (*r*).

75. The other provisions, which ought to be inserted in conditions of sale, are so well known as not to require notice.

(*p*) *Ex parte* Hunter, 6 Ves. jun. 94; Bowles *v.* Rogers, *ibid.* 95, n.; 1 Cooke, 123; see Hope *v.* Booth, 1 Barn. & Adol. 507.

(*q*) *Ex parte* Lord Seaforth, 1 Rose, 306; *ex parte* Gyde, 1 Glyn & Jam. 323.

(*r*) Hagedorn *v.* Laing, 6 Taunt. 514, 1 Marsh. 162.

76. Although a vendor ought, by proper conditions, to be relieved from obvious difficulties and from expenses which may be unfairly pressed as against him, but which a purchaser, if left to bear them, would take care should fall lightly upon himself, yet the general practice between vendor and purchaser should be adhered to as near as may be. In some instances, for example, the sale for the first time of houses in a town which has long been the property of one family, purchasers may be found to purchase, subject to any conditions which the seller may think fit to impose; yet, in the general run of sales, unusual conditions alarm or disgust parties or their solicitors, and they stay away from the sale, or, if they purchase, they interpose every possible obstacle in the way of the title as a set-off against the hard conditions to which they were compelled to subscribe. The common conditions of sale will always be found to facilitate the completion of the purchase, where the seller has a good title.

77. Immediately after sale of an estate by auction, an agreement (*s*) to complete the purchase should be signed by the parties or their agent, because sales by auction of estates are within the statute of frauds (*t*); and consequently, the contract could not be enforced against either of the parties who had not signed an agreement (*u*). Although a man purchase several lots, yet a distinct contract arises upon each lot, and consequently if no lot is of the value of 20*l.* no stamp is necessary, although altogether they are of more value (*x*); but they may all be comprised in one agreement.

78. An auctioneer, however, as the agent of the pur-

(*s*) See a form of an agreement, Appendix, No. 5.

(*t*) See *post*, ch. 3.

(*u*) See *post*, ch. 3. See a form of an agreement, Appendix, No. 6.

(*x*) Emmerson *v.* Heelis, 2 Taunt. 38.

chaser, which for this purpose in law he is, may bind him to the bidding, by signing for him; if therefore he put down the purchaser's name as the buyer, and the amount of the bidding opposite to the lot in the particulars and conditions of sale, or make an entry in his books of all the requisite particulars, the purchaser will be bound. And on the other hand, the auctioneer's receipt for the deposit may amount to an agreement, binding upon the seller, if it contain the names of the seller and purchaser, the description of the estate sold and the price, and refer to the conditions so as to enable the Court to read them. For in either case, the memorandum, entry, or receipt by the auctioneer, must in itself, or with the particulars or other paper which it embodies by a reference, contain all the particulars required to the validity of a written agreement. But this subject properly belongs to the third chapter, in which the statute of frauds is considered; to which therefore, the reader is referred. I may here, however, observe, that an auctioneer signing an agreement as in his own name, may show that it was really on behalf of his principal (*y*).

(*y*) See 2 Nev. & Per. 519.

## SECTION IV.

### OF AUCTIONEERS AND AGENTS AND OF THE DEPOSIT AND PURCHASE MONEY.

1. *Auctioneer liable if no authority.*
3. *If sale defeated by his negligence, not entitled to commission.*
4. *Amount of commission on sale.*
5. *Amount for finding a purchaser.*
6. *When it is payable.*

7. *Agent bidding beyond his authority.*
9. *Agent to sell not entitled to receive the money.*
10. *Auctioneer cannot give credit.*
11. *Set-off.*
12. *Remittance by seller's direction.*
13. *Purchaser may stop his check if contract void.*
14. *Must not pay agent before the fixed time.*
15. *Seller's direction to pay third person binding.*
16. *Deposit is part payment.*
17. *Auctioneer to retain it till contract completed.*
18. *Interpleader by auctioneer in equity.*
21. *At law.*
23. *Loss by insolvency of auctioneer falls on seller.*
24. *Auctioneer liable where principal not disclosed.*
25. *Not liable to interest.*
26. *May pay to insolvent principal.*
27. *Payment to agent payment to principal.*
28. *Deposit invested by Court at risk of seller.*
29. *Where loss by sale cannot be thrown on purchaser.*
30. *Seller not bound by investment without his assent.*
31. *Waver of payment of deposit.*
32. *No election to forfeit deposit.*
33. *Forfeiture of deposit relieved against.*
34. *Seller to repay deposit although his bill dismissed.*

1. It frequently happens that estates advertised to be sold by auction, are sold by private contract, instead of being brought to the hammer, and the sale is not announced to the public till the day fixed for the auction, and even sometimes not till the auctioneer's appearance in the auction-room. Notice of an intended sale by auction is said to be a contract with all the world: and the parties to whom the notice is addressed ought not to be put to the expense and trouble of attending the auction unless the sale is to take place. It should be stated, therefore, in the advertisements, that the estate will be sold by auction at the place and time fixed upon, *unless previously sold by private contract; in which case notice of the sale shall be immediately given to the public:* and notice should be given accordingly.

2. If an auctioneer sell an estate without a sufficient authority, so that the purchaser cannot obtain the benefit

of his bargain, he (the auctioneer) will be compelled to pay all the costs which the purchaser may have been put to, and the interest of the purchase-money, if it has been unproductive (*a*), for there being no principal who is responsible, the auctioneer is answerable as principal, otherwise the purchaser would have no remedy (*b*).

3. And if an auctioneer do not insert usual clauses in the conditions of sale, whereby the sale of the estate is defeated, he cannot recover any compensation from the vendor for his services; and it is immaterial that he read over the conditions of sale to the seller, who approved of them. The same rule of course applies to negligence generally on the part of the auctioneer, whereby the sale is defeated (*c*).

4. The auctioneer is, of course, entitled to a fair remuneration for his labour; the amount must generally depend upon private agreement, although where there is no special agreement, and there is a particular commission commonly charged, and the seller was aware of the custom, that would no doubt, in most cases, be the measure of the allowance (*d*). It would be difficult, in any case, to recover an unwarrantable or exorbitant commission. Upon large sales this difficulty is mostly obviated by making a contract beforehand with the auctioneer. Mr. Justice Lawrence, upon one occasion, observed, that considering the great sums of money which auctioneers were paid for preparing particulars and selling estates, they ought to be more correct. They contended some time ago, he added, that they

(*a*) Bratt *v.* Ellis, MS.; Jones *v.* Dyke, MS. App. Nos. 7 and 8; and see Nelson *v.* Aldridge, 2 Stark. Ca. 435.

(*b*) See Gaby *v.* Driver, 2 You. & Jerv. 549.

(*c*) Denew *v.* Deverall, 3 Camp. Ca. 451; Jones *v.* Nanney, 13 Price, 76.

(*d*) See Maltby *v.* Christie, 1 Esp. Ca. 340.

were entitled to have the full sum of 5 *l.* per cent. commission, even if a man advertised an estate to be sold by auction, and it was afterwards sold by private contract; and then they contended for half the full commission (*e*).

5. If several land-agents are employed to sell an estate, one who finds a purchaser may be entitled to a commission for so doing, although the purchase is made of another of the agents, who receives his commission; but the jury are not bound to give what is termed the usual commission for finding a purchaser, viz., two per cent. (*f*).

6. If an agent for sale of an estate is to be paid a per centage on the sum obtained, he cannot recover his commission until the money is received by the principal. If, therefore, it is paid into the bank under an Act of Parliament, by the authority of which the property was purchased, the commission is not recoverable until at least the seller's right to the money is ascertained, and it is owing to his wilful default that he has not received it (*g*).

7. If an attorney or agent bid more for an estate than he was empowered to do, he himself would be liable; but it seems that his principal would not (*h*). But unless he were expressly limited as to price, and not enabled to go beyond the limits of his authority, his principal would be bound (*i*).

8. Where the principal denies the authority, and the agent is compelled to perform the agreement himself, because he cannot prove the commission, he may after-

(*e*) 3 Smith, 440 (1806).

(*f*) Murray *v.* Currie, 7 Carr. & Payn. 584.

(*g*) Bull *v.* Price, 7 Bing. 237; 5 Moo. & Pay. 2.

(*h*) See Ambl. 498; 10 Ves. jun. 400.

(*i*) Hicks *v.* Hankin, 4 Esp. Ca. 114. See East India Company *v.* Hensley, 1 Esp. Ca. 112.

wards file a bill against his principal; and if the principal deny the authority, an issue will be directed to try the fact; and if the authority be proved, the principal will be compelled to take the estate at the sum which he authorised the agent to bid (*k*). If the agent make the agreement in that character, and his authority is denied, and he pays the deposit, he may recover it back in his own name if a good title cannot be made (*l*). If the agency be established, the agent will be compelled to transfer the benefit of the contract to his principal, although he made the contract in his own name, and swears that it was on his own account (*m*).

9. An agent employed to sell has no authority as such to receive payment of the purchase-money (*n*).

10. And if an auctioneer being authorised to receive, give credit to the vendee, or take a bill, or other security, for the purchase money, it is entirely at his own risk: the vendor can compel him to pay the money (*o*). As between an agent for the seller and a purchaser, it seems that an agent with an undisclosed principal may vary the terms of payment after the sale is completed: the principal may interfere at any time before payment, but not to rescind what has been before done. This is essential to the safety of the purchasers. But if a man sell, acting as a broker, the moment the sale is completed he is *functus officii*. The terms of the contract cannot then be altered except by the authority of the principal (*p*).

11. But if the seller is indebted to his agent, whom he authorises to receive the money out of which he intends

(*k*) Wyatt *v.* Allen, MS. App. No. 9.

(*l*) Langstroth *v.* Toulmin, 3 Stark. Ca. 145.

(*m*) Lees *v.* Nuttall, 1 Russ. & Myl. 53; 2 Myl. & Kee. 819.

(*n*) Mynn *v.* Joliffe, 1 Mood. & Rob. 326.

(*o*) Williams *v.* Millington, 1 H. Blackst. 81. See Wiltshire *v.* Sims, 1 Camp. Ca. 258.

(*p*) See Blackburn *v.* Scholes, 2 Camp. Ca. 343.

the agent should pay himself, the purchaser to the extent of the agent's debt against the seller may discharge the purchase-money by setting it off in account with the agent, if he is indebted to the purchaser; for this can make no difference to the seller if the agent takes care to receive in cash the balance due to the seller. A person, however, who does not take the ordinary and proper course of paying the whole in money must take care to be able to prove that the agent is in this situation. If, therefore, he pays by a settlement in account, he takes upon himself the risk of being able to show the debt due from the principal to the agent, and the specific circumstances under which the agent was appointed to receive the money (*p*).

12. If the seller direct the purchaser to remit, or pay the purchase-money in a particular manner, as by the post, or to a banker's, the purchaser so remitting or paying the money will be discharged, although it be lost, if he have used due caution in the transaction (*q*).

13. If a purchaser, instead of paying the deposit in cash, give a cheque for it, and he might have recovered the deposit if paid on account of a misdescription for example,—the cheque, though not given without consideration, may be avoided; and therefore he may successfully defend an action upon the cheque (*r*).

14. If a purchaser pay his money to the agent of the vendor before the time when the latter is authorised to receive it, he makes that agent his own for the purpose of paying over the money to the right owner (*s*).

15. If the seller for a valuable consideration direct

(*p*) Barker *v.* Greenwood, 2 You. & Coll. 414.

(*q*) Warwick *v.* Noakes, Peake's Ca. 67 a; Hawkins *v.* Rutt, *ib.* 186; Eyles *v.* Ellis, 4 Bing. 112.

(*r*) Mills *v.* Oddy, 6 Carr. & Payn. 728.

(*s*) See Parnther *v.* Gaitskill, 13 East, 432.

his agent to pay over the proceeds of the sale to a third person, he cannot revoke the order (*t*).

16. A deposit is considered as a payment in part of the purchase-money (*u*), and not as a mere pledge, which was also the rule of the civil law where money was given; but if a ring or the like was given by way of earnest or pledge, it was to be returned (*x*).

17. The auctioneer should not part with the deposit until the sale be carried into effect (*y*); because he is considered as a stakeholder, or depositary of it (*z*). In a late case, where the auctioneer was also the attorney of the seller, and paid over the money to the seller, after he knew that objections to the title had been raised, an action against him for the deposit was sustained, but the Judges cautiously abstained from pointing out the duty of an auctioneer in any other case (*a*). However, in a later case, where the auctioneer had paid over the deposit to the vendor, without any notice from the purchaser not to do so, and before any defect of title was discovered, it was held that the purchaser (the title being defective) might recover the deposit from the auctioneer (*b*). For the payment of the deposit depends upon the want of a good title being made out. If a good title is not made out, the purchaser becomes entitled to his deposit; and, in strictness, an action

(*t*) Metcalf *v.* Clough, 2 Mann. & Ryl. 178.

(*u*) Pordage *v.* Cole, 1 Saund. 319; see Main *v.* Melbourn, 4 Ves. jun. 720; Klinitz *v.* Surry, 5 Esp. Ca. 207; Ambrose *v.* Ambrose, 1 Cox, 194.

(*x*) Vinnius, l. 3, 24.

(*y*) Burrough *v.* Skinner, 5 Burr. 2639; Berry *v.* Young, 2 Esp. Ca. 640, n.; Spurrier *v.* Elderton, 5 Esp. Ca. 1; and see *post.* ch. 16.

(*z*) Jones *v.* Edney, *cor.* Lord Ellenborough, 4 Dec. 1812.

(*a*) See Edwards *v.* Hodding, 5 Taunt. 815; 1 Marsh. 377.

(*b*) Gray *v.* Gutteridge, 1 Mann. & Ryl. 614.

may be maintained for it without giving notice of the default to the auctioneer (*c*).

18. If both the parties claim the deposit, the auctioneer may file a bill of interpleader, and pray for an injunction, which will be granted, upon payment into court of the deposit (*d*).

19. But an auctioneer cannot maintain a bill of interpleader if he insist upon retaining out of the deposit either his commission or the auction duty; for interpleader is where the plaintiff is the holder of a stake which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants (*e*).

20. If upon a bill filed for an injunction, the Court order the deposit to be paid into court, it will, it seems, be after deducting the auctioneer's charges and expenses (*f*), although perhaps this deserves re-consideration; for the purchaser's deposit may not ultimately be the fund out of which those charges are to be paid; but this is done without prejudice to any question as to so much of the deposit as is retained (*g*).

21. Under the Interpleader Act (*h*), by which authority is given to a court of law to make such order between such defendant and the plaintiff as to costs and other matters as may appear just and reasonable, the Court has gone the length of saying, that in the first instance, upon application for a rule to interplead, the fund shall bear the

(*c*) Duncan v. Cafe, 2 Mees. & Wels. 244.

(*d*) Farebrother v. Prattent, 5 Price, 303; 1 Dan. 64.

(*e*) Mitchell v. Hayne, 2 Sim. & Stu. 63; but as to the auction duty, see Farebrother v. Prattent.

(*f*) Annesley v. Muggridge, 1 Madd. 593.

(*g*) Yates v. Farebrother, 4 Madd. 239.

(*h*) 1 & 2 Wil. 4, c. 58.

costs, and the party in the wrong shall afterwards make up the fund (*i*). This operates severely against the right of a purchaser entitled to a return of his deposit.

22. And in a case where the action was brought by the purchaser against the *auctioneer*, and the seller had brought an action against the *purchaser* for the residue of the purchase-money, and the Court had ordered the money into court and directed the seller to proceed with his action, but he failed to do so and became insolvent, the Court, under the Act, directed that the seller's claim against the auctioneer should be barred. The question then arose as to the stakeholder's costs, and the Court allowed him to take them out of the fund in court, that is, out of the deposit which belonged to the purchaser, and left the latter to his right of action against the insolvent seller for having subjected the purchaser's deposit to this deduction, and the Court refused to take into account that the seller was insolvent (*k*).

22. In a case where 1,000*l.* was paid as a deposit to an auctioneer, according to the conditions of sale, and the vendor opposed two motions by the purchaser, in an original and cross-cause filed concerning the contract, for payment of the deposit into court, and the auctioneer became a bankrupt, the loss was holden to fall on the vendor, although the second motion had succeeded, and the day named for payment of the money into court was subsequent to the bankruptcy (*l*). And perhaps a loss by the insolvency of the auctioneer will, in every case, fall on the vendor, who nominates him, and whose agent he properly is (*m*).

(*i*) 4 Bing. N. C. 723.

(*k*) Pitchers *v.* Edney, 4 Bing. N. C. 721.

(*l*) Brown *v.* Fenton, *et e cont.* Rolls, 23 June 1807, MS.; S. C. 14 Ves. jun. 144.

(*m*) See 2 H. Blackst. 592; 13 Ves. jun. 602; 14 Ves. jun. 150;

24. And unless an auctioneer disclose the name of his principal, an action will lie against him for damages on breach of contract (*n*).

25. Generally speaking, an auctioneer is not liable for interest; but that subject will be considered fully in the chapter on Interest (*o*).

26. An auctioneer being only an agent, may safely pay over the proceeds of the sale to the seller, his principal, although the latter is to his knowledge in embarrassed circumstances (*p*) (I). It must be a very special case in which he can set up the *jus tertii* (*q*).

27. Where a man is completely the agent of the vendor, a payment to him is in law a payment to the principal; and in an action against the latter for recovery of the deposit, it is immaterial whether it has actually been paid over to him or not (*r*).

28. If, pending a suit for specific performance, a deposit be laid out in the public funds, under the authority of the Court, it will be binding on both vendor and vendee; and, if laid out without opposition by the seller, it must be presumed to be with his assent; and, in either case, he must take the stock as he finds it (*s*).

Annesley *v.* Muggridge, 1 Madd. 593; Smith *v.* Lloyd, 1 Madd. 618.

(*n*) Hanson *v.* Roberdeau, Peake's Ca. 120; see Simon *v.* Motivos, 3 Burr. 1921; Owen *v.* Gooch, 2 Esp. Ca. 567; 12 Ves. jun. 352, 484.

(*o*) *Post*, ch. 16. s. 1.

(*p*) White *v.* Bartlett, 9 Bing. 378; 2 Moo. & S. 515.

(*q*) Crosskey *v.* Mills, 1 Cro. Mees. & Ros. 298.

(*r*) Duke of Norfolk *v.* Worthy, 1 Camp. N. P. 337.

(*s*) Poole *v.* Rudd, 3 Bro. C. C. 49; and see Doyley *v.* the Countess of Powis, 2 Bro. C. C. 32; 1 Cox, 206.

---

(I) If a man obtain possession of goods by fraud between him and the owner, which an auctioneer sell for him, the auctioneer cannot safely pay over the proceeds to his principal after notice from the assignees of the insolvent owner; Hardman *v.* Willcock, 9 Bing. 382, n.

29. If a purchaser is entitled to a return of his deposit, he is not compellable to take the stock in which it may have been invested, unless such investment were made under the authority of the Court, or with his assent. And an assent will not be implied against a party because notice was given to him of the investment, to which he made no reply (*t*). Therefore, where the deposit is considerable, and it is probable that the purchase may not be completed for a long time, it seems advisable for the parties to enter into some arrangement for the investment of the deposit.

30. As a vendor will not be subject to any loss by the investment of the purchase-money in the funds without his assent, so he will not be entitled to any benefit by a rise in the funds, although the purchaser gave him notice of the investment; unless he (the vendor) agreed to be bound by the appropriation. Sir William Grant has observed, that a deposit does not impose a liability or responsibility upon the party to whom notice of it is given; throwing upon him any risk as to the principal. The principal remains entirely at the risk of the party making the deposit. He cannot, by depositing the money with his bankers, throw the risk of their credit upon the other parties. They are not called upon to express their opinion of that bank, or to say anything upon the subject. There is no difference between that and a deposit at the Bank of England, or a conversion of the money into stock; as the one party has no more right to make the other consent to have the fund laid out in stock than in a private bank (*u*).

31. No objection can be made to the whole of the deposit required by the conditions not being paid by the

(*t*) Roberts *v.* Massey, 13 Ves. jun. 561; M'Cann *v.* Forbes, 1 Hogan, 13.

(*u*) Roberts *v.* Massey, *ubi sup.*; Acland *v.* Gainsford, 2 Mad. 28.

purchaser, if the vendor, after the sale, agree to accept a less sum (*x*).

32. A purchaser has no right to elect to put an end to the agreement by forfeiting the deposit (*y*).

33. Although the deposit be forfeited at law, yet equity will, in general, relieve the purchaser, upon his putting the vendor in the same situation as he would have been in had the contract been performed at the time agreed upon (*z*). But if a bill by a purchaser for a specific performance is dismissed, the Court cannot order the deposit to be returned: as that would be decreeing relief (*a*).

34. Where the *seller* files the bill he submits to the jurisdiction, and although his bill is dismissed, the Court will compel him to repay the deposit, and with interest, where that ought to be paid. This was first decided by Lord Eldon, and has since been followed by other judges.

(*x*) Hanson *v.* Roberdeau, Peake's Ca. 120. See *ex parte* Gwynne, 12 Ves. jun. 378; and 1 Camp. Ca. 427.

(*y*) 2 Mer. 506.

(*z*) Vernon *v.* Stephens, 2 P. Wms. 66; Moss *v.* Matthews, 3 Ves. jun. 279.

(*a*) Bennet College *v.* Carey, 3 Bro. C. C. 390.

## SECTION V.

### OF SALES BY PRIVATE CONTRACT.

1. *Printed conditions and agreement.*
2. *Written agreement; letters.*
3. *Previous representations at an end.*
4. *Unless there be fraud.*
5. *Purchase completed by agent binding although contract not in writing.*
7. *Where agent binds himself.*
8. *Personal undertaking by solicitor.*

9. *Attested copies of parcels where sale is in lots.*
10. *Contract to procure a purchaser.*
11. *Waver of contract on compromise by the other party with his creditors.*
12. *Purchaser liable for nuisance on the estate.*
13. *Duties on valuations.*

1. In regard to sales by private contract, all such of the foregoing observations as do not apply exclusively to sales by auction are equally applicable to sales by private contract. But it is seldom that a seller can obtain the introduction into an agreement of an unusual stipulation. There is no competition at the moment, and the price being agreed upon, the terms of the contract follow the usual practice. The attempt to introduce an unusual condition would in many cases put an end to the treaty. Where it is really important to a seller that he should be guarded in the sale by special conditions, the best plan would be to have the particulars of the estate with the conditions printed, adapting them to a private sale with a printed form of an agreement at the end. Persons desirous of treating for the estate would thus know beforehand upon what conditions the sale was to be made, and would not be likely, if they did make an offer, to object to be bound by them.

2. As soon as the treaty is concluded, a regular written agreement should be signed by both parties, containing the names of the seller and buyer, the description of the estate and the price, with the usual stipulations (*a*). Letters, as we shall see, may amount to a sufficient agreement. They are often relied upon, where it is feared by either party that the other will withdraw if the matter is prolonged. But they generally lead to litigation.

3. We shall see that after a contract is executed, what passed between the parties cannot be adverted to (except

(*a*) See a form of an agreement, Appendix, No. 10.

as a defence against a specific performance), because what passed between the parties in their communication may have been altered and shifted in a variety of ways, but what they signed and sealed was finally settled. It would destroy all trust; it would destroy all security, and lay it open, unless the parties are completely bound by what they sign and seal. This was laid down at law by Lord Loughborough (*b*).

4. And in a later case, it was said to be in vain to reduce a contract to writing if you may afterwards refer to all that has passed by parol. But fraud is an exception. One learned judge held, that where parties come to an understanding, and reduce the contract to writing, by that alone they are afterwards to be bound, unless some fraud can be shown. Even if there had been a representation it would not avail. He held that if a man brought him a horse, and made any representation whatever of his quality and soundness, and afterwards they agreed in writing for the purchase of the horse, that shortens and corrects the representation, and whatever terms are not contained in the contract do not bind the seller, and must be struck out of the case (*c*).

5. But as fraud is admitted to be an exception, the question in these cases must be, did the representations amount to a fraud? In the above case the opinion of the Court was, that mere representations, not embodied into the contract, were not a fraud. Where the representations do amount to a fraud, the purchaser, although the contract is silent on that head, has been allowed to recover damages (*d*). The cases are not easily reconcileable with each other, nor do they furnish a plain principle to guide future decisions.

(*b*) Haynes *v.* Hare, 1 H. Blackst. 664.

(*c*) Pickering *v.* Dowson, 4 Taunt 779; *post.*

(*d*) Stevens *v.* Dobell, 3 Barn. & Cress. 623.

6. If a man at the request of another enter into a contract for a purchase, and pay the price and obtain the subject, the principal cannot, in answer to an action for the money paid to his use, object that the contract was not in writing as required by the statute of frauds (*e*).

7. As agreements for sale of estates are generally entered into by the attornies of the parties, it may, in this place, be proper to observe, that where an attorney enters into an agreement on behalf of his principal, the agreement should be made and signed in the name of the principal, by him as attorney: for if an attorney covenant in *his own* name for *himself*, *his heirs*, &c. he will himself be personally bound, though he be described in the instrument as covenanting for and on the part of his principal (*f*).

8. A personal undertaking by a solicitor at a sale to procure certain evidence of the title, &c. cannot be enforced in a summary way under the summary jurisdiction of the Court (*g*).

9. Where an estate is sold in lots, whether by public auction or private contract, it may be advisable for the vendor to take attested copies of the parcels included in the different conveyances; in order to satisfy a cautious purchaser of any part of the estate, that no part of the

(*e*) Pawle *v.* Gun, 4 Bing. N. C. 445.

(*f*) Appleton *v.* Binks, 5 East, 148; Kendray *v.* Hodson, 5 Esp. Ca. 228; Norton *v.* Herron, 1 Ry. & Mood. 229; S. C. 1 Carr. & P. 648; Spittle *v.* Lavender, 1 Moore, 270; Gray *v.* Gutteridge, 1 Man. & Ry. 614. See Duke of Norfolk *v.* Worthy, 1 Camp. Ca. 337; Bowen *v.* Morris, 2 Taunt. 375; Pell *v.* Stephens, 2 My. & Kee. 334; Gaby *v.* Driver, 2 You. & Jerv. 549; Jones *v.* Littledale, 6 Adol. & Ell. 486; Magee *v.* Atkinson, 2 Mees. & Wels. 440.

(*g*) Peart *v.* Bushell, 2 Sim. 38.

estate bought by him is included in any of the conveyances to the other purchasers.

10. It may here be observed, that if a man agrees to get another so much for his estate, and actually provide a purchaser with whom the owner agrees for the sale of the property, at the sum stipulated, and a deposit is paid, the first agreement will be performed, although the purchaser cannot perform the agreement, if the seller let him off, and retain the deposit as a forfeiture (*h*).

11. Where a man had bought an estate and paid a deposit, but the title had not been made out, and being desirous of compromising with his creditors, applied to the seller to cancel the contract and return the deposit, which he refused to do, but said that he would never sue the purchaser on the contract, and thereupon the compromise with the creditors proceeded; it was held that it would have been a fraud in the seller if he had attempted to enforce the contract, and therefore the purchaser was not allowed to recover the deposit, although the title had not been made out (*i*).

12. A purchaser should be cautious in buying a property where a nuisance exists; for if a nuisance be created, and a man purchases the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance. But if after the reversion is purchased, the nuisance be created by the occupier, the reversioner incurs no liability; yet, in such a case, if there was only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant

(*h*) Horford *v.* Wilson, 1 Taunt. 12.

(*i*) Clark *v.* Upton, 3 Manu. & Ryl. 89.

had created the nuisance, that would make the landlord liable. He is not to let the land with the nuisance upon it (*k*).

13. By a late act (*l*), the following duties are imposed upon every valuation or appraisement of any estate, or effects, real or personal, or of any interest therein, or of the annual value thereof; viz. where the amount does not exceed 50 *l.*, a duty of 2*s.* 6*d.*; where it exceeds 50*l.* but does not exceed 100 *l.*, a duty of 5*s.*; where it exceeds 100*l.* and does not exceed 200 *l.*, a duty of 10*s.*; where it exceeds 200 *l.* and does not exceed 500*l.*, a duty of 15 *s.*; and where it exceeds 500*l.*, a duty of 20*s.*

(*k*) The King *v.* Pedly, 1 Adol. & Ell. 827, *per* Littledale, J.

(*l*) 55 Geo. III. c. 184. See Lees *v.* Burrows, 12 East, 1.

## SECTION VI.

## OF SALES BY PERSONS NOT BEING OWNERS.


2. *Valuation of property.*
4. *May sell privately, or by auction.*
5. *Insolvents' estates to be sold by auction.*
7. *Assignees of bankrupts not to delay sale.*
8. *Sale by private contract not within authority to sell by auction.*
9. *Sale in lots.*
11. *Sale by auction valid although not at full price.*
12. *Trustees must use reasonable diligence.*
14. *Time of sale.*
15. *Where sale will be stopped.*
18. *False representation by trustee.*
19. *Conditions of sale.*
20. *Where assignee may buy in.*
21. *Where they may have a reserved bidding.*
22. *Where damages against the assignees fall on the estate.*
23. *Assignees putting up an estate.*
24. *Deposit repaid without a bill filed.*
25. *Biddings for bankrupt's estate opened.*
26. *Power to mortgagee to sell.*

28. *Liability to make a good title.*
29. *And compensation for misdescription.*
30. *Cannot sell to themselves.*
31. *Trustee of legal estate to convey to trustees to sell.*
32. *Tenant for life, when entitled to rents.*
33. *Sales by trustees under powers of sale and exchange.*
34. *Cannot be controlled: how to sell.*
35. *Their contract binds the estate.*
36. *Trustees' liability to costs.*

1. Where the seller is a trustee for sale, assignee of a bankrupt or insolvent, or mortgagee with a power to sell, he has to consider not only his obligations to the purchaser, but also his liabilities to his *cestui que trusts* or mortgagor.

2. Of course trustees should satisfy themselves of the value of the property they are empowered to sell, and although it certainly is not necessary in every case to have a valuation made, yet they will be justified in taking that step, and not allowing the estate to go for less than the valuation (*a*), but at last trustees, like other sellers, must be guided by that common proof of value, that a thing is worth what it will fetch.

3. Lord Eldon observed, upon the usual words, that the trustees may sell for such price as shall appear to them to be reasonable, that that expression must be construed, at least in a question between the trustees and the *cestui que trust*, after they have with due diligence examined (*b*).

4. A sale by trustees, &c. may, unless there be a restriction, be made by private contract or by public auction. Even in the case of assignees of bankrupts, there is nothing in the statutes to prevent them selling by private contract; it may be frequently advantageous

(*a*) See 5 Ves. jun. 680, 681.

(*b*) 10 Ves. jun. 309; as to rights of pre-emption given through trustees, see 11 Ves. jun. 454, 445, and *post*, ch. 4.

for the creditors, and with their consent would be unobjectionable. It is however a circumstance of evidence not to be disregarded upon a complaint that the property, by a different mode of disposing of it, might have been rendered more productive (*c*).

5. The real estate of an insolvent however is directed to be sold by public auction, with the sanction of the creditors (*d*).

6. The insolvent's estate is to be sold within six months after the appointment of the assignee, or within such other time as the court for the relief of insolvents shall direct (*e*).

7. The bankrupt's estate should be sold without delay, and assignees will not be justified in postponing the sale against the demand of any individual creditor (*f*). There appears to have been a difference of opinion between Lord Thurlow and Lord Eldon upon the point whether the Lord Chancellor had power to postpone the sale against the demand of a creditor (*g*), although Lord Eldon fully assented to Lord Thurlow's doctrine as a general rule (*h*).

8. A sale by private contract by an *agent* authorised to sell by auction is not valid, although the price be greater than was required (*i*), nor could such a sale by trustees in the like case be supported.

9. The sale may be made in lots or altogether, as may be deemed most advantageous.

10. Where a trust estate was put up to sale by auction

(*c*) *Per* Lord Eldon, *ex parte* Dunman, 2 Rose, 66.

(*d*) 1 & 2 Vic. c. 110. s. 42, 47, 48.

(*e*) Sect. 47; see Doe v. Evans, 1 Crompt. & Mees. 450.

(*f*) *Ex parte* Goring, 1 Ves. jun. 168.

(*g*) *Ex parte* Kendall, 17 Ves. jun. 519, 522.

(*h*) See 6 Ves. jun. 622, 623.

(*i*) Daniel v. Adams, Ambl. 495; see *post*, ch. 4.

in several lots, upon the deliberate opinion of the auctioneer that the estate would sell most advantageously in lots, and such sale having been tried without effect, the estate was put up at the same sale in one lot and sold, so that competition was not invited by any previous notice that *such* a sale would take place, the purchaser was, upon slight circumstances, refused a specific performance (*k*).

11. Where the sale by trustees, &c. is made by auction, with all those circumstances of caution which a provident owner would have applied in the case of his own property, it would form no objection to the specific performance of the contract that the estate had not obtained a full price. Those who sell by auction submit themselves to the chance of competition, and must abide by it (*l*).

12. Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price; and that in the execution of the trust they will pay equal and fair attention to the interest of all persons concerned. If trustees or those who act by their authority fail in reasonable diligence—if they contract under circumstances of haste and improvidence—if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust at the expense of another party, a court of equity will not enforce the specific performance of the contract, however fair and justifiable the conduct of the purchaser may have been. The remedy of the law is open to such a purchaser, but he has no claim to the assistance of a court of equity (*m*).

(*k*) Ord. *v.* Noel, 5 Madd. 438.

(*l*) *Per* Leach, V. C.; Ord *v.* Noel, 5 Madd. 440; see 3 Mer. 208.

(*m*) *Per* Leach, V. C. 5 Madd.

13. There have been cases, Lord Eldon observed, upon contracts by trustees to sell, which is the situation of assignees, where the Court has said, not that it will order the contracts to be cancelled, but that if the trustee has been negligent, not taking that care to preserve the interest of his *cestui que trusts* which he ought to have done, it will not permit the party dealing with him to take advantage of that negligence: if he was dealing with one whom he knew to have a duty, and if that duty was plainly neglected, the contract will not be enforced (*n*).

14. The usual direction is, to sell with all convenient speed, which is no more than the ordinary duty implied in a trustee, and there must necessarily be some discretion which the trustee may safely exercise (*o*); and if there are several trustees, one is not bound to surrender his opinion as to the fittest time of sale to the other (*p*); and acting providently, they may buy in the estate; but trustees who do buy in an estate and delay the resale incur a great risk of answering for any loss which may be sustained (*q*).

15. The Court has refused to stay a sale by trustees, although to be made the next day, and the notice of the intended sale was alleged to be much shorter than usual, because this was not one of the cases in which, on account of irreparable injury to the plaintiff, the Court proceeds in this summary way. If the trustees should be guilty of a breach of trust in making the proposed sale, they will be answerable to the *cestui que*

440, 441; Bridger v. Rice, 1 Jac. & Walk. 74; vide *post*, ch. 4.

(*n*) *Per* Lord Eldon, in Turner v. Harvey, Jac. 178.

(*o*) Garret v. Noble, 6 Sim. 504; Buxton v. Buxton, 1 Myl. & Cra. 80.

(*p*) Buxton v. Buxton, 1 Myl. & Cra. 80.

(*q*) See Taylor v. Tabrum, 6 Sim. 281. *Qu.* If not heard upon appeal.

*trust* for the damage sustained (*r*). But in a later case, where a trustee to sell in a mortgage had not apprised the mortgagor of his intention to proceed to a sale, and it being his duty to attend equally to the interest of both *cestui que trusts*, and to apprise both of the intention to sell, so that each might take the means to procure an advantageous sale, the Court stopped the sale. If the trust for sale had been in the mortgagee himself, the Court thought that the mortgagor might, where due notice had not been given so as to afford a fair probability of an advantageous sale, relieve himself by giving notice to the purchaser that he had filed a bill to impeach the sale, and that it was better to put him to the inconvenience of an additional party to his suit than to risk a possible injury to the mortgagee by interrupting the sale (*s*).

Injunctions ought not to be granted upon slight grounds in such cases, but the opinion above quoted of Sir John Leach's, as to giving notice instead of applying for an injunction, was one upon which he frequently acted in other cases, but the rule was always disapproved of by Lord Eldon.

16. Although a trust for sale has been established by decree, yet if there be an appeal the Court will, in a proper case, stop the sale until the final decision (*t*).

17. If a bill is filed for the execution of the trust, a sale cannot be made without the leave of the Court (*u*).

18. If a trustee falsely represent the state of the incumbrances to a purchaser, he would, as we have seen,

(*r*) Sir John Pechel *v.* Fowler, 2 Anstr. 542.

(*s*) Anon. 6 Madd. 10.

(*t*) Jenkins *v.* Herries, whilst depending in Dom. Proc. M.S.

(*u*) Walker *v.* Smallwood, Ambl. 676.

be bound to make good the loss sustained through his misrepresentation (*x*).

19. Although a man selling his own property may sell subject to such conditions as he pleases, yet trustees and assignees cannot impose any condition for the benefit of the creator of the trust or the bankrupt, which would reduce the value of the property (*y*).

And all the trustees should see that the sale is duly made, for they will be responsible for the act of any to whom they delegate the duty (*z*). For where several trustees sell, although there is the usual clause that each shall be liable only for his own receipts and defaults, yet if they allow one of them to receive and *retain* the purchase-money, they will be answerable for any loss occasioned by his dishonesty or insolvency (*a*). As soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it (*b*).

20. An assignee of a bankrupt may buy in an estate with the previous consent or subsequent approbation of the creditors (*c*); but if he do so of his own authority he will be deemed the purchaser, and held to the bargain (*d*).

21. Upon a sale under an order in bankruptcy upon a petition by the mortgagee, the assignees are not allowed to have a mere reserved bidding, and if they buy in the estate without authority they will be held to

(*x*) See *supra*, p. 5, 6.

(*y*) See 3 Mer. 268.; Robinson v. Musgrove, 2 Mood. & Rob. 92.

(*z*) See 8 Price, 166, 167.

(*a*) Bone v. Cook, 13 Price, 332; M'Clel. 168; see Brice v. Stokes, 11 Ves. jun. 319.

(*b*) 11 Ves. jun. 327; *per* Lord Eldon.

(*c*) *Ex parte* Buxton, 1 Gly. & Jam. 355.

(*d*) *Ex parte* Lewis, *ib.* 69.

the purchase (*e*). If they desire actually to bid for the property they may have permission, but then the property may be knocked down to them as the real buyers (*f*); nor upon the sale of unincumbered property can the assignees have leave to bid unless under very special circumstances. A majority of the creditors present at a meeting summoned for the purpose cannot bind the minority (*g*).

22. If assignees contract to sell subject to the approbation of the creditors, and the creditors approve, and consent to the contract, and afterwards the contract is resisted on the part of the estate, the damages, if any be recovered by the purchaser, must, as between the assignees and the estate, be paid out of the latter, and not by the assignees (*h*).

23. It is well settled, that assignees of a bankrupt are not bound to take what Lord Kenyon calls a *damnosa hæreditas*, property of the bankrupt, which so far from being valuable, would be a charge to the creditors; but they may make their election; if, however, they do elect to take the property, they cannot afterwards renounce it, because it turns out to be a bad bargain (*i*). This observation is made as an introduction to a case (*k*), in which it was decided that the assignees of a bankrupt could not be charged as assignees of the lease, where they had not entered into actual possession, but merely put up the property to sale by auction without

(*e*) *Ex parte* Tomkins, Ch. 23d August 1816; M.S. App. No. 11; *ex parte* Lucas, 1 Mont. & Ayr. 93.

(*f*) *In re* Skinner, 1 Mont. & Ayr. 81.

(*g*) *Ex parte* Beaumont, 1 Mont. & Ayr. 304.

(*h*) Turner *v.* Harvey, Jac. 178.

(*i*) See 7 East, 342.

(*k*) Turner *v.* Richardson, 7 East, 336; Wheeler *v.* Bramah, 3 Camp. Ca. 370; Copeland *v.* Stephens, 1 Barn. & Ald. 593; and see Carter *v.* Warne, 1 Mood. & Malk. 479; 4 Carr. & Pay. 191.

stating to whom it belonged, or on whose behalf it was sold, and no person bid at the sale : the Court considered this as a mere experiment to enable the assignees to judge, whether the lease were beneficial or not, and compared it to a valuation by a surveyor ; but where upon a sale by assignees they received a deposit, but the purchaser refusing to complete his purchase, a second sale was resorted to without success ; yet, as there had been a sale, and a deposit paid, the Court, in the absence of evidence why they did not enforce the contract of sale, presumed that it was in force, and held that the contract of sale fixed them with possession (*l*).

If the assignees do accept the property, the bankrupt is by a late act (*m*) relieved from the rent and covenants, and if the assignees decline the same, the bankrupt is not to be liable in case he deliver up the lease to the lessor within fourteen days, and the lessor is enabled in a summary way to compel the assignees to make their election either to accept the same or deliver up the lease and possession of the estate ; and a provision for the same purposes is contained in the late act regarding insolvents (*n*).

24. If a bankrupt's estate be sold and the purchaser pay a deposit, and then the fiat be superseded, the Court will upon petition order the deposit to be returned, without driving the purchaser to file a bill (*o*).

25. The biddings for an estate sold under a fiat in bankruptcy have lately been opened in analogy to the rule upon sales by courts of equity (*p*). This is much

(*l*) Hastings v. Wilson, Holt's Ca. 290.

(*m*) 6 Geo. IV. c. 16. s. 75. See *ex parte* Pomeroy, 1 Rose, 57 ; *ex parte* Nixon, 1 Rose, 445.

(*n*) 1 & 2 Vic. c. 110. s. 50.

(*o*) *Ex parte* Fector, Buck, 428.

(*p*) *Ex parte* Hutchinson, 2 Mont. & Ayr. 727 ; see *ex parte* Partington, 1 Ball & Beat. 209.

to be lamented. Lord Manners refused to open such a sale unless there was fraud or mismanagement (*q*).

26. A power in a mortgage deed to the mortgagee to sell is in the nature of a trust, but it may be exercised without the concurrence of the mortgagor (*r*).

27. And where there was an equitable mortgage, with a power of sale, although the mortgagee was precluded from selling the estate for a stipulated period, yet the mortgagor having become bankrupt within that period, the Court of Review made an order for an immediate sale, upon the petition of the mortgagee, against the wish of the assignees (*s*).

28. Trustees, assignees of bankrupts (*t*), and mortgagees with a power of sale, are of course liable to make a good title, just as if they were *sui juris*, although they are not bound to enter into covenants for the title (*u*); and if they do not deliver the deeds to the purchaser, they are liable in the same way to furnish attested copies of the deeds, and a covenant to produce the deeds (*x*).

29. And a purchaser from trustees is entitled to a compensation for a misdescription of the quantity, &c., although made without fraud, as in the case of a sale by an owner (*y*).

30. Trustees, assignees, mortgagees with powers of sale, cannot sell to themselves (*z*): they may of course vest the estate by conveyance in themselves as purchasers; even executors, having a power of sale, may sell and appoint the estate to themselves, or any of

(*q*) *In re* Martin & Ormsby, 2 Moll. 446.

(*r*) *Post*, ch. 10.

(*s*) *Ex parte* Sam. Bignold, 3 Mont. & Ayr. 477: *sed qu.*

(*t*) See *post*, ch. 10.

(*u*) *Post*, ch. 13.

(*x*) Vide *infra*, ch. 9.

(*y*) Hill *v.* Buckley, 17 Ves. jun. 394.

(*z*) Ch. 19, *post.*

them, or appoint it to a nominal purchaser as a trustee for them (*a*); but equity would not allow such a purchase to stand, unless it should prove beneficial to the *cestui que trusts* (*b*).

31. Where an equitable owner has conveyed the estate to trustees to sell, the person in whom the legal estate is outstanding is bound to convey it to the trustees for sale, and is not entitled to require the concurrence of the *cestui que trusts* of the money to be produced by sale. But if, in parting with the legal estate, he goes beyond the mere purpose of conveying it to the equitable trustees, and so deals with it as to facilitate a breach of trust by the trustees, and a breach of trust be in consequence committed, he is deemed a party to such breach of trust, and is responsible for it (*c*).

32. Although a tenant for life of money to be produced by the sale of an estate may not, by the expressions of a will, be entitled to any interest until a sale and investment of the produce, yet where the sale is directed to be made with all convenient speed, twelve months are considered as the time within which the sale might reasonably have been made, and from that time the tenant for life is entitled to the rents of the estate remaining unsold (*d*).

33. In regard to trustees having the usual power of sale and exchange under a settlement, they must act in the execution of the power, when they determine to exercise it, as if it were a trust. They should ascertain, before they proceed to a sale, that their power is not a conditional one (*e*); and they should not *sell* under a

(*a*) Mackintosh *v.* Barber, 1 Bing. 50.

(*b*) 1 Sugd. Pow. 140, 141.

(*c*) Angier *v.* Stannard, 3 Myl. & Kee. 566.

(*d*) Vickers *v.* Scott, 3 Myl. & Kee. 500; see Sitwell *v.* Bernard, 6 Ves. jun. 520, and many later cases.

(*e*) See 2 Sugd. on Pow. 497.

power to make partition, or to exchange, although this may be accomplished indirectly (*f*).

34. Trustees of such a power, acting *bonâ fide*, cannot be controlled by equity in the exercise of their discretion, and a proper contract for sale by them will be enforced in equity (*g*); neither can they be compelled to adopt a contract for sale by the tenant for life (*h*). They should not, under the usual power, which provides for a reinvestment, sell the estate for the mere purpose of converting it into money (*i*); and if they sell the estate they must sell the standing timber with it, although the tenant for life is unimpeachable of waste (*k*). They may sell the estate to the tenant for life himself, even where his consent is required to the sale (*l*).

35. Their contract to sell under a power of sale binds the estate; and though by the deaths of parties the power should be extinguished, yet the contract must be executed by those who have got an interest by the extinguishment of the power (*m*).

36. And I may here observe, that trustees will be answerable for costs in a suit if the decision be against them, just as if they were selling their own property, as between them and the vendor (*n*); although, if they acted properly, they may be able to charge those costs against the trust property. But although often asked, the Court seldom, in a suit between the trustees and a purchaser, directs them to have their costs over out of the trust estate, but leaves them to settle that question with their *cestui que trusts*.

(*f*) See 2 Sugd. on Pow. 506.

(*g*) Ib. 511.

(*h*) Thomas *v.* Dering, 1 Kee. 729.

(*i*) 2 Sugd. on Pow. 511, 512.

(*k*) Ib. 513.

(*l*) Ib. 517.

(*m*) Mortlock *v.* Butler, 10 Ves. jun. 292; and see Shannon *v.* Bradstreet, 1 Scho. & Lef. 52.

(*n*) Edwards *v.* Harvey, Coop. 40; see *post*, ch. 16, s. 2.

# CHAPTER II.

## OF SALES UNDER THE AUTHORITY OF THE COURTS OF EQUITY.

### SECTION I.

### OF THE PROCEEDINGS FROM THE ADVERTISEMENTS TO THE CONVEYANCE.


1. *Reserved bidding.*
2. *Particulars and advertisements.*
3. *Sales in the country.*
5. *Improper description.*
7. *Verbal declarations.*
8. *Mortgagee not to conduct sale.*
9. *How sale conducted.*
10. *Deposit.*
11. *Substitution of another as purchaser.*
13. *Re-sale at a profit.*
14. *Decree a security to purchasers.*
15. *Judgment creditors affected.*
17. *Contract not complete till confirmation.*
18. *How report is confirmed.*
20. *Loss by fire, &c. in the interim.*
21. *Proceedings where purchaser holds back.*
22. *Bidding by insane person void.*
23. *Payment of purchase-money and possession.*
24. *Incumbrances, how paid off.*
27. *Possession from previous quarter-day.*
30. *Mortgagee's right when purchaser.*
32. *Purchaser's right to life annuity.*
33. *And to a life interest.*
34 *And to a colliery.*
35. *Court alone gives possession.*
36. *Preparation, &c. of conveyance.*
39. *Exceptions to report as to draft conveyance.*
41. *Or to report of title.*
42. *Costs to purchaser where title bad.*
43. *Who is to pay them.*
44. *Costs of reference of title.*
47. *Delay in making out title.*
49. *Sale contrary to order void.*
51. *Sale not within statute of frauds.*
53. *Purchaser restrained from waste.*


1. WE have already seen, that sales under the decrees of the Court of Chancery, or Exchequer, are not liable

to the auction duty; and therefore if public notice of a vendor's intention to bid for the estate is not necessary, where a single bidder is employed to prevent the estate from being sold at an under-value (*a*), it follows, that *no* notice need be given previously to the sale of an estate under a decree, of the vendor's intention to buy in the estate, if a particular price be not bid for it. At the same time, it must be observed, that where a fraud is committed on the purchaser, by puffing at the sale, it cannot be supported, any more than a sale by auction under similar circumstances (*b*); but the Court will, in a proper case, authorise a bidding to be reserved, and to be made one of the conditions of sale. The reservation will be left to the Master's discretion, but if he exercise the discretion the Court accompanies the reserved bidding with many precautions (*c*).

2. Where an estate is directed to be sold before a Master, the particulars of sale are prepared by the plaintiff's solicitor: after they are allowed by the Master, the advertisement for sale must be prepared, either by the plaintiff's solicitor, or by the Master's clerk, and the signature of the Master must be obtained to authorise the insertion of the advertisements in the Gazette. There are always two advertisements (*d*); in the first, no time is appointed for the sale. About three weeks or a month after the insertion of the first advertisement, a warrant must be taken out to fix a time for the sale, and it must be served on all the parties' clerks in court. The warrant being attended, the Master, with the approbation of all parties, will fix the time; and the second advertisement, which is usually called the peremptory adver-

(*a*) *Vide supra*, p. 27.

(*b*) *Vide supra*, p. 32.

(*c*) Jervoise *v.* Clark, 1 Jac. & Walk. 389; Shaw *v.* Simpson, *ib.* 392, n.

(*d*) See 2 Fowl. Prac. 305.

tisement, stating the time, must then be prepared, and inserted in the Gazette (*e*).

3. The estate is generally sold before the Master, but the Master is at liberty, if he shall think it for the benefit of the parties interested, to order the same to be sold in the country, at such place and by such person as he shall think fit (*f*).

4. When the sale in the country is over, an affidavit, prepared by the Master's clerk, and sworn to by the person appointed (together with the bidding-book and printed particulars annexed), stating the sale and the biddings, and the sum for which the estate sold, and to whom, by name, is required (*g*).

5. The particulars should, as in the case of private sales, correctly state the rental and nature of tenure, &c. If the property be described as held by tenants under written agreements, and the holdings are by parol, the purchaser will be allowed to retire from the contract (*h*).

6. If the rents of the estate are incorrectly represented to the purchaser's disadvantage, he will be entitled to a compensation; but if he object to the statement upon a sale, and there is a re-sale under the same representation, and instead of pointing out the error he again purchases, he cannot claim any compensation (*i*).

7. The Court, as in cases of sale by public auction, does not in general attend to verbal declarations at the sale, the babble of the auction-room, as it has been called, except in cases where they have to consider whether a purchaser is to take his bargain or not (*k*).

(*e*) See 1 Turner's Practice by Ven. 127.

(*f*) General order, 23d Nov. 1831, 75.

(*g*) 1 Newl. Pract. 540.

(*h*) Bessonet v. Robins, 1 Sans. & Scul. 142.

(*i*) Campbell v. Hay, 2 Moll. 102.

(*k*) See 1 Jac. & Walk. 638, 639; *per* Lord Eldon.

8. If a mortgagee in a foreclosure suit be allowed to bid for the estate, he will not be permitted to conduct the sale (*l*).

9. The plaintiff's solicitor should attend at the sale, which is conducted in the following manner: The Master's clerk prepares a particular of the lots to be sold, with spaces between each lot. The lots are successively put up at a price offered by any person present, and every bidder must sign his name and the sum he offers, in the space on the particular, under the lot for which he bids; and formerly 2 *s.* 6 *d.* was paid to the Master's clerk for every bidding; but that regulation, which had a tendency to damp the sale, was abolished, and in lieu of the half-crowns, a sum was allowed to the clerk, as part of the expenses attending the sale. And this again has been corrected under the authority of the 3 & 4 Will. IV., c. 94, and "upon every sale by the Master, where the purchase-money does not exceed 2,000 *l.*, payable on the report confirmed absolute, there is payable by such party as the Master shall direct, 5 *l.*, and for every sale above 2,000 *l.*, on every 100 *l.*, 5 *s.* It has been decided that when the whole produce of the sale does not exceed 2,000 *l.*, however numerous the lots or purchasers, only 5 *l.* is payable, and 5 *s.* on every 100 *l.* beyond that sum (*m*).

The best bidder is of course declared the purchaser. If any lots are not sold, they must be again advertised for sale (*n*).

10. The payment of a deposit, and the investment of it in the funds, are governed by the same rules as are adhered to where the contract is between party and

(*l*) Domville *v.* Berrington, 2 You. & Coll. 723.

(*m*) In the matter of Allen's Charities, 2 Myl. & Kee. 627; Windsor *v.* Tyrrell, *ib.* 628, n.

(*n*) See 1 Turn. Prac. 129; 2 Fowl. Prac. 306, 307.

party: and therefore a purchaser is not entitled to the benefit of a rise in the funds when his purchase is completed (*o*).

11. The Court will, on motion, discharge the purchaser, and substitute any other person in his stead; but this will not be done unless such person pay in the money, and an affidavit be made that there is no underbargain; for the new purchaser may give the other a sum of money to stand in his place, and so deceive the Court (*p*). Formerly the practice seems to have been to require the consent of all the parties in the cause, as well as the consent of the original purchaser (*q*).

12. But even where the title is defective, and another person has agreed to take the estate with the defective title, yet no order can be made until the first purchaser is discharged (*r*).

13. If the purchaser resell at a profit behind the back of the Court, before his purchase is confirmed, the second purchaser is considered a substituted purchaser, and must pay the additional price into Court for the benefit of the estate (*s*).

14. Although more of an estate is sold than is necessary for the purposes of the trust by virtue of which the decree was made, yet the purchaser can make no objection to it, the decree being a sufficient security to him, as it cannot appear but that it was right to sell the whole. If, however, the decree were, that the Master should sell Greenacre, and he sells Blackacre, an objection to the sale would be good (*t*); although it

(*o*) *Vide supra*, p. 69; Ambrose v. Ambrose, 1 Cox, 194; D'Oyley v. Countess of Powis, *ib.* 206.

(*p*) Rigby v. M'Namara, 6 Ves. jun. 515: Vale v. Davenport, 6 Ves. jun. 615.

(*q*) Matthews v. Stubbs, 2 Bro. C. C. 291.

(*r*) Williams v. Wace, C. Coop. 42.

(*s*) Nodder v. Ruffin, 1 Taunt. 341.

(*t*) Lutwych v. Winford, 2 Bro. C. C. 248.

seems that it may be laid down as a general rule, that a purchaser shall not lose the benefit of his purchase by any irregularity of the proceedings in a cause (*u*). If a decree is obtained by fraud, it may, of course, be relieved against (*x*); and it has been said that a purchaser is bound to see, that, at least as far as appears on the face of the proceedings before the Court, there is no fraud in the case (*y*); but, if the Court itself be imposed upon, it would be a strong measure to *imply* notice of the fraud to the purchaser, from the very proceedings before the Court. But it is a settled maxim that persons purchasing under decrees of the Court are bound to see that the sale is made according to the decree (*z*).

15. A person having a legal lien, as a judgment-creditor not coming in under the decree, would not be bound by it, and might proceed against the purchaser, unless he obtained a legal interest over-reaching the lien; in which case the claim being merely in equity, the Court would protect the purchaser buying under its decree (*a*), or rather would not lend its aid to the judgment-creditor against him.

16. When the Court sells it will protect the purchaser against the parties to the suit, and all persons coming in under the decree, as in the case of judgment-credi-

(*u*) Lloyd *v.* Johnes, 9 Ves. jun. 37; Curtis *v.* Price, 12 Ves. jun. 89; Bennett *v.* Harnell, 2 Scho. & Lef. 566; Burke *v.* Crosbie, 1 Ball & Beat. 489; Lightburne *v.* Swift, 2 Ball & Beat. 207; see Baker *v.* Morgan, 2 Dow, 526; Mullins *v.* Townsend, 1 Dow & Clark, 430.

(*x*) Kennedy *v.* Daly, 1 Scho. & Lef. 355; Giffard *v.* Hort, *ib.*; Lansdowne *v.* Beauman, 1 Moll. 89.

(*y*) Gore *v.* Stacpoole, 1 Dow, 30.

(*z*) Colclough *v.* Sterum, 3 Bligh, 181.

(*a*) Barrett *v.* Blake, 2 Ball & Beat. 354; see Steele *v.* Philips, 1 Hogan, 49; Johns *v.* French, *ib.* 450.

tors, and although only a few can be paid, yet all will be restrained. Where there is original authority, as in carrying a trust into execution, if the old judgment-creditors will not come in, the Court, it is said, restrains them from proceeding against those lands in future (*b*).

17. In sales by auction or private agreement, the contract is complete when the agreement is signed; but a different rule prevails in sales before a Master; the purchaser is not considered as entitled to the benefit of his contract till the Master's report of the purchaser's bidding is absolutely confirmed; and I shall now proceed to show what steps a purchaser must take to obtain an absolute confirmation of the Master's report.

18. The purchaser must first, at his own expense, procure a report from the Master, of his being the best bidder for the lot he has purchased. After the report is filed, and an office-copy of it taken by the purchaser, he must, at his own expense, apply to the Court by motion, of which no notice need be given (*c*), that the purchase may be confirmed. Upon this application the order will be confirmed *nisi* (*d*), that is, unless cause be shown against the same in eight days after service. The purchaser must, at his own expense, procure an office-copy of this order from the Register (I). If no cause be shown within the eight days, the purchaser must, at his own expense, apply to the Court to confirm

(*b*) Stackpoole v. Curtis, 2 Moll. 604.

(*c*) See Parker's Analysis, 141.

(*d*) For a form of the order, see 2 Fowler's Pract. 308.

(I) See 3 & 4 Will. 4, c. 94, s. 10, which authorises any person to take an office-copy of so much only of any decree, order, report or exceptions, as he may require.

the report absolutely, which will be done of course (*e*), on an affidavit of the service of the order (*f*), and a certificate of no cause having been shown. The certificate is obtained from the Register by application to the entering clerk, and leaving the order *nisi* the day before. Notice of this application need not be given (*g*). But if he be served with notice of a motion to open the biddings, he cannot regularly proceed to confirm his report absolutely (*h*). The order, however, to confirm absolutely the report when served operates from the day on which it was pronounced (*i*).

19. If after having obtained the order *nisi*, the purchaser neglects to confirm the order, the vendor himself may make the motion (*k*).

20. The bidder not being considered as the purchaser until the report is confirmed, is not liable to any loss by fire or otherwise which may happen to the estate in the interim (*l*) ; nor is he, until the confirmation of the report, compellable to complete his purchase (*m*) ; but upon the report being confirmed, he will be compelled to carry the contract into execution (*n*). And if an interest of uncertain duration be purchased—as a life interest, the purchaser will be bound, although the life drop the same night (*o*).

(*e*) For a form of the order, see 2 Fowler's Pract. 311.

(*f*) For forms of the affidavit, see 2 Turn. Pract. 503. 522 ; Parker's Anal. 98 ; 2 Fowl. Pract. 310.

(*g*) See 1 Turn. Pract. 129.

(*h*) Vansittart *v.* Collier, 2 Sim. & Stu. 608.

(*i*) Aberdeen *v.* Watlin, 6 Sim. 146.

(*k*) Chillingworth *v.* Chillingworth, 1 Sim. & Stu. 291.

(*l*) *Ex parte* Minor, 11 Ves. jun. 559 ; see 13 Ves. jun. 518 ; 1 Jac. & Walk. 639.

(*m*) Anon. 2 Ves. jun. 335.

(*n*) Barker *v.* Holford, and Eggington *v.* Flavel, 2 Anstr. 344, cited.

(*o*) Anson *v.* Towgood, 1 Jac. & Walk. 637.

21. If the purchaser neglect to complete his purchase, the practice is, for the sellers to confirm the report, and then if the purchaser is supposed to be responsible, to get an order to inquire whether the party can make out a good title (*p*), and if he can, to obtain an order upon the purchaser to complete his purchase (*q*); (I) but if the purchaser is unable to complete his purchase, then on the report being confirmed, it is moved to discharge him from the bidding (*r*), and notice of this motion must be given to the purchaser (*s*). But a purchaser will not be permitted to baffle the Court; and therefore, instead of discharging the purchaser from his bidding, the Court will, if required, make an order that he shall, within a given time, pay the money, or stand committed (*t*).

22. If an insane person bid, of course the estate must be resold; but the Court has no power to hold the next

(*p*) Notice must be given of the motion for this order. For a form of the notice, see 2 Turner, 650.

(*q*) See 2 Fowl. Pract. 318. 325.

(*r*) Cunningham *v.* Williams, 2 Anstr. 344.

(*s*) For a form of the notice, see 2 Turn. Pract. 651.

(*t*) Lansdown *v.* Elderton, 14 Ves. jun. 512.

(I) A motion was made before Lord Erskine, that the purchase-money should be paid in by the purchaser. The purchaser did not appear. After consulting the Register, who had searched for precedents, and expressing his unwillingness to do any thing to prejudice sales by the Court, the Chancellor refused the motion, but ordered the title to be referred to the Master; and then, he said, if a good title could be made he would compel payment of the money according to the usual practice.—Anon. Ch. 22d July 1806, MS. In 1 Newl. Pract. 544, it is said, that it seems that if the report is confirmed by the *vendors* it is not necessary, previous to the application against the purchaser that he be ordered to pay in his purchase-money, that an abstract of title should be delivered to him. Sanders *v.* Guy, Jan. 1811, before Lord Eldon.

bidder to his bidding, and the Court has refused in such a case to allow the next bidder to stand as the purchaser, notwithstanding all the parties in the cause desired it, as they apprehended the estate would not sell for so much to any other person. But the estate was ordered to be resold generally (*u*).

23. When the report is absolutely confirmed, the purchaser is entitled to a conveyance on payment of the purchase-money, and may, after giving notice of his intention (*x*), apply to the Court for leave to pay his purchase-money into the Bank (*y*), and to be let into possession of the estate; but this application should of course not be made until the title be approved of (*z*). When the money is paid according to the order, the purchaser must, at his own expense, obtain a certificate of the payment of it.

24. If the estate be subject to an incumbrance, which appears upon the report, the purchaser should, after giving notice of his intention (*a*), apply to the Court for leave to pay off the charge, and to pay the residue of the purchase-money into the Bank. But where an incumbrance on the estate does not appear on the report, and any of the parties refuse, or are incompetent to consent, a purchaser cannot apply any part of his purchase-money in discharge of the incumbrance, though perhaps, if the parties be all competent to consent, and do consent, it may be done (*b*).

25. Where two or more persons purchase one lot,

(*u*) Blackbeard *v.* Lindigren, 1 Cox, 205.

(*x*) For forms of the notice, see 2 Turn. Pr. 647; Park. Anal. 140.

(*y*) For the mode of paying the money into the Bank, see 1 Turn. Pract. 210; and for a form of the order, see 2 Fowl. Pract. 313.

(*z*) See 2 Fowl. Pract. 317.

(*a*) For a form of such notice, see 2 Turn. Pract. 648.

(*b*) —— *v.* Stretton, 1 Ves. jun. 266.

the money must be paid altogether; the Court will not allow them to pay their proportions separately, on account of the confusion which might ensue (*c*).

26. In the Exchequer, purchase-money is allowed to be paid in without prejudice to any objections which the purchaser may be advised to make upon subsequent investigation (*d*). And this is sometimes allowed in the Court of Chancery upon special application, but it is a practice not to be encouraged.

27. A purchaser under a decree is entitled to be let into possession of the estate from the quarter-day preceding his purchase, paying his money before the following one (*e*); which proposition has no relation to the time of his being declared by the Master to be the highest bidder, but to the confirmation of the report (*f*), for until then he is not the purchaser.

28. Where a purchaser allows the time to elapse, he is entitled to the rent only from the quarter-day preceding the payment of the money into Court. This is the settled practice here, although it led to a difference of opinion in Ireland before it was settled there (*g*).

29. And a purchaser is not entitled to the rents for a period beyond the quarter-day preceding the payment of his money, merely because he has been ready to complete his purchase, and had his money ready lying dead in a banker's hands; for he might have moved to pay the money into Court, when it would have been laid out: and this, if done by special application, would not have been an acceptance of the title (*h*).

(*c*) Darkin v. Marye, 1 Anst. 22.

(*d*) Marfill v. Rudge, 2 You. & Coll. 566.

(*e*) Twigg v. Fifield, 13 Ves. jun. 517; see Garrick v. Earl Camden, 2 Cox, 231; *vide post*, ch. 16.

(*f*) See 1 Rep. t. Plunk. 176, 177.

(*g*) See Gowan v. Tighe; Prendergast v. Eyre, 1 Rep. t. Plunk. 168. 180.

(*h*) Barker v. Harper, Coop. 32.

30. When a mortgagee purchases, and his principal and interest, calculated up to the last quarter-day, exceed the purchase-money, he will be let into possession as from the *preceding* quarter-day (*i*).

31. But a purchaser will not be allowed profits not really belonging to the quarter; for example, a purchaser of a manor must pay to the vendor the fines payable on account of deaths of copyholders *before* the quarter, although the admissions do not take effect until after he is let into possession, for such fines will be considered as having accrued before the period from which the purchaser is entitled (*k*).

32. A life annuity stands upon a different footing, and a purchaser will be entitled to it from the time he could have confirmed the report absolutely, and pays interest from that day (*l*).

33. And where a life interest was sold in three per cent. consols, and reduced, and the day after the sale half a year's dividends on the consols became due, and the purchase was confirmed, and the money paid before the end of the month, the purchaser was held to be entitled to the half year's dividend. Lord Eldon observed that the rule of the Court in the purchase of a fee simple estate was to give the profits from the quarter-day preceding the payment of the purchase-money, but was that so, he asked, when a man buys a life estate which may not last five minutes? It would be difficult to state any difference between the dividends on the consols which became due the next day, and those on the reduced, which were not payable till three months after. Could anything turn upon the report not being confirmed? There was a case about a house

(*i*) Bates v. Bonner, 1 Sim. Cox, 231.

427.

(*k*) Garrick v. Lord Camden, 2

(*l*) Twigg v. Fifield, 13 Ves. jun. 517.

being burned down before the confirmation of the report. But if the tenant for life had died the same night, must not the purchase-money have been paid? The report, he thought, when confirmed must have relation back to the purchase; and the contract was made the moment that the purchaser's name was entered in the Master's book. If the tenant for life (I) had lived till the day after the sale and then died, the purchaser would have had nothing if he was not entitled to these dividends (*m*).

34. Nor does the general rule apply to a colliery, which is considered as a trade. The profits are settled monthly, and therefore the purchaser is entitled to the profits only from the commencement of the month in which he purchased, paying his purchase-money in the course of that month (*n*).

35. If a purchaser enter into possession, he will be compelled to pay the money into Court, although he entered with the permission of the parties in the cause. The Court only can give such permission (*o*).

36. When the report is absolutely confirmed, and every thing arranged, the draft of the conveyance must be drawn by the purchaser's solicitor, and either settled by the Master, if the parties insist upon it, or, which is more customary, by a conveyancing counsel of whom the Master approves. The Master's clerk will, at the purchaser's expense, ingross the deed, procure the report or certificate of its being allowed, and then deliver the

(*m*) Anson *v.* Towgood, 1 Jac. & Walk. 637.

(*n*) Wren *v.* Kirton, 8 Ves. jun. 502; Williams *v.* Attenborough, Turn. &. Russ. 70.

(*o*) Anon. L. I. Hall, 16 July 1816, MS.

(I) In the report it is *the purchaser*, because the purchaser was himself the tenant for life, whose interest was sold.

deeds to the purchasers; and it is usual to obtain the Master's signature to every skin. The report must be filed (*p*).

37. It is usual, however, to so word decrees, that the draft shall not go before the Master *unless the parties differ*. Where this mode is adopted, the business is transacted in the same way as upon a sale by private contract, unless the parties cannot agree, in which case, resort is had to the Master.

38. When the deeds have been properly executed by all necessary parties, an affidavit of the due execution of them must be made, and filed in the affidavit office, and an office-copy of the affidavit must be taken: this being done, the money directed to be paid in consequence thereof, may be procured in the usual manner (*q*).

39. If the parties disagree as to the necessary parties, &c. to the conveyance, the Master will report his approbation of the draft, as settled by him. To this report exceptions may be taken (*r*), and then the question will come before the Court in a regular way.

40. Where a Master is directed to settle a conveyance in case the parties differ about the same, the party entitled to prepare the conveyance is to bring in the draft of the conveyance into the Master's office, and give notice of his having so done to the other party; and at any time within eight days after such notice, such other party will have liberty to inspect the same without fee, and may take a copy thereof if he thinks fit, and at or before the expiration of the eight days, or such further time as the Master shall in his discretion allow, he must then either agree to adopt the conveyance or signify his

(*p*) 1 Turn. Pract. 145.
(*q*) 1 Turn. Pract. 145.
(*r*) Lloyd v. Griffith, 1 Dick. 103; Tipping v. Gartside, 2 Fowl. Pract. 328; Wakeman v. Duchess of Rutland, 3 Ves. jun. 504.

dissent therefrom, and will thereupon be at liberty to deliver a statement in writing of the alterations which he proposes in the draft of the conveyance. But if he deliver no such statement in writing, or if the other party refuses to adopt the proposed alterations in the draft of the conveyance, the Master is then to proceed to settle the conveyance according to the practice of the Court. And in case the Master shall adopt the proposed alterations in the draft, the costs of the proceeding with respect to the conveyance are borne by the other party (*s*).

41. So if the parties differ as to the validity of the title to the estate, the Master must make his report upon the title, to which exceptions may in like manner be taken (*t*).

42. If the title prove bad, the purchaser will be paid out of the funds in the cause, the costs of the orders for confirming him as purchaser, of the reference, and of the application, and the expense of investigating the title. The order in such a case is for payment out of the fund, of the purchaser's costs of, and consequent upon his having become purchaser, and also of the application, and his reasonable charges and expenses of investigating the title (*u*).

43. If there are no funds in Court, the plaintiff will in a common case be ordered to pay the purchaser in the first instance (*x*) his costs, charges, and expenses incurred in the investigation of the title, together with the costs of the application; and this, although the plaintiff

(*s*) General order, 23d Nov. 1831, 76.

(*t*) For forms of exceptions, see 2 Turn. Pract. 589.

(*u*) Reynolds *v.* Blake, 2 Sim. & Stu. 117; Attorney-General *v.* Corporation of Newark, 8 Sim. 74.

(*x*) Smith *v.* Nelson, 2 Sim. & Stu. 557.

be only a legatee, but he will be at liberty to recover them over in the suit (*y*).

44. In every case the purchaser is entitled to the costs of the motion for a reference of title, and to the costs of that reference (*z*). Where the title proves good the purchaser bears his own costs of the investigation.

45. But if a purchaser is relieved from the purchase upon a collateral ground which he ultimately takes, of course he will not be allowed his costs of investigating the title (*a*).

46. In a case before Lord Hardwicke (*b*), where a man having bought an estate before the Master filed a bill against the heirs at law of a devisor under whom the title was made, and also against the persons who were to convey the property, in order to have the conveyance made, and to establish the will, and perpetuate the testimony, and the bill was dismissed (but without prejudice to the evidence for perpetuating the testimony) with costs as to the heirs at law, who examined no witnesses, but contested the will by their answer, and without costs as to the other parties, the purchaser was allowed so much of the costs of the suit as related to the perpetuating the testimony of the execution of the will, and the costs paid to the heirs at law, although Lord Hardwicke did not think it was absolutely necessary to perpetuate the testimony.

The purchaser, it will be observed, was not allowed the costs of the suit so far as it sought a conveyance to him, which he could have obtained without suit, and

(*y*) Berry *v.* Johnson, 2 You. & Coll. 564.

(*z*) Camden *v.* Benson, 1 Kee. 671; see Fielder *v.* Higginson, 3 Ves. & Bea. 142; Reynolds *v.* Blake, 2 Sim. & Stu. 117.

(*a*) Magennis *v.* Fallon, 2 Moll. 592.

(*b*) Mackrell *v.* Hunt, 2 Madd. 34.

clearly the other costs would not now be allowed to a purchaser, for he is not at liberty to file a bill against adverse parties in order to clear up the title before a conveyance, much less to throw the costs of such a suit upon the estate.

47. In a case where there was error in the decree under which the estate was sold, the purchaser was discharged, upon motion, from his purchase, although the parties were proceeding to rectify it (*c*). Lord Eldon said, that he would not extend the rule which the Court had adopted, of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it had not already been applied, but as to costs, Lord Eldon observed, that the rule in general was that the suitor must pay for the mistakes of the Court. It was true the purchaser was not a party to the suit, but still the other parties had been misled by the Court; they had been acting on its judgment, and it required consideration whether they should be made to pay the costs. The purchaser waved the costs, but he ought, it should seem, to have been allowed them.

48. If a purchaser of an estate under a decree of the Court, after the absolute confirmation of the report, and before any conveyance made to him, die, having devised his interest therein, the Court will order a conveyance to be made to the devisees, without the consent of the testator's heir at law, where he is an infant (*d*).

49. If an estate directed to be sold before a Master, is sold by private contract, or in any other manner contrary to the order of the Court, and not actually conveyed to the purchaser, the Court will not take notice of the sale, but will direct the estate to be sold before

(*c*) Lechmere v. Brasier, 2 Jac. & Walk. 287.

(*d*) The King v. Gregory, 4 Price, 380.

the Master, according to the decree (*e*). And a person who has notice of the decree cannot be advised to purchase the estate unless it be sold before the Master (*f*): and the money should be paid into court, and not to the party (*g*).

50. If an estate be sold contrary to the order of the Court, and the purchaser had notice of the decree, he will have no remedy; but if he bought without notice, he may recover at law for breach of the agreement (*h*).

51. A sale before a Master is not within the statute of frauds, and after confirmation of the Master's report of the best purchaser, the sale will be carried into effect even against the representative of the purchaser, although he did not subscribe; the judgment of the Court taking it out of the statute (*i*).

52. And even if the authority of an agent not being admitted cannot be proved, yet if the Master's report could be confirmed, the sale would be carried into execution unless some fraud were proved (*k*).

53. As a purchaser under a decree does by the act of purchase submit himself to the jurisdiction of the Court, he may, if he obtain possession of the estate before the contract is completed, be restrained by injunction from committing waste (*l*).

(*e*) Annesley *v.* Ashurst, 3 P. Wms. 282. See and consider *ex parte* Hughes, 6 Ves. jun. 617.

(*f*) See 2 vol. Ca. and Opin. 224, 225.

(*g*) See 2 Scho. & Lef. 581; see Price *v.* North, 2 You. & Coll. 627, which *qu.*

(*h*) Raymond *v.* Webb, Lofft, 66; see Mortlock *v.* Buller, 10 Ves. jun. 314.

(*i*) Att. Gen. *v.* Day, 1 Ves. 218.

(*k*) Ibid.

(*l*) Casamajor *v.* Strode, 1 Sim. & Stu. 381.

## SECTION II.

### OF THE PRACTICE IN IRELAND.

1. *Opinion on abstract before a sale.*
2. *Sale must be before the Master.*
3. *Solicitor bidding must pay deposit.*
4. *General practice up to confirming report.*
5. *Neglect to lodge three-fourths.*
6. *Promissory note for purchase-money.*
7. *Purchaser entitled to possession from preceding quarter-day.*
8, 10, 12. *Receiver's fees, and loss by his insolvency.*
9. *Loss by insolvency of tenants.*
11. *Payments after purchase attributable to former arrears.*
13. *Remedy for neglect in making out title.*
14. *Receiver appointed for purchaser's costs.*
15. *Costs of investigating title.*
16. *Profit and loss by investment in the funds.*
18. *When purchase-money can be obtained out of Court.*

1. As the practice in Ireland differs in many respects from that in England, it may be useful to point out some of the leading points decided in Ireland upon this first branch of the subject. According to an order there, no sale ought to take place until an abstract of title has been prepared and counsel's opinion upon it obtained, and the title deeds are deposited. It has been said that no rule has been more disregarded (*a*).

2. A sale before the Master's clerk instead of the Master himself will be set aside for irregularity (*b*).

3. It seems, that a solicitor who attends a sale and bids for his client, although he declares the fact, is responsible for the payment of one-fourth of the bidding (which is there payable as a deposit); but on payment

(*a*) 2 Scho. & Lef. 738; 2 Moll. 583.

(*b*) Ellis *v.* Molloy, 2 Hog. 255.

of the deposit the client, and not the attorney, must complete the purchase, and if the purchase be not completed the deposit will be forfeited (*c*).

4. The general practice is thus stated (*d*):—The purchaser procures from the Master a certificate (and not a report, as in England) that he has been declared the highest bidder. Upon the production of this certificate, the purchaser then obtains a side-bar rule for liberty to lodge one-fourth of his purchase-money in the Bank of Ireland to the credit of the cause; by another side-bar rule, upon the production of the Accountant-General's certificate, he obtains a conditional order to confirm the sale, unless cause shown in eight days after service of such order. The purchaser having lodged the remaining three-fourths of the purchase-money (which is also by a side-bar rule), after the expiration of the eight days, upon the Registrar's certificate of no cause shown, and the Accountant-General's certificate of the whole of the purchase-money having been lodged, may obtain a side-bar rule to confirm the sale absolutely. In Ireland, therefore, all the purchase-money must be paid before the report can be confirmed absolutely: of course such a payment does not there amount to an acceptance of the title; but if the title prove bad, the purchaser is entitled to a return of his money with interest (*e*).

5. But if a purchaser neglect to lodge the three-fourths, although the title prove bad, he is not allowed interest on the one-fourth actually lodged (*f*).

(*c*) Hobhouse *v.* Hamilton, 1 Hog. 401.

(*d*) 1 Rep. t. Plunk. 181, n, by Lloyd & Goold; Kirwan *v.* Blake, 1 Hogan, 151.

(*e*) Kirwan *v.* Blake, 1 Hog. 160.

(*f*) Hill *v.* Kirwan, 1 Hog. 357.

6. By consent, it is the practice for the purchaser to lodge his promissory note, payable with interest, in lieu of paying the deposit in the first instance (*g*). Every such note should be drawn payable with interest; but even if it be not, the purchaser will be compelled to pay interest upon the completion of the contract (*h*).

7. Although the purchaser allows a considerable time to elapse, and the Master's report of a good title is confirmed absolutely before the remaining three-fourths of the purchase-money are paid; yet the purchaser will be entitled to the rents from the quarter-day preceding the payment of the three-fourths (*i*). The purchaser is properly held entitled to the rents from the payment of the money, although the report of his purchase is not confirmed absolutely, because, as we have seen, he ought to pay all the purchase-money before he can obtain a confirmation of the report (*k*).

8. Where the vendor is guilty of the delay and the purchaser has not procured a new receiver upon payment of his purchase-money, he is entitled to the full rents, and any loss by the insolvency of the receiver, or from any other cause after the default, must be borne out of the funds in the cause (*l*).

9. The general rule is, that a purchaser who has lodged the whole of his purchase-money and obtained an order to confirm the sale, has a right to make the receiver account from time to time, and is entitled to the rents; and if any part of them have been lost by the

(*g*) Gibbons *v.* Berry; O'Connor *v.* Richards, 1 Sauss. & Scul. 158. 160; and see there as to the amount of interest.

(*h*) Hill *v.* Kirwan, 1 Hog. 357.

(*i*) Gowan *v.* Tighe, 1 Rep. t. Plunk. 168.

(*k*) Prendergast *v.* Eyre, *ib.* 180.

(*l*) Blennerhasset *v.* M'Namara, 1 Moll. 81; Campbell *v.* Hay, 2 Moll. 102.

default of the receiver, or of any other person, the loss must be made good to him out of the purchase-money; but if, on the other hand, the rents are in the tenants' hands, without any neglect in not collecting them, or if any of the tenants have become insolvent, the purchaser must bear the loss, for the parties do not warrant the payment of the rents, nor does the sale amount to an insurance contract against any loss (*m*).

10. And if a purchaser pay his purchase-money into court, and obtain an order that he shall be entitled to "the rents," receivers' fees cannot be deducted; and Hart, L. C. in Ireland, thought, that where the purchaser had paid his money and was not guilty of the subsequent delay, he ought not to pay the receiver's fees, although the practice there was to deduct them (*n*). In England this difficulty does not arise, because a purchaser is not permitted to pay his purchase-money until he approves of the title, except by arrangement or consent.

11. Where the tenants are in arrear and pay monies to the receiver after the purchase, they are to be attributed to the payment of arrears first, and are not to go to the purchaser for rent since accrued due to him (*o*).

12. And it has been held, that a purchaser who allows the receiver to continue in possession instead of taking possession himself, on an undertaking to account if the title should turn out defective, is bound to pay the receiver's fees when he is afterwards paid the rents and enters into possession (*p*).

This seems to be a harsh rule against a purchaser, who ought not to be compelled to enter into possession

(*m*) D'Espard *v.* Head, 1 Hog. 486.

(*n*) Duigenan *v.* Nangle, 2 Moll. 96. 104.

(*o*) Lee *v.* Morehead, 2 Moll. 509.

(*p*) Brown *v.* Dowdall, 2 Hog. 198.

until the title is cleared up, nor ultimately be made to pay any charge, although the title prove good, as a penalty for not having previously taken possession.

13. In a case (*q*) where the plaintiff's solicitor in the cause was guilty of great neglect in making out the title, an order was made that he should make out a good title in a month, or in default thereof, that the purchaser should be at liberty to proceed to make it out himself, with liberty for him to apply for the costs of making out the title against the funds in the cause.

14. Where a purchaser is entitled to be repaid his costs for want of a good title, they are deemed to be a lien on the land, and if there is no fund in court, an order will be made, upon the application of the purchaser, appointing a receiver, in order that the costs may be paid out of the rents; and upon that ground, in a case where no report had been made that the title was bad, the Court refused to stay the payment to a creditor of the only fund in court (*r*).

15. Where a good title is made, the purchaser bears his own costs of the investigation; but it is laid down that he would be entitled to his costs if there was a substantial variance from the original abstract of title. In Ireland the practice differs from that in England, for it is said that in Ireland the vendor's solicitor is only bound to send copies of deeds and documents to the purchaser's solicitor, and leave it to him to consult counsel, in which case, if the title prove good, the purchaser's fee to counsel ought to be paid by himself. However, the constant practice has been otherwise. The plaintiff's solicitor sends a case to the purchaser's counsel, and pays the fee,

(*q*) Harding *v.* Middleton, 1 Hogan, 80.

(*r*) M'Cann *v.* O'Farrell, 1 Hogan, 137; Hill *v.* Kirwan, *ib.* 175.

which is thus thrown on the estate, and, as this a convenient practice, the Court does not object to it (*s*).

16. The purchaser, having paid all the purchase-money, will, if the title turns out to be bad, receive back his purchase-money and interest, without being involved in any of the consequences of the investment under the order of the Court, nor can he prevent the investment of the purchase-money in stock. But he *may* have his purchase-money invested in stock expressly at his own risk, or transfer stock expressly at his own risk to the amount of the purchase-money; but in such case he will be bound to make good the full amount of the purchase-money on the day when the transaction is completed, and to gain or lose the difference himself (*t*). But the rule is said not to be universal, that the purchaser receiving back his money shall not benefit by a rise in the funds (*u*).

17. And where a purchaser obtained an order on motion, without notice to the parties, to transfer stock instead of paying cash as his deposit, and the stock had risen, he was allowed to take the profit upon completing the purchase; for as the order was not binding for want of notice, if there had been a fall he must have sustained the loss, and therefore he ought to have the gain. But it was said that if the order had been upon hearing of all parties, it would have been the act of the court, looking at the rights of all parties, and an appropriation of so much of the purchase-money, and therefore the rise or fall of the stock, would produce profit or loss to the funds in the cause, and not to the purchaser (*x*).

18. The purchase-money is not allowed to be ob-

(*s*) Leland *v.* Griffith, 2 Moll. 150, *per* Master of the Rolls; see Goffe *v.* Mitchell, 2 Moll. 508.

(*t*) Kirwan *v.* Blake, 1 Hog. 151.

(*u*) Scott *v.* Rothe, 2 Moll. 548.

(*x*) M'Cann *v.* Forbes, 1 Hogan, 13; Roche *v.* O'Shea, 1 Hogan, 162, cited.

tained out of court, unless the conveyance is duly executed and an injunction obtained to put the purchaser into possession (*y*).

(*y*) Farrell *v.* Irwin; Massy *v.* Massy, 2 Moll. 511.

## SECTION III.

### OF OPENING THE BIDDINGS, AND OF RESCINDING THE CONTRACT.

1. *Opening biddings.*
3. *Advance required.*
5. *When report absolutely confirmed advance of price not sufficient.*
12. *Fraud sufficient.*
13. *Costs of first purchaser.*
14. *Re-allotment upon re-sale.*
16. *Person present at sale may open it.*
17. *Sham biddings.*
18. *Person opening not repaid his costs.*
20. *Where lots, all to be opened.*
21. *Opening sale of lots to different purchasers.*
22. *Substitution of sub-purchaser.*
23. *Return of stock on rescinding contract.*
24. *Inequitable sale rescinded.*
25. *But not a hard bargain.*
26. *Unless there is mistake.*
28. *But there must be no delay.*
29. *Solicitor bound although only buying for.*
30. *Remedy against executors.*
31. *No costs to purchaser of extended estate although no title.*

1. THUS far we have traced a sale before a Master where no opposition is made to the absolute confirmation of the Master's report of the best bidder, and the sale is regularly concluded. But where estates are sold before a Master under the decree of a court of equity, the Court considers itself to have a greater power over the contract than it would have were the contract made between party and party (*a*); and as the chief aim of the Court is to obtain as great a price for the estate as can possibly be got, it is in the habit of opening the biddings after the estate is sold.

(*a*) See 1 P. Wms. 747.

2. Where a person is desirous of opening a bidding, he must, at his own expense, apply to the Court, by motion for that purpose, stating the advance offered. Notice of the motion must be given to the person reported the purchaser of the lot, and to the parties in the cause (*b*). If the Court approve of the sum offered, the application will be granted, and on the order being drawn up, entered and served, a new sale must be had before the Master. The order is made at the expense of the person opening the biddings, and he must bear the expense of paying in his deposit, and pay the costs of the first purchaser (*c*), and interest at the rate of 4 *l.* per cent. on such part of the purchase-money as the Master shall find to have lain dead (*d*).

3. Mere advance of price, if the report of the purchaser being the best bidder is not absolutely confirmed, is sufficient to open the biddings, and they will be opened more than once, even on the application of the same person, if a sufficient advance be offered (*e*); but the Court will stipulate for the price, and not permit the biddings to be opened upon a small advance (*f*); and, although an advance of 10 per cent. used generally to be considered sufficient on a large sum, yet no such rule now prevails (*g*); but in the case of a sale under a creditor's suit, the Court permitted the biddings to be opened, upon an advance of 5 per cent. on 10,000 *l.* (*h*).

(*b*) For a form of the notice, see 2 Turn. Pract. 649, 650.

(*c*) 2 Fowl. Pract. 318; 1 Turner's Pract. 131.

(*d*) This was directed on opening the biddings for Gen. Birch's estate, MS.

(*e*) Scott *v.* Nisbitt, 3 Bro. C. C. 475; Hodges *v.* Jones, 2 Fowl. Pract. 318; see Baillie *v.* Chaigneau, 6 Bro. P. C. by Toml. 313; Preston *v.* Barker, 15 Ves. jun. 140.

(*f*) Anon. 1 Ves. jun. 453; Anon. 2 Ves. jun. 487; Upton *v.* Lord Ferrers, 4 Ves. jun. 700; and Anon. 5 Ves. jun. 148.

(*g*) Andrews *v.* Emerson, 7 Ves. jun. 4; White *v.* Wilson, 14 Ves. jun. 151. See Anon. 3 Madd. 494.

(*h*) Brooks *v.* Snaith, 3 Ves. & Bea. 144.

An advance of 350 *l.* upon 5,300 *l.* was refused, and it was said that the former cases only established that where an advance so large as 500 *l.* is offered the Court will act upon it, though it be less than 10 per cent. (*i*). But in a later case, 300 *l.* was accepted on 5,030 *l.* (*k*), and 365 *l.* (being 5 per cent.) on 7,300 *l.* (*l*). Biddings, it seems, will not be opened unless 40 *l.* at least be offered in advance (*m*); and the common rule does not apply to a colliery (*n*).

4. Where the timber is separately valued, the price upon which the advance is to be made is the aggregate of the purchase-money and valuation of the timber (*o*).

5. The determinations on this subject assume a very different aspect when the report is absolutely confirmed. Biddings are in general not to be opened after confirmation of the report (*p*): increase of price alone is not sufficient, however large, although it is a strong auxiliary argument where there are other grounds.

6. In a case (*q*), however, before Lord Rosslyn, this rule, although so frequently acknowledged and acted upon, was not attended to, but biddings were opened after the report was absolutely confirmed, merely on an advance of price. This case is now completely overruled.

(*i*) Garstone *v.* Edwards, 1 Sim. & Stu. 20; Lefroy *v.* Lefroy, 2 Russ. 606; Cochrane *v.* Cochrane, 2 Russ. & Myl. 684.

(*k*) Lawrence *v.* Halliday, 6 Sim. 296.

(*l*) Domville *v.* Berrington, 2 You. & Coll. 723.

(*m*) Farlow *v.* Weildon, 4 Madd. 460; Brookfield *v.* Bradley, 1 Sim. & Stu. 23; Leland *v.* Griffith, 2 Moll. 510.

(*n*) Williams *v.* Attenborough, Turn. & Russ. 70.

(*o*) Bates *v.* Bonnor, 6 Sim. 380.

(*p*) 2 Ves. jun. 53; Scott *v.* Nisbitt, 3 Bro. C. C. 475; Boyer *v.* Blackwell, 3 Anstr. 656; Prideaux *v.* Prideaux, 1 Bro. C. C. 287; 2 Ves. jun. 53; 1 Cox, 35; Aubrey *v.* Denny, 2 Moll. 508.

(*q*) Chetham *v.* Grugeon, 5 Ves. jun. 86; and see his Lordship's decision in Prideaux *v.* Prideaux, *ubi sup.* when Lord Commissioner.

7. But very particular circumstances may perhaps induce the Court to open the biddings after confirmation of the report, if the advance be considerable (I).

8. Thus, in a case (*r*) where the owner of the estate (who joined in a motion for the purpose of opening biddings after the report was absolutely confirmed) was in prison at the time of the confirmation, and it appeared that he would have opened the biddings before confirmation of the report, had he been able, and had even directed persons to bid more than what the estate sold for, who deceived him, and an advance of 4,000*l.* (being more than one-fourth of the original purchase-money) was offered, the biddings were opened on the deposit of the 4,000*l.* being made.

9. Strong as the circumstances in this case were, Lord Eldon, in a late case, expressed great disapprobation of the decision, and determined generally, that after a purchaser has confirmed his report, unless some particular principle arises out of his character, as connected with the ownership of the estate, or some trust or confidence, or his own conduct in obtaining his report, the bidding ought not to be opened (*s*).

10. And Lord Redesdale, also, in a case before him, held that biddings could not be opened after the report was absolutely confirmed, unless on the ground of fraud on the part of the purchaser. And he considered it to the advantage of suitors to observe greater strictness in opening biddings, as it would procure better sales (*t*).

11. In a still later case, Lord Eldon adhered to the

(*r*) Watson *v.* Birch, 2 Ves. jun. 51; 4 Bro. C. C. 172.

(*s*) Morice *v.* the Bishop of Durham, 11 Ves. jun. 57.

(*t*) Fergus *v.* Gore, 1 Schoales & Lefroy, 350.

(I) In Ireland, a sale under a decree was actually set aside after the purchaser was put in possession, and the conveyance to him executed

same rule, and said that he could not do a thing more mischievous to the suitors than to relax further the binding nature of contracts in the Master's office: half the estates that are sold in the Court being thrown away upon the speculation that there will be an opportunity of purchasing them afterwards by opening the biddings (*u*).

12. Fraud will, of course, be a sufficient ground for opening the biddings. Therefore, if the parties agree not to bid against each other (*x*), or a survey be made of an estate with some degree of collusion with the tenants (*y*), and it misrepresents the value and quality of the estate, and some of the purchasers are aware of this fraud in making the survey, and the owner is ignorant of it; or the purchaser of the estate be partner with the solicitor of the cause, and is in possession of some particular knowledge to the benefit of which the other parties were entitled (*z*); in all these cases the Court would open the biddings, although the report had been absolutely confirmed. And lately in Ireland biddings were opened after confirmation, because the plaintiff in a foreclosure suit was the purchaser, although he was by the practice at liberty to purchase (*a*).

13. Where the biddings are opened, the advance is to be deposited immediately (*b*), and the costs of

(*u*) White *v.* Wilson, 14 Ves. jun. 151.

(*x*) See 2 Ves. jun. 52.

(*y*) Ryder *v.* Gower, 6 Bro. P. C. 148; and see 2 Ves. jun. 53.

(*z*) Price *v.* Moxon, July 14, 1754, before Lord Hardwicke. See 6 Bro. P. C. 155; 2 Ves. jun. 54.

(*a*) O'Connor *v.* Richards, 1 Sauss. & Scul. 246.

(*b*) Anon. 6 Ves. jun. 513.

---

and registered, because another person offered 200*l.* more than the purchaser had paid. Conran *v.* Barry, Vern. & Scriv. 111. See *Ex parte* Partington, 1 Ball & Beatty, 209; see 3 Mont. & Ayr. 545.

the purchaser to be paid by the persons opening the biddings (*c*); but the Court will not direct the Master to allow a specific expense (*d*). If the last purchaser himself opened the biddings, the person again opening them must pay the costs of the former opening (*e*).

14. If the biddings are opened, the estate may be allotted for sale in a different manner to what it at first was (*f*).

15. As the biddings are opened for the benefit of the suitor, no other person will be favoured in that respect.

Thus, upon a motion to open a bidding of 5,020 *l.* (*g*), upon the ground of mistake as to the time of sale, and an over-bidding of 150 *l.*; the Lord Chancellor refused it, saying, he would not open it for a less sum than 500 *l.*, and that the circumstance that the bidder was too late was no ground at all.

16. The person who is desirous of opening the biddings having been present at the sale, and having bid, is no objection to their being opened, although a greater advance may, on that account, be required (*h*). Nor is it material that the applicant is entitled to a part of the produce of the estates (*i*).

17. A man opening the biddings on behalf of a per-

(*c*) See Watts *v.* Martin, 4 Bro. C. C. 113; and see *ibid.* 178; Upton *v.* Lord Ferrers, 4 Ves. jun. 700.

(*d*) Anon. 1 Ves. jun. 286.

(*e*) See 6 Sim. 382.

(*f*) Watts *v.* Martin, 4 Bro. C. C. 113.

(*g*) Anon. 1 Ves. jun. 453.

(*h*) Rigby *v.* M'Namara, 6 Ves. jun. 117. See Tait *v.* Lord Northwick, 5 Ves. jun. 655; see 15 Ves. jun. 14; and see M'Cullock *v.* Cotbach, 3 Madd. 314, where the Vice-Chancellor ruled *contra*; but the rule is established by Thornhill *v.* Thornhill, 2 Jac. & Walk. 347; Pearson *v.* Pearson, 13 Price, 213; Tyndale *v.* Warre, Jac. 525; Lefroy *v.* Lefroy, 2 Russ. 606; Biggs *v.* Rowe, 1 Sans. & Scul. 152.

(*i*) Hooper *v.* Goodwin, Coop. 95.

son not in existence, will himself be decreed to be the purchaser, and sham biddings on such a resale will be set aside by discharging the report of the bidders being the best, and the Master will be directed to report the person who procured the biddings to be opened as the best bidder at the price at which he opened them (*k*), although this might not fully meet the justice of the case in some instances.

18. Where a person is permitted to open the biddings upon the usual terms, paying the costs, and making a deposit, and the estate is bought by another person, the person opening the biddings is entitled to take back his deposit; but he is not entitled to an allowance for his costs, as they are in the nature of a premium paid by him for the opportunity of bidding (*l*).

19. Under special circumstances, however, they might be allowed. If a person came forward for the benefit of the family, and the estate at the first sale was knocked down by mistake, or sold at a great under-value, he would be allowed his expenses (*m*).

20. It seems, that if a person purchase several lots of an estate, and the biddings are opened as to one, he shall have an option to open them all (*n*). The person desirous of opening the biddings as to some of the lots must submit to take the others at the sum for which they were sold, if the purchaser desires to relinquish them, and they shall not upon the resale fetch that

(*k*) Molesworth *v.* Opie, 1 Dick. 289.

(*l*) Rigby *v.* M'Namara, 6 Ves. jun. 466; Earl of Macclesfield *v.* Blake, 8 Ves. jun. 214; Trefusis *v.* Clinton, 1 Ves. & Beam. 361; Chester *v.* Gorges, 2 Moll. 505.

(*m*) Earl of Macclesfield *v.* Blake, *ubi sup.*; Owen *v.* Foulks, 9 Ves. jun. 348; West *v.* Vincent, 12 Ves. jun. 6.

(*n*) See Boyer *v.* Blackwell, 3 Anstr. 657; *ex parte* Tilsley, 4 Madd. 227, n.; see 2 Myl. & Cra. 726. 731.

sum (*o*). This is with a view to protect the estate from loss.

In two late cases the distinction was taken that where the lots, the biddings for which are sought to be opened, were purchased before the other lots bought by the same purchaser, he is entitled to have the biddings opened as to *all* the lots (*p*); but the rule ought to be universal.

21. Where several lots are sold to different purchasers, a separate motion must be made to open the biddings for each lot; one motion to open all, although on an advance of a certain sum for each lot, will not be permitted (*q*).

22. If, after the report is absolutely confirmed, the purchaser sell to another, the second purchaser may be substituted in the place of the first purchaser, although he (the first purchaser) is dead and his heir is abroad (*r*).

23. If a purchase be rescinded, and the purchaser has paid his money into court, and it has been laid out *upon his application*, he is to take back the stock, whether the funds have fallen or risen since the investment (*s*).

24. The authority which the Court has over these contracts enables it in a proper case to relieve the purchaser as well as the suitor. Therefore, where the contract is inequitable, the purchaser, on submitting to forfeit his deposit, will be discharged from his purchase (*t*).

(*o*) Bates *v.* Bonnor, 6 Sim. 380.

(*p*) Price *v.* Price, 1 Sim. & Stu. 386.

(*q*) Goodall *v.* Pickford, 6 Sim. 379.

(*r*) Pearce *v.* Pearce, 7 Sim. 138.

(*s*) Hodder *v.* Ruffin, V. C., 21 Mar. 1825, MS.

(*t*) Savile *v.* Savile, 1 P. Wms. 745.

25. Where, however, the contract is not inequitable, a purchaser must proceed in his purchase, and will not be permitted to forfeit his deposit, and abandon the contract, however disadvantageous it may be.

Thus, on an application to the Court by the persons who opened the biddings for General Birch's estate (*u*), to forfeit their deposit, which was resisted by the creditors for whose benefit the estate was sold; the Court held the purchasers to their bargain, and would not permit them to rescind the contract, although they had given a price which was considered much beyond the value of the estate.

26. But where the purchaser has by *mistake* given an unreasonable price for the estate, the Court will in a proper case wholly rescind the contract.

27. This equity was enforced in the case of Morshead *v.* Frederick (*x*), where it appeared that Smiths, the bankers, were tenants in possession of the house in question, for which *they* paid two rents, one a ground rent of 56 *l.* to the defendant, and the other an improved rent of 210 *l.* to a third person. The house was directed to be sold, under a decree; and the plaintiffs, by a broker, treated for the purchase of it, and employed him to value it. The broker had an interview with the attorney concerned in the sale, who stated, that the rent payable for the house was the 56 *l.* and the broker valued the estate accordingly. A written agreement was not entered into, but the contract was approved of by the Master, and the money paid into the Bank. The purchasers then moved the Court to rescind the contract, on the ground of mistake, and the broker proved that the purchasers had not

(*u*) MS.; and see Sewell *v.* Johnson, Bunb. 76.

(*x*) Ch. 20 Feb. 1806, MS. App. No. 11.

informed him of the rent of 210 *l.*; and that he was ignorant of the existence of it at the time he made his valuation: and the Court ordered the purchase-money to be repaid, and rescinded the contract. This, however, may be considered a strong case. It might be argued that the purchasers' only equity was their own negligence.

28. If a party be entitled to come to the Court to rescind a sale not completed by conveyance, on the ground of mistake, he must not be guilty of delay after the mistake is discovered (*y*).

29. Although the solicitor in the cause buy in an estate merely to prevent a sale at an undervalue, yet if he act without authority he will not be discharged from his purchase. Lord Eldon has said, that it would be a very wholesome rule to lay down, that the solicitor in the cause should have nothing to do with the sale; as the certain effect of a bidding by the solicitor in the cause is that the sale is immediately chilled (*z*).

30. Where a person bought under the decree for another who died without having adopted the contract, although an order *nisi* to confirm the purchase in his name had been obtained, the Court refused to order the executors of the purchaser to pay the purchase-money, and the heir declining the purchase, the order *nisi* was set aside, and a re-sale ordered, and the consideration as to any deficiency that might arise on the re-sale, and by whom the costs of it were to be repaid, were reserved; it was held that the executors, in a purchase

(*y*) Price *v.* North, 2 You. & Coll. 620.

(*z*) Nelthorpe *v.* Pennyman, 14 Ves. jun. 517; see *ex parte* Tomkins, Ch. 23d Aug. 1816, MS. App. No. 10; *ex parte* Lucas, 1 Mont. & Ayr. 93.

by their testator from the Court, could not be compelled by the heir to pay for the estate without filing a bill (*a*).

31. If an extended estate be sold under the 25 Geo. 3, c. 35, and the sale be confirmed by the Remembrancer's report, and the usual orders, yet where a good title cannot be made, the Court of Exchequer will, upon the motion of the Crown, discharge the purchaser without payment to him of any costs incurred in investigating the title, or in procuring the reports (*b*).

(*a*) Lord *v.* Lord, 1 Sim. 503.

(*b*) Rex *v.* Cracroft, 1 M'Clel. & You. 460.

## CHAPTER III.

### OF PAROL AGREEMENTS.

WITH a view to prevent many fraudulent practices which were commonly endeavoured to be upheld by perjury, it was enacted by the 29 Car. II. c. 3, usually called the statute of frauds, that (*a*) "all leases, estates, interests of freeholds, or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made and created by livery and seisin only, or by parol, and not put in writing by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the effect of leases or estates at will, any consideration for making any such parol leases or estates notwithstanding." But, nevertheless, leases not exceeding three years, whereupon the reserved rent should amount to two-thirds of the full improved value, were excepted (*b*). The Act then requires the assignment, grant, and surrender of existing interests to be made by writing (*c*); and then (*d*) enacts that "no action shall be brought, whereby to charge any person upon any agreement made upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them (I), unless the agreement, upon

(*a*) Sect. 1.
(*b*) Sect. 2.
(*c*) Sect. 3.
(*d*) Sect. 4.

(I) "Or upon any agreement not to be performed within a year;" which clause does not extend to any agreement concerning lands. Hollis *v.* Edwards, 1 Vern. 159. It is quite clear, that an agreement

which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

In treating of these legislative provisions, we may consider—1. What interests are within the statute:—2. What is a sufficient agreement:—3. What agreements will be enforced, although by parol:—and we may reserve for a separate chapter the consideration of the cases in which parol evidence is admissible to vary or annul written instruments.

## SECTION I.

### OF THE GENERAL CONSTRUCTION OF THE STATUTE.

1. *Construction of first section.*
3. *Construction of fourth section.*
5. *Construction of third section.*
6. *Parol license valid.*
8. *Collateral agreement valid.*
9. *Void agreement may operate as a license.*

1. It was observed in the case of Crosby *v.* Wadsworth (*e*), that collecting the meaning of the first section by aid derived from the language and terms of the second section, and the exception therein contained, the leases, &c. meant to be vacated by the first section, must be understood as *leases* of the *like* kind

(*e*) 6 East, 610.

for sale of lands must be in writing, although the contract is to be performed the next day. See Bracebridge *v.* Heald, 1 Barn. & Ald. 722.

with those in the second section, but which conveyed *a larger interest* to the party *than for a term of three years*, and such, also, as were made *under a rent reserved thereupon*; and the Court therefore determined that a sale of a standing crop of mowing grass, then growing, was not within the first section of the statute, because neither of the foregoing circumstances was to be found in the agreement, although, as the agreement conferred an exclusive right to the vesture of the land during a limited time, and for given purposes, it was, the Court held, *a contract* or sale of *an interest in*, or at least an interest *concerning lands*.

2. It was not, however, necessary in the above case, to decide upon the precise construction of the first section, which seems in this respect to be co-extensive with the fourth, and, consequently, every interest which is within the fourth section is equally within the first, unless it come within the saving of the second section. The first and second sections appear to enact, that all interests actually created without writing shall be void, unless in the case of a lease not exceeding three years, at nearly rack-rent, which exception must have been introduced for the convenience of mankind, and under an impression that such an interest would not be a sufficient temptation to induce men to commit perjury. Perhaps, therefore, the first section ought to extend to every possible interest which is not within the exception in the second clause. If an estate, of whatever value, should be conveyed to a purchaser by livery of seisin, without writing, the act would avoid the estate, although the purchaser had paid his money. An actual lease for any given number of years, whether with or without rent, or any interest uncertain in point of duration, must, it should seem, equally fall within the provision

of the first section, and cannot be sustained unless it come within the saving in the second section (*f*).

3. This, however, of itself would not have prevented all the evils which the act intended to avoid; for although actual estates could not be created, yet still parol *agreements* might have been entered into respecting the future creation of them. To remedy this mischief, the provision in the fourth section was inserted, which, it is conceived, relates not to contracts or sales of land, &c. but to any *agreement* made upon any contract or sale of lands, &c. (1), and as agreements were

(*f*) See Lord Bolton *v.* Tomlin, 5 Adol. & Ell. 857, for the extent of the second section.

(1) This appears to be the true meaning of the statute, although this branch of the fourth section has been sometimes read as a distinct clause, in which case the word *agreement* is dropped, and the clause runs thus, "no action to be brought upon any contract or sale of lands," &c. See Anon. 1 Ventr. 361, and 6 East, 611, and Mechelem *v.* Wallace, 1 Nev. & Per. 224; but this clause seems to be governed by the preceding one in the same section, as to agreements made upon consideration of marriage. The statute says, no action to be brought, "to charge any person upon *any agreement made upon* any consideration of marriage, or upon [any agreement made upon] any contract or sale of lands," &c. The words between crotchets must, it is submitted, be implied. At the same time, there is certainly ground to contend, that the clause would have the same operation if not governed by the words in the preceding clause.

The statute seems to have been strangely misunderstood in the case of Charlewood *v.* Duke of Bedford, 1 Atk. 497, the report of which agrees with the Registrar's book. The object of the bill was to compel the performance in specie of a parol *agreement*, by the Duke's steward, to grant a lease. The case, therefore, fell within the fourth section, but the defendant pleaded the first, and to bring his case within it, stated the words of the statute, at the close of that section, to be "any *contract* for making such lease, or any former law to the contrary notwithstanding." The words really are "any *consideration*," &c. The framer of the plea must have adopted an error which has been

more to be dreaded than contracts actually executed, no exception was inserted after the fourth section, similar to that which follows the first section, and consequently an *agreement* by parol, to create even such an interest as is excepted in the second section, would be merely void.

4. If this be the true construction of the Act it answers the purposes for which it was passed, and the question in all cases must be—Is the interest in dispute actually created by the parties, or does the contract rest *in fieri?* If it be actually created, it is avoided by the first section, unless saved by the second. If it be not actually created, the agreement cannot be enforced by reason of the fourth section, whatever be the nature of it. But if the first section were to be restrained beyond the express provisions of the second section, then, although every parol *agreement* for any

---

sometimes entertained, that the first section relates to leases, and the fourth to sales, and this notion compelled him to alter the statute in the way he did, for he could not otherwise have brought his case within it. It is observable that Lord C. B. Comyns, before whom the cause was heard, did not notice the mistake.

Lord Keeper North seems to have entertained the erroneous opinion above noticed; for, in a case which came before him on a parol agreement for a lease, he said that the difficulty that arose upon the act was that it makes void the estate, but does not say the agreement itself shall be void, and therefore, though the estate itself is void, yet, possibly, *the agreement may subsist*, so that a man may recover damages at law for the non-performance of it; and if so, he should not doubt to decree it in equity; and he actually sent the parties to law, in order to have the point decided, and for that purpose directed the defendant to admit the agreement. Hollis v. Edwards, 1 Vern. 159. The plaintiff was of course nonsuited in the action, and thereupon Lord North dismissed the bill. His impression before the trial must, it should seem, have been that the first section related to leases, and the fourth only to sales; or at least he must have thought that the fourth did not embrace *agreements* for leases.

interest in lands would be void, yet many estates might still be actually raised by parol. The first section, however, seems to embrace *interests* of *every* description, whilst the exception relates only to *leases* of a *particular* description. One consequence of qualifying all the interests specified in the first section, in the manner proposed by the aid derived from the second section, would be, that an estate in fee might still, as formerly, be conveyed by livery of seisin without writing. But if the doctrine should even be confined to *leases*, it would open a considerable door to perjury. If the two requisites are to concur to bring a lease within the first section, namely, a larger interest than that mentioned in the second section, and a reserved rent, then it should seem that a lease by parol for a thousand years without rent would be valid, notwithstanding the statute. If one only of these requisites be essential, yet cases of importance may be taken out of the Act; an estate, however valuable, may be claimed under a parol lease for any term short of three years without rent. This is the temptation to perjury which the statute intended to remove. And this mischief must necessarily follow, that if the parties swear to an *agreement* for such an interest it will be within the statute; whereas if they swear to an actual demise the case will be taken out of the statute.

5. The construction suggested in Crosby *v.* Wadsworth, of the first section of the statute, has since been attempted to be extended to the third section. It has been contended that the leases mentioned in the third section, as requiring to be assigned by writing, must be intended such leases as are required by the first and second sections of the statute to be created by deed or writing, viz. leases conveying a larger interest to the party than for a term of three years; but the Lord C.

Baron, at *nisi prius*, ruled otherwise, and appears to have held, that although an interest was created by parol, by virtue of the second section, yet it cannot be assigned without a note in writing, by reason of the third section (*g*). And even a tenancy from year to year created by parol, cannot be surrendered, although by mutual consent, by parol (*h*).

---

6. But it has been decided, that a mere license is not within the first section of the statute of frauds. This was decided in the case of Wood *v.* Lake (*i*). A parol agreement was entered into for liberty to stack coals on part of a close for seven years, and that during this term the person to whom it was granted should have the sole use of that part of the close upon which he was to have the liberty of stacking coals (I). Lee, C. J., and Dennison, held the agreement to be good. They relied upon the case of Webb and Paternoster (*k*), where they said it is laid down, that a grant of a license to stack hay upon land, does not amount to a lease of the land. As the agreement in the present case was only for an easement, and not for an interest in the land, it did not

(*g*) See Botting *v.* Martin, 1 Camp. Ca. 13, but *qu.* whether the *agreement* or the *assignment* was by parol.

(*h*) Mollet *v.* Brayne, 2 Camp. Ca. 103. See Stone *v.* Whiting, 2 Stark. Ca. 235; Thomson *v.* Wilson, 2 Stark. 379; Phipps *v.* Sculthorpe, 1 Barn. & Ald. 50; Thomas *v.* Cook, 2 Stark. Ca. 408; 2 Barn. & Ald. 119.

(*i*) Say. 3; and see Winter *v.* Brockwell, 8 East, 308; Rex *v.* Inhabitants of Standon, 2 Man. & Selw. 461; Tayler *v.* Waters, 2 Marsh, 551; 7 Taunt. 74; Rex *v.* Inhabitants of Horndon, 4 Man. & Selw. 562; Cocker *v.* Cowper, 1 Cro. Mees. & Rosc. 418.

(*k*) Palm. 71.

---

(I) Sayer is but an inaccurate reporter. It is not stated, but the fact is, that an annual payment was reserved in respect of the easement.

amount to a lease, and consequently it was not within the statute of frauds. Mr. Justice Forster concurred in opinion, that the agreement did not amount to a lease, but he inclined to be of opinion, that the words in the statute, any *uncertain interest in land*, did extend to this agreement; but Lee and Dennison thought those words related only to interests, which were uncertain as to the time of their duration. After time taken to consider, it was holden, that the agreement was good for the seven years.

7. The case referred to in Palmer does not seem to bear out the judgment in the above case: the decision turned upon another point; but Montague and Haughton both thought that the interest in that case was such as bound the land in the hands of a subsequent lessee. That case arose before the statute of frauds, and it would require a considerable stretch to make it apply to a case since the statute. No one will deny, that these cases are within the mischief against which the Legislature intended to guard. In Wood and Lake, the plaintiff was to have the sole use of the part of the land upon which he should stack his coals. How is this to be distinguished in substance from an actual demise for seven years? It appears to be in the very teeth of the statute, which extends generally to all leases, *estates* or *interests*. The statute expresses an anxious intention to embrace interests of every description. How can it be argued, that a license not countermandable, and which confers the sole use of a place on a man, is not an interest within the statute? Upon what principle is it, that the person entitled to such an easement may maintain trespass? This relaxation of the statute holds out a strong temptation to a man in possession of land, under a parol agreement, to commit perjury, in order to ensure to himself a more permanent

interest in the land than the statute would permit him to claim, were the real transaction disclosed. The case of Wood *v.* Lake has, however, been followed in several recent cases (*l*).

8. It has been decided, that if, after a lease has been granted, the landlord make improvements on the estate, in consideration of an agreement to pay an additional sum per annum, the sum is not rent, and the agreement is collateral to the lease, and may therefore be recovered upon, although by parol (*m*).

9. An *agreement* under the fourth section which cannot be enforced on either side, is a contract void altogether, and yet may have, as an agreement, some operation in communicating a license so as to excuse what would otherwise be a trespass, but such license would be countermandable (*n*).

(*l*) See the late note.

(*m*) Hoby *v.* Roebuck, 2 Marsh. 433.

(*n*) Carrington *v.* Roots, 2 Mees. & Wels. 257; see Winter *v.* Brockwell, 8 East, 308; Crosby *v.* Wadsworth, 6 East, 602.

## SECTION II.

### OF THE FOURTH SECTION.

1. *Extends to interests created de novo.*
5. *Exclusive right to vesture within it.*
6. *So growing crops, as grass.*
7. *Or growing poles, underwood, timber.*
8. *But not wheat.*
9. *Nor trees sold as wood.*
10. *Nor potatoes.*
11. *Nor turnips.*
12. *Nor hops.*
13. *Nor crops between tenants.*
14. *But void sale, if executed, binding.*
15, 32, 36. *And sales of crops not within fourth section, are within the seventeenth.*

16. *Crops sold with the land within fourth section.*
17. *Fixtures.*
18, 32, 35. *Examination of the cases.*
19, 35. *Anon. in Lord Raymond.*
20. *Waddington* v. *Bristow.*
21, 34. *Crosby* v. *Wadsworth.*
22, 34. *Emmerson* v. *Heelis.*
23. *Teall* v. *Auty.*
24. *Parker* v. *Staniland.*
25. *Warwick* v. *Bruce.*
28. *Smith* v. *Surman.*
29. *Scorell* v. *Boxall.*
30. *Carrington* v. *Roots.*
31. *Sainsbury* v. *Matthews.*
32. *Dunne* v. *Ferguson.*
38. *Purchaser of husbandry crops.*
39. *Proper stamp.*
40. *Mining company shares within the fourth section.*
41. *Entire parol agreement for realty and personalty wholly void.*

---

1. The fourth section of the Act extends as well to interests created *de novo* out of an estate, as to subsisting interests. Therefore an agreement for an assignment of a lease will not be binding, unless made in writing (*a*).

2. If a man having agreed *verbally* to buy an estate, agree by writing to sell the benefit of his contract to another who actually obtains a conveyance from the original seller, the transfer will be a sufficient consideration for the promise, and the first purchaser may recover the sum agreed to be paid for the transfer (*b*).

3. We have already seen that a void agreement may operate as a license countermandable (*c*).

4. In regard to the cases which have arisen upon the sale, by parol, of growing crops of grass, timber, underwood, potatoes, turnips, &c. I propose to state, in the abstract, the points of law which have been ruled, and then, in consequence of the importance of the subject and the conflicting nature of the authorities, to examine fully the grounds upon which they were decided.

(*a*) Anon. 1 Ventr. 361; see Poultney v. Holmes, 1 Str. 405.

(*b*) Seaman v. Price, 1 Ry. & Mood. 195.

(*c*) *Supra*, pl. 9.

5. First then, an actual interest agreed to be granted in land of course falls within the fourth section, and requires a written agreement. And if an agreement profess to give an exclusive right to the vesture of land during a given period, that is an interest concerning lands within the fourth section, and therefore, as we have seen, an agreement to sell a growing crop of mowing grass, to be mowed and made into hay by the purchaser, requires a written agreement (*d*).

6. And even where such an exclusive right is not given as amounts to an interest in or concerning lands, yet an agreement to sell a crop which would not go as emblements to an executor, *e. g.* a crop of grass, cannot be deemed a chattel, and therefore can only be bound by a written contract (*e*).

7. Upon the same principle, a sale of growing poles (*f*), or of standing underwood (*g*), and of course therefore of timber, is within the fourth section, and a written contract of sale cannot be dispensed with.

8. But any crop which would be emblements, and might be taken in execution, for example, wheat, may be considered goods and chattels, and therefore not within the fourth section (*h*).

9. So an agreement to sell standing timber, as trees, at so much a foot, which the proprietor had begun to cut down, and the purchaser bought them after two had been actually felled, was held to be a contract for the trees when they should be cut down and severed from the freehold, and consequently not to be within the fourth

(*d*) Crosby *v.* Wadsworth, 6 East, 602; see also Carrington *v.* Roots, 2 Mees. & Wels. 248.

(*e*) See Evans *v.* Roberts, 5 Barn. & Cress. 829; Smith *v.* Surman, 9 Barn. & Cress. 566.

(*f*) Teall *v.* Auty, 4 Moo. 542.

(*g*) Scorell *v.* Boxall, 1 You. & Jerv. 396.

(*h*) See 3 Barn. & Cress. 364.

section (*i*) ; the timber was to be made a chattel by the seller (*k*). This, therefore, is an exception from the general case of selling standing timber.

10. And sales of potatoes in the ground, which would be emblements, do not fall within the fourth section ; whether sold at so much per sack, to be dug by the purchaser and taken away *immediately*, which is considered as a sale merely of the potatoes, and it is quite accidental if they derive any further advantage from being in the land, which is a mere warehouse for them, and the purchaser has only an accommodation, and no interest in the soil (*l*) ; or whether they are then growing and sold at so much an acre, to be dug and carried away by the purchaser, without any time limited, which is considered still as a sale only of the potatoes, and whether at the time of sale they were covered with earth in a field or in a box, still it is a sale of a mere chattel (*m*) ; or whether the crop be in a growing state, and be sold by the cover, to be turned up by the seller (*n*) ; or the crop be sold at so much a sack, to be dug by the purchaser at the usual time, and to be then paid for, which is a contract to pay so much per sack for the potatoes when delivered (*o*).

11. So a crop of turnips, even recently sown, is not within that section (*p*).

12. Neither it seems would a parcel of growing hops fall within its provisions (*q*).

(*i*) Smith *v.* Surman, 9 Barn. & Cress. 561 ; 4 Man. & Ry. 455.

(*k*) See 1 Crompt. & Mees. 105.

(*l*) Parker *v.* Staniland, 11 East, 362.

(*m*) Warwick *v.* Bruce, 2 Man. & Selw. 205.

(*n*) Evans *v.* Roberts, 5 Barn. & Cress. 829 ; 8 Dowl. & Ry. 611 ; see 5 Barn. & Adol. 116 ; Hallen *v.* Render, 2 Crompt. & Mees. 266.

(*o*) Sainsbury *v.* Matthews, 4 Mees. & Wels. 343.

(*p*) Dunne *v.* Ferguson, 1 Hayes, 541.

(*q*) Waddington *v.* Bristow, 2 Bos. & Pull. 452.

13. And a parol agreement for the sale of crops may be good between an outgoing and incoming tenant, for there would be no sale of any interest in the land, for that would come from the landlord (*r*).

14. But although a parol agreement, which is within the fourth section, cannot be enforced before it is executed, yet if the agreement is executed by delivery and acceptance of the subject matter of the sale, the seller may then recover (*s*).

15. And the consequence of the sale of such various crops, not carrying to the purchaser an interest in or concerning the land in which they grow or are planted, is, that they are, with reference to the time when the contract is completed, goods, wares, and merchandise, and therefore fall within the 17th section of the statute, which enacts, that no contract for the sale of goods, wares, and merchandise, for the price of 10 *l.* or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum of the bargain be made and signed by the parties, to be charged by such contract or their agents thereunto lawfully authorised (*t*). So that if the case fall within the fourth section, there must be a contract in writing, and if it do not fall within it, yet there must still be a writing, unless there was earnest or part payment made, or part of the subject matter of sale be accepted and received by the purchaser.

16. In Lord Falmouth *v.* Thomas (*u*), where a farm

(*r*) See Mayfield *v.* Wadsley, 3 Barn. & Cress. 357; 5 Dowl. & Ry. 224; Emmerson *v.* Heelis, 2 Taunt. 38 *contra*, is overruled, see 5 Barn. & Cress. 832.

(*s*) Teall *v.* Auty, 4 Moo. 542

(*t*) Evans *v.* Roberts, 5 Barn. & Cress. 829; Smith *v.* Surman, 9 Barn. & Cress. 566.

(*u*) 1 Crompt. & Mees. 89; see

was agreed to be let by parol, and the tenant was to take the growing crops and pay for them, and also for the work, labour, and materials in preparing the land for tillage, it was held that the case fell within the fourth section of the statute. The Court observed that at the time when the contract was made the crops were growing upon the land, the tenant was to have had the land as well as the crops, and the work, labour, and materials were so incorporated with the land as to be inseparable from it. He would not have the benefit of the work, labour, and materials unless he had the land, and they were of opinion that the right to the crops and the benefit of the work, labour, and materials were both of them an interest in land.

17. But where (*x*) a tenant having a right to remove fixtures left them in the house, upon a verbal agreement with the landlord that the latter should take them at a valuation, the Court were quite satisfied that this was not a sale of any interest in land, and the judgment of the Court, and particularly of Mr. Justice Littledale, in Evans *v.* Roberts, upon the subject of growing crops, was, they said, an authority to the same effect.

18. I have thus endeavoured to trace the law as it stands upon the authorities for the guidance of the student and practitioner. But the law on this head is not in a satisfactory state, and can hardly be considered as settled. The cases still require to be thoroughly examined by the Courts, with a view to place the law upon a proper foundation.

19. The first authority is a statement in Lord Ray-

1 Atk. 175; Poulter *v.* Killingbeck, 1 Bos. & Pull. 397; see 6 East, 613; Mayfield *v.* Wadsley, 3 Barn. & Cress. 357.

(*x*) Haller *v.* Render, 1 Cr. Mees. & Ros. 266 (1834); Lee *v.* Risden, 7 Taunt. 188; Colegrave *v.* Dias Santos, 2 Barn. & Cress. 76; Clayton *v.* Burtonshaw, 5 Barn. & Cress. 47.

mond (*y*), that Treby, Chief Justice, reported to the other justices that it was a question before him, at a trial at *nisi prius* at Guildhall, whether the sale of timber *growing* upon the land ought to be in writing by the statute of frauds, or might be by parol. And he was of opinion, and gave the rule accordingly, that it might be by parol, because it was a bare chattel, and to this opinion Mr. Justice Powell agreed. And this in a late case was quoted by Mr. Justice Holroyd as an authority, and the case of an ordinary crop, for he added, in some cases, therefore crops growing upon the land may be considered as goods and chattels (*z*).

20. In Waddington *v.* Bristow (*a*) the question indirectly arose. An agreement was made for the purchase of all a man's growth of hops on his land at a certain rate per hundred weight, to be in pockets, and delivered at a place named, and the custom was where, as in this case, no time was specified for the delivery, it should be within a reasonable time after the hops are picked and dried; and the question was whether this was a sale of goods, wares, and merchandise, so as to exempt the written agreement from a stamp duty, under an exception in the then Stamp Act, and it was held that it was not. Lord Alvanley thought it an agreement for the sale of goods, wares, and merchandise, *and something more*. Mr. Justice Heath looked to the time at which the contract was made, and at that time the hops did not exist in the state of goods, wares, and merchandise. Mr. Justice Rooke considered the exemption to apply only to ordinary commercial transactions. Mr. Justice Chambre said this contract gave the vendee an interest in the whole produce of that part of the vendor's farm

(*y*) Anon. 1 Lord Raym. 182; see Hob. 173, 1 Atk. 175.

(*z*) See 3 Barn. & Cress. 364.

(*a*) 2 Bos. & Pull. 452.

which consists of hop grounds. If the vendor had grubbed up the hops, or had refused to gather or dry them, it would have been a breach of the contract. *Though he admitted that a contract for the sale of so many hops as twenty-two acres might produce, to be delivered at a distant day, might fall within the exception of the Act, notwithstanding the hops were not in the state of goods, wares, and merchandises at the time of the contract made,* yet he could not think the present agreement within that exemption, since it *gave an interest to the vendee in the produce of the vendor's land.*

Mr. Justice Bayley observed, in a later case, that Chambre, J., was the only judge who intimated an opinion that the contract gave the vendee an interest in the land. He (Bayley, J.) concurred in opinion with the three judges who thought in that case that the hops were not goods, wares, and merchandise at the time of the contract. Mr. Justice Bayley therefore seems to have been of opinion that the sale of the hops was not an interest in land, (although that, as he observed, was not the question there,) and yet they were not goods, wares, and merchandise—as Lord Alvanley said, something more than the latter,—and as we may add, something less than the former. The contract, it should be observed, was in November, for all the hops which should be grown in the ensuing year upon the particular lands. At that time the hops which were the subject of the contract were not in existence, there was nothing but the root of the plant, and the purchaser was not to have that (*b*).

21. In the important case of Crosby *v.* Wadsworth (*c*), there was a parol agreement to sell a standing crop of mowing grass then growing. The grass was to be

(*b*) 5 Barn. & Cress. 834, 835. (*c*) 6 East, 602 (1805).

mowed and made into hay by the purchaser, but no time was fixed at which the mowing was to be begun. Lord Ellenborough, in delivering the opinion of the Court, observed, that this could not be considered in any proper sense of the words as a sale of goods, wares, and merchandise, the crop being at the time of the bargain an unsevered portion of the freehold, and not moveable goods or personal chattels; and he thought that the agreement, conferring as it professed to do an exclusive right to the vesture of the land during a limited time, and for given purposes, was a contract or sale of an interest in, or at least an interest concerning lands.

22. In a later case, in the Common Pleas (*d*), growing turnips were sold in lots by auction, and the question arose upon the necessity of a written agreement. It was said *arguendo*, that the turnips were actually ripe and fit to be drawn, but there was no proof on this point. The Court simply observed, that as to this being an interest in land, they did not see how it could be distinguished from the case of hops decided in this court; but as they held that there was a sufficient signature to bind the purchaser, it seems hardly to have been necessary to decide the question we are now considering (*e*). Mr. Justice Bailey, in Evans *v.* Roberts, said, that he did not agree with Lord Chief Justice Mansfield, that there was no distinction between the hops in Waddington *v.* Bristow, and the growing turnips in the case of Emmerson *v.* Heelis, because he thought that in the latter case the growing turnips at the time of the contract were chattels (*f*).

23. In Teall *v.* Auty (*g*), A having bought a lot of grow-

(*d*) Emmerson *v.* Heelis, 2 Taunt. 38 (1809).

(*e*) See 5 Barn. & Cress. 833.

(*f*) 5 Barn. & Cress. 835.

(*g*) 4 Moo. 542 (1820); see Scorell *v.* Boxall, *infra*.

ing timber, sold the poles to B, which A the seller cut and delivered to B the purchaser, who carried them away; and upon the authority of Waddington *v.* Bristow, Emmerson *v.* Heelis, and Crosby *v.* Wadsworth, the Court was of opinion that the agreement was originally for the purchase of an interest in land, for when it was made the poles were growing; but the poles having been actually taken away, the question ultimately turned upon the form of action.

24. In Parker *v.* Staniland (*h*), where potatoes in the ground, and which had not been severed, were sold at so much a sack, to be dug by the purchaser, and taken away *immediately*, and which was held not to be a sale within the 4th section, Lord Ellenborough observed, that there was this difference between the cases, that in Crosby *v.* Wadsworth the contract was made while the grass was then in a *growing state*, which was afterwards to be mown at maturity, and made into hay; whereas there the contract was for the potatoes in a matured state of growth, which were then ready to be taken, and were agreed to be taken immediately. The contract was confined to the sale of potatoes, and nothing else was in the contemplation of the parties. He was not disposed to extend the case of Crosby *v.* Wadsworth further, so as to bring such a contract as this within the statute of frauds, as passing an interest in land. Mr. Justice Bayley also referred the cases of Crosby *v.* Wadsworth and Waddington *v.* Bristow to the ground that the contracts were made for the *growing crops* of grass and hops, and therefore the purchasers of the crops had an intermediate interest in the land while the crops were growing to maturity before they were gathered.

This places the doctrine upon an intelligible footing:

(*h*) 11 East, 362 (1809).

it shows that there is nothing in the nature of the crop, whether hops, grass, potatoes, turnips, &c., but that the distinction relied upon was between *growing* crops and those which had arrived at maturity.

25. In the next case (*i*), where the sale was of a *growing* crop of potatoes at so much per acre, to be dug and carried away by the purchaser, but no time was appointed for that purpose, it was decided that the contract was not within the 4th section of the statute. But here the Court had to grapple with the difficulty, that the crop was a *growing* one. Lord Ellenborough observed, that if this had been a contract conferring an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it would be a contract for the sale of an interest in, or concerning lands, and would then fall unquestionably within the range of Crosby *v.* Wadsworth. But here the contract was for the sale of potatoes at so much per acre; *the potatoes were the subject matter of sale*, and whether at the time of the sale they were covered with earth in the field or in a box, still it was the sale of a mere chattel.

In this case, therefore, the learned judge gave up his former ground; he looked at the contract as at the delivery of the crop, and as depending upon the question, whether merely the crop or an interest in the land was the subject matter of sale. There is no objection to the rule which he refers to as being established by Crosby *v.* Wadsworth.

26. In Evans *v.* Roberts (*k*), where it was held that a cover of potatoes in the ground, to be turned up by the seller, might be sold by parol, Mr. Justice Bayley took the distinction, that the contract was to buy the potatoes which a given quantity of land should

(*i*) Warwick *v.* Bruce, 2 Man. & Selw. 205 (1813).

(*k*) 5 Barn. & Cress. 829 (1826).

produce, but not to have any right to the possession of the land. In Crosby *v.* Wadsworth, he observed, the buyer did acquire an interest in the land, for by the terms of the contract he was to mow the grass, and must therefore have had the possession of the land for that purpose. Besides, in that case the contract was for the growing grass, which is the natural and permanent produce of the land, renewed from time to time without cultivation. And he took the distinction between growing grass, which does not come within the description of goods and chattels, and cannot be seized as such under a *fi. fa.*, and growing potatoes, which come within the description of emblements, and are deemed chattels by reason of their being raised by labour and manurance. He held therefore that this case did not fall, nor would a sale of a growing crop of the like kind fall within the 4th section.

Mr. Justice Holroyd, in the same case, thought, that although the vendee might have an incidental right by virtue of his contract to some benefit from the land while the potatoes were ariving at maturity, yet he had not an interest in the land within the meaning of the statute: if even the buyer had had the right to dig up the potatoes, he would not have had an interest in the land, but a mere easement. And Mr. Justice Littledale was still more explicit. He was of opinion that a sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not a sale of lands, tenements or hereditaments, or any interest in or concerning them within the 4th section of the statute. The words lands, tenements, and hereditaments in that section, appeared to him to have been used by the legislature to denote a fee simple, and the words, any interest in or concerning

them, were used to denote a chattel interest, or some interest less than a fee simple.

27. But in this case, Mr. Justice Bayley for the first time referred to the rule as to emblements, and gave an extrajudicial opinion, that the contract was for the sale of goods, wares, and merchandises, within the meaning of the 17th section, but as the price was under 10*l.*, a written note or memorandum of the agreement was not necessary. Littledale, J., took the same view of the case, whilst Holroyd, J., simply held, that the case did not fall within the 4th section.

28. In Smith *v.* Surman (*l*), where the timber was in the course of being felled by the seller, and was sold at so much a foot, that was held not to fall within the 4th section. Mr. Justice Bayley said the contract was not for the growing trees, but for the timber, at so much per foot; *i. e.* the produce of the trees when they should be cut down and severed from the freehold. Mr. Justice Littledale was of opinion that if the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, it would not have given him an interest in the land within the meaning of the statute. The object of a party who sells timber is not to give the vendee any interest in his land, but to pass to him an interest in the trees when they become goods and chattels. But after an elaborate consideration of the statute, the Court held that the contract fell within the 17th section, notwithstanding that work and labour was to be performed upon the trees by the seller, and that they were not converted into goods and chattels until after the contract.

(*l*) *Supra*, p. 143. 9 Barn. & Cress. 561 (1829).

29. And in Scorell *v.* Boxall (*m*), where the question was whether trespass could be maintained by the purchaser by parol of underwood which was to be cut by him, Alexander, C.B., said that this parol contract was in direct violation of the statute of frauds. It seemed to him to be clearly a contract relating to the sale of an interest in land, which, by the statute, must be in writing. Mr. Baron Hullock said that it was incumbent on the purchaser to establish his right to an interest in the freehold, for trees are annexed to the freehold, are parcel of the inheritance, and pass with it. He referred to the distinction as to what are or are not emblements. There was, he said, a manifest distinction between crops and the subject matter of this contract. It is true that the dictum in Lord Raymond was opposed to this opinion; but it was to be remembered that, if it were law, the several modern cases which have been decided could never have arisen. He never before heard that dictum cited as an authority, and the only claim which it had, in his opinion, to that distinction, was the allusion to it by Mr. Justice Holroyd, in Mayfield *v.* Wadsley.

30. Again, in Carrington *v.* Roots (*n*), which, like Crosby *v.* Wadsworth, was a verbal agreement to sell a growing crop of grass at so much an acre, to be cleared by the purchaser before a day named, the Court said, that if this was a contract for the sale of goods, it was not disputed that it was void by the 17th section of the statute; and they held that if it was to be considered as the sale of an interest in land, it was not binding by virtue of the 4th section of the statute. But no distinction was taken as to the nature of the crop.

(*m*) 1 You. & Jerv. 396 (1829); see Teall *v.* Auty, *supra*, p. 142.

(*n*) 2 Mees. & Wels. 248 (1837).

31. So where the sale was of potatoes then planted, at the price of 2 *s.* per sack, the same to be dug by the purchaser at the usual time for digging the same, and to be paid for at that time, it was held to be a contract to sell potatoes at so much a sack on a future day, to be taken up at the expense of the vendee. He must give notice to the seller for that purpose, and could not come upon the land when he pleased. It gave no right to the land. If a tempest had destroyed the crop and there had been none to deliver, the loss would clearly have fallen on the seller. There was only a stipulation to pay so much per sack for the potatoes when delivered; it was only a contract for goods to be sold and delivered (*o*).

32. In a case where a crop of turnips recently sown was sold for 10 *l.*, Joy, C.B., in Ireland, observed that, at common law, growing crops were uniformly held to be *goods*. The statute of frauds took them as it found them, and provided for lands and goods according as they were so esteemed before its enactment. If before the statute a growing crop had been held to be an interest in lands, it would come within the 2d section of the Act (*p*), but if it were only goods and chattels, then it came within the 13th section. And the Court thought that growing crops had all the consequences of chattels, and were, like them, liable to be taken in execution, and therefore the contract was a valid one (*q*).

33. In the result, therefore, where the crops are considered as chattels, there must be a note or memoran-

(*o*) Sainsbury *v.* Matthews, 4 Mees. & Wels. 343 (1838); nothing was said in regard to the 17th section, on account, I suppose, of the value.

(*p*) Irish Act, 7 Will. 3, c. 12.

(*q*) Dunne *v.* Ferguson, 1 Hayes, 541.

dum in writing of the agreement under the 17th section, unless the value be under 10 *l.*, or there was earnest or part payment, or part of the subject matter of sale was received and accepted by the purchaser.

34. It remains to be considered in which of the cases the true rule has been adopted. It is to be regretted that they are so conflicting, and still more that many of them should have been decided upon slight distinctions, which in later cases it was found necessary to abandon.

35. As to the leading case of Crosby *v.* Wadsworth, which Lord Ellenborough professed his own unwillingness to carry further, there is much in the judgment open to observation; but the question is, whether the Court came to the right conclusion, that the agreement did confer an exclusive right to the vesture of the land during a limited period and for a given purpose. If that was the true construction, the agreement no doubt required a writing to give validity to it. But there appears to have been no solid distinction between that and many of the later cases, in which a power to enter and gather the crop was incidentally given. The cases of potatoes and turnips for example, are stronger cases, more particularly the former, as the ground is disturbed, and the whole produce is carried off. If Crosby *v.* Wadsworth was, as it appears to have been, a mere sale of a growing crop, to be cut and carried by the purchaser, the decision could not now be supported on this principle, consistently with the other authorities, and the case of Emmerson *v.* Heelis may safely be considered as overruled.

36. But then it will be urged that Crosby *v.* Wadsworth may be supported on the other ground, viz. the doctrine of emblements, as there the crop was grass spontaneously produced from year to year. But the

Chief Justice took no such distinction, nor did he refer to any such doctrine in its support in the later cases in which he referred to that case; nor was that distinction taken in Carrington *v.* Roots, which, like Crosby *v.* Wadsworth, was the sale of a growing crop of grass. This distinction would require a written agreement under the 4th section for the sale of a crop of grass, whilst a crop of clover would fall within the 17th section. Indeed, many difficulties would arise: it would be doubted, for example, which section would apply to a growing crop of apples (*r*); and part of a crop of clover might fall within the 17th section and the residue within the 4th (*s*); and the different sorts of fixtures would lead to many distinctions (*t*). And where cases are within the 4th section, still there would be exceptions, according to the distinction in Smith *v.* Surman, for that case establishes that even a permanent crop may, although growing, be sold as a chattel. But the learned reader may probably doubt whether the doctrine of emblements has been properly applied to this case. Clearly, the framers of the statute of frauds had no such distinction in view, nor was it adopted by the Courts until recently. It is a new construction of this old statute, and few things are less to be desired. The right to take a crop in execution, or its character in case of death as an emblement, does not determine the question upon the statute. The crop, whatever be its nature, is growing or planted and in the ground, and the true question was agitated in the early cases, viz., whether the sale of the crop was an interest in or concerning land, and it was held that it was not, and it would be better it is submitted to abide by that rule, than, in every case of a permanent crop, to be considering whe-

(*r*) See 5 Barn. & Adol. 116. & Adol. 105.

(*s*) See Graves *v.* Weld, 5 Barn. (*t*) See 7 Taunt. 191,

ther it be sold as a growing crop or as a chattel. The point ruled by Treby, C. J., and agreed to by Powel, J., and quoted as an authority by Holroyd, J., and never denied to be such till the case of Scorell *v.* Boxall, ought not to have been lightly overruled. It would be difficult to support Teall *v.* Auty as an authority, for there the poles were already a chattel in the hands of the original buyer and sub-seller, and he was to cut and deliver them at a given price; that case is in direct opposition to the case of Smith *v.* Surman. If the late cases are to be followed, it will be found necessary to have the rule as to fixtures reconsidered.

37. If it should ultimately be held that the 4th section does not apply to any of these cases, unless an exclusive interest in the land is given to the purchaser, the only other question will be, whether any of these crops fall within the 17th section. The opinion in Waddington *v.* Bristow, as we have seen, was, that hops (which are emblements) were goods, wares, and merchandise, *and something more*; and in Crosby *v.* Wadsworth, the case of the growing crop of grass (which is not an emblement), Lord Ellenborough said, that, in the outset, he felt himself warranted in laying wholly out of the case, the provision contained in the 17th section, as not applicable to the subject matter of that agreement, which could not be considered in any proper sense of the words as a sale of goods, wares or merchandise, the crop being at the time of the bargain (and with reference to which he agreed with Mr. Justice Heath in Waddington *v.* Bristow, that the subject matter must be taken) an unsevered portion of the freehold, and not moveable goods or personal chattels (*u*). And he made this observation, not with reference to any supposed dis-

(*u*) 6 East, 610.

tinction on this point between natural and artificial grasses, but generally with reference to an unsevered crop in the ground. And this seems to be the true distinction; but as the law stands, every sale of crops in the ground should be made by a written agreement, unless they are under the value of 10 *l.*, and are clearly sold as moveable goods.

38. Before we quit the subject of crops, we may observe, that any purchaser of the crops of any person engaged or employed in husbandry, on any lands let to farm, must not take, use and dispose of any hay, straw, grass, turnips or other roots, or other produce, or any manure or dressings intended for such lands, and being thereon in any other manner or for any other purpose than the seller ought to have taken, used or disposed of the same, if no such sale had been made (*x*).

39. We may close the subject of a sale of growing crops by observing, that an agreement for such a sale, carrying the right of possession for a limited time at a gross sum not exceeding 50 *l.*, requires a 1 *l.* stamp as a conveyance within the description in the Stamp Act (*y*).

40. In a case in Ireland (*z*), a sale of a share in a mining company was held, by the Court of King's Bench, to be within the statute. The Chief Justice observed, that the mining company were engaged in a partnership in interests, in or concerning lands, tenements or hereditaments. The nature of mining implies at least a right to open the ground, and keep it open, and such right to the land for a limited time and purpose as induced the Court, in Crosby *v.* Wadsworth (*a*), to hold a contract for the sale of a growing crop to be within the statute. But the evidence given upon the

(*x*) 56 Geo. 3, c. 50, s. 11.
(*y*) Cattle *v.* Gamble, 5 Bing. N. C. 46.
(*z*) Boyce *v.* Green, Batty, 608.
(*a*) 6 East, 602.

trial, by the secretary of the company, put this part of the case out of doubt. He stated, that the company had many mines at work in different parts of Ireland, that they had purchased some and rented others, and that they had erected steam engines, and smelting houses, and built workmen's houses. Now, the shares of this company were transferable; and what does a purchaser of one of them acquire, and what would he be entitled to on the dissolution of the company? Why, a share in those houses and interests in lands which the company had acquired.

41. We may close these observations by observing, that if an entire agreement be made for the sale of real and personal estate, and the agreement as to the land be within the statute, and void, it cannot be supported as to the personal property which was sold with it (*b*).

(*b*) Cooke *v.* Tombs, 2 Anst. 420; Lea *v.* Barber, *ib.* 425, cited. See Chater *v.* Beckett, 8 Term Rep. 201; and see Neal *v.* Viney, 1 Camp. Ca. 471; Corder *v.* Drakeford, 3 Taunt. 382; Mayfield *v.* Wadsley, 3 Barn. & Cress. 357; 5 Dowl. & R. 224; Lord Falmouth *v.* Thomas, 1 Crompt. & Mees. 89; Mechelen *v.* Wallace, 2 Nev. & Per. 224.

## SECTION III.

### OF THE FORM AND SIGNATURE OF THE AGREEMENT.

2. *Signature by party to be charged sufficient.*
5. *How the other party may be bound.*
8. *Receipts and letters sufficient.*
9. *Stamping letters.*
11. *Offers in writing binding.*
13. *Unless there be fraud.*
14. 39. *Simple acceptance binding.*
15. *Offer may be retracted before acceptance.*
16. *Where special acceptance necessary.*

17. *Receipt or letter must specify all the terms.*
24. *Trifling omission fatal.*
25. *Omissions supplied by reference to other writings.*
31. *What amounts to an adoption of an unsigned agreement.*
32. *Insufficient references to other papers.*
34. *Want of signature not supplied by letter abandoning an agreement.*
35. *Reference to different contract insufficient.*
36. *Auctioneer's receipt, entry, &c., binding.*
38. *Letters to third persons binding.*
40. *Bonds of reference to surveyor.*
41. *Rent rolls, abstracts, &c., not agreements.*
44. *Nor draft of conveyance.*
45. *Valid agreement binding, though sent as instructions.*
47. *Pleading letters.*

1. We may now consider, first, what is a sufficient agreement; 2dly, what is a sufficient signature by the party or his agent; and 3dly, who will be deemed an agent lawfully authorised.

2. The statute requires the writing to be signed only by the person to be charged; and therefore, if a bill be brought against a person who signed an agreement, he will be bound by it, although the other party did not sign it, as the agreement is signed by the person to be charged (*a*). This point has been established by the authority of the Lord Keeper North, Lord Keeper Wright, Lord Chancellor Hardwicke, Lord C. B. Smith,

(*a*) Hatton *v.* Gray, 2 Ch. Ca. 164; Cotton *v.* Lee, 2 Bro. C. C. 564; Coleman *v.* Upcot, 5 Vin. Abr. 527. pl. 17; Buckhouse *v.* Crossby, 2 Eq. Ca. Abr. 32, pl. 44; Seton *v.* Slade, 7 Ves. jun. 265; 2 Jac. & Walk. 428; Fowle *v.* Freeman, MS.; 9 Ves. jun. 355, S. C. See 1 Scho. & Lef. 20; and 11 Ves. jun. 592; Western *v.* Russell, 3 Ves. & Bea. 187; and see Wain *v.* Warlters, 5 East, 10; Egerton *v.* Matthews, 6 East, 307, which do not impeach this doctrine: see particularly 5 East, 16; and Allen *v.* Bennet, 3 Taunt. 169. As to Wain *v.* Warlters, see Stadt *v.* Lill, 9 East, 348; 1 Camp. Ca. 242; *Ex parte* Minet, 14 Ves. jun. 189; *Ex parte* Gardom, 15 Ves. jun. 286; Bateman *v.* Philips, 15 East, 272; Saunders *v.* Wakefield, 4 Barn. & Ald. 595; Jenkins *v.* Reynolds, 3 Brod. & Bing. 14; 6 Man. 86.

and Bathurst and Aston, Justices, when Lords Commissioners, Lord Chancellor Thurlow, Lord Chancellor Eldon, and Sir Wm. Grant. The Legislature has expressly said, that the agreement shall be binding *if signed by the party to be charged*; and as Lord Hardwicke has observed, the word *party* in the statute is not to be construed *party* as to a deed, but person in general (*b*); but there have been instances in which the want of the signature to the agreement by the party seeking to enforce it, has been deemed a badge of fraud (*c*); but, perhaps, the transaction ought not to be viewed in that light, unless the other party called on the party who had not signed to execute it, in which case a refusal to sign might be held to operate as a repudiation of the contract (*d*) (I).

3. In a late case, Lord C. J. Mansfield observed, that *in equity* a contract signed by one party would be enforced, *and it was not clear that it was different at law* (*e*). The rule in equity, it is conceived, is founded simply on the words of the statute, which must be equally binding on the courts of law. There is not an objection which can be made to the rule as applicable to an action at law which will not apply with equal force to a suit in equity. In a later case, accordingly, upon the 17th section, the same learned judge observed, that every one knows it is the daily practice of the Court of Chancery

(*b*) See 3 Atk. 503.

(*c*) See O'Rourke *v.* Percival, 2 Ball and Beatty, 58.

(*d*) See 2 Ball & Beatty, 371; and Martin *v.* Mitchell, 3 Swanst. 428.

(*e*) Bowen *v.* Morris, 2 Taunt. 374.

(I) The author's anxiety to place the law upon a safer footing, induced him to bring in a bill to amend the statute of frauds. He had not an opportunity of pressing it through the House of Commons; but as such things are not accessible, and the law will probably be altered, it has been thought right to print the bill in the Appendix, No. 12.

to establish contracts signed by one person only, and yet a court of equity can no more dispense with the statute of frauds than a court of law can (*f*). Lord Eldon has observed, that equity has not upon these points gone further than courts of law: what is the construction of the statute, what within the legal intent of it will amount to a signing, being the same questions in equity as at law. Upon that point, equity professing to follow the law, if a new question should arise, he said that he would rather send a case to a court of law (*g*). In a still later case at *nisi prius*, where the purchaser only had signed, Lord Tenterden said it was the duty of the auctioneer to sign, and he had often had occasion to lament they do not do so. What a court of equity would do in the case he could not possibly say. He declined deciding the point according to his opinion, as the counsel would not undertake to carry the same forward on a bill of exceptions (*h*).

4. This point was again agitated in the late case of Laythoarp *v.* Bryant (*i*), and it was decided that the agreement was binding upon the party who signed it. This puts the point at rest. The Court thought there was no reason for saying that the signature of both parties is that which makes the agreement. The agreement in truth is made before any signature. The word agreement was satisfied if the writing states the subject matter of the contract, the consideration, and is signed by the party to be charged. The statute requires that it shall be signed by the party to be charged, and it was not intended to impose on the vendor the burthen of the proof of some other paper in the hands of

(*f*) Allen *v.* Bennet, 3 Taunt. 176.

(*g*) 18 Ves. jun. 183.

(*h*) Wheeler *v.* Collier, 1 Mood. & Mal. 123.

(*i*) 2 Bing. N. C. 735; Field *v.* Boland, 1 Drury & Walsh, 37.

the opposite party, and which the vendor may have no means of producing, for it often happens that each party delivers to the other the part signed by himself. A common case is where an agreement arises out of a correspondence: it often happens that a party is unable to give evidence of his own letter, and he is not to be defeated because he cannot produce a formal agreement signed by both the parties to the contract.

5. The cases establish this further principle, that where a contract in writing or note exists which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them, although it is not written with any view of binding the writer by the contract (*k*).

6. But although the agreement must be signed, yet it need not be so averred in a bill for a specific performance; for the writing, unless signed, would not be an agreement, and as the allegation in the bill of course is that there is an agreement in writing, signature must be presumed until the contrary is shown (*l*).

7. If a written agreement has been in a part executed, it seems that an agreement subsequently entered into between the parties, and reduced into writing, will bind them both, if signed by one of them (*m*).

8. A receipt for the purchase-money may constitute an agreement in writing within the statute (*n*); and it has frequently been decided, that a note or letter will be a sufficient agreement to take a case out of the sta-

(*k*) Dobell *v.* Hutchinson, 3. Adol. & Ell. 355; *vide infra*.

(*l*) Rist *v.* Hobson, 1 Sim. & Stu. 513.

(*m*) Owen *v.* Davies, 1 Ves. 82.

(*n*) Coles *v.* Trecothick, 9 Ves. jun. 234; Blagden *v.* Bradbear, 12 Ves. jun. 466.

tute (*o*); but every agreement must be stamped before it can be read (*p*); and, as this ought to be done, the Court will permit the cause to stand over to get the agreement stamped, and will assist either party in obtaining it for that purpose.

9. Thus, in Fowle *v.* Freeman (*q*), the agreement was sent by the vendor to his attorney, with a letter written at the bottom, directing him to prepare a technical agreement. The vendor afterwards refused to perform the contract, and the attorney would not deliver the agreement to the purchaser for the purpose of getting it stamped, contending that it was a private letter to him; but the Court, on motion, ordered it to be delivered to the purchaser for that purpose.

10. But if the agreement is admitted by the answer, so as to dispense with the necessity of proving it, the office-copy of the bill, or, if the defendant refuse to produce it, the record itself, may be read in support of the plaintiff's case, and need not be stamped, nor can the fact of the agreement not being stamped be taken advantage of (*r*).

11. If, upon a treaty for sale of an estate, the owner write a letter to the person wishing to buy it, stating, that if he parts with the estate it shall be on such and such terms (specifying them); and such person, upon receipt of the letter, or within a reasonable time after the offer is made (*s*), accept the terms mentioned in it,

(*o*) Coleman *v.* Upcot, 5 Vin. Abr. 527, pl. 17; Buckhouse *v.* Crossby, 2 Eq. Ca. Abr. 32, pl. 44.

(*p*) Ford *v.* Compton; Hearne *v.* James, 2 Bro. C. C. 32, 309.

(*q*) Rolls, March 8, 1804, MS. 9 Ves. jun. 351, S. C. but not reported as to this point. See *infra*, Clarke *v.* Terrel, 1 Smith's Rep. 399; Coles *v.* Trecothick, 9 Ves. jun. 234.

(*r*) Huddleston *v.* Briscoe, 11 Ves. jun. 583.

(*s*) See 3 Mer. 454.

the owner will be compelled to perform the contract *in specie* (*t*).

12. So if a man (being in company) make offers of a bargain, and then write them down and sign them; and another person take them up and prefer his bill, that will be a sufficient agreement to take the case out of the statute (*u*).

13. But if it appear that, on being submitted to any person for acceptance, he had hastily snatched it up, had refused the owner a copy of it; or if, from other circumstances, fraud in procuring it may be inferred, in case of an action, it will be left to the jury to say whether it was intended by the defendant, at first, to be a valid agreement on his part, or as only containing proposals in writing, subject to future revision (*x*): and if the aid of equity be sought, these circumstances would have equal weight with the Court. So in every case it must be considered, whether the note or correspondence import a concluded agreement: if it amount merely to treaty, it will not sustain an action or suit (*y*).

14. The letters will not constitute an agreement unless the answer to the offer is a simple acceptance, without the introduction of any new term (*z*) (1).

15. And although a given time be named in the offer

(*t*) Coleman v. Upcot, 5 Vin. Abr. 527, pl. 87. See Gaskarth v. Lord Lowther, 12 Ves. jun. 107.

(*u*) S. C. *per* Lord Chancellor.

(*x*) See Knight v. Crockford, 1 Esp. Ca. 189.

(*y*) Huddleston v. Briscoe, 11 Ves. jun. 583; Stratford v. Bosworth, 2 Ves. & Bea. 341; Ogilvie v. Foljambe, 3 Mer. 53.

(*z*) Holland v. Eyre, 2 Sim. & Stu. 194; Routledge v. Grant, 4 Bing. 653; 1 Moore & Payne, 717; Smith v. Surman, 9 Barn. & Cress. 561.

(1) Where there are divers letters, it is sufficient to stamp one with the duty of 1 *l.* 15 *s.*, although in the whole they contain twice the number of words allowed or upwards: 55 Geo. III. c. 184. Sch. Agreement.

for the acceptance of it, yet it may be retracted at any time before it is actually accepted (*a*).

16. And where a letter or other writing do not in itself evidence all the terms of the engagement by which the person signing it consents to be bound, but it requires from the other party not a simple assent to the terms stated, but a special acceptance which is to supply a farther term of the agreement; there it is obvious that such special acceptance must be expressed in writing, for otherwise the whole agreement will not be in writing, within the statute of frauds (*b*).

17. The note or writing must specify the terms of the agreement, for otherwise all the danger of perjury which the statute intended to guard against would be let in.

18. Thus, upon the sale of nine houses which were in mortgage, the vendor wrote a letter to the mortgagee to this effect: "Mr. Leonard, pray deliver my writings to the bearer, I having disposed of them. Am, &c." The vendor afterwards refused to perform the contract, and pleaded the statute of frauds to a bill filed by the purchaser for a specific performance, and the plea was allowed; because it ought to be such an agreement as specified the terms thereof, which this did not, though it was signed by the party; for this mentioned not the sum that was to be paid, nor the number of houses that were to be disposed of; whether all, or some, or how many; nor to whom they were to be disposed of; neither did this letter mention whether they were disposed of by way of sale or assignment of lease (*c*): but

(*a*) Routledge *v.* Grant, *ubi. sup.*

(*b*) Boys *v.* Ayerst, 6 Madd. 316.

(*c*) Seagood *v.* Meale, Prec. Cha. 560; Rose *v.* Cunynghame, 11 Ves. jun. 550; Card *v.* Jaffray, 2 Scho. & Lef. 374; Lord Ormond *v.* Anderson, 2 Ball & Beat. 363; and see Champion *v.* Plum-

where the property is described generally as "Mr. O.'s house," parol evidence has always been admitted to show to what house the treaty related (*d*).

19. So where the memorandum was in these words, "Sold 100 Mining Purdy's, at 17 *s.* 6 *d.*, J. Greene," it was held insufficient, as the names of both the buyer and the seller were not mentioned in it (*e*).

20. So where (*f*), upon a parol agreement, the vendor sent a letter to the purchaser, informing him that, at the time he contracted for the sale of the estate, the value of the timber was not known to him, and that he (the purchaser) should not have the estate, unless he would give a larger price; Lord Hardwicke held, that the letter could not be sufficient evidence of the agreement, the terms of it not being mentioned in the agreement itself.

21. So in a recent case, where an auctioneer's receipt for the deposit was attempted to be set up as an agreement, the Master of the Rolls rejected it, because it did not state the price to be paid for the estate; and it could not be collected from the amount of the deposit, as it did not appear what proportion it bore to the price (*g*).

22. And here we may notice a case where an agreement was executed which referred to certain covenants, which had been read, contained in a described paper, which, in fact, contained the terms of the agreement.

mer, 1 New Rep. 252; Hinde *v.* Whitehouse, 7 East, 558; Cooper *v.* Smith, 15 East, 103; Richards *v.* Porter, 6 Barn. & Cress. 437; 9 Dowl. & Ry. 497; all four cases on the 17th section.

(*d*) Ogilvie *v.* Foljambe, 3 Mer. 53.

(*e*) Boyce *v.* Green, Batty, 608.

(*f*) Clerk *v.* Wright, 1 Atk. 12; and see Clinan *v.* Cooke, 1 Scho. & Lef. 22.

(*g*) Blagden *v.* Bradbear, 12 Ves. jun. 466; see Elmore *v.* Kingscote, 5 Barn. & Cress. 583; 8 Dowl. & Ry. 343.

It appeared that all the covenants contained in that paper had not been read; and which of them had been read, and which had not, was the difficulty, which could only be solved by parol testimony; and Mr. Justice Buller held clearly, that such evidence was inadmissible (*h*), as it would introduce all the mischiefs, inconvenience, and uncertainty the statute was designed to prevent; and Lord Redesdale has since unqualifiedly approved of this decision (*i*).

23. Neither will a performance be compelled on a note or letter, if any error or omission, however trifling, appear in the essential terms of the agreement.

24. Thus in a case (*k*) (I) before Lord Hardwicke, the bill was brought to have a specific performance of an agreement, from letters which had passed between the parties. It appeared, that a certain number of years purchase was to be given for the land, but it could not be ascertained whether the rents upon a few cow-

(*h*) Brodie *v.* St. Paul, 1 Ves. jun. 326; Higginson *v.* Clowes, 15 Ves. jun. 516; Lindsay *v.* Lynch, 3 Sch. & Lef. 1.

(*i*) 1 Sch. & Lef. 38; and see O'Herlihy *v.* Hedges, *ibid.* 123.

(*k*) Lord Middleton *v.* Wilson, *et e contra*, Chan. 1741, MS.; S. C. Lofft, 801, cited. See 9 Ves. jun. 252; Stokes *v.* Moore, 1 Cox, 219; Popham *v.* Eyre, Lofft, 786; Gordon *v.* Trevelyan, 1 Price, 64; Blore *v.* Sutton, 3 Mer. 237; Price *v.* Assheton, 1 You. & Col. 441; Kenworthy *v.* Schofield, 2 Barn. & Cress. 945.

(I) The case is in Reg. Lib. 1741, fo. 260, by the name of Lord Middleton *v.* Eyre. The estate was sold by an agent to Dr. Wilson, by parol, and the parties appear to have bound themselves by letters, the particulars of which do not appear in the Register's book. The parties beneficially interested afterwards sold the estate for a greater price to Lord Middleton, who filed a bill for a specific performance of the agreement, and Dr. Wilson filed a cross-bill. The cross-bill was dismissed with costs, and in the original cause a specific performance was decreed. The point in the text is not stated in the Register's book.

gates were 5*s.* or 1*s.*; and although there was no other doubt, Lord Hardwicke held, that such an agreement could not be carried into execution. He said, that in these cases it ought to be considered, whether at law the party could recover damages; for if he could not, the Court ought not to carry such agreements into execution.

25. The late Lord C. J. Mansfield observed, that there had been many cases in Chancery, some of which he thought had been carried too far, where the Court had picked out a contract from letters, in which the parties never certainly contemplated that a complete contract was contained (*l*).

26. If the property be not identified, but is capable of being so by the reference in the agreement or letter, that is sufficient; therefore a letter written by the seller to the purchaser's solicitor, stating that "he had sold the house, &c. in Newport to Mr. Owen for 1,000 guineas, the money to be paid as soon as the deeds can be had from Mr. Deere," was held valid, as the deeds would show what house was the subject of the contract (*m*).

27. So although a letter do not in itself contain the whole agreement, yet if it *actually refer* to a writing that does, that will be sufficient, although such writing is not signed.

28. Thus in a case where an estate was advertised to be let for three lives, or thirty-one years, and an agreement was entered into for a lease, in which the term for which it was to be granted was omitted; Lord Redesdale held, *that if the agreement had referred to the advertisement*, parol evidence might have been admitted to show what was the thing (namely the advertisement)

(*l*) 3 Taunt. 172.

(*m*) Owen *v.* Thomas, 3 Myl. & Kee. 353; *supra*, p. 167.

so referred to, for then it would be an agreement to grant for so much time as was expressed in the advertisement; and then the identity of the advertisement might be proved by parol evidence (*n*). And Sir William Grant, in a late case, expressed his opinion, that a receipt which did not contain the terms of the agreement, might have been enforced as an agreement, had it referred to the conditions of sale, which would have entitled the Court to look at them for the terms (*o*).

And where a written offer or proposal to sell was sent by the owner to A, followed by another letter from the owner to A, stating that he had just received A's note (which did not appear), and was glad he had determined to purchase the farm, and concluded that he would write to B (who had made an offer for the estate) to inform him he had agreed to purchase the estate; Sir W. Grant thought that his letter plainly implied that he had offered to sell upon some terms in which he understood A to have acquiesced, for it was evidently not an assent to any terms then first proposed to him. Determination and agreement upon the part of A to purchase did seem necessarily to pre-suppose some proposal to sell, for it would be absurd to speak of an original proposal from A as a determination and agreement bringing the business to such a close as that it only remained to confer upon the title. This letter therefore clearly implied an antecedent proposal, followed by an acceptance, to which it was an assent. As to the nature

(*n*) See Clinan *v.* Cooke, 1 Scho. & Lef. 22; and see Cass *v.* Waterhouse, Prec. Cha. 29; Hinde *v.* Whitehouse, 7 East, 558; Feoffees of Heriot's Hospital *v.* Gibson, 2 Dow, 301; Powell *v.* Dillon, 2 Ball & Beat. 416.

(*o*) Blagden *v.* Bradbear, 12 Ves. jun. 466; and see Shippey *v.* Derrison, 5 Esp. Ca. 190; Hinde *v.* Whitehouse, 7 East, 558; Kenworthy *v.* Schofield, 2 Barn. & Cress. 945; S. C. 4 Dowl. & Ry. 556; Turn. & Russ. 352.

of the proposal, there was no controversy. It was in the seller's handwriting, and, coupling that with the letter, it amounted to an agreement signed by the party to be charged within the 4th section of the statute of frauds (*p*). In this case therefore the words were spelled, with a view to collect from them that some proposal or offer had preceded them, and that being made out, parol evidence was admitted to prove the proposal in writing, which had actually been sent.

29. So an agreement not containing the name of the buyer or seller may be made out by connecting it with a letter from him on the subject (*q*), or with the conditions of sale, where they are referred to by the agreement, and contain the name (*r*).

30. It was said by the Court, in a late case (*s*), that the cases on this subject are not at first sight uniform, but on examination it will be found that they establish this principle,—that where a contract or a note in writing exists which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them; but we may further observe, that such a note in writing would bind the party who signs it, although there was no contract or note in writing existing which bound the other party.

31. In a case (*t*) where an agreement for sale was reduced into writing, but not signed, owing to the vendor

(*p*) Western *v.* Russell, 3 Ves. & Bea. 187.

(*q*) Allen *v.* Bennet, 3 Taunt. 169; Western *v.* Russell, 3 Ves. & Bea. 187; Dobell *v.* Hutchinson, 3 Adol. & Ell. 355, 5 Nev. & Man. 251.

(*r*) Laythoarp *v.* Bryant, 2 Bing. N. C. 735.

(*s*) Dobell *v.* Hutchinson, 3 Adol. & Ell. 371; 5 Nev. & Man. 260, *supra*.

(*t*) Tawney *v.* Crowther, 3 Bro. C. C. 161, 318; and see Forster

having failed in an appointment for that purpose; the vendee's agent wrote to urge the signing of the agreement; and the vendor wrote in answer a letter, in which, after stating his having been from home, he said, "his word should always be as good as any security he could give." And this was held by Lord Thurlow to take the case out of the statute, as clearly referring to the written instrument. The ground of this decision was, that the vendor had agreed, by writing, to sign the agreement. If he had said he never would sign it, he could not have been bound; but if he said he never would sign it, but would make it as good as if he did, it would be a promise to perform it; if he said he would never sign it, because he would not hamper himself by an agreement, it would be too perverse to be admitted (*u*). It appears that Lord Thurlow was diffident of his opinion in this case; and Lord Redesdale has declared, that he had often discussed the case, and he could never bring his mind to agree with Lord Thurlow's decision, because he (Lord Redesdale) thought the true meaning of the agreement was, "I will not bind myself, but you shall rely on my word (*x*)."

32. But in these cases there must be a clear reference to the particular paper, so as to prevent the possibility of one paper being substituted for another (*y*).

33. In a case where the memorandum was "Sold 100 Mining Purdy's, at 17*s.* 6*d.*, J. Greene," the purchaser insisted that the defect in the memorandum was removed by the seller having himself admitted the

*v.* Hale, 3 Ves. jun. 696; Cooke *v.* Tombs, 2 Anstr. 420; Saunderson *v.* Jackson, 2 Bos. & Pull. 238; and 9 Ves. jun. 250; Hoadly *v.* M'Lain, 10 Bing. 482.

(*u*) *Per* Lord Thurlow, 3 Bro. C. C. 320.

(*x*) See 1 Scho. & Lef. 34; and see Tanner *v.* Smart, 6 Barn. & Cress. 603; 9 Dowl. & R. 549.

(*y*) Boydell *v.* Drummond, 11 East, 142.

agreement by sending to the purchaser another paper, containing these words: "I hereby undertake to have transferred to Messrs. John & J. Boyce one hundred shares in the Mining Company of Ireland, *as soon as the books are opened for that purpose.* Value received, 7th January 1825. James Greene." But it was held that this document could not answer the objection made to the other, for it did not refer to it, and could not be connected with it or called in aid of it; and, besides, this document varied from the other in two respects; first, in the names of the parties; for it was an undertaking to transfer to Messrs. John & J. Boyce; secondly, a certain condition was introduced into it which was not in the other instrument (*z*).

34. A letter written as an *abandonment* of a contract cannot operate within the above rule, as a *ratification* of it so as to supply the want of a signature to the original contract (*a*).

35. And if the agreement is defective, and the letter refers to a different contract from that proved by the opposite party, the letter cannot be adduced as evidence of the contract set up. The letter must be taken altogether, and if it falsify the contract proved by the parol testimony, it will not take the case out of the statute (*b*).

36. As we shall hereafter see, an auctioneer is an agent lawfully authorised for the vendor and purchaser within the statute. Upon the sale of estates by auction, a deposit is almost universally paid, for which the auctioneer gives a receipt, referring to the particulars, or indorsed on them, and amounting, in most cases, to a valid agreement on the part of the vendor within the

(*z*) Batty, 608; *supra*, p. 167.

(*a*) Gosbell *v.* Archer, 2 Adol. & Ell. 500; 4 Nev. & Man. 485.

(*b*) Cooper *v.* Smith, 15 East, 103.

statute (*c*). And it seems that a bill of sale, or entry by the auctioneer, of the account of the sale, in his books, stating the name of the owner, the person to whom the estate is sold, and the price it fetched, would be deemed a sufficient memorandum of the agreement to satisfy the statute (*d*). This, however, it clearly would not, unless it either contained the conditions of the sale and the particulars of the property, or actually referred to them, so as to enable the Court to look at them (*e*).

37. In a case upon the sale by auction of a chattel which was within the statute, the sale was made subject to conditions, which were read by the auctioneer before the biddings commenced, but they were not attached to the catalogue, or referred to by it, and the sale was held to be void, although the auctioneer wrote the purchaser's name and the price against the article in the catalogue. The conditions, although in the room, not being actually attached or clearly referred to, formed no part of the thing signed. If the conditions had been separated from the catalogue during the progress of the sale, still the signature to the latter, made after the separation, would have been unavailing (*f*).

38. A note or letter, written by the vendor to any third person, containing directions to carry the agreement into execution, will, subject to the before-mentioned rules, be a sufficient agreement to take a case

(*c*) See Blagden *v.* Bradbear, 12 Ves. jun. 466, *et supra*; Gosbell *v.* Archer, 2 Adol. & Ell. 500.

(*d*) See Emmerson *v.* Heelis, 2 Taunt. 33, *et infra*; but see Mussell *v.* Cooke, Prec. Cha. 533; Charlewood *v.* Duke of Bedford, 1 Atk. 497; Ramsbottom *v.* Mortley, 2 Mau. & Selw. 445.

(*e*) Blagden *v.* Bradbear, *ubi sup.* Hinde *v.* Whitehouse, 7 East, 558.

(*f*) Kenworthy *v.* Schofield, 2 Barn. & Cress. 945; 4 Dowl. & Ry. 556.

out of the statute (*g*). This was laid down by Lord Hardwicke, who said, that it had been deemed to be a signing within the statute, and agreeable to the provision of it. And the point was expressly determined, in the year 1719, by the Court of Exchequer (*h*).—Upon an agreement for an assignment of a lease, the owner sent a letter, specifying the agreement, to a scrivener, with directions to draw an assignment pursuant to the agreement; and Chief Baron Bury, Baron Price, and Baron Page, were of opinion, that the letter was a writing within the statute of frauds. And the same doctrine appears to apply to a letter written by a purchaser (*i*).

39. In Kennedy *v.* Lee (*k*), Lord Eldon observed, that in order to form a contract by letter, he apprehended nothing more was necessary than this, that when one man makes an offer to another to sell for so much, and the other closes with the terms of his offer, there must be a fair understanding on the part of each as to what is to be the purchase-money, and how it is to be paid, and also a reasonable description of the subject of the bargain. It must be understood, however, that the party seeking the specific performance of such an agreement, is bound to find in the correspondence, not merely a treaty, still less a proposal for an agreement, but a treaty with reference to which mutual consent can be clearly demonstrated, or a proposal met by that sort of acceptance, which makes it no longer the act of one party but of both. It follows, that he is

(*g*) Welford *v.* Beazely, 3 Atk. 503. See Seagood *v.* Meale, Prec. Cha. 560; Cooke *v.* Tombs, 2 Anstr. 420; Owen *v.* Thomas, 3 Myl. & Kee, 353.

(*h*) Smith *v.* Watson, Bunb. 55; S. C. MS.

(*i*) Rose *v.* Cunynghame, 11 Ves. jun. 550.

(*k*) 3 Mer. 441; and see Ogilvie *v.* Foljambe, 3 Mer. 53.

bound to point out to the Court, upon the face of the correspondence, a clear description of the subject-matter relative to which the contract was in fact made and entered into. But he did not mean (because the cases which had been decided would not bear him out in going so far) that he was to see that both parties really meant the same precise thing, but only that both actually gave their assent to that proposition, which, be it what it may, *de facto* arises out of the terms of the correspondence. The same construction must be put upon a letter, or a series of letters, that would be applied to the case of a formal instrument; the only difference between them being, that a letter or a correspondence is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise conclusion.

40. In Cooth *v.* Jackson (*l*), Lord Rosslyn put the case of a bond of reference to a surveyor, the price to depend upon his valuation, only to ascertain how much an acre the purchaser was to pay for the land. And his Lordship said, he should conceive that not to be within the statute.

41. But rent-rolls, particulars of estates, abstracts, &c. delivered by the vendor on the treaty for sale, will not be considered as an agreement, although signed by him, and containing the particulars of the agreement; nor will letters written, or representations made by him, to creditors, concerning the sale, receive that construction.

42. Thus, in a case (*m*) where *A* agreed by parol with *B* for the purchase of lands; shortly afterwards, a rent-roll was delivered to *A*, which *B* dated and altered in his own hand-writing; and it was intituled, "Land

(*l*) 6 Ves. jun. 17.

(*m*) Whaley *v.* Bagenel, 6 Bro. P. C. 5.

agreed to be sold by *B* to *A* from, &c., at twenty-one years' purchase, for the clear yearly rent." An abstract of the title, also, stating the contract, was delivered by *A*'s agent, and also further particulars and papers at different times. *B* also wrote to several of his creditors, informing them that he had agreed with *A* for the sale of the estate, at twenty-one years' purchase; referred tenants to *A* as owner of the estate; and set up the contract as a bar to an *elegit*. *B* afterwards refused to perform the agreement; and to a bill filed for a specific performance, pleaded the statute of frauds, and the plea was allowed.

43. So, in a later case (*n*), upon a bill filed by a vendee, for a specific performance of a parol agreement for sale of lands, it appeared that the vendor gave the purchaser a particular of the property to be sold, with the terms and conditions, all in his own hand-writing, and signed by him; and it was afterwards delivered, by agreement of both parties, to an attorney, to prepare the conveyance from, who prepared a draft, and brought it to the parties, and they read over and approved of it, and agreed to execute the same, whenever a fair copy could be written out. The defendant, however, refused to fulfil his part of the agreement, and pleaded the statute of frauds to the bill; and, as the particular was delivered at the outset of the treaty, no agreement being then made, the Court held it could only be delivered as a list or catalogue of the matters for sale, to enable the purchaser to form a proper estimate of their value; that the signing the particular could have no other effect than to give it authenticity, as a true list of the items then offered for sale; and that the subsequent acts could not affect the original nature of the particular, and turn it into an agreement.

(*n*) Cook *v.* Tombs, 2 Anst. 420; and see Cass *v.* Waterhouse, Prec. Cha. 29.

44. Although an agreement be reduced into writing by a person present at the making of it, yet if the parties do not sign it, they will not be bound by it (*o*); and the mere preparation of a draft of the conveyance which recites the agreement in the usual terms, although approved of by the agents on both sides, will not amount to an agreement (*p*).

45. If an agreement contain all the terms, the sending of it, as instructions to a person to prepare a proper agreement, will not be deemed an intention to extend the agreement, but merely to reduce it into technical language.

46. Thus, in Fowle *v.* Freeman (*q*), after some treaty for the purchase of an estate, certain terms were agreed upon and written down by Freeman the vendor, and afterwards written out by him, as an agreement; viz.—"March 12th, 1803. I agree to sell to Mr. Fowle my estate, &c. for the sum of 27,000 *l.* upon the following conditions, &c." [stating them.] Freeman signed this agreement, and read it to Fowle, who approved of it. Freeman then underwrote a letter to his solicitor in town to the following effect:—"Sir, please to prepare a proper agreement for Mr. Fowle and me to sign, and send it to me at this place. You will also deliver to Mr. Everett," (the gentleman who carried the letter to town,) "an abstract of my title-deeds for his examination. As soon as the title-deeds are approved of, he engages to lend me 5,000 *l.* till Michaelmas next." The letter was signed and dated by him, and was delivered by Mr. Everett to the solicitor in town. Freeman afterwards

(*o*) Gunter *v.* Halsey, Ambl. 586; Whitchurch *v.* Bevis, 2 Bro. C. C. 559; Ramsbottom *v.* Tunbridge, Ramsbottom *v.* Mortley, 2 Man. & Selw. 434. 445.

(*p*) Marquis of Townsend *v.* Bishop of Norwich, 1 Rop. H. & W. by Jac. 308, n. vide *infra*.

(*q*) Rolls, 8th March, 1804, MS.; 9 Ves. jun. 351, S. C.; Dowling *v.* Maguire, 1 Rep. temp. Plunket, 1; Thomas *v.* Dering, 1 Kee. 729.

refused to perform the agreement; and, to a bill filed by Fowle for a specific performance, pleaded the statute of frauds. The Master of the Rolls held, that if the attorney had prepared an agreement, according to the letter, Freeman would have been compelled to execute it, and the attorney could not alter the agreement itself in any one respect. A letter or proposal will do, although the party repents; and many decrees have been founded merely on letters. If this objection were to hold, he said it might be contended, that if an agreement contained a reference to title-deeds to be formally executed, it would not do; and his Honor decreed a specific performance.

47. In these cases it should be observed, that letters may be stated in a bill as constituting the alleged agreement, or as evidence of an alleged parol agreement. In the first case, the defendant may insist that they do not make out a concluded agreement, and no extrinsic evidence can be received; in the latter he may plead the statute of frauds (*r*).

(*r*) Birce *v.* Bletchley, 6 Madd. 17.

## SECTION IV.

## OF THE SIGNATURE TO AN AGREEMENT.

1. *Of specialties and parol contracts.*
4. *Of the place of the signature.*
7. *Signature in form as witness valid.*
9. *But not a signature as an attesting witness.*
11. *Name of agent sufficient.*
12. *Initials sufficient.*
14. *Signature on particulars and conditions of sale.*
16. *Alterations of draft of conveyance, &c. insufficient.*
17. *Draft unstamped, evidence.*

1. We are next to consider what is a sufficient signature by the party or his agent. Before the statute of

frauds, an agreement, although reduced into writing and signed, was not considered as a written agreement unless sealed; but it was regarded as a parol agreement, and the writing as evidence of it (*a*).

2. It has been justly said that the same rule prevails since the statute of frauds (*b*); for the law of England recognises only two kinds of contracts; viz. specialties and parol agreements, which last include all writings not under seal, as well as verbal agreements not reduced into writing (*c*). In the case of Wheeler *v.* Newton (*d*), the agreement not having been sealed, seems to have been insisted upon, as leaving the case within the statute: and Lord Commissioner Rawlinson said, that agreements in writing, though not sealed, *had some better countenance* since the statute of frauds and perjuries than they had before (1).

3. This doubt must have arisen from the common-law doctrine before noticed, that an agreement not under seal is simply a parol agreement, and the writing evidence of it; but there certainly was no foundation for the doubt: the statute makes signing only requisite to the validity of a written agreement, and it is now clearly established, that sealing is not necessary; and if a man be in the habit of printing or stamping instead of writing his name, he would be considered to have signed by his printed name (*e*).

(*a*) See 1 Ch. Ca. 85.

(*b*) See Marq. of Normanby *v.* Duke of Devonshire, 2 Freem. 216.

(*c*) Rann *v.* Hughes, 7 Term Rep. 350, n.; S. C. MS. *in tot. verbis.*

(*d*) Prec. Ch. 16.

(*e*) Saunderson *v.* Jackson, 2 Bos. & Pull. 238; Schneider *v.* Norris, 2 Mau. & Selw. 286.

(1) In Dawson *v.* Ellis, 1 Jac. and Walk. 524, the Court was of opinion, that if *A* contract verbally to sell to *B* and afterwards contract by writing to sell to *C*, and then convey the estate to *B*, he (*B*) is not liable to perform the contract with *C*, although he had notice of it before the conveyance.

4. The signature required by the statute is to have the effect of giving authenticity to the *whole* instrument; and where the name is inserted in such a manner as to have that effect, it does not much signify in what part of the instrument it is to be found (*f*).

5. Therefore, the signing the name at the beginning of the agreement will take it out of the statute; as, if a person write the agreement himself, and begin, "*A B* agrees to sell, &c." and this was only in analogy to the case of a testator writing his name at the beginning of his will, which was equivalent to his signing it; and yet the statute of frauds expressly required a signature (*g*).

6. And such a signature will be sufficient, although a place be left for a signature at the bottom of the instrument (*h*); and yet, as Lord Eldon observed, it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete till it was further signed.

7. And a party may be bound by his signature, although he subscribe in form as a witness (*i*).

8. So, where a clerk of an agent duly authorised to treat for a principal, signed an agreement thus, "Witness *A B*, for *C D*, agent to the seller," it was holden to be out of the statute (*k*).

9. But an agreement after a sale by auction signed

(*f*) *Vide* Stokes v. Moore, stated *infra*; Allen v. Bennet, 3 Taunt. 169.

(*g*) Knight v. Crockford, 1 Esp. Ca. 189; and see 1 Bro. C. C. 410; 3 Esp. Ca. 182; 9 Ves. jun. 248; and Saunderson v. Jackson, 2 Bos. & Pull. 238. See Cooper v. Smith, 15 East, 103; Morison v. Turnour, 18 Ves. jun. 175; Propert v. Parker, 1 Russ. & Myl. 625.

(*h*) Saunderson v. Jackson, *ubi supra*.

(*i*) See Welford v. Beazely, 1 Ves. 6; 3 Atk. 503; and see 9 Ves. jun. 251.

(*k*) Coles v. Trecothick, 9 Ves. jun. 234; 1 Smith's Rep. 233; but see Blore v. Sutton, 3 Mer. 237.

by the purchaser, and regularly witnessed by the auctioneer's clerk, who had full authority to give receipts for him, and did give a separate receipt for the deposit, was of course held not to be so signed as to bind the seller (*l*).

10. Lord Eldon, in the case of Coles v. Trecothick, laid it down, that where a party or principal, or person to be bound signs as, what he cannot be, a witness, he cannot be understood to sign otherwise than as principal. But the signature in that case was altogether different from a simple signature as a witness, for though the person in that case called himself a witness, it is evident that he could not have signed as such, since he signed for another person, and it was the same thing as if he had signed merely "E. Philips, for Mr. Smith, agent for the seller" (*m*).

This seems to be the true distinction. In a late case, Lord Denman, C. J., said, he thought Lord Eldon's remark in Coles *v.* Trecothick open to much observation. A witness might be drawn into transactions which he did not contemplate, and of which he was ignorant. That would be a great step to take; no such decision had been actually made, and if it had, he should pause, unless he found it sanctioned by the very highest authority, before he held that a party attesting was bound by the instrument (*n*). But there appears to be no foundation for the doubt thus thrown upon the dictum of Lord Eldon, for he confines his observation to the case where the party or principal, or person to be bound signs as, *what he cannot be, a witness,* and must therefore be considered to sign in his proper character. The objection is, that a party who was

(*l*) Gosbell v. Archer, 2 Adol. & Ell. 500.

(*m*) See 2 Adol. & Ell. 508, 509; 4 Nev. & Mann. 494.

(*n*) 2 Adol. & Ell. 508.

merely required to attest the execution as a witness, might be drawn in to become what he never contemplated, a party to a contract of which he was ignorant. But by the rule as expressed by Lord Eldon, the person signing is assumed to be really the contracting party. In the case put by way of objection, there would be no real contract by the party to sign.

11. It is not necessary to put down the name of the principal: if the name of the actual bidder, although an agent, be put down, that is sufficient (*o*).

12. And it is sufficient, it seems, if the initials of the name are set down (*p*).

13. But a letter without a signature of the name in some way cannot be brought within the statute. Therefore, a letter written by a mother to her son, beginning, "My dear Nicholas," and ending, "your affectionate mother," with a full direction, containing the son's name and place of residence, is not a good agreement within the statute (*q*).

14. It seems that the signature of the purchaser by himself or his agent, on the back of the particulars and conditions of sale, with the sum opposite to it, is a sufficient compliance with the directions of the act (*r*); where the paper on which the endorsement is made contains the name of the seller.

15. And, as we have seen, an agreement not signed, may be supported by a signature to a writing referring to the agreement.

(*o*) White *v.* Proctor, 4 Taunt. 209; Kenworthy *v.* Schofield, 2 Barn. & Cress. 945.

(*p*) Phillimore *v.* Barry, 1 Camp. Ca. 513.

(*q*) Selby *v.* Selby, Rolls, 1817, MS.

(*r*) *Vide supra*, and Hodgson *v.* Le Bret, Camp. Ca. 233; Phillimore *v.* Barry, *ib.* 513; Goom *v.* Afflalo, 6 Barn. & Cress. 117; 9 Dowl. & Ry. 148; cases on the 17th sect.; Emmerson *v.* Heelis, 2 Taunt. 38.

16. But the mere altering the draft of the conveyance will not take a case out of the statute (*s*), nor will the written approbation of it by the agents be sufficient, although it recite the contract in the usual way (*t*); neither will the writing over of the whole draft by the defendant with his own hand be sufficient, as there must be a signature (*u*). To this rule we may, perhaps, refer the case of Stokes *v.* Moore (*x*); where the defendant wrote instructions for a lease to the plaintiff, in these words; viz. "The lease renewed; Mrs. Stokes to pay the King's tax; also to pay Moore 24 *l.* a year, half-yearly; Mrs. Stokes to keep the house in good tenantable repair, &c." Stokes, the lessee, filed a bill for a specific performance, and the Court of Exchequer held it not to be a sufficient signing to take the agreement out of the statute; although it was not necessary to decide the point.

Lord Eldon is reported to have said, that he had some doubt of the doctrine in this case (*y*).

Mr. Baron Eyre appears to have put it on its true grounds. He said, that the signature is to have the effect of giving authenticity to the whole instrument; and if the name is inserted *so as to have that effect,* he did not think it signified much in what part of the instrument it was to be found; it was, perhaps, difficult,

(*s*) Hawkins *v.* Holmes, 1 P. Wms. 776, which overruled Lowther *v.* Carril, 1 Vern. 221. See Shippey *v.* Derrison, 5 Esp. Ca. 190.

(*t*) Marquis of Townsend *v.* Bishop of Norwich, *supra*, p. 178; and see Doe *v.* Rdgriph, 4 Carr. & Pay. 312.

(*u*) Ithel *v.* Potter, 1 P. Wms. 771, cited.

(*x*) Stokes *v.* Moore, 1 Cox, 219; Cox's n. to 1 P. Wms. 771. See 1 Smith's Rep. 244.

(*y*) And see Emmerson *v.* Heelis, 2 Taunt. 38, and observe how the purchaser's name was signed there. See also Morison *v.* Turnour, 18 Ves. jun. 175; Western *v.* Russell, 3 Ves. & Bea. 187; Ogilvie *v.* Foljambe, 3 Mer. 53.

except in the case of a letter with a postscript, to find an instance where a name inserted in the middle of a writing can well have that effect; and then the name being generally found in a particular place, by the common usage of mankind, it may very *probably* [qu. properly] have the effect of a legal signature, and extend to the whole; but he did not understand how a name inserted in the body of an instrument, and *applicable to particular purposes*, could amount to such an authentication as is required by the statute.

17. A draft of an agreement not signed, may be given in evidence without a stamp, although a memorandum is written upon it, "We approve of the within draft," and is signed by both parties; for those words do not import an agreement, but merely an evidence of something they intended to agree to (*z*). Still where the parties themselves, not being professional persons, sign such a memorandum, it is a question to be decided in each case, whether they signed in that form as simply approving of the draft as such, or whether they intended to give validity to it as an agreement.

(*z*) Doe v. Ridgriph, 4 Carr. & Pay. 312.

## SECTION V.

### OF SIGNATURE BY AGENTS.

1. *Agent appointed by parol good.*
4. *Clerk of agent requires distinct authority.*
5. *Revocation of authority.*
7. *Signature for one party sufficient, whether lands or goods.*
6. 8. *Auctioneer and clerk agents for both parties.*
13. *Although an agent bid.*
14. *Where auctioneer can sign for a party and sue him.*
16. *Ratification of act of assumed agent.*

1. In considering what signature satisfies the requisition of the statute, we have necessarily adverted to

signatures by agents; and it will now be proper to consider who will be deemed an agent lawfully authorised within the statute of frauds to sign an agreement for the sale or purchase of an estate.

2. In the first and third sections of the statute of frauds, which relate to leases, &c. the writing is required to be signed by the parties making it, or their agent *authorised by writing*. This latter requisite is omitted in the fourth and seventeenth sections of the statute (I). The Legislature seems to have taken this distinction, that where an interest is intended to be actually passed, the agent must be authorised by writing; but that where a mere agreement is entered into, the agent need not be constituted by writing; and therefore an agent may be authorised by parol to treat for, or buy an estate, although the contract itself must be in writing (*a*). It is, however, in all cases, highly desirable that the agent should have a written authority. Where he has merely a parol authority, it must frequently be difficult to prove the existence and extent of it (*b*); although it may be observed that his testimony will be received

(*a*) Waller *v.* Hendon, 5 Vin. Abr. 524, pl. 45; Wedderburne *v.* Carr, in the Exchequer, T. T. 1775; 3 Wooddes. 423, cited; Rucker *v.* Cammeyer, 1 Esp. Ca. 175; Coles *v.* Trecothick, 9 Ves. jun. 234; 1 Smith's Rep. 233; Barry *v.* Lord Barrymore, 1 Sch. & Lef. 28, cited; Clinan *v.* Cooke, *ib.* 22; Emmerson *v.* Heelis, 2 Taunt. 38; see 2 Nev. & Per. 530.

(*b*) Mortlock *v.* Buller, 10 Ves. jun. 292. See Daniel *v.* Adams, Ambl. 495; Charlewood *v.* the Duke of Bedford, 1 Atk. 497; and see 5 Vin. Abr. 522, pl. 35; Wyatt *v.* Allen, MS. App. No. 9.

(I) In a note to Mr. East's 7th vol. p. 565, it is said, that by the fourth section, to affect lands, the note must be signed by an agent thereunto lawfully authorised *by writing*, &c., which words, "by writing," are omitted in the seventeenth section, touching the sale of goods. This mistake must be attributed to the hurry of the press, for the agent is in neither section required to be authorised by writing.

with great caution against his signature as agent. If, however, at the time of signing, he make a declaration that he has no authority, his principal will not be bound (*c*). But of course, although he purchase in his own name, yet the fact of the agency so as to charge the principal may be made out by parol evidence (*d*).

3. In a case in Ireland (*e*), where upon a parol offer, the owner wrote to a third person, stating, that if he thought the proposal the value of the place, he (the owner) was satisfied, and the purchaser deposited the purchase-money with the third person, who made a memorandum of it, and stated that he considered it a great price, and signed it; the agreement was enforced upon the ground that the third person was acting in the place of the seller, and every dealing with the one was a dealing with the other.

4. Although an agent is authorised to sell at a particular price, yet it seems that his clerk cannot contract without a special authority or agreement for that purpose (*f*); which, however, need not be in writing.

5. The principal may revoke the authority of the agent at any time before an agreement is executed according to the statute, although the agent has previously agreed *verbally* to sell the property (*g*); and an intended purchaser may in like manner revoke his authority to his agent to purchase (*h*). And, on the other hand, he may adopt the act of a man acting as his agent (*i*).

(*c*) Howard *v.* Braithwaite, 1 Ves. & Beam. 202.

(*d*) Wilson *v.* Hart, 1 Moore, 45.

(*e*) Field *v.* Boland, 1 Dru. & Walsh, 37.

(*f*) Coles *v.* Trecothick, 9 Ves. jun. 234; Blore *v.* Sutton, 3 Mer. 237; see 4 Barn. & Adol. 446.

(*g*) See Farmer *v.* Robinson, 2 Camp. Ca. 339, n.

(*h*) As to sales by auction, see Blagden *v.* Bradbear, 12 Ves. jun. 467; Mason *v.* Armitage, 13 Ves. jun. 25.

(*i*) Vide *infra*, p. 191.

6. The auctioneer and his clerk may be considered as the constituted agents of the vendor; he appoints the former to announce the biddings, and the latter to take down the names of the purchasers and the prices of the lots.

7. The statute requires every agreement as to lands, or some memorandum or note thereof, to be in writing, and signed *by the party to be charged*, or some other person *thereunto*, (that is, to the signing thereof) (*k*) by *him* authorised. And that as to goods, some note or memorandum in writing of the bargain shall be made and signed by the *parties* to be charged by such contracts, or their *agents*, thereunto authorised. And yet it has been decided, that the signature of the party to be charged by himself or agent is sufficient, even in a contract for goods (*l*), although the other party has not signed, and consequently is not bound; so that there appears to be no difference between the two clauses of the statute, in regard to the appointment and power of an agent.

8. It has, however, been repeatedly decided, that an auctioneer is the agent of both parties upon a sale of goods, so as to be enabled to bind them both under the statute (*m*); whilst, on the contrary, it had been decided, and lately seemed to be the prevailing opinion, that the auctioneer was not the agent of the purchaser upon a sale by auction of *estates*, so as to be authorised to bind him by setting down in writing the terms of the

(*k*) See 1 Ves. & Beam. 207.

(*l*) Allen *v.* Bennet, 3 Taunt. 169.

(*m*) Simon *v.* Motivos, 3 Burr. 1921; Bull.Ni.Pri.280; 1 Blackst. 599; Rucker *v.* Cammeyer, 1 Esp. Ca. 105; Hinde *v.* Whitehouse, 7 East, 558; and see Rondeau *v.* Wyatt, 2 H. Blackst. 67; and 1 Ca. & Opin. 142, 143; Phillimore *v.* Barry, 1 Camp. Ca. 513; and see the observations in the 2d edit. of this work, p. 57—64.

contract (*n*); but in a late case, upon the sale of an interest within the fourth section, the Court of Common Pleas held, that the auctioneer was an agent for the purchaser, even upon a sale of estates. Lord C. J. Mansfield, in delivering judgment, asked, By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings loudly, and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots; therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser (*o*). In a later case (*p*), the Court of Common Pleas adhered to their former decision, and they considered the signature by the auctioneer of the purchaser's name alone, sufficient, although he was only an agent, to bind the principal; and the conditions expressly required that the highest bidder should sign a contract for the purchase. The principal, however, was present, and did not object to the signature by the auctioneer until after it was made. The action in this case was brought for the auction duty. Upon a bill filed by the seller for a specific performance, the Master of the Rolls decreed it, following the decisions in the Common Pleas, although his own opinion was, that an auctioneer is not the agent of the purchaser (*q*). The rule, therefore, may now be laid down generally, that an auctioneer is an agent lawfully authorised by the purchaser.

(*n*) Stansfield *v.* Johnson, 1 Esp. Ca. 101; Walker *v.* Constable, 2 Esp. Ca. 659; 1 Bos. & Pull. 306; Buckmaster *v.* Harrop, 7 Ves. jun. 341; 13 Ves. jun. 456; Coles *v.* Trecothick, 9 Ves. jun. 234; 1 Smith, 257; see 13 Ves. jun. 473.

(*o*) Emmerson *v.* Heelis, 2 Taunt. 38. See 1 Cas. and Opin. 142, 143.

(*p*) White *v.* Proctor, 4 Taunt. 209.

(*q*) Kemys *v.* Proctor, 3 Ves. & Bea. 57; 1 Jac. & Walk. 350; Kenworthy *v.* Schofield, 2 Barn. & Cress. 945; 4 Dowl. & Ry. 556.

9. And an auctioneer's clerk who takes down the biddings openly is considered the agent of both the seller and purchaser. The clerk is constituted deputy by the whole room, and the purchasers, by their silence when the hammer falls, give him their authority to execute the contract on their behalf, and this prevents the necessity of each purchaser coming to the table to make the entry for himself. It is not necessary to suppose that the vendor rested a particular confidence in the auctioneer for the purpose of putting down the names in the sale-book. He may be taken to have constituted that person his agent for the making of such entries whom the auctioneer might choose to appoint (*q*).

10. But upon a sale of goods by an executor, who before the sale agreed with a legatee that he might bid at the sale, and the price should be set off against the legacy, which the legatee did, it was held that an action by the seller for the price, under the conditions of sale, could not be maintained; that the auctioneer is not *ex vi termini* agent for both parties, and that he was not so here; and that his putting down the name was merely to fix the price, and not to bind this purchaser to the conditions: the purchaser under conditions of sale cannot give evidence to vary the contract, but here, properly speaking, the legatee did not so purchase (*r*).

11. And this principle of implied agency in an auctioneer is not extended to other cases (*s*).

12. It was always clear, that an auctioneer, appointed by a vendor, was a good agent for *him* within the statute (*t*).

13. And although a purchaser bid by an agent, yet

(*q*) See p. 191.

(*r*) Bartlett *v.* Purnell, 4 Adol. & Ell. 792.

(*s*) Lord Glengal *v.* Barnard, 1 Kee. 769.

(*t*) *Vide supra.*

the auctioneer is still duly authorised to sign the agreement (*u*).

14. The agent must be a third person; neither of the contracting parties can be the agent of the other (*x*); and therefore, although a purchaser is bound by the signature of the auctioneer, yet the auctioneer himself cannot, although the seller could, maintain an action upon such a contract, because the agent whose signature is to bind the defendant must not be the other contracting party upon the record (*y*).

15. This, however, has since been doubted (*z*); and it was held that the auctioneer's clerk can bind the purchaser by an entry made in his presence; and as the clerk had made the entry, the auctioneer was allowed to maintain the action. It was not necessary to overrule Farebrother *v.* Simmons; but the opinion of the Court was in favour of the auctioneer's power to maintain an action, although he signed as agent of the other party. It was certainly irregular, it was said, that the contracting parties should act as each other's agents, but it was very different where the contract is signed by an individual who was not either of the contractors.

16. Finally, a contract by one as agent for another is valid under the statute, although the alleged agent had no authority at the time, provided that the alleged principal afterwards ratifies the contract (*a*).

(*u*) Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Proctor, 4 Taunt. 209.

(*x*) See Wright *v.* Dannah, 2 Camp. 283 (17th section).

(*y*) Farebrother *v.* Simmons, 5 Barn. & Ald. 333 (17th section).

(*z*) Bird *v.* Boulter, 1 Nev. & Mann. 313; 4 Barn. & Adol. 447 (17th section).

(*a*) Maclean *v.* Dunn, 4 Bingh. 722; 1 Moo. & Pay. 761; see Gosbell *v.* Archer, 2 Adol. & Ell. 500.

## SECTION VI.

### OF PAROL AGREEMENTS NOT WITHIN THE STATUTE.

2. *Sales by auction within the statute.*
3. *Sales before a Master not.*
5. *Agreements confessed not.*
10. *But agreement may be admitted and statute insisted upon.*
12. *Conviction of perjury.*

1. We have seen what is considered a sufficient agreement to take a case out of the statute; but there are cases in which the performance of an agreement will be compelled, although the terms of it are not reduced to writing: for though the statute provided that no agreement should be good, unless signed by the party to be bound thereby, or some person authorised by him, yet on all the questions upon that statute, the purport of making it has been considered, viz. to prevent frauds and perjuries; and where there has appeared to be no danger of either, the courts have endeavoured to take the case out of the statute (*a*).

2. Upon this ground it was that in the case of Simon *v.* Motivos, Lord Mansfield and Mr. Justice Wilmot expressed a clear opinion, in which Mr. Justice Yates was inclined to concur, that sales by auction were not within the statute, because the solemnity of that kind of sale precludes all perjury as to the fact itself of sale. The case, however, which arose upon the sale of goods, was determined upon the ground of the constructive agency of the auctioneer (*b*), who had set down in writing the name of the purchaser, &c. (*c*).

(*a*) See 1 Ves. 221.
(*b*) *Vide supra.*
(*c*) 3 Burr. 1921; Bull. Ni. Pri. 286; 1 Blackst. 599.

Succeeding Judges have entertained a different opinion on the great question, whether sales by auction are within the statute of frauds; and it has accordingly been since frequently decided, that sales by auction of estates (*d*), and even of goods, are within the statute (*e*).

3. But on the ground that there is no danger in such a transaction of either fraud or perjury, a sale before a Master, under the decree of a court of equity, will be carried into execution, although the purchaser did not subscribe any agreement. The judgment of the Court, in confirming the purchase, takes it out of the statute (*f*).

4. So if, under a reference to a Master, an agreement be made to lay out trust-money in the purchase of particular lands, and the Master make his report accordingly, and the report be confirmed without any opposition by the owner of the estate, the purchase will be carried into a specific execution, although no agreement was signed by the vendor. The sale is a judicial sale, which takes it entirely out of the statute (*g*).

---

5. It has been repeatedly determined in equity (*h*), that if a bill be brought for the execution of an agree-

(*d*) Stansfield *v.* Johnson, 1 Esp. Ca. 101; Walker *v.* Constable, 2 Esp. Ca. 659; 1 Bos. & Pull. 306; Buckmaster *v.* Harrop, 7 Ves. jun. 341, affirmed on appeal, Dec. 1806; Blagden *v.* Bradbear, 12 Ves. jun. 466; and see Coles *v.* Trecothick, 9 Ves. jun. 249; Hinde *v.* Whitehouse, 7 East, 558; Mason *v.* Armitage, 13 Ves. jun. 25; Higginson *v.* Clowes, 15 Ves. jun. 516. The case of Symonds *v.* Ball, 8 Term Rep. 151, turned on the particular provisions of another act of parliament.

(*e*) Kenworthy *v.* Schofield, 2 Barn. & Cress. 945; 4 Dowl. & Ry. 556.

(*f*) Attorney General *v.* Day, 1 Ves. 218; and see 12 Ves. jun. 472.

(*g*) S. C.

(*h*) Croyston *v.* Banes, Prec. Cha. 208; and see 1 Ves. 221. 441; Ambl. 586; Mose. 370;

ment not in writing, nor so stated in the bill, yet if the defendant put in his answer, and confess the agreement, that takes the case entirely out of the mischief intended to be prevented by the statute; and there being no danger of perjury, the Court would decree it; and if the defendant should die, upon a bill of revivor against his heir, the same decree would be made as if the ancestor were living, the principle going throughout, and equally binding the representatives (*i*).

6. Lord Chancellor Bathurst, however, held that an agreement, not in part performed, could not be carried into execution, although confessed by the answer. In Eyre *v.* Popham (*k*), addressing himself to Mr. Ambler, he asked if there was any case in which there had been a decree founded upon a confession generally without a part performed? and Mr. Ambler replied, that in some of the cases, the Chancellor had been mentioned to have said it, but he never found a decree. In giving judgment, his Lordship is reported to have said, "This is not an agreement in writing, upon the statute of frauds; but the question is, whether it is an agreement which so appears as that the Court will decree a performance. It has been said, that it is a known rule in this Court, that where an agreement appears confessed, the Court will decree a performance, though no part has been performed: some *dictums* there have been, but Mr. Ambler confesses that he has found no decree—that where the substance clearly appears, though in parol, without any part performed, the Court will decree an agreement to be executed. I think it cannot be possible; this Court

and Symondson *v.* Tweed, Prec. Cha. 437; Gilb. Eq. Rep. 35; Wanby *v.* Sawbridge, 1 Bro. C. C. 414, cited.

(*i*) *Per* Lord Hardwicke, see 1 Ves. 221.

(*k*) Lofft, 808, 809; and see Eyre *v.* Iveson, 2 Bro. C. C. 563, cited.

cannot repeal the statute of frauds, or any statute. The King has no such power, by the constitution, intrusted to him; and therefore there can be no such power in his delegates. The only case I know that takes a contract out of the statute is of fraud, and the jurisdiction of this Court is principally intended to prevent fraud and deceit. Where a party has given ground to another to think he had a title secured, the Court will secure it to him. The ground, therefore, in making and refusing decrees, has been fraud. It can never be laid down by the Court, that where the substance appears it shall be executed. It would not have been so at common law."

7. In the discussion of the foregoing case, neither the bar nor the Court appear to have been aware of a case before Lord Chancellor Macclesfield (*l*), in which the defendant having pleaded the statute of frauds to a bill seeking a specific performance of a parol agreement, his Lordship said, the plea was proper, but then the defendant ought, by answer, to deny the agreement; for if he confessed the agreement, the Court would decree a performance, *notwithstanding the statute*; for that such confession would not be looked upon as perjury, or intended to be prevented by the statute. And he therefore confirmed an order, that the plea should stand for an answer, with liberty for the plaintiff to except thereto, and that the benefit thereof should be saved to the defendant until the hearing of the cause. And Lord Hardwicke appears to have entertained the same opinion (*m*).

(*l*) Child *v.* Godolphin, 1 Dick. 39; 2 Bro. C. C. 566, cited; and see Hartley *v.* Wilkinson, Irish Term Rep. 357.

(*m*) See Cottington *v.* Fletcher, 2 Atk. 155; and see 3 Atk. 3; but see 4 Ves. jun. 24.

8. In Whitchurch *v.* Bevis (*u*), Lord Thurlow at first expressed his opinion, that the only effect of the statute was, that an agreement should not be proved *aliunde*. No evidence that could be given would sustain the suit if the defendant answered and denied the agreement. In this case the agreement was confessed, but the statute was pleaded, and it was ultimately decided on its own particular circumstances. Lord Thurlow said, he meant to determine upon the ground of this particular case; because it might become to be more seriously considered what sort of a verbal agreement, notwithstanding the plea of the statute of frauds, might be sustained, as being confessed by the answer, so as the Court would carry it into execution. He added, that he was prepared to say, if there were general instructions for an agreement, consisting of material circumstances to be hereafter extended more at large, and to be put into the form of an instrument, with a view to be signed by the parties, and no fraud, but the party takes advantage of the *locus pœnitentiæ*, he should not be compelled to perform such an agreement as that, *when he insists upon the statute of frauds*.

9. It is curious to observe the different opinions which have prevailed on this point. Lord Macclesfield held, that if the agreement was confessed, even a plea of the statute would not protect the defendant; in which opinion he seems to have been followed by Lord Hardwicke. On the other hand, Lord Bathurst thought that, unless there were fraud, an admission of the agreement by the defendant would not enable the Court to decree it, although the defendant did not insist on the statute. Lord Thurlow appears to have been of opinion, that if the agreement was admitted, the statute could only

(*u*) 2 Bro. C. C. 559; 2 Dick. 664.

be used as a defence where there was a clear *locus pœnitentiæ*, but that evidence could not be admitted to falsify the defendant's answer.

10. None of the foregoing opinions has, however, been attended to. Mr. Baron Eyre seems to have led the way in holding, that if the defendant, by his answer, insisted upon the statute of frauds, a specific performance could not be decreed, although he confessed the agreement (*o*). And Lord Thurlow, notwithstanding his opinion in Whitchurch *v.* Bevis, said, in the prior case of Whitbread *v.* Brockhurst, that it should rather seem that if the defendant confesses the agreement in his answer, but insists upon the statute, it would be more simple and conformable to reason to say, that the statute should be a bar to the plaintiff's claim (*p*); and these opinions have been adopted by Lord Rosslyn and Lord Eldon (*q*); and Sir William Grant actually decided, that the statute may be used as a bar to the relief, although the agreement be admitted (*r*). It is immaterial, he said, what admissions are made by a defendant insisting upon the benefit of the statute, for he throws it upon the plaintiff to show a complete written agreement; and it can no more be thrown upon the defendant to supply defects in the agreement, than to supply the want of an agreement.

11. Where, however, a defendant has, by answer, admitted the agreement, and submitted to perform it, he cannot, by an answer to an amended bill, plead the statute of frauds (*s*).

(*o*) Stewart *v.* Careless, 2 Bro. C. C. 564, 565, cited; Walters *v.* Morgan, 2 Cox, 369.

(*p*) See 1 Bro. C. C. 416.

(*q*) Moore *v.* Edwards, 4 Ves. jun. 23; Cooth *v.* Jackson, 6 Ves. jun. 12; Row *v.* Teed, 15 Ves. jun. 375; see Rondeau *v.* Wyatt, 2 H. Blackst. 63; and 1 Rose, 300.

(*r*) Blagden *v.* Bradbear, 12 Ves. jun. 464; see also 2 Ball & Beat. 349.

(*s*) Spurrier *v.* Fitzgerald, 6 Ves. jun. 548.

12. If the defendant deny the agreement, he may be tried for perjury; but a conviction will not enable equity to decree a performance of the agreement (*t*) (I); and therefore, as the plaintiff cannot avail himself in any civil proceedings of the conviction of the defendant, he is a competent witness to prove the perjury (*u*).

(*t*) Bartlett *v.* Pickersgill, 4 Burr. 2255; 4 East, 577, n. (*b*); 1 Cox, 15. See Rastel *v.* Hutchinson, 1 Dick. 44, and Fell *v.* Chamberlain, 2 Dick. 484; Burdon *v.* Browning, 2 Taunt. 520.

(*u*) The King *v.* Boston, 4 East, 572.

(I) It appears that the plaintiff in Fell *v.* Chamberlain did prefer a bill of indictment for perjury against the defendant; and the Master of the Rolls granted an order to the six clerks to deliver the bill and answer, interrogatories, and depositions of witnesses to a solicitor, in order to be produced at the trial. Reg. Lib. A. 1772, fo. 496.

## SECTION VII.

### OF FRAUD AND PART PERFORMANCE.


1. *Agreement in writing prevented by fraud.*
2. *Part performance, parol agreement enforced.*
3. *What acts are a part performance.*
4. *Delivery of abstracts or the like, not.*
5. *Delivery of possession sufficient.*
6. *Unless referable to another title, or wrongfully obtained.*
7. *Payment of rent, where sufficient.*
8. *Expenditure in improvements.*
10. *Payment of purchase-money insufficient, semble.*
16. *Payment of auction duty insufficient.*
17. *Acts done to a man's own prejudice.*
18. *Distinct lots.*
19. *Where terms of agreement are uncertain.*
29. *Representatives bound where part performance.*
30. *Whether remainderman bound.*
31. *Issue directed.*


1. There are other cases taken out of the statute, not so much on the principle of no danger of perjury, as

that the statute was not intended to create or protect fraud. Lord Keeper North appears to have entertained a floating opinion, although he never actually decided the point, that if the plaintiff laid in his bill that it was part of the agreement that the agreement should be put into writing, it would take the case out of the statute (*a*). In a case before Lord Thurlow (*b*), this doctrine was stated at the bar; and in answer to it, he said, he took that to be a single case, and to have been overruled. *If you interpose the medium of fraud, by which the agreement is prevented from being put into writing, he agreed to it*, otherwise he took Lord North's doctrine, 'that if it had been laid in the bill, that it was a part of the agreement that it should be put into writing, it would have done,' to be a single decision, and contradicted, though not expressly, yet by the current of opinions.

2. So where agreements have been carried partly into execution, the Court will decree the performance of them, in order that one side may not take advantage of the statute, to be guilty of fraud (*c*) (I).

3. An agreement will not be considered as partly executed, unless the acts done are such as could be done with no other view or design than to perform the agreement; or perhaps, to speak more correctly, with the view of the agreement being performed; and if it do not appear but the acts done might have been done with

(*a*) Hollis *v.* Whiting, or Edwards, 1 Vern. 151. 159; Leake *v.* Morrice, 2 Cha. Ca. 135.

(*b*) Whitchurch *v.* Bevis, 2 Bro. C. C. 565.

(*c*) See 1 Ves. 221; Taylor *v.* Beech, 1 Ves. 297.

(I) The ground of relief in these cases is fraud, and that species of fraud which is conusable in equity only; although it seems that the Court of King's Bench once held, that where an agreement was partly executed, *it was totally out of the statute*. See 1 Bro. C. C. 417.

other views, the agreement will not be taken out of the statute (*d*).

4. Neither will acts merely introductory, or ancillary to an agreement, be considered as a part-performance, although attended with expense. Therefore, delivering an abstract, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations, &c. (*e*), will not take a parol agreement out of the statute.

5. But if possession be delivered to the purchaser, the agreement will be considered as in part executed (*f*); especially if he expend money in building or improving according to the agreement (*g*), for the statute should

(*d*) Gunter *v.* Halsey, Ambl. 586; Lacon *v.* Mertins, 3 Atk. 1; and see 19 Ves. jun. 479.

(*e*) Clerk *v.* Wright, 1 Atk. 12; Whitbread *v.* Brockhurst, 1 Bro. C. C. 412; Cole *v.* White, 1 Bro. C. C. 409, cited; Whitchurch *v.* Bevis, 2 Bro. C. C. 559; Whaley *v.* Bagenal, 6 Bro. P. C. 645; Cooke *v.* Tombs, 2 Anst. 420; and see Cooth *v.* Jackson, 6 Ves. jun. 12; and Redding *v.* Wilkes, 3 Bro. C. C. 400.

(*f*) Butcher *v.* Stapely, 1 Vern. 363; Pyke *v.* Williams, 2 Vern. 465; Lockey *v.* Lockey, Prec. Cha. 518; Earl of Aylesford's case, 2 Stra. 783; Binstead *v.* Coleman, Bunb. 65; S. C. MS. in *tot. verbis*; Barrett *v.* Gomeserra, Bunb. 94; Lacon *v.* Mertins, 3 Atk. 1; Wills *v.* Stradling, 3 Ves. jun. 378; Bowers *v.* Cator, 4 Ves. jun. 91; Denton *v.* Stewart, 4th July 1786, cited in Mr. Fonbl. note to 1 Trea. Eq. 175 (I); Gregory *v.* Mighell, 18 Ves. jun. 328; Kine *v.* Balfe, 2 Ball & Beat. 343; Morphett *v.* Jones, Rolls, Feb. 1818, MS.; 1 Swanst. 172.

(*g*) Foxcraft *v.* Lister, 2 Vern. 456; Gilb. Eq. Rep. 4, cited; Co P. C. 108, reported; Floyd

(I) In this case the plaintiff not only purchased the house, but also the furniture, for which she had actually paid; and it appears by the decree, that there was a receipt given by the defendant, the contents of which, however, are not stated in the Registrar's book. The defendant positively denied the agreement, and insisted that the plaintiff was only tenant at will. Reg. Lib. A. 1785, fo. 552, by the name of Denton *v.* Seward; *ibid.* 717, by the name of Denton *v.* Stewart.

never be so turned, construed, or used, as to protect or be a mean of fraud (*h*).

6. Possession, however, must be delivered in part-performance; for if the purchaser obtain it wrongfully, it will not avail him (*i*). And a possession which can be referred to a title distinct from the agreement will not take a case out of the statute. Therefore, possession by a tenant cannot be deemed a part-performance. The delivery of possession, by a person having possession, to the person claiming under the agreement, is a strong and marked circumstance; but a tenant of course continues in possession, unless he has notice to quit; and the mere fact of his continuance in possession (which is all that can be admitted, for *quo animo* he continued in possession, is not a subject of admission) cannot weigh with the Court (*k*).

7. But if he pay an additional rent, although that is *per se* an equivocal circumstance (for it may be that he shall hold only from year to year, the lease being expired), yet there may be other inducements. If, therefore, it be averred that the landlord accepted the additional rent upon the foot of the agreement, the acceptance upon the ground of the agreement will not be equivocal at all. The landlord, in such a case, must answer whether it was accepted upon a holding from year to year, or any other ground (*l*).

8. If it be part of such a contract with a tenant in possession, that money shall be laid out, and it is one of

*v.* Buckland, 2 Freem. 268; Mortimer *v.* Orchard, 2 Ves. jun. 243; Toole *v.* Medlicott, 1 Ball & Beatty, 393. See Wheeler *v.* D'Esterre, 2 Dow, 359; and see 19 Ves. jun. 479.

(*h*) See 3 Burr. 1919.

(*i*) Cole *v.* White, 1 Bro. C. C. 409, cited.

(*k*) Wills *v.* Stradling, 3 Ves. jun. 378; Smith *v.* Turner, Prec. Cha. 561, cited; Savage *v.* Carrol, 1 Ball & Beatty, 265.

(*l*) Wills *v.* Stradling, *ubi sup.*

the considerations for granting the lease (the laying out which must be then with the privity of the landlord), it is very strong to take it out of the statute (*m*). But it is necessary that the act should unequivocally refer to and result from the agreement, and be such that the party would suffer an injury amounting to fraud, by the refusal to execute that agreement. Therefore, where upon the faith of a promise of a renewal, a tenant rebuilt a party-wall, the agreement was held to be within the statute. The act done was equivocal: for it would have taken place equally if there had been no agreement: it was such also as easily admitted of compensation, without executing the agreement. The money expended might be recovered from the landlord, if it was by the landlord that the expense was to be borne (*n*).

9. In a late case, Lord Redesdale thought that it was absolutely necessary for courts of equity, in these cases, to make a stand, and not carry the decisions farther (*o*).

---

10. It is generally understood, that payment of a substantial part of the purchase-money will take a parol agreement out of the statute. How far this opinion is well-founded, appears to be deserving of particular consideration.

11. There are four cases in Tothill, which arose previously to the statute of frauds, and appear to be applicable to the point under consideration; for equity, even before the statute of frauds, would not execute a mere parol agreement not in part performed. In the first case (*p*), which was heard in the 38th of Eliz. relief was denied, "because it was but a preparation for an

(*m*) S. C.

(*n*) Frame *v.* Dawson, 14 Ves. jun. 386. See Lindsay *v.* Lynch, 2 Scho. & Lef. 1; O'Reilly *v.* Thompson, 2 Cox, 271.

(*o*) See 2 Scho. & Lef. 5.

(*p*) William *v.* Nevil, Toth. 135.

action upon the case." In the two next cases (*q*), which came on in the 9th of Jac. I., parol agreements were enforced, apparently on account of the payment of very trifling parts of the purchase-money, but the particular circumstances of these cases do not appear. The last case reported in Tothill (*r*) was decided in the 30th of Jac. I., and the facts are distinctly stated. The bill was to be relieved concerning a promise to assure land of inheritance, of which there had not been any execution, but only 55 *s.* paid in hand, and the bill was dismissed. This point received a similar determination, in the next case on the subject before the statute, which is reported in Cha. Rep. (*s*), and was determined in the 15th Cha. II. So the same doctrine was adhered to in a case which occurred three years afterwards, and is reported in Freeman (*t*); for although a parol agreement for a house, with 20 *s.* paid, was decreed without further execution proved, yet it appears by the judgment, that the relief would not have been granted if the defendant, the vendor, had demurred to the bill, which he had neglected to do, but had proceeded to proof. The last case I have met with previously to the statute, was decided in the 21st Car. II. (*u*), and there a parol agreement, upon which only 20 *s.* were paid, was carried into a specific execution. This case probably turned, like the one immediately preceding it, on the neglect of the defendants to demur to the bill. It must be admitted, that the foregoing decisions are not easily reconcileable, yet the result of them clearly is, that payment of a trifling part of the purchase-money was not a part-performance

(*q*) Ferne *v.* Bullock, Toth. 206; Clark *v.* Hackwell, *ibid.* 228.

(*r*) Miller *v.* Blandist, Toth. 85.

(*s*) Simmons *v.* Cornelius, 1 Cha. Rep. 128.

(*t*) Anon. 2 Freem. 128.

(*u*) Voll *v.* Smith, 3 Cha. Rep. 16.

of a parol agreement. Whether payment of a considerable sum would have availed a purchaser, does not appear. In Toth. 67, a case is thus stated: "Moyl *v.* Horne, by reason 200 *l.* was deposited towards payment, decreed." This case may, perhaps, be deemed an authority that, prior to the statute, the payment of a substantial part of the purchase-money would have enabled equity to specifically perform a parol agreement; but it certainly is too vague to be relied on.

12. Our attention is now called to the statute itself. The clause relating to lands declares generally, that no contract, not in writing, shall be enforced by action; there is also a clause in the act, which relates to sales of goods, which are declared to be binding if something is given in earnest or part payment to bind the bargain.

13. The first case in the books, subsequently to the statute, is in Freem. (*x*), where it is stated, that a contract for land, and *a great part* of the money paid, is void since the statute of frauds and perjuries; but the party that paid the money may, in equity (I), recover back the money. And for this Freeman states he saw Sir William Jones's opinion under his hand. This was about four years after the act. The next case is Leak *v.* Morrice (*y*), which occurred in the same year; the bill was to have an agreement performed by the defendant; which was, in effect, that the defendant should assign a term of years in his house and certain goods, for two hundred guineas, whereof he paid one in hand as earnest of the bargain, and three days after nineteen guineas more; and part of the bargain was, that it should be executed by writings, by a certain time. The defendant pleaded the statute of frauds, and alleged the

(*x*) 1 Freem. 486. ca. 664 b. (*y*) 2 Cha.Ca.135; 1 Dick. 14.

(I) At this day it may be recovered at law.

money was only paid for the lease, but confessed the receipt of the twenty guineas, and offered to repay them. Lord Keeper North said, it was clear that the defendant ought to repay the money, but overruled the plea on another ground. In this case it does not appear to have occurred to either the bar or the court, that payment of money would take a parol contract for lands out of the statute. The case of Alsop *v.* Patten (*z*), arose about fifteen years afterwards. There a joint lessee of a building lease agreed to sell his moiety to the other lessee for four guineas, and accepted a pair of compasses in hand to bind the bargain. The vendor pleaded the statute to a bill filed by the purchaser for a performance in specie. Lord Chancellor Jefferies ordered him to answer, and saved the benefit of the plea to the hearing, as the agreement was, in some part, executed. In this case, unless there was a part performance of the agreement, independently of the mere delivery of the compasses, it is clear that the Court confounded the section of the statute by which personal contracts are binding, if earnest is paid, with the clause relating to land. The next case is Seagood *v.* Meale (*a*) which arose thirty-four years after the case of Alsop *v.* Patten. The case was, that upon a parol agreement for sale of an estate for 150*l.*, a guinea was paid, and the payment of the guinea was agreed to be clearly of no consequence in case of an agreement touching lands or houses, the payment of money being only binding in cases of contracts for goods. In this case we find the doctrine laid down generally, that the payment of money is not a part-performance of a parol agreement for lands, and no distinction was taken, as seems sometimes to have been thought, between the payment of a substantial part of the purchase-money, and of a trifling portion.

(*z*) 1 Vern. 472. (*a*) Prec. Cha. 560.

Then comes the case of Lord Fingal, or Lord Pengal *v.* Ross, which was decided by Lord Cowper, in the 8th of Anne (*b*) (I). *A* agreed with *B* to make him a lease for twenty-one years of lands rendering rent, *B* paying *A* 150*l.* fine. *B* paid 100*l.* in part, then *A* refused to execute the agreement; and upon a bill filed for a specific performance, the agreement was held to be within the statute; but the 100*l.* was decreed to be refunded. The Lord Chancellor said, the payment of this 100*l.* was not such a performance of the agreement on one part, as to decree an execution on the other; for the statute of frauds makes one sort of contracts, viz. personal contracts, good, if any money is paid in earnest. Now that statute says, that no agreement concerning lands shall be good, except it is reduced into writing; and therefore, a parol agreement, as it was in that case, would not be good by giving money by way of earnest. Thus far no room is left for doubt; but in Lacon *v.* Mertins (*c*), Lord Hardwicke laid it down, that paying money had always been considered as a part-performance. This, however, was a mere *dictum*; it was not necessary to decide the question; the cases on the subject were not cited; and another rule is laid down too generally in the same report. A case, indeed, is said to have been decided in 1750 (*d*), at which time Lord Hardwicke was Chancellor, where the bill was to compel the *acceptance* of a lease under a parol agreement upon a fine of 150*l.*, and 16*l.* paid in part of the same; and

(*b*) 2 Eq. Ca. Abr. 46. pl. 12.
(*c*) 3 Atk. 1.
(*d*) Dickinson *v.* Adams, 4 Ves. jun. 722, cited.

---

(I) It has been said, that this case is not to be found in the Registrar's book. See 4 Ves. jun. 721. The author himself has searched the Registrar's calendars for 1709 and 1710 without success. The search was made under the letters L (the plaintiff being a lord) P and F.

the plea was overruled, without hearing the counsel for the plaintiff, and the decision, it is said, appears by the Registrar's book (I). But it does not appear from this statement, whether there was or was not any other act of part-performance; and it is a sufficient objection to this decision, that the plaintiff's counsel were not heard, as no one can deny that the point was open to argument. The next case is a recent one (*e*), in which Lord Rosslyn held, that the payment of a small sum, as five guineas, where the purchase-money is 100*l.*, would not take the case out of the statute; but he seemed clearly of opinion, that payment of a considerable part of the purchase-money would be sufficient: and he treated the case of Lord Fingal *v.* Ross as ill determined. However, it was not necessary to decide the question. The opinion was clearly extra-judicial. In the late case of Coles *v.* Trecothick (*f*), where the purchase-money was 20,000*l.* and 2,000*l.* were paid in part, the point was treated at the bar as doubtful, and the Court evidently declined giving an opinion on the subject.

14. Upon the whole, it appears clearly, that since the statute of frauds, the payment of a small sum cannot be deemed a part-performance. The *dicta* are in favour of a considerable sum being a part-performance, but this construction is notauthorized by the statute, and it

(*e*) Main *v.* Melbourn, 4 Ves. jun. 720.

(*f*) 9 Ves. jun. 234; *Ex parte* Hooper, 1 Mer. 7.

(I) The author has searched the Registrar's calendars for 1750, with great attention, but without success. He met with only one case where the plaintiff's name was Dickinson, and there the defendant's name was Baskerville; and the case is on a different point. Reg. Lib. A. 1750, fol. 545. Neither does a case in the same book, fol. 514, by the name of Davis *v.* Adams, embrace the point in question. The search was made under the letter A as well as the letter D.—Note, the case perhaps turned on the principle stated in page 209, *infra*.

is opposed by a case, in which the contrary was decided, upon the most convincing grounds. On this subject, Sir William Grant's admirable judgment in Butcher *v.* Butcher (*g*), must occur to every discerning mind; it turns on a subject so applicable to the present, that his arguments, with a slight alteration, directly bear upon it. To say that a *considerable* share of the purchase-money must be given, is rather to raise a question than to establish a rule. What is a considerable share, and what is a trifling sum? Is it to be judged of upon a mere statement of the sum paid, without reference to the amount of the purchase-money?—If so, what is the sum that must be given to call for the interference of the Court? What is the limit of amount at which it ceases to be trifling, and begins to be substantial? If it is to be considered with reference to the amount of the purchase-money, what is the proportion which ought to be paid? Mr. Booth also was impressed with this difficulty, although his sentiments are not so forcibly expressed. Where, he asks, will you strike the line? And who shall settle the quantum that shall suffice in payment of part of any purchase-money, to draw the case out of the statute; or ascertain what shall be deemed so trifling as to leave the case within it (*h*)?

15. Since the above observations were written, a decision of Lord Redesdale's has appeared, in which he held clearly that payment of purchase-money is not a part-performance; and although his Lordship did not advert to all the cases on the subject, yet his decision it is to be hoped will put the point at rest. He said, that it had always been considered that the payment of money is not to be deemed a part-performance, to take a case out of the statute. Seagood *v.* Meale is

(*g*) 9 Ves. jun. 382. (*h*) 1 Ca. and Opin. 136.

the leading case on that subject: there a guinea was paid by way of earnest; and it was agreed clearly, that that was of no consequence in case of an agreement touching lands. Now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally; for it is paid in both cases as part-payment, and no distinction can be drawn (*i*): but the great reason, he added, why part-payment does not take such an agreement out of the statute, is, that the statute has said, that in another case, viz. with respect to goods, it shall operate as a part-performance. And the Courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the Legislature said it should bind in case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands (*k*).

16. But, even admitting that the payment of purchase-money may be deemed a part-performance, yet the payment of the auction duty, however considerable, will not enable the Court to decree a specific performance of a parol agreement; as the revenue laws cannot be held to operate beyond their direct and immediate purpose, to affect the property and vary the rights of the parties not within the intention of the act (*l*).

17. In some cases it has been decided, that acts done by the defendant to his own prejudice, could be made a ground for compelling him perform the agreement: but Sir William Grant held the contrary, where there is no prejudice to the plaintiff (*m*), because the ground on

(*i*) See acc. Cordage *v.* Cole, 1 Saund. 319.

(*k*) Clinan *v.* Cooke, 1 Scho. & Lef. 22; and see O'Herlihy *v.* Hedges, *ib.* 123; 14 Ves. jun. 388.

(*l*) Buckmaster *v.* Harrop, 7 Ves. jun. 341; 13 Ves. jun. 456.

(*m*) Buckmaster *v.* Harrop, *ubi sup.* See Hawkins *v.* Holmes, 1 P.

which the Court acts, is fraud in refusing to perform, after performance by the other party (*n*); but where the defendant has, for instance, paid the auction duty or purchase-money, it is no fraud on the vendor, *but a loss to himself*, which ought not to be made a ground for a specific performance against himself.

18. Where a person purchases several lots of an estate, included in distinct articles of sale, a part-performance as to one lot will not be deemed a part-performance as to the other lots, and will therefore only take the agreement out of the statute as to the lot in respect of which there was a part-performance (*o*).

---

19. It may happen, that although an agreement be in part performed, yet the Court may not be able to ascertain the terms, and then it seems the case will not be taken out of the statute. If, however, the terms be made out satisfactorily to the Court, contrariety of evidence is not material (*p*), and the Court will use its utmost endeavours to get at the terms of the agreement.

20. In the case of Mortimer *v.* Orchard (*q*), where a parol agreement with two persons had been in part performed, the plaintiff's witness proved an agreement different from that set up by the bill, and the defendants stated an agreement different from both. The Chancellor thought in strictness the bill ought to be dismissed; but as there had been an execution of some agreement between the parties, and there were two

Wms. 770; and see *post*, ch. 4, n. observations on Potter *v.* Potter.

(*n*) See Popham *v.* Eyre, Lofft, 786; Clinan *v.* Cooke, 1 Scho. & Lef. 22; and O'Herlihy *v.* Hedges, *ibid.* 123

(*o*) Buckmaster *v.* Harrop, 7 Ves. jun. 341.

(*p*) See 1 Ves. 221.

(*q*) 2 Ves. jun. 243. See Lindsay *v.* Lynch, 2 Scho. & Lef. 1.

defendants who proved the agreement set up by their answers, he decreed a specific performance of the agreement confessed by the answers.

21. In one case where, upon the faith of a parol agreement, a man entered and built, it was proved that the defendant told the plaintiff that his word was as good as his bond, and promised the plaintiff a lease when he should have renewed his own from his landlord. Lord Chancellor Jefferies said, that the defendant was guilty of a fraud, and ought to be punished for it; and so decreed a lease to the plaintiff, *though the terms were uncertain*. It was, he said, in the plaintiff's election for what time he would hold it, and he elected to hold during the defendant's term at the old rent, but the *plaintiff* was to pay costs (*r*).

22. And in a case from Yorkshire, possession having been delivered in pursuance of a parol agreement, and a dispute arising upon the terms of the agreement, Lord Thurlow sent it to the Master, upon the ground of the possession being delivered, to inquire what the agreement was. The difficulty was in ascertaining what the terms were. The Master decided as well as he could, and then the cause came on before Lord Rosslyn, upon further directions, who certainly seemed to think Lord Thurlow had gone a great away, and either drove them to a compromise, or refused to go on with the decree upon the principle upon which it was made (*s*).

23. Lord Thurlow, however, appears to have formed a settled opinion upon this point. For in Allen *v.* Bower (*t*), where he considered the written memorandum as evidence of a parol agreement, which was in

(*r*) Anon. 5 Vin. Abr. 523, pl. 40; and see Anon. *ib.* 522. pl. 38.

(*s*) Anon. 6 Ves. jun. 470, cited by Lord Eldon.

(*t*) 3 Bro. C. C. 149.

part performed (whether rightly or not (*u*) is immaterial to the present question), he directed the Master, *who had refused to admit parol evidence*, to inquire and state what the promise was, that was mentioned in the memorandum, and at what time the promise was made, *and what interest the tenant was to acquire in the premises under such promise*; and the Master was to be at liberty to state specially any particular circumstances that might arise on such inquiries, and the parties were to be examined on interrogatories. In consequence of this order, evidence was received, which proved that the tenant was to hold during his life; and Lord Thurlow decreed a lease to be executed accordingly.

24. So in a case before Lord Redesdale, where an agreement in writing was held to be within the statute, because the term for which it was to be granted was not expressed, his Lordship said, he should have had great difficulty if there were evidence of part-performance. *He must have directed a further inquiry*, for the party had not suggested by his bill, that the agreement was for any specific term, and the case stood both on the pleadings and evidence imperfect on that head (*x*). And in a late case before Lord Eldon, he thought the Court must at least endeavour to collect, if they can, what are the terms the parties have referred to (*y*).

25. But in the case of Symondson *v.* Tweed (*z*), it was laid down, that in all cases wherever the Court had decreed a specific execution of a parol agreement, yet the same had been supported and made out by letters in writing, *and the particular terms stipulated therein*, as a

(*u*) See 1 Sch. & Lef. 37.

(*x*) Clinan *v.* Cooke, 1 Scho. & Lef. 22.

(*y*) Boardman *v.* Mostyn, 6 Ves. jun. 467.

(*z*) Prec. Cha. 374; Gilb. Eq. Rep. 35.

foundation for the decree; otherwise the Court would never carry such an agreement into execution. And in a case before the late Lord Alvanley, when Master of the Rolls (*a*), he is reported to have said, "I admit my opinion is, that the Court has gone rather too far in permitting part-performance, and other circumstances, to take cases out of the statute, and then, unavoidably perhaps, after establishing the agreement, to admit parol evidence of the contents of that agreement. As to part-performance, it might be evidence of some agreement, but of what, it must be left to parol evidence. I always thought the Court went a great way. They ought not to have held it evidence of an unknown agreement, but to have had the money laid out repaid. It ought to have been a compensation. Those cases are very dissatisfactory. It was very right to say, the statute should not be an engine of fraud, therefore compensation would have been very proper. They have, however, gone farther, saying, it was clear that there was some agreement, and letting them prove it; but how does the circumstance of having laid out a great deal of money, prove that he is to have a lease of ninety-nine years? The common sense of the thing would have been to have let them bring an action for the money. I should pause upon such a case." And Lord Eldon has said, that perhaps if it was *res integra*, the soundest rule would be, that if the party leaves it uncertain, the agreement is not taken out of the statute sufficiently to admit of its being enforced.

26. In a late case in Ireland, where after a part-performance of a parol agreement the purchaser died, and there was no evidence of the amount of the price agreed on, or of the quantity of estate to be conveyed, Lord

(*a*) Forster *v.* Hale, 3 Ves. jun. 712, 713.

Manners refused to grant a reference for the purpose of ascertaining the terms of the contract. There was, he said, no evidence whatever of the terms, and the reference was sought to supply the entire absence of this very material part of the case. Where there is contradictory evidence in a case that raises a doubt in the mind of the Court; that is to say, where the case is fully proved by the party on whom the onus of proof lay, but that proof shaken or rendered doubtful by the evidence on the other side, there the Court will direct a reference or an issue to ascertain the fact; but where there is no evidence whatever, would it not, he asked, be introducing all the mischiefs intended to be guarded against by the rules of the Court, in not allowing evidence to be gone into after publication, and holding out an opportunity to a party to supply the defect by fabricated evidence, if he were to direct such an inquiry? He therefore did not think himself at liberty from the evidence in the case to direct the reference or issue desired (*b*).

27. And in a later case (*c*), a bill for a specific performance was dismissed with costs because the agreement was by parol, and although part performed, the terms of it could not be made out by reason of the variance between the witnesses for the plaintiff.

28. We cannot but observe the growing reluctance manifested to carry parol agreements into execution, on the ground of part-performance, where the terms do not distinctly appear; and although, according to many authorities, the mere circumstance of the terms not appearing, or being controverted by the parties, will not, of itself, deter the Court from taking the best measures

(*b*) Savage v. Carroll, 1 Ball & Beatty, 265. See *ibid.* 404, 550, 551.

(*c*) Reynolds v. Waring, 1 You. 346.

to ascertain the real terms (*d*); yet the prevailing opinion requires the party seeking the specific performance in such a case to show the distinct terms and nature of the contract. We may however remark, that it rarely happens that an agreement cannot be distinctly proved where the estate is sold. Most of the cases on this head have arisen on leases, where the covenants, &c. are generally left open to future consideration.

29. Where a parol agreement is so far executed as to entitle either of the parties to require a specific execution of it, it will be binding on the representatives of the other party in case of his death, to the same extent as he himself was bound by it (*e*).

30. In a case before Lord Redesdale (*f*), he held that a contract by a tenant for life with a power of leasing, to grant a lease under his power, was binding on the remainder-man. In the course of the argument, a question was put from the bar, whether, if this had been a case of a parol agreement in part performed, it could be enforced? In answer to which, Lord Redesdale expressed himself thus: "That, I think, would raise a very distinct question, a question upon the statute of frauds; and perhaps a remainder-man might be protected by the statute, though the tenant for life would not. For the party himself is bound by a part-performance of a parol agreement, principally on the ground of fraud, which is personal. Such a ground could scarcely be made to apply to the case of a remainder-man, unless money had been expended, and there had been an acquiescence after the remainder vested, which were held by Lord Hardwicke, in Stiles *v.* Cowper, 3 Atk. 692, in the case

(*d*) See Savage *v.* Carroll, 2 Ball & Beat. 444.

(*e*) *Vide infra*, ch. 4.

(*f*) Shannon *v.* Bradstreet, 1 Scho. & Lef. 52; Lowe & Swift, 2 Ball & Beat. 529.

of an actual lease under a power, but with covenants not according to the power, to bind the remainder-man to grant a lease for the same term with covenants according to the power (*g*)."

31. In a case where it was alleged on the one side, that under a parol agreement the purchase-money had been paid and possession delivered; and on the other, that there was no sale, but that possession was delivered to make a qualification, and the alleged purchaser was a mere agent, and both the seller and purchaser were dead; an issue was directed whether the purchaser was, at his death, beneficially entitled to the premises in question (*h*).

32. These remarks may be closed by observing, that equity seems to have been guided by nearly the same rules in compelling a specific performance of parol agreements before the statute (*i*), as have been adhered to since; but still, the student cannot be too cautious in distinguishing the cases which were decided before the statute from those decided subsequently. Much confusion has arisen from inattention to this point.

(*g*) See 2 Sugd. Pow. 131.

(*h*) Burkett *v.* Randall, 3 Mer. 466.

(*i*) See Miller *v.* Blandist, Toth. 85; William *v.* Nevil, *ibid.* 135; Ferne *v.* Bullock, *ibid.* 200. 238; Clark *v.* Hackwell, *ibid.* 260; Simmons *v.* Cornelius, 1 Cha. Rep. 128; Anon. 2 Freem. 128; Voll *v.* Smith, 3 Cha. Rep. 16; and see Marquis of Normanby *v.* Duke of Devonshire, 2 Freem. 217.

## SECTION VIII.

### OF THE ADMISSIBILITY OF PAROL EVIDENCE TO VARY WRITTEN INSTRUMENTS.

1. *Parol averments to support a deed.*
2. *Parol addition rejected.*
5. *So of what passed upon the treaty.*
7, 11. *Parol declaration of auctioneer rejected.*
10. *Parol addition also rejected in equity.*
14. *Or to diminish the rent.*
18. *Unless on behalf of a* defendant *in equity.*
20. *Where there is fraud.*
21. *Or mistake or surprise.*
23. *But not to explain the instrument.*
24, 25. *Clowes* v. *Higginson considered.*
26, 27. *Croome* v. *Lediard considered.*
28. *Parol variations after the contract, without consideration, rejected.*
32. *Negative words of the statute.*
33. *Where written agreement correct, parol addition rejected altogether.*
36. *Parol evidence of collateral matters, as taxes, &c., rejected.*
41. *Waiver of stipulation for good title rejected.*
42. *Contra in equity.*
43. *Time cannot be waived by parol at law.*
45. *Contra in equity.*
46. *Parol variation part performed enforced in equity.*
50. *Result as to parol variations.*
51. *Entire agreement for realty and personalty.*

Of this learning we may treat under three heads, 1st, where there is not any ambiguity in the written instrument; 2dly, where there is an ambiguity; and, 3dly, where a term of an agreement is omitted or varied in the written instrument by mistake or fraud.—And,

1. Previously to the statute of frauds, parol evidence might have been given of collateral and independent facts, which tended to support a deed. Thus, although a valuable consideration was always essential to the validity of a bargain and sale, yet Rolle laid it down,

that (*a*) upon *averment* that the deed was in consideration of money, or other valuable consideration given, the land should pass, because the averment was consistent with the deed. The same rule has prevailed since the statute of frauds. Where in a conveyance 28*l.* only were stated to have been received, parol evidence was admitted to prove that 2*l.* more were actually paid (*b*). And in a later case parol evidence was received, that a sum of money was paid as a premium in order to constitute the relation of master and apprentice, although no mention of it was made in the written agreement entered into between the parties (*c*). In all these cases we observe, that the evidence is not offered to contradict or vary the agreement, but to ascertain an independent fact, which is consistent with the deed, and which it is necessary to ascertain, with a view to effectuate the real intention of the parties (*d*).

2. It is, however, clearly settled, that parol evidence is not admissible to disannul and substantially vary a written agreement; for, as Lord Hardwicke observes, to add anything to an agreement in writing by admitting parol evidence, is not only contrary to the statute of frauds and perjuries, but to the rule of the common law before that statute was in being (*e*).

3. Thus, in a leading case on this subject (*f*), it

(*a*) 2 Ro. Abr. 786. (N.) pl. 1; and see 1 Rep. 176, a.

(*b*) *Rex* v. the Inhabitants of Scammonden, 8 Term Rep. 474.

(*c*) *Rex* v. the Inhabitants of Laindon, 8 Term Rep. 379; and see 2 Cha. Ca. 143; Tull v. Parlett, 1 Mood. & Malk. 472.

(*d*) *Rex* v. Inhabitants of Wickham, 2 Adol. & Ell. 517.

(*e*) Parteriche v. Powlet, 2 Atk. 383; and see Tinney v. Tinney, 3 Atk. 8; Binstead v. Coleman, Bunb. 65; Hogg v. Snaith, 1 Taunt. 347.

(*f*) Meres v. Ansell, 3 Wils. 275; and see Mease v. Mease, Cowp. 47; Lofft, 457; Cuff v. Penn, 1 Mau. & Selw. 21; Greaves v. Ashlin, 3 Camp. Ca. 426; Hope v. Atkins, 1 Price, 143.

appeared that by an agreement in writing, the grass and vesture of hay from off a close of land, called Boreham Meadow, were to be taken by one Ansell. The subscribing witness to the agreement proved the written agreement, and he and another person deposed, that it was at the same time (when the written agreement was made) agreed by the parties by *parol*, that Ansell should not only have the hay from off Boreham Meadow, but also the possession of the soil and produce of that and another close of land. The cause was tried at *nisi prius* before Lord Mansfield, who admitted the evidence, and afterwards reported that he was not dissatisfied with the verdict in consequence of it. But Lord Chief Justice De Grey, and the other Judges of the Court of Common Pleas, held decidedly, that the evidence was totally inadmissible, as it annulled and substantially altered and impugned the written agreement.

4. So in Preston *v* Merceau (*g*), by an agreement in writing a house was let at 26*l.* a year; and the landlord attempted to show, by parol evidence, that the tenant had agreed to pay the ground-rent for the house to the original landlord, over and above the 26*l.* a year; but the Court of Common Pleas rejected the evidence.

5. In a late case in the King's Bench, the Chief Justice, in delivering the opinion of the Court, observed, that by the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract. But after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it,

(*g*) 2 Blackst. 1249.

by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to or subtract from, or vary or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement (*h*). But this refers only to an agreement at common law.

6. And in an earlier case (*i*), the Lord Chief Baron observed, that the foundation of the rules for rejecting parol evidence is in the general rules of evidence, in which writing stands higher in the scale than parol testimony, and when treaties are reduced into writing, such writing is taken to express the ultimate sense of the parties, and is to speak for itself. Indeed, nothing was so familiar as this idea. At *nisi prius*, where an agreement is spoken of, the first question always asked is, whether the agreement is in writing; if so, there is an end of all parol evidence; for when parties express their meaning with solemnity, that is very proper to be taken as their final sense of the agreement. In the case of a contract respecting land, this general idea receives weight from the circumstance that you cannot contract at all on that subject but in writing, and that therefore is a further reason for rejecting the parol evidence. In this way only is the statute of frauds material, for the foundation and bottom of the objection is in the *general* rules of evidence. He took the rule to apply in every case where the question is, *what* is the agreement?

7. And upon the general rule of law, independently of the statute of frauds, it has been determined that verbal declarations by an auctioneer in the auction-

(*h*) Goss *v.* Lord Nugent, 2 Nev. & Man. 33, 34, *sed qu.* the latter part; see pl. 19, *post.*

(*i*) Davis *v.* Symonds, 1 Cox, 402.

room, contrary to the printed conditions of sale, are inadmissible as evidence, unless perhaps the purchaser has particular personal information given him of the mistake in the particulars (*k*).

8. In a late case (*l*), upon the sale of timber by a written particular, which was silent as to the quantity, it was attempted to show, that the auctioneer verbally warranted the quantity to be eighty tons, and it was insisted that this evidence was admissible, because it did not *contradict* the particular, but merely supplied its defect in not stating the quantity. But it was held that the evidence was not admissible. Lord Ellenborough said, that the purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, he knew of no instance where a party might not, by parol testimony, superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect. There was no doubt, he added, that the warranty as to the quantity of timber would not vary the agreement contained in the written conditions of sale.

9. So, since the Act of Parliament for altering the style, a demise from Michaelmas must be taken to be from new Michaelmas, and parol evidence cannot be admitted to show that the parties intended it to commence at old Michaelmas (*m*), unless the demise is by parol (*n*).

(*k*) Gunnis *v.* Erhart, 1 H. Blackst. 289. See 13 Ves. jun. 471, and *infra*; and Fife *v.* Clayton, 13 Ves. jun. 546; Higginson *v.* Clowes, 15 Ves. jun. 516; *supra*, p. 40.

(*l*) Powell *v.* Edmunds, 12 East, 6; Jones *v.* Edney, 3 Camp. Ca. 285.

(*m*) Doe *v.* Lea, 11 East, 312.

(*n*) Doe *v.* Benson, 4 Barn. & Ald. 588.

10. The rules of evidence are universally the same in courts of law and equity. Therefore parol evidence, which goes to substantially alter a written agreement, cannot be received in a court of equity any more than in a court of law (*o*).

11. Thus in the case of Lawson *v.* Laude (*p*), a bill was brought to carry into execution an agreement between the plaintiff and defendant, for granting to the defendant a lease of a farm. The defendant objected to execute the lease, because some land, called Oxlane, agreed to be demised, was left out of the lease. The plaintiff offered evidence to prove, that it was left out by the particular and joint direction of the plaintiff and defendant. Sir Thomas Clarke held the evidence to be in direct contradiction to the statute of frauds, and therefore dismissed the bill.

12. So in a case before Lord Bathurst (*q*), the bill was filed for an injunction to stay proceedings at law for a breach of covenant, in not assigning *all* the premises, which the defendant insisted, by an agreement in writing, and a lease in pursuance of it, were to be assigned. The plaintiff stated by his bill, that though the agreement was for *all* the premises, yet the defendant, at the time of the execution of the lease, agreed that three pieces of land should be excepted, and the plaintiff examined several witnesses to prove the fact, which they did; but the defendant by his answer denied the fact, and insisted upon the extent of the written agreement; and the parol evidence being objected to at the hearing, it was not permitted to be read.

13. Neither can it be proved by parol evidence that

(*o*) See 3 Wils. 276; and see Foot *v.* Salway, 2 Cha. Ca. 142.

(*p*) 1 Dick. 346.

(*q*) Fell *v.* Chamberlain, 2 Dick. 484. I could not meet with the facts in the Registrar's book; see Reg. Lib. A. 1772, fol. 1. 496.

an agreement to sell to two jointly, was really a contract with one only, and the other was to have a security for the money he might advance; for that would contradict the written agreement (*r*).

14. And in an important case before Lord Eldon (*s*), he refused to execute an agreement with a variation attempted to be introduced by parol, on the ground of mistake, or at least of surprise, which was denied by the answer. So in the late case of Woollam *v.* Hearn (*t*), where a specific performance was sought of an agreement for a lease, at a less rent than that mentioned in the agreement, which variation was introduced by parol, on the ground of fraud and misrepresentation in the landlord; the evidence was read without prejudice, and the Master of the Rolls thought it made out the plaintiff's case; but his Honor held himself bound by the authorities, and accordingly rejected the evidence, and dismissed the bill. And this doctrine has been distinctly recognized by Lord Redesdale (*u*).

15. So verbal declarations, in opposition to printed conditions of sale, are inadmissible as evidence in equity as well as at law (*x*).

16. And if a material term be added by one party to a written agreement after its execution, he destroys his own rights under the instrument. But although this doctrine has been referred to the statute of frauds, yet it seems rather to depend on the principles of the common law (*y*).

(*r*) Davis *v.* Symonds, 1 Cox, 402.

(*s*) Marquis of Townsend *v.* Stangroom, 6 Ves. jun. 328. See 1 Ves. & Bea. 526, 527.

(*t*) 7 Ves. jun. 211.

(*u*) 1 Scho. & Lef. 39.

(*x*) Jenkinson *v.* Pepys, 6 Ves. jun. 330, cited; 15 Ves. jun. 521; 1 Ves. & Bea. 528; see 15 Ves. jun. 171, 546; Higginson *v.* Clowes, 15 Ves. jun. 516.

(*y*) Powell *v.* Divett, 15 East, 29.

17. In the late case of Besant *v.* Richards (*z*), where the purchaser was plaintiff, the contract described the property as held by one Watson, and the sale was to be completed at Michaelmas. Watson held an agreement for a lease for ten years, but the seller represented to the purchaser that this agreement was void, and that he had served Watson with notice to quit at Michaelmas, and that he would give possession at that time. The tenant refused to quit, and the Master of the Rolls held that the purchaser ought not to be bound by the agreement, purchasing as he did on the faith of that representation. He was entitled to be released from the agreement altogether, or if he chose he might perform it and have compensation, and the plaintiff electing to take the agreement with a compensation, a decree was made accordingly; but it seems difficult to sustain this decision consistently with the authorities, although there might have been sufficient ground to have released the purchaser altogether.

18. But when equity is called upon to exercise its peculiar jurisdiction, by decreeing a specific performance, *the party to be charged* is to be let in to show, that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed (*a*).

19. For the rule applies no further than this precise question, *What* is the agreement? Where the question is, what were the collateral circumstances attending the agreement? they may be proved by parol evidence. If any of these collateral circumstances are reduced into writing, the same rule applies to them as to the original agreement; but if not, both at law and in equity such collateral circumstances may be proved by parol; for example, duress at law, fraud and circumvention in

(*z*) 1 Tamlyn 509. (*a*) See 7 Ves. jun. 219.

equity. When it it said that parol evidence shall not *affect* written instruments, the vice of the argument turns upon the use of the word "affect;" for if it means *to vary it*, it is true, and if it is to be carried beyond that meaning it is not true; there is nothing so clear as the jurisdiction of the court to *affect* a written instrument by parol testimony: the courts of law do it every day, and in truth set them aside; courts of equity do it on other grounds, and take a larger field (*b*).

20. Therefore a defendant resisting a specific performance of an agreement, may prove by parol evidence, that by fraud the written agreement does not contain the real terms (*c*). Such evidence was admitted by Lord Hardwicke in Joynes *v.* Statham (*d*); and in the case of Woollam *v.* Hearn (*e*), before cited, the Master of the Rolls said, that if it had been a bill brought by the defendant for a specific performance, he should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance.

21. So Lord Hardwicke admitted, that an omission by mistake or surprise, would let in the evidence as well as fraud; and Lord Eldon actually admitted parol evidence of surprise, as a defence to a bill seeking a performance in specie; but he said, that those producing evidence of mistake or surprise, in opposition to a specific performance, undertake a case of great difficulty (*f*). In a later case, the Master of the Rolls admitted parol evidence on behalf of a defendant, to show a parol promise at the time of signing the agreement to vary the

(*b*) *Per* Ld. C. Baron, Davis *v.* Symonds, 1 Cox, 405. 407.

(*c*) See the cases cited *infra*, as to discharging or varying a written agreement by parol; and see Walker *v.* Walker, 2 Atk. 98; and see 6 Ves. jun. 334, n.

(*d*) 3 Atk. 388.

(*e*) 7 Ves. jun. 211.

(*f*) Marquis of Townshend *v.* Stangroom, 6 Ves. jun. 328.

terms of it, and upon the evidence he dismissed the bill for a specific performance of the written agreement (*g*).

22. So where by the *mistake* of the solicitor the agreement only required the purchaser to bear the expense of the conveyance, whereas the real agreement was, that he should also bear the expense of making out the title, the Master of the Rolls admitted parol evidence of the real agreement and of the mistake; and upon the strength of it, his Honor gave the plaintiff, the purchaser, his option to have his bill, which was for a specific performance according to the terms of the written agreement, dismissed, or to have the agreement performed in the way contended for by the seller (*h*).

23. But in a case before Sir W. Grant, where an estate was sold in lots, and at the end of some of the lots only it was stated that the timber was to be taken at a valuation, but there was a general condition that the timber should be paid for; the seller's bill for a specific performance, requiring the purchaser of several lots to pay for all the timber, was dismissed, and parol evidence of the declaration of the auctioneer that the timber on all the lots was to be paid for, was of course rejected. But the Master of the Rolls said he desired not to be understood as delivering any opinion whether, supposing these plaintiffs had been defendants, the evidence would or would not be admissible, but his opinion was, that clearly upon the part of a plaintiff seeking performance, it could not be received (*i*). The purchaser then filed a bill against the seller for a

(*g*) Clarke *v.* Grant, 14 Ves. jun. 519; and see 15 Ves. jun. 523.

(*h*) Ramsbottom *v.* Gosden, 1 Ves. & Beam. 165. See Flood *v.* Finlay, 2 Ball & Beatty, 9; Lord William Gordon *v.* Marquis of Hertford, 2 Madd. 106; Garrard *v.* Girling, 1 Wils. Ch. Cas. 460; 2 Swanst. 244.

(*i*) Higginson *v.* Clowes, 15 Ves. jun. 516.

specific performance, according to his construction that he was to pay for the timber on the lots only to which a stipulation to that effect was added. The seller, *as defendant*, offered parol evidence of the declaration by the auctioneer. The Vice-Chancellor, Sir T. Plumer, agreed that fraud would let in the evidence as a defence. He added, that upon clear evidence of mistake or surprise, that the parties did not understand each other, it is introduced, not to explain or alter the agreement, but, consistently with its terms, to show circumstances of mistake or surprise, making a specific performance, as in the case of fraud, unjust, and therefore not conformable to the principles upon which a court of equity exercises this jurisdiction. There was, however, considerable difficulty in the application of evidence under this head, calling for great caution, particularly upon sales by auction, least under this idea of introducing evidence of mistake, the rule should be relaxed, by letting it in to explain, alter, contradict, and in effect, get rid of a written agreement. In sales by auction, the real object, he said, of introducing declarations by auctioneers or other persons, is to explain, alter, or contradict the written agreement, in effect to substitute another contract; and, independent of authority, he should be much disposed to reject such declarations, as open to all the mischief against which the statute was directed, and also violating the rule of law which prevailed previously, *whether offered by a plaintiff seeking a performance, or by a defendant to get rid of the contract*, a distinction which it was difficult to adopt, where the evidence is introduced to show that the writing purporting to be a contract is not the contract; that there is no contract between them if that which was proved by parol did not make a part of it. That does not depend upon the principle on which a

defendant is permitted to show fraud, mistake, or surprise, collateral to and independent of the written contract, the object in the other case being to get rid of the contract by explaining it away. He did not recollect any instance that evidence offered in that view had been received, but there were cases in which it had been rejected; and he referred to Jenkinson *v.* Pepys, without noticing the distinction that there the parol evidence was offered by the plaintiff, and admitted that in Ramsbottom *v.* Gosden the parol evidence seemed to have had the effect, in some degree, of altering the written contract; but if the evidence there offered could fairly be brought under the head of mistake, that did not infringe upon the principle that parol evidence of fraud, mistake, or surprise, might be received as a defence. But no authority having decided that evidence could be received, except upon one of those grounds, and the declarations in this case being offered where the parties had contracted in writing upon a subject distinctly adverted to in their written contract, which made a provision for it (whether explicit and satisfactory was not material), the evidence of these declarations, he said, must be rejected, because there was no fraud, mistake, or surprise, and the evidence was offered to contradict, explain, or vary the written contract (*k*).

24. This judgment does not seem to be warranted by the principles of the Court. It is manifest that the learned judge was disposed to overrule the settled distinction. It is not necessary, in order to render the evidence admissible, that its object should be to show fraud, mistake, or surprise, collateral to or independent of the written contract, although that usually is its tendency;

(*k*) Clowes *v.* Higginson, 1 Ves. & Bea. 524; see and consider Croome *v.* Lediard, 2 My. & Kee. 251.

but the evidence is admissible where, by way of defence, the object is to get rid of the contract, by showing that it is not the contract really entered into by the parties, although where, even as a defence, the evidence is used to show that the terms of the contract are not the real ones, the evidence, when admitted, must be very powerful to induce the Court to believe that the terms expressed are not the real ones. In Ramsbotton *v.* Gosden, as the contract was silent as to the expense of making out the title, that of course would have fallen on the vendor; but that was a mistake, and contrary to the real contract, and parol evidence really to contradict the written agreement on this head was admitted as a defence.

25. So where lands, which upon admeasurement did not contain thirty-six acres, were described in a particular to contain forty-one acres by estimation, were the same more or less, and the purchaser in answer to a bill for a specific performance set up parol declarations of the auctioneer that he sold it for forty-one acres, and if it was less, an abatement should be made, the Master of the Rolls, Sir W. Grant, admitted the evidence and dismissed the bill, because after such a declaration made by the auctioneer, it was fraudulent and unfair in the seller to insist upon the execution of the contract, not giving the defendant the benefit of that declaration (*l*). And yet the subject was distinctly adverted to in the written contract, and indeed the provision was free from ambiguity, and the parol evidence *contradicted* it; whereas, in Clowes *v.* Higginson, there was an ambiguity—two statements, which might be considered at variance with each other—which the parol evidence would have *explained*. The evidence, it is

(*l*) Winch *v.* Winchester, 1 Ves. & Beam. 375.

submitted, in the latter case, was admissible in equity as a defence, simply on the ground that the plaintiff, who ought to come into equity with clean hands, sought to commit a fraud in evading to pay for the timber, although the auctioneer declared that it was to be paid for.

26. Yet in a later case (*m*), where there was a contract by each of two persons to buy an estate of each other, both estates to be valued by the same person, and both purchases to be completed on the same day; the case was a peculiar one, but it was decided that the contracts were distinct, although contained in the same paper, and notwithstanding the difference between having to pay for one estate with the price of another, and having to retain your own estate and yet to pay for another; and it was held by the Master of the Rolls, Sir John Leach, that no evidence *aliunde* could be received to give a construction to the agreement contrary to the plain import of those expressions, and he therefore rejected evidence tendered by the defendant to show that the real intention was to exchange the estates; and Lord Chancellor Brougham, upon appeal, without hearing the respondent's counsel, affirmed the decree. Parol evidence of matter collateral to the agreement might, he said, be received; but no evidence of matter *dehors* was admissible to alter the terms and substance of the contract. In the present case, the purpose for which the parol evidence was tendered on the part of the defendant was, not to enforce a collateral stipulation, but to show that the transaction was conducted on the basis of an exchange, a circumstance which, if true, was totally at variance with the language and plain import of the instrument. Nothing could be

(*m*) Croome *v.* Lediard, 2 Myl. & Kee. 251.

more dangerous than to admit such evidence, for, if the agreement between the parties were in fact conducted upon the basis of an exchange, why was the instrument so drawn as to suppress the real nature of the transaction?

27. The decision in the above case was probably well founded, although it is not perhaps altogether placed upon the true grounds. The evidence, it is submitted, was inadmissible, not because it was not to enforce a collateral stipulation, but because it did not prove that by fraud, mistake, or surprise, the agreement did not state the alleged real contract, viz., for an exchange between the parties. The defendant was an attorney, and fraud was not alleged, nor indeed was mistake or surprise, for he had himself prepared the agreement, and he preferred making it a mutual contract for sale and purchase, instead of an exchange, and of course he could not be permitted to alter its character by parol evidence of the mode in which the negotiation was conducted, and of the views of the parties, in order to avoid the consequences which attached to the nature of the contract which the parties, with their eyes open, having regard to other objects, had thought it proper to adopt. It seems important to refer this case to the true ground upon which it is to be supported, in order to prevent the rule from being misunderstood.

28. In a case where a written agreement for a lease was subsequently varied in part by parol, and upon a bill filed by the tenant for a specific performance of the original agreement, the landlord set up a subsequent parol waiver of the written agreement, and a new agreement entered into at his solicitor's, every term of which was to the disadvantage of the plaintiff, without any consideration for the variation; the Master of the Rolls decreed a specific performance according to the prayer

of the bill: he considered the case made out by the landlord *not a waiver of the contract*, but a variation by parol which had not been acted upon, and which was made without consideration (*n*). The first parol variation, it may be observed, was admitted, and the plaintiff was willing to execute it.

29. Where after the written agreement for sale was signed a variation was made and reduced into writing, but not signed, the purchaser having filed a bill for a specific performance, either with or without the variation, the Court put the seller to his election, and he having declined to elect, decreed a performance of the original agreement without the variation (*o*).

30. The case before Lord Eldon (*p*) shows the rule of equity in a strong light. The landlord filed a bill for a specific performance of the written agreement, varied by the parol evidence; the tenant filed a cross-bill for a specific performance of the written agreement. The result was, that both bills were dismissed; the first, because parol evidence was not admissible as a foundation for a decree *enforcing* a specific performance; the second, on the ground that such evidence was admissible to rebut the equity of the plaintiff in the second bill.

31. A similar case appears to have been decided by Lord Chancellor Macclesfield. The case has, I believe, never been cited, and it requires some attention to get at the facts. They appear, however, to be, that the plaintiff in the first bill sought a specific performance of an agreement by him to grant a lease to the defendant. The defendant set up a parol agreement, by which he

(*n*) Price *v.* Dyer, MS. 17 Ves. jun. 356; Robinson *v.* Page, 3 Russ. 114.

(*o*) Robinson *v.* Page, 3 Russ. 114.

(*p*) Lord Townshend *v.* Stangroom, 6 Ves. jun. 328.

was to have liberty to grub bushes, and exhibited a cross-bill for a performance *in specie* of the written agreement, with the addition of a clause to grub bushes according to the parol agreement, and both the bills were dismissed, but without costs (*q*).

32. Upon the admissibility of parol evidence, as a defence to a bill seeking a specific performance, Lord Redesdale has forcibly observed, that it should be recollected what are the words of the statute: "No person shall be charged upon any contract or sale of lands, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." No person shall be charged with the execution of an agreement who has not, either by himself or his agent, signed a written agreement; but the statute does not say, that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, "That is not the agreement meant to have been signed." Such a case is left as it was by the statute: it does not say, that a written agreement shall bind, but that an unwritten agreement shall not bind (*r*). And nearly the same observations upon the negative words of the statute, were made by the Lord Chief Baron Skinner, in the great case of Rann and Hughes (*s*).

33. But if parties enter into an agreement which is correctly reduced into writing, and at the same time add a term by parol, equity cannot look out of the agreement, although the person insisting upon the parol

(*q*) Hosier *v.* Read, 9 Mod. 86. I have searched the Register's books for this case without success.

(*r*) 1 Scho. & Lef. Rep. 39.

(*s*) 7 Term Rep. 350, n.

agreement is a defendant, and sets it up as a bar to the aid of the Court in favour of the plaintiff.

34. Thus, in Omerod *v.* Hardman (*t*), the vendor filed a bill for a specific performance. It was not mentioned in the written agreement at what time the purchaser was to take possession of the estate; but the purchaser, the defendant, offered parol evidence to show that it was at the same time agreed, though not made part of the written agreement, that he should be let into possession at a stated time; and he resisted a performance of the agreement, on the ground of possession not having been delivered to him according to the parol agreement. Mr. Justice Chambre objected to the evidence being read. He said, that it was urged for the defendant, that evidence may be read where the parol agreement is not inconsistent with the written agreement. This, (that is, the parol agreement, in the case before him,) he added, was to further the written agreement, and to secure what was through carelessness omitted to be provided for in the written agreement, viz. delivery of possession, according to the custom of the country. Mr. Baron Graham said, that the parol agreement could only be admitted where the written agreement was not drawn according to the intention of the parties at the time. You cannot by parol add any thing to what was the real agreement at the time, after that has been correctly reduced into writing. And he entirely agreed with Mr. Justice Chambre, that the parol could not be made to form part of the written agreement.

---

35. Lord Hardwicke is reported (*u*) to have said, that

(*t*) 5 Ves. jun. 722; and see pl. 28, *supra*.

(*u*) 3 Atk. 389, 390; but see 4 Bro. C. C. 518; 6 Ves. jun. 335, n.; 1 Scho. & Lef. 38.

a plaintiff seeking a specific performance might enter into parol evidence to show that the defendant was to pay the rent clear of taxes, no mention being made of taxes in the agreement; because it was an agreement executory only, and as, in leases, there were always covenants relating to taxes, the Master would inquire what the agreement was as to taxes, and therefore the proof would not be a variation of the agreement. And this extra-judicial opinion appears to have been approved of by two enlightened Judges (*x*), one of whom (*y*) laid it down, that parol evidence was admissible to prove collateral matters, concerning which nothing was said in the agreement, as who was to put the house in repair, or the like.

36. But notwithstanding these *dicta*, it has been expressly decided, that parol evidence of even collateral matters, such as the payment of taxes, &c. which are of the essence of the agreement, is inadmissible both at law and in equity. Thus, in Rich *v.* Jackson (*z*), it appeared that William Stiles and William Jackson entered into a treaty for the lease of a house belonging to Stiles, and in a conversation between them on the subject, Jackson offered 80*l.* a year rent, and that he would pay all the taxes, which Stiles agreed to accept. An agreement was drawn up by Jackson, in his own hand-writing, in which no notice was taken of taxes. Rich, who claimed under Stiles, refused to execute a lease unless the rent was made payable clear of taxes, and Jackson, the defendant, who claimed under William Jackson, refused to accept such a lease. Jackson having paid some money for land-tax, brought an action in the Court of Common Pleas for the recovery of it, the

(*x*) See 2 Blackst. 1250; 7 Ves. jun. 221.

(*y*) Mr. Justice Blackstone.

(*z*) 4 Bro. C. C. 514; 6 Ves. jun. 334, n.

plaintiff having refused to deduct it in the payment of the rent. The cause was tried at Guildhall, before Lord Rosslyn, then Lord Chief Justice of the Common Pleas. The defendant was suffered to give parol evidence of the real agreement, and the Judge gave credit to the veracity of the witnesses, notwithstanding which he rejected the evidence, and directed a verdict to be given for Jackson, with costs; and, upon an application to the Court of Common Pleas, the Court approved of the verdict, and refused a rule to show cause why the same should not be set aside.

37. In this branch of the case, therefore, the point was solemnly decided in a court of law, and the same determination was afterwards made upon the same case in a court of equity. Rich being defeated at law, filed his bill for a specific performance of the agreement, varied by the parol evidence; and the cause came on to be heard before Lord Rosslyn, then Lord Chancellor, who said, that the prior conversations, and the manner of drawing up the agreement by one party, and signing it by another, would have no influence. The real question was, whether in equity, any more than at law, the evidence ought to be admitted; whether there is any distinction in a court of equity, where a party comes to enforce a written agreement by obtaining a more formal instrument, and to add, in doing that, a term not expressed in the written agreement, and of such a nature as to bear against the written agreement. He had looked into all the cases, and could not find that the Court had ever taken upon itself, in executing a written agreement by a specific performance, to add to it by any circumstance that parol evidence could introduce. And he accordingly dismissed the bill, but without costs.

38. Indeed Lord Rosslyn appears to have made a similar decision in a case prior to that of Rich *v.* Jackson. The

case to which I allude is Jordan *v.* Sawkins (*a*); where a bill was filed for a specific performance of a lease, and it was stated, that there was a memorandum annexed to the original agreement, that the tenant (I) was to pay the land-tax (which, it must be presumed, was not signed, and was therefore only tantamount to a parol agreement). The cause was heard before the Lords Commissioners Eyre, Ashhurst, and Wilson, who decreed a performance of the contract with the variation, that it was to be at a clear rent of 40*l. without deducting land-tax.* The cause was re-heard before Lord Rosslyn, who said, that if the agreement had been carried into execution as it originally stood, the landlord must have paid the land-tax. The Court could not specifically perform an agreement with a variation, and he therefore reversed the decree, and dismissed the bill.

39. As a term agreed upon by parol cannot be added to a written agreement, by a parity of reason a written agreement cannot be *varied* by parol.

This was decided by Lord Thurlow in a branch of the last-mentioned case (*b*). It appeared that a lease was agreed, by writing, to be granted of a house for twenty-one years, to commence from the 21st of April 1791, and that it was afterwards agreed by parol, that the lease should commence on the 24th of June instead of the 21st of April. To a bill filed by the tenant for a specific performance of the written agreement, varied by the parol agreement, the statute of frauds was pleaded,

(*a*) Jordan *v.* Sawkins, 3 Bro. C. C. 388; 1 Ves. jun. 402; and see O'Connor *v.* Spaight, 1 Scho. & Lef. 305; and see the cases *infra*, as to the *discharge* of a parol agreement.

(*b*) See 7 Ves. jun. 133.

(l) In the Report, the name of the landlord is, by mistake, inserted for that of the tenant.

and Lord Chancellor Thurlow held, that the different period of commencing the lease made a material variation, as it gave the estate from the owner for so many months longer, and therefore he allowed the plea.

40. So, in the case of Price *v.* Dyer (*c*), which has already been mentioned, where a parol waiver of a written agreement was set up as a defence to a specific performance, Sir William Grant was of opinion, that there was not an abandonment of the agreement, but merely a variation, and that as the variation was without consideration, and had not been acted upon, it was not a good defence to the plaintiff's demand. After premising that the original written agreement was binding, and had not, in his opinion, been waived, he added, that here was a mere variation. The question then was as to the variation. His opinion was, that verbal variations were not a sufficient bar where the situation of the parties in all other respects remained unaltered. The defendant had lost nothing; would lose nothing. He had only lost what he had gratuitously gained. A specific performance of the original agreement was decreed, but without costs.

41. So in Goss *v.* Lord Nugent (*d*), a case at law, where the contract stipulated for a good title to several lots, but the purchaser, after the contract, and with notice of a defect in the title to one lot, waived the objection, and entered into possession, but afterwards resisted the contract, it was held, that the seller could not maintain an action for the purchase-money, on account of the statute of frauds.

The Court observed, that by the general rules of the common law, if there be a contract which had been reduced into writing, verbal evidence was not allowed to

(*c*) MS. Rolls, 17 Ves. jun. 356.

(*d*) 5 Barn. & Ell. 58; 2 Nev. & Mann. 28.

be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement had been reduced into writing, it was competent to the parties, at any time before breach of it by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or vary or qualify the terms of it, and thus to make a new contract; which was to be proved partly by the written agreement, and partly by the subsequent verbal terms, engrafted upon what would be thus left of the written agreement. But the present contract was subject to the control of the statute of frauds.

As this was only a waiver and abandonment of a part of the agreement, it might be said by the plaintiff that this did not in any degree vary what was to be done by either party; that the same land was to be conveyed, there was to be the same extent of interest in the land, and it was to be conveyed at the same time, and the same price was to be paid, and that it was only an abandonment of a collateral point. But the Court thought that the object of the statute was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which was sought to be enforced must be proved by writing only. In the present case the written contract was not that which was sought to be enforced, it was a new contract which the parties had entered into, and that new contract was to be proved partly by the former written agreement, and partly by the new verbal agreement; the present contract, therefore, was not a contract entirely in writing; and as to the title being collateral to the land, the title appeared to the Court to be a most essential part of the contract; for if there was not a good title the land might, in some

instances, better not be conveyed at all. But the Court added, that their opinion was not formed upon the stipulation about the title being an essential part of the agreement, but upon the general effect and meaning of the statute of frauds, that the contract in question was not wholly one in writing.

42. The Court, in the above case, observed, that whether the seller might not have relief in a court of equity they gave no opinion. Now, although the general rule of law upon the statute is the same at law as in equity, yet a purchaser is at liberty to accept a defective title if he think proper; and if, as in the above case, he do so, and thereupon is let into possession, equity would bind him by his act, and compel him to complete the purchase.

43. In the above case (*e*) the Court referred to the cases at law on contracts within the statute of frauds, where verbal evidence has been allowed to prove that the time for the performance of the contract had been enlarged by a verbal agreement (*f*), and where the decisions proceeded on the ground that the original contract continued, and that it was only a substitution of different days of performance. It was not necessary, the Court said, to say whether those cases were rightly decided. If they were so, still the case before them was a different case, for there, without doubt, the terms of the original contract were varied.

44. And in a later case at law, it was decided that the time could not be enlarged by parol (*g*). The agreement was, that the assignment should be made and possession delivered on the 3d of May. Neither

(*e*) 2 Nev. & Mann. 35.

(*f*) Warren *v.* Staggs, 3 Term Rep. 591, cited; Thresh *v.* Rake, 1 Esp. N. P. C. 53; Cuff *v.* Penn, 1 Man. & Selw. 21.

(*g*) Stowell *v.* Robinson, 3 Bing. N. C. 928.

party was ready to carry the contract into effect on that day, and the purchaser on and subsequently to that day endeavoured to remove an obstacle in the way of the title, and within what the Court considered a reasonable time, the objection would have been removed, had not the purchaser demanded a return of the deposit. So that the simple question arose, Can the day for the completion of the purchase of an interest in land inserted in a written contract be waived by a parol agreement, and another day be substituted in its place, so as to bind the parties? And it was held it could not. The Court could not get over the difficulty that to allow the substitution of a new stipulation as to the time of completing the contract, by reason of a subsequent parol agreement between the parties to that effect, in lieu of a stipulation as to time, contained in the written agreement signed by the parties, was virtually and substantially to allow an action to be brought on an agreement relating to the sale of land, partly in writing signed by the parties, and partly not in writing, but by parol only, and amounted to a contravention of the statute of frauds. They thought that the reasoning upon which the Court of King's Bench proceeded in Goss *v.* Lord Nugent went directly to the point, that the evidence then under consideration was inadmissible.

45. These decisions will drive many cases into equity, where, as we shall hereafter see, time may be enlarged or waived by the acts of the parties, or even the nature of the title may induce the Court to consider it not of the essence of the contract (*h*).

Where the time is varied by the agreement of the parties, courts of equity, which, according to their general rule, consider themselves as having full power to

(*h*) See chap. 5.

open the time appointed, would of course adopt that which the parties themselves had agreed upon, although only by parol. And they might fairly consider it, as heretofore it was considered even at law, as not varying the substance of the contract itself, which is still to be executed, although at the enlarged time.

46. Where the parol variation has been in part performed, equity, acting upon its general principles, will decree a specific performance of the agreement as varied by parol.

47. Thus in a case reported by Viner (*i*): *A* leased a house to *B* for eleven years, and was to allow 20 *l.* to be laid out in repairs; the agreement was reduced into writing, and signed and sealed by both parties. *B* repaired the house, and finding it to take a much greater sum than the 20*l.*, told *A.* of it, and that he would nevertheless go on and lay out more money if he would enlarge the term to twenty-one years, or add fourteen, or as many as *B* should think fit. *A* replied, that they would not fall out about that, and afterwards declared that he would enlarge the term, without mentioning the term in certain. The question was, whether this new agreement, made by parol, which varied from the written agreement, should be carried into execution, notwithstanding the statute of frauds. The Master of the Rolls said, that before the statute, a written agreement could not be controlled by a parol agreement, contrary to it, or altering it; *but this was a new agreement*, and the laying out the money was a part-performance on one part, and ought to be carried into execution; and built his decree on these cases: first, where a parol agreement was for a building lease, and before it was reduced into writing, the lessee began to build, and after dif-

(*i*) Anon. 5 Vin. 522, pl. 38; 4 Geo. 1.

fering on the terms of the lease, the lessee brought a bill, and the lessor insisted on the statute of frauds; the Lord Keeper dismissed the bill, but the plaintiff was relieved in *Dom. Proc.:* and the second was a case in Lord Jefferies's time.

48. So, in the case of Legal *v.* Miller (*k*): The agreement was for taking a house at 32 *l.* per annum, and part of the agreement was, that the owner should put the house in repair. It was afterwards discovered not to be worth while barely to repair the house, but better to pull it down; and, therefore, without any alteration in the written agreement, the house was pulled down by consent of the tenant, apprised of the great expense it would be to the landlord; and an agreement was made by parol only, on the part of the tenant, to add 8 *l.* per annum to the 32 *l.* The *tenant* brought a bill for specific performance, on the foot of the written agreement, by which he was to pay only the 32 *l.* rent. The defendant, by his answer, set up the parol agreement. Sir John Strange said, such evidence is frequently suffered to be read, especially to *rebut such an equity* as now insisted on by the bill: as where the agreement is in part carried into execution, parol evidence is allowed to prove that; *or where it is a hard agreement; and the Court may, therefore, decree against the written agreement, as in* 1 *Vern.* 240, (*Gorman* v. *Salisbury*); and the single question being here, whether the Court should decree a specific performance of the agreement the plaintiff insists upon, and being satisfied, from the parol evidence, that it should not, the Court must dismiss the bill. And in the subsequent case of Pitcairne *v.* Ogbourne (*l*), Sir John Strange referred to this decision, and approved of it.

(*k*) 2 Ves. 299. (*l*) 2 Ves. 375.

49. And in Price *v.* Dyer (*m*), Sir Wm. Grant said, that variations acted upon as in Legal *v.* Miller, would be a bar; that is a fraud.

50. The result of the authorities as to a parol *variation*, appears to be,

1st, That evidence of it is totally inadmissible at law.

2dly, That in equity the most unequivocal proof of it will be expected.

3dly, That if it be proved to the satisfaction of the Court, yet it cannot be used as a defence to a bill demanding a specific performance of the original contract alone, or as a ground for granting a specific performance of the original contract, with the variation introduced by parol, unless there has been such a part-performance of the new parol agreement, as would enable the Court to grant its aid in the case of an original independent agreement, and then, in the view of equity, it is tantamount to a written agreement (*n*), and effect will be given to it, either in favour of a plaintiff or a defendant.

51. But we must bear in mind that some variations not admitted at law, for example, the title and time, equity has always, exercising its peculiar jurisdiction, deemed to be subjects which the parties might waive by their acts.

52. And even where part of the subject matter of the agreement might have been valid by sale and delivery, and an agreement in writing was not requisite, yet if the agreement be entire, it must so continue, and it cannot be separated or altered otherwise than by writing (*o*).

(*m*) *Supra*, 238.

(*n*) See Van *v.* Corpe, 3 Myl. & Kee. 277.

(*o*) Harvey *v.* Graham, 5 Adol. & Ell. 61.

## SECTION IX.

### OF THE ADMISSIBILITY OF PAROL EVIDENCE TO ANNUL WRITTEN INSTRUMENTS.

1. *Principle of the rule: parol waiver.*
2. *Gorman* v. *Salisbury.*
3. *Buckhouse* v. *Crossby.*
5. *Davis* v. *Symonds.*
6. *Price* v. *Dyer.*
7. *Robinson* v. *Page.*
8. *Goss* v. *Lord Nugent.*
9. *Result.*
10. *Waiver of* parol *agreement cannot be proved.*

1. The rule of law is, *nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine quo ligatum est:* and therefore a covenant under seal not broken cannot be discharged by parol agreement (*a*). And in general, as we have seen, an agreement in writing cannot be controlled by averment of the parties, as it would be dangerous to admit such nude averments against matter in writing (*b*). This was an imperative rule, previously to the statute of frauds. That Act provides that no action shall be brought upon any agreement made upon any contract or sale of lands, or any interest in or concerning the same, unless the agreement is in writing and signed by the party to be charged. A parol waiver, like a written agreement not under seal, is a simple contract; and a parol waiver not being a contract for sale, may be said not to fall within the provision of the statute. But Lord Hardwicke observed, that an agreement to waive a purchase

(*a*) Kaye v. Waghorn, 1 Taunt. 428.

(*b*) Countess of Rutland's case, 5 Co. 25 b; Blemerhasset v. Pierson, 3 Lev. 234.

contract is as much an agreement concerning lands as the original contract (*c*). The statute excludes parol agreements as to lands, and makes written agreements *primâ facie* valid. No action is to be brought upon any agreement made upon any contract or sale of lands, &c., unless in writing. Now a waiver *is* an agreement made upon a contract or sale of lands, viz., an agreement to relinquish the benefit of such an agreement; and although the statute only prohibits the bringing any action unless the agreement is in writing, yet that may well be construed to prevent the setting up a parol agreement as a defence to an action upon a valid written agreement. The agreement must be in writing, or no action can be maintained upon it. Does not this, by a necessary implication, exclude a parol agreement which is to waive a written one? Is not the like mischief to be guarded against in each case?

2. In a case of which there is a short note in Vernon (*d*), the precise point occurred, and the Lord Keeper held, that the agreement might be discharged by parol, and therefore dismissed the bill, which was brought to have the agreement executed *in specie*.

3. Then came the case of Buckhouse and Crossby, before Lord Hardwicke (*e*), where, to a bill filed by a purchaser for a specific performance, the vendor insisted the contract had been *discharged* by parol, and the case of Gorman *v.* Salisbury was cited by his counsel, as an authority in his favour. The Lord Chancellor, under the circumstances, decreed for the plaintiff, with costs; and declared, that though he would not say that a contract in writing would not be waived by parol, yet

(*c*) 2 Eq. Ca. Abr. 33.

(*d*) Gorman *v.* Salisbury, 1 Vern. 240. I could not discover any trace of this cause in the Register's book.

(*e*) 2 Eq. Ca. Abr. 32, pl. 44; 10 Geo. II.

he should expect, in such a case, very clear proof; and the proof, in the present case, he thought very insufficient to discharge a contract in writing; and observed, that the statute of frauds and perjuries requires that "all contracts and agreements concerning land should be in writing." Now, an agreement to waive a purchase contract is as much an agreement concerning lands as the original contract. However, he said, there was no occasion then to determine this point. Lord Hardwicke's observation, that the statute requires all contracts to be in writing, is correct; for, if they are not, they cannot be enforced; but the clause is, as we have seen, merely negative, that no agreement concerning land shall be enforced unless it is in writing.

4. In another case, Lord Hardwicke is reported to have said, that it was certain that an interest in land *could not be parted with, or waived by naked parol, without writing*; yet articles might, by parol, be so far waived, that if the party came into equity for a specific execution, such parol waiver would rebut the equity which the party before had, and prevent the Court from executing them specifically (*f*).

5. In Davis *v.* Symonds (*g*), where it was insisted that the agreement was waived, and that such waiver might be by parol, the Lord Chief Baron observed, that it certainly might be so; the waiver was, in its own nature, subsequent to and necessarily collateral to the agreement, and therefore could never bear any relation to the rule of evidence forbidding parol evidence to alter the agreement. There might, indeed, he added, have been another rule that a written agreement should not be waived by parol, but, in fact, courts of equity did not consider themselves as bound by any such rule;

(*f*) Bell *v.* Howard, 9 Mod. 302; and see Earl of Anglesea *v.* Annesley, 4 Bro. P. C. 421.

(*g*) 1 Cox, 402, 1787.

and it was then clear that a written agreement might be waived so.

6. And it has been the prevailing opinion that a written contract may, in equity, be discharged by a parol agreement (*h*). And in the case of Price *v.* Dyer (*i*), before referred to, Sir William Grant said, that he inclined to think the effect of a clear abandonment by parol, would be to discharge the written agreement. But in the cases which had occurred, the parol agreement put an end to the transaction, and restored the parties to their original situation.

7. And in a case before Lord Lyndhurst, when Master of the Rolls (*k*), he observed, that it was said, and authorities were cited to show that parol waiver and abandonment might be set up as a defence to a bill for specific performance. Unquestionably, he added, waiver even by parol would be a sufficient answer to the plaintiff's claim, but the circumstances of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into.

8. In a late case at law (*l*) the Court observed, that the statute does not say in distinct terms that all contracts concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing, and as there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived

(*h*) 1 Ves. jun. 404, 4 Bro. C. C. 519; 6 Ves. jun. 337, n.; 9 Ves. jun. 250; 3 Wooddes, 428; s. 4. Rob. stat. of frauds, 89; Inge *v.* Lippingwell, 2 Dick. 469.

(*i*) MS. Rolls; S. C. 17 Ves. jun. 356.

(*k*) Robinson *v.* Page, 3 Russ. 119.

(*l*) Goss *v.* Lord Nugent, 5 Barn. & Adol. 58; 2 Nev. & Mann. 34.

and abandoned by a new agreement not in writing, so so as to prevent either party from recovering on the contract which was in writing. It was not, however, necessary, the Court added, to give an opinion upon that point.

9. The result is, that an abandonment of the whole agreement clearly made out—for the Court will look at the evidence with great jealousy—is a good *defence* in equity, but that it is doubtful whether such a defence is available at law; perhaps the better opinion is that it is inadmissible at law.

10. In considering the point under discussion, the reader will be careful not to confound the foregoing cases with the case of Walker *v.* Constable (*m*). There the *original* agreement was a *parol* agreement; and the question was, whether, being abandoned, parol evidence could be given of it. Lord C. J. Eyre held, that the existence and the terms of the agreement must be proved before it could be proved to be abandoned, and upon that it was sufficient to say, that *being in writing* (1) the instrument itself must be produced, and parol evidence of it was inadmissible.

(*m*) 2 Esp. 659; 1 Bos. & Pull. 306. See Adams *v.* Fairbain, 2 Stark. 277.

(1) That is, in contemplation of law, for it is not deemed an agreement unless reduced into writing.

## SECTION X.

### OF PAROL EVIDENCE TO EXPLAIN AMBIGUITIES.

1. *Sorts of ambiguities.*
2. *Latent ambiguity cleared up by parol evidence.*
4. *Patent ambiguity not.*
7. *Explanation of words of trade in Act of Parliament.*

8. *General words not restrained by parol.*
12. *Contra in equity upon mistake.*
13. *Situation of parties, &c. looked at where there is ambiguity.*
15. *Ancient statute: contemporaneous usage.*
16. *Whether price can be looked at where there is an ambiguity.*

1. This branch of our subject, although the most trite, is not perhaps, therefore, less difficult. Bacon says (*a*), there are two sorts of ambiguities of words, the one is *ambiguitas patens*, and the other *latens*. *Patens*, he adds, is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seems certain, and without ambiguity, for anything that appears upon the instrument, but there is some collateral matter out of the deed that breeds the ambiguity.

2. A latent ambiguity may be assisted by parol evidence, because the ambiguity being raised by parol, may fairly be dissolved by the same means, according to the general rule of law. Therefore, if, previously to the statute, a man having two manors, both called Dale, had conveyed the manor of Dale to another, evidence might have been given to prove which manor was intended to pass (*b*), and such evidence is still admissible: this has been repeatedly decided (*c*). So, on the same principle, parol evidence is always received to show what is parcel or not of the thing conveyed (*d*).

(*a*) Max. p. 82; Reg. 23.

(*b*) 2 Ro. Abr. 676, pl. 11; and see Lord Cheney's case, 5 Rep. 68; Altham's case, 8 Rep. 155 a; and Harding *v.* Suffolk, 1 Cha. Rep. 74.

(*c*) Jones *v.* Newman, 1 Blackst. 63; 3 Wils. 276; 2 Atk. 239, 240. 373; 1 Bro. C. C. 341.

(*d*) Quaintrell *v.* Wright, Bunb. 274; Longchamps *v.* Fawcett, Peake's Ca. 71; Doe *v.* Burt, 1 Term Rep. 701; Anon. 1 Str. 95; but where there is property to satisfy the words of the will, it cannot be shown by parol evidence that the testator meant to pass some not within the description. See Doe *v.* Oxenden, 3 Taunt. 147; and see and consider Boys

And if an agreement refer to a plan as an existing document upon which the contract is founded, parol evidence is admissible for the purpose of identifying the plan (*e*).

3. In some cases a latent ambiguity may be fatal. Parol evidence may be adduced to prove the ambiguity, where none sufficiently satisfactory can be offered to explain it (*f*). And to render parol evidence admissible in these cases, a clear latent ambiguity must be first shown. Evidence which merely raises a conjecture is insufficient (*g*).

4. But although a latent ambiguity may be aided by parol evidence, yet a patent ambiguity cannot be aided by extrinsic evidence, because that would in effect be to pass without deed, what by the law can be passed by deed only. Of this, Bacon observes, infinite cases might be put; for it holdeth generally, that all ambiguity of words, by the matter within the deed, and not out of the deed, shall be helped by construction, or in some cases by election, but never by averment, but rather shall make the deed void for uncertainty.

5. In Mansell *v.* Price, personal estate was settled in trust for Price the defendant, and Catherine his wife, for their lives, and the life of the survivor of them, and then for their issue, with a power to the wife to dispose of 1,500*l.*, part of the monies, to any persons she pleased. She exercised this power, by giving the money to Sir Edward Mansell, in trust to pay 1,000*l.* to *A*, when she should attain twenty-one, or marry; but if she died

*v.* Williams, 2 Russ. & Myl. 689.

(*e*) Hodges *v.* Horsfall, 1 Russ. & Myl. 116.

(*f*) Thomas *v.* Thomas, 6 Term Rep. 671; see Bradshaw *v.* Bradshaw, 2 You. & Coll. 72; Alexander *v.* Crosbie, Rep. t. Sugd. 145.

(*g*) See Lord Walpole *v.* Earl of Cholmondeley, 7 Term Rep. 138.

before twenty-one, or marriage, then it should be to such uses as *B* should appoint. And the other 500*l.* she directed to be paid to *C*, in exactly the same terms as before. The bill was filed by the guardian of *A* and *C*, infants, to have the money paid, and to be put out for them to have the interest thereof immediately. For the defendant Price, it was insisted that he was entitled to the interest of 1,500*l.*, until it should become payable. The first question was, whether parol evidence could be admitted to explain the intention of Catherine Price what should become of the interest till the times of payment; for if that could be admitted, there was sufficient to prove the husband should not have it. And the Master of the Rolls was of opinion that such evidence could not be read (*h*).

6. So in Kelly *v.* Powlet (*i*), the question was, whether plate passed under a bequest of household furniture. The drawer of the will said, it was *not* intended; but his evidence was refused, and the plate was held to pass.

7. Again, in a case in the Exchequer (*k*), it appeared that, by an act of parliament, cast plate-glass was directed to be *squared* into plates of certain dimensions. The question was, whether certain plates were in the shape directed by the act. The Attorney-general at the trial produced books explaining the process and terms of the art in the manufacture, and the defendants

(*h*) MS. T. Term, 8 & 9 Geo. II.; and see Hart *v.* Durand, 3 Anstr. 684; Chamberlaine *v.* Chamberlaine, 2 Freem. 52; Ulrich *v.* Ditchfield, MS. 2 Atk. 372, where the evidence was not received.

(*i*) 1 Bro. C. C. 476, cited; Ambl. 605, reported, which I conceive has overruled Pendleton *v.* Grant, 1 Eq. Ca. Abr. 230, pl. 2; 2 Vern. 517; and see 1 Bro. C. C. 350, 351; Seymour *v.* Rapier, Bunb. 28; Doe *v.* Bland, 11 East, 441.

(*k*) Attorney-General *v.* the Cast Plate-Glass Company, 1 Anstr. 39; see Clayton *v.* Gregson, 5 Adol. & Ell. 302.

offered evidence to prove the technical meaning in the trade of the word *squaring* glass; the evidence was, however, refused, and a verdict found against the defendants: and upon a motion for a new trial, Lord Chief Baron Eyre said: In explaining an act of parliament, it is impossible to contend that evidence should be admitted, for that would be to make it a question of fact, in place of a question of law. The judge is to direct the jury as to the point of law, and in doing so must form his judgment of the meaning of the Legislature, in the same manner as if it had come before him on demurrer, when no evidence would be admitted. Yet on a demurrer a judge may well inform himself from dictionaries or books, on the particular subject concerning the meaning of any word. If he does so at *nisi prius*, and shows them to the jury, they are not to be considered as evidence, but only as the grounds on which the judge has formed his opinion, as if he were to cite any authorities for the point of law he lays down.

8. So parol evidence is inadmissible to restrain the legal operation of general words in an instrument. Therefore it cannot be admitted to prove, that a particular estate was not intended to pass under general words sufficient to comprise it.

9. Thus, in Davis *v.* Thomas (*l*), a husband and wife being seised of settled estates in the county of Pembroke, bought an estate in the same county, called Rigman Hill, which was conveyed to them, and the survivor in fee. The husband having prevailed on the wife to join with him in suffering a recovery of the settled estates, in order to enable him to mortgage them, gave the attorney employed to suffer the recovery a particular description of the settled estates, which did not comprise

(*l*) Reg. Lib. 1757, fol. 33, 34. See Thomas *v.* Davis, 1 Dick, 301, *et infra*.

Rigman Hill; and it *clearly* appeared, from several circumstances, that he had not any intention to comprise that estate, the title-deeds of which were in his wife's custody. The attorney, fearful of not comprising the whole estate, and not knowing that Rigman Hill had been purchased, added general words sufficient to comprise that estate. The recovery was suffered to the use of the husband in fee, who afterwards mortgaged the estate by the same description. The husband by his will gave all his estates to his wife for life. She survived him, and after her death the heir at law of the husband brought an ejectment against the persons claiming Rigman Hill, under the wife, which came on to be tried at the April Great Sessions for Pembrokeshire, in 1756. Parol evidence was offered by the defendant, to show that it was not intended to comprise Rigman Hill in the recovery and mortgage; but it was refused, and the plaintiff had a verdict.

10. So in Shelling *v.* Farmer (*m*), where to a release in pursuance of an award, the plaintiff would have called the arbitrators to prove that they refused to take into consideration a particular fact, although the award and release contained *general words* sufficient to take in all; Eyre, C. J., would not suffer any evidence to be given to contradict the deed.

11. And in the recent case of Butcher *v.* Butcher (*n*), *general words* in a release were held not to extend to a certain bond of indemnity: and Lord Chief Justice Mansfield, at Guildhall, refused to admit parol evidence to show the intention of the releasor to release the bond. And upon a motion for a new trial, the Court of Common Pleas intimated a strong opinion, that no

(*m*) 1 Str. 646. See Strode *v.* Lady Falkland, 2 Vern. 621; 3 Cha. Rep. 90; and Goodinge *v.* Goodinge, 1 Ves. 231.

(*n*) 1 New Rep. 113.

evidence could be admissible to explain the release, since the doubt, if any, was *ambiguitas patens*; and in consequence of this intimation the counsel for the plaintiff declined arguing the case.

12. But, as we shall presently see, the effect of general words may be restrained in a court of equity, on the ground of mistake, where it is satisfactorily proved.

13. It still remains to observe, that courts both of law and equity constantly advert to the situation of the parties, &c. in order to enable them to construe ambiguous or ill-penned instruments, although parol evidence of the intention of the parties could not be received, and this has been sanctioned by a leading case in the House of Lords (*o*).

14. In one case (*p*), where it was doubtful whether a covenant for renewal extended to a perpetual renewal, and the parties had renewed four times successively under the covenant, Lord Mansfield and the other Judges of the King's Bench held, that the parties themselves had put a construction upon the covenant, and were therefore bound by it. Lord Alvanley, who was in the cause, said, when Master of the Rolls, that he was never more amazed than at this decision, and that Mr. Justice Wilson, who argued with him, was astonished at it (*q*); and he more than once expressed his marked disapprobation of this doctrine (*r*). Lord Eldon (*s*), and and Sir Wm. Grant (*t*), have both also dissented from

(*o*) Sir John Eden *v.* the Earl of Bute, 7 Bro. P. C. 745. See Countess of Shelburne *v.* the Earl of Inchiquin, 1 Bro. C. C. 338.

(*p*) Cook *v.* Booth, Cowp. 819; and see Blackst. 1249; 1 New Rep. 42. See Peake on Evid. ch. 2.

(*q*) Baynham *v.* Guy's Hospital, 3 Ves. 295; and see 2 Ves. jun. 448.

(*r*) See Eaton *v.* Lyon, 3 Ves. jun. 690.

(*s*) See Iggulden *v.* May, 9 Ves. jun. 325.

(*t*) See Moore *v.* Foley, 6 Ves. jun. 232.

it; and Lord C. J. Mansfield, in a late case, observed, that it was a case which had been impeached upon all occasions (*u*). And it appears to be now clearly settled, that in the *construction* of an agreement or deed, the acts of the parties cannot be taken into consideration (*x*).

15. Where, however, the words of an *ancient* statute or instrument are doubtful, *contemporaneous* usage, although it cannot overturn the clear words of the instrument, will be admitted to explain it; for *jus et norma loquendi* is governed by usage, and the meaning of things spoken or written must be as it hath constantly been received to be by common acceptation (*y*). This has been determined in many cases, and such evidence accordingly received (*z*). And in a late case on this subject, Lord Ellenborough said, it was in constant practice at *nisi prius* to receive evidence of usage to explain doubtful words in old instruments; and it would be difficult to show any just ground of distinction between the information which a Judge might receive to aid his judgment in bank and at *nisi prius* (*a*).

16. In a late case (*b*), where a question arose upon the meaning of the words "keep in order," in an agreement to plant trees upon land, Mr. Baron Bayley said,

(*u*) See 2 New Rep. 452.

(*x*) See Clifton *v.* Walmsley, 5 Term Rep. 564; and see Iggulden *v.* May, 7 East, 237.

(*y*) Sheppard *v.* Gosnold, Vaugh. 169.

(*z*) Rex *v.* Varlo, Cowp. 246; Gape *v.* Handley, 3 Term Rep. 228, n.; Blankley *v.* Winstanley, 3 Term Rep. 279; Rex *v.* Bellzinger, 4 Term Rep. 810; Rex *v.* Miller, 6 Term Rep. 268; and see Attorney-general *v.* Parker, 2 Atk. 576; Attorney-general *v.* Forster, 10 Ves. jun. 335; Kitchin *v.* Bartch, 7 East, 53; Bailiffs, &c. of Tewkesbury *v.* Bricknell, 2 Taunt. 120.

(*a*) Rex *v.* Osbourne, 4 East, 327; and see Stammers *v.* Dixon, 7 East, 200.

(*b*) Allen *v.* Cameron, 1 Crompt. & Mees. 832.

that he should not have thought that the price ought to have been taken into consideration, unless "keeping in order" had been an equivocal expression, but the price must be an ingredient from which a construction of such an agreement as that might be come at. He thought the price was an ingredient in the construction of an agreement, in which equivocal words were used, and Mr. Baron Vaughan was of the same opinion; but Mr. Baron Bolland did not concur in that opinion, because a party may enter into a contract, and undertake to do work for much less than its value. He thought it a dangerous doctrine that the price might be imported into the consideration of the construction of the agreement. Mr. Baron Bayley added, that he should certainly think that the price was not admissible in construing the agreement, had it not been that there was an ambiguity in it; but even with this explanation, Mr. Baron Bolland's appears to be the sounder opinion.

## SECTION XI.

### OF PAROL EVIDENCE IN EQUITY TO CORRECT MISTAKES OR FRAUDS.

1. *Mistakes and frauds corrected by parol evidence.*
2. *Effect of defendant's denial.*
4. *Issue directed.*
5. *Whether settlement can be corrected by parol evidence alone.*
10. *Mistake proved by instructions and parol evidence.*
13. *Mistake of purchaser's attorney in conveyance corrected.*
14. *Proposals to correct by, must be final contract.*
15. *Settlement to prevent a forfeiture.*
16. *Omission of provision on supposed illegality.*

19. *Fraud corrected.*
20. *What amounts to fraud.*
21. *Third person drawing up minutes contrary to intention.*
23. *Promise to rectify an accidental omission enforced.*
26. *Effect of fraud.*
27. *No relief against bonâ fide purchaser.*

THE last division of our subject relates to the jurisdiction of equity, in correcting mistakes and fraudulent omissions in agreements and deeds (I).

1. In Henkle *v.* the Royal Exchange Assurance Office (*a*), Lord Hardwicke said, that no doubt but equity had jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that if reduced into writing contrary to the intention of the parties, on proper proof that would be rectified; he thought, however, that in these cases there should be the strongest proof possible. In a case which was much agitated before Lord Thurlow, he laid down the rule with great latitude, that if a mistake appears, it is as much to be rectified as fraud (*b*). So in another

(*a*) 1 Ves. 317.

(*b*) Taylor *v.* Radd, 5 Ves. jun. 595, cited.

(I) Even at law the palpable mistake of a word will not defeat the intention of the parties. In a case in the Common Pleas, where the condition of a bond was, that it should be void if the obligor did *not* pay; and performance being pleaded on the ground of literal expression, the Court held the plea bad. Anon. Dougl. 384, cited, 2d edition. See 1 Dow, 147. It seems clearly settled, that words evidently omitted in a will by mistake may be supplied, both at law and in equity, Tollett *v.* Tollett, Ambl. 194; Coryton *v.* Hellier, 2 Bur. 923, cited; and Doe *v.* Micklem, 6 East, 486; see Lane *v.* Goudge, 9 Ves. jun. 225; Mellish *v.* Mellish, and Phillips *v.* Chamberlain, 4 Ves. jun. 45. 51; but however evident the mistake may be, the words will not be supplied if the testator's manifest intention would be defeated by the insertion of them. Chapman *v.* Brown, 3 Burr. 1626. See 2 Ves. jun. 365. But now *words of inheritance* are supplied by the 1 Vict. c. 26, s. 28, 29.

case before the same Chancellor, he said that he thought it impossible to refuse, as incompetent, evidence which went to prove that the words taken down were contrary to the concurrent intention of all parties. To be sure, he added, it must be strong, irrefragable evidence, but he did not think he could reject it as incompetent (*c*.)

2. Lord Eldon, observing upon these *dicta*, said, that Lord Thurlow seemed to say that the proof must satisfy the Court what was the concurrent intention of all parties; and he added, *it must never be forgot to what extent the defendant, one of the parties, admits or denies the agreement.* In the case before Lord Eldon (*d*), a specific performance of an agreement was sought, with a variation attempted to be introduced by parol, on the ground of mistake and surprise, which was positively denied by the defendant. And the Chancellor said, that he would not say, that upon the evidence without the answer, he should not have had so much doubt whether he ought not to rectify the agreement, as to take more time to consider whether the bill should be dismissed; but as the agreement was to be considered with reference to the answer by which he had positively denied it, he dismissed the bill, but without costs.

3. Lord Eldon's decision precisely accords with Lord Thurlow's opinion, which he rightly construed. For in Lord Irnham *v.* Child (*e*), it was observed by Lord Thurlow, that if a mistake be admitted, the Court would not overturn the rule of equity by varying the deed; but

(*c*) Countess of Shelburne *v.* the Earl of Inchiquin, 1 Bro. C. C. 338; and see Cock *v.* Richards, 10 Ves. jun. 441.

(*d*) Marquis of Townshend *v.* Stangroom, 6 Ves. jun. 328; see Attorney-general *v.* Commissioners of Woods and Forests, 1 You. & Coll. 559. 583.

(*e*) 1 Bro. C. C. 92; and see Hare *v.* Shearwood, 3 Bro. C. C. 168; 1 Ves. jun. 241; and Haynes *v.* Hare, 1 Hen. Blackst. 659.

it would be an equity *dehors* the deed. Then it should be proved as much to the satisfaction of the Court, as if it were admitted: "*The difficulty of this is so great, that there is no instance of its prevailing against a party insisting there was no mistake.*"

4. Where the Court cannot satisfy itself of the fact, an issue may be directed to try the question. Thus, in the case of the South Sea Company *v.* D'Oliff (*f*), D'Oliff agreed not to carry goods under certain circumstances; and if information was given in two months after his return home that he had done so, he was to pay certain stated damages. The instrument was not drawn up until on board the ship, and in a great hurry, and executed there by D'Oliff; who when he got out to sea, and read it over, found it was six months instead of two; and brought a bill to be relieved against that variation in the instrument, the company having brought an action on it. Lord King sent it to an issue; it was tried on a question, whether it was the original agreement it should be two instead of six months. A verdict was given in favour of the plaintiff, that the agreement was designed to be in two, and in consequence of that, Lord Talbot made a decree to relieve the plaintiff against any difficulty by the variation.

---

5. The hesitation with which parol evidence is received in equity to correct even mistakes in agreements and deeds, is strongly exemplified by a case before Sir William Fortescue (*g*). Previously to marriage an estate was agreed to be settled on the intended husband for life, remainder to the wife for life, remainder to the sons

(*f*) 2 Ves. 377; 5 Ves. jun. 601, cited; and see Pember *v.* Mathers, 1 Bro. C. C. 52.

(*g*) Harwood *v.* Wallis, 2 Ves. 195, cited; see Rep. t. Sugd. 150.

successively in tail male, remainder to all the daughters. Instructions were given to an attorney to draw the settlement, who drew it as far as the limitations to the sons, where he stopped, and wrote, then go on as in Pippin *v.* Ekins; which was a precedent he delivered to his clerk, to go on from that limitation, and was a right settlement to the issue male and daughters by that wife; but the clerk drew the settlement to all the daughters of the husband, without restraining it to that marriage: it was executed with this mistake: the question arose between an only daughter of that marriage and children of the husband's by the second wife. The draft of the attorney was proved, and the settlement in Pippin *v.* Ekins; but the Court would not admit parol evidence of the attorney to be read, and held that the other evidence would not do; that nothing appearing in writing under the hands of the parties, the settlement could not be altered. And Sir Thomas Clark is reported to have said (*h*), that as to the head of the mistake, he did not give a positive opinion, but he did not think the Court had relied upon parol evidence singly.

6. But whatever difficulty there may be of admitting parol evidence singly, yet it is always admitted where it is corroborated by other evidence.

7. This doctrine was carried a great way in the case of Dr. Coldcot *v.* Serjeant Hide (*i*). Dr. Coldcot having purchased church-lands in fee, under the title of Cromwell, sold them to the defendant's testator, and entered into general covenants for the title. Upon the Restoration the estate was avoided, and upon an action on the covenants, damages to the value of the purchase-money were recovered. A bill was then filed to be relieved

(*h*) 1 Dick. 295.

(*i*) 1 Cha. Ca. 15; 2 Freem. 173; 1 Sid. 238, cited; 11 Car. II.

against the recovery at law, which suggested a surprise upon the plaintiff, in getting him to enter into general covenants, and that it was declared by the parties, when the deed was executed, that it was intended Dr. Coldcot should not undertake any further than against himself; and *there being some proof of this declaration*, it was decreed by the Lord Chancellor and Master of the Rolls, that the defendant should acknowledge satisfaction on the judgment, *and pay costs*. And the reporter says, a like case to this between Farrer *v.* Farrer was heard and decreed after the same manner, about six months ago.

8. A case, nearly similar, occurred about eleven years afterwards (*k*); but it appeared that all the covenants except the one upon which judgment had been obtained at law, were restrained to the acts of the vendor, *and that the vendor sold only such estate as he had.*

9. This last case was quoted in a case in the Common Pleas before Lord Eldon (*l*), who thought the decision must have been made on the ground of the intent of the parties appearing on the instrument, since that intent, and the consequent legal effect of the instrument, could only be collected from the instrument itself, and not from any thing *dehors*. In a still later case in the same Court (*m*), Lord Alvanley thought, under the circumstances of the case, that the application was made to the Court of Chancery to correct the mistake, in the same manner as applications are made to that Court to correct marriage articles where clauses are inserted contrary to the intent of the parties. It seems clear, however, that the relief in this case was founded on parol evidence *that the vendor sold only such estate as he had*, corroborated as it was by the form of the deed

(*k*) Fielder *v.* Studley, Finch, 90.

(*l*) Browning *v.* Wright, 2 Bos. & Pull. 575.

(*m*) Hesse *v.* Stevenson, 3 Bos. & Pull. 26.

and the subject of the contract. Such evidence was received in the prior case of Dr. Coldcot and Serjeant Hide, and is still clearly admissible.

10. Thus in Young *v.* Young (*n*), the plaintiff married Lucy, a defendant, and an infant; the husband stated, or drew by way of instructions to his attorney, what the wife's fortune then was, and agreed to add as much to be settled in strict settlement, and likewise stated that the intended wife had a prospect of an additional fortune; to which he agreed, provided it did not exceed 1,000*l.*, to add a like sum, to be likewise settled strictly, and he to have the excess. The settlement was prepared according to the instructions; but the solicitor having, in the margin of the draft, added double the sum, the settlement was prepared and executed according to that mistake. Parol evidence was admitted to prove the mistake; that is, the settlement was first shown to differ from the written instructions, and parol evidence of the counsel and attorney was then received, to prove the mistake.

11. This equity was administered in the case of Thomas *v.* Davis, before cited (*o*), where it clearly appeared, that the estate in question was not intended to be comprehended in the general words. This appeared from many circumstances, but particularly from the description of the estate given by the husband to the attorney by way of instructions, which described the lands particularly, and did not include Rigman Hill; and the attorney proved that he did not know of this estate, and that he introduced general words, merely to guard against any wrong or imperfect description of the lands actually intended to pass. It was objected, that

(*n*) 1 Dick. 295, cited. See 1 Dick. 303, 304.

(*o*) *Supra*, p. 253; 1 Dick. 301; Reg. Lib. B. 1757, fol. 33, 34.

the admission of the attorney's evidence was in direct contradiction to the statute of frauds; but Sir Thomas Clark was clear it might be read, and accordingly admitted it (l).

12. So in Rogers *v.* Earl (*p*), instructions were given, previously to marriage, for a settlement of the wife's estate on the husband during his life, if he and his wife should so long live, remainder to the wife for life, remainder to the issue of the marriage in strict settlement, remainder to such uses as the wife should appoint; and a draft of a settlement was drawn accordingly. And after the limitation to the husband, it stood thus: And immediately after the decease of the husband, then to the wife, &c.; and proper limitations were inserted to trustees to preserve contingent remainders. When the wife saw the draft, thinking she was past child-bearing, she objected to the limitations to the issue, and they were directed to be struck out. The attorney, by mistake, not only struck out

(*p*) 1 Dick. 294. Note, the facts are not stated in the report; they are extracted from the Registrar's book; see Reg. Lib. B. 1756, fol. 295; see Pritchard *v.* Quinchant, Ambl. 147; 5 Ves. jun. 596, n. (*a*); and Barstow *v.* Kilvington, 5 Ves. jun. 593; and see Nelson *v.* Nelson, Nels. Cha. Rep. 7; Shaw *v.* Jakeman, 4 East, 201; Duke of Bedford *v.* Marquis of Abercorn, 1 Myl. & Cra. 312; Marquis of Exeter *v.* Marchioness of Exeter, 3 Myl. & Cra. 321.

(l) The judgment is very inaccurately stated in the report. After addressing himself to the general words, the Master of the Rolls is stated to have said, 'Do these words comprise Redmond [Rigman] Hill? I do not think they do include Redmond Hill; but other words do. If Redmond Hill was not intended, why was the wife to join; and why did she join?—This is absolute nonsense. The wife joined because she was interested in the settled estates; and the opinion of the Court was, that the general words did include Rigman Hill. The editor's marginal abstract of this case shows how difficult it is to understand the report of it.

those limitations, but also the limitation to the wife for life, and the subsequent limitation to trustees to preserve, and the deed was executed without the mistake being discovered, whereby, as the bill stated, the said power for appointing the reversion of the premises was made to take place on the decease of the plaintiff generally, though the limitation to him was only during the joint lives. The wife exercised her power by deed in favour of her husband during his life, and then by will gave him the fee, and then died in his life-time. Her heir-at-law insisted that the use resulted to him during the husband's life, and that there being no trustee to preserve contingent remainders, the devise in the will as an execution of the power, not taking effect till the determination of the particular estate, was void, and brought an ejectment against the husband, and obtained a verdict (I). The husband then filed a bill for an injunction, and to rectify the mistake in the settlement. The defendant, by his answer, urged that the draft of the settlement might have been altered with a view to support the husband's claim, and insisted that parol evidence could not be received; but Sir Thomas Clark decreed, that the power appeared to have been designed so far to extend as to enable her to dispose of the interests in the estates after the determination of the coverture, and during the life of her husband, as well as to dispose of the inheritance of the estates after her husband's decease, and ordered the settlement to be rectified accordingly; but without costs on either side.

13. In the last case upon this subject (*q*), a con-

(*q*) Rob *v.* Butterwick, 2 Price, 190; and see Beaumont *v.* Bramley, 1 Turn. 41.

(I) The first point at least was clear at law, but the defendant set up an old term as a bar to the plaintiff's right to recover. The de-

veyance of a portion of church-tithes upon a purchase was made, contrary to what was considered to be the true construction of the written agreement, subject to a proportion of the rent reserved by the lease of the tithes; and upon proof that this was done by the mistake of the *purchaser*'s attorney, and that the rent had not been demanded for several years, the deed was after the lapse of several years rectified and made conformable to the written agreement.

14. To enable equity to amend an instrument by proposals, it must of course be shown that they constituted the final contract of the parties, for they may have been varied by subsequent agreement before the execution of the deed; in which case there would be no mistake to rectify (*r*).

---

15. If a settlement be made contrary to the intention of the parties, merely to prevent a forfeiture (I), parol evidence is admissible of the real intent of the parties (*s*), and the settlement will be rectified in conformity with it.

(*r*) Marquis of Breadalbane *v.* Marquis of Chandos, 2 Myl. & Cra. 711.

(*s*) Harvey *v.* Harvey, 2 Cha. Ca. 180, decided the same way, first by Sir Harbottle Grimston, then by Lord Nottingham, and afterwards by Lord Chancellor Jefferies; and see Fitzgib. 213, 214; see Stratford *v.* Powell, 1 Ball & Beatty, 1.

---

fence, however, did not succeed. See Farmer dem. Earl *v.* Rogers, 2 Wils. 26.

(I) In this case the settlement was to prevent the estate from being sequestered on account of the husband having been in arms for Charles the First. The decree was made in the reign of James his son. So that as to the *nature* of the forfeiture, it is evident that the relief of equity would not have been afforded, for the purpose of *upholding* the settlement, except under the Restoration!

16. Where parties omit any provision in a deed, on the impression of its being illegal, and trust to each other's honour, they must rely upon that, and cannot require the defect to be supplied by parol evidence.

17. Thus in Lord Irnham *v.* Child (*t*), it appeared that Lord Irnham treated with Child for sale of an annuity. Upon settling the terms, it was agreed that the annuity should be redeemable; but both parties supposing that this appearing upon the face of the transaction would make it usurious, it was agreed that the grant should not have in it a clause of redemption; and it was accordingly drawn and executed without such a clause. Lord Thurlow refused to supply the omission. A similar decision was made by Mr. Justice Buller, when sitting in Chancery for the Lord Chancellor (*u*); and two similar determinations were made by Lord Kenyon, when Master of the Rolls (*x*).

18. Upon these cases Lord Eldon observes, that they went upon an indisputably clear principle, that the parties did not mean to insert in the agreement a provision for redemption, because they were all of one mind that it would be usurious; and they desired the Court to do not what they intended, for the insertion of that provision was directly contrary to their intention; but they desired to be put in the same situation as if they had been better informed, and consequently had a

(*t*) 1 Bro. C. C. 92.

(*u*) Hare *v.* Shearwood, 1 Ves. jun. 241; 3 Bro. C. C. 168. See and consider Haynes *v.* Hare, 1 Hen. Blackst. 659 (1).

(*x*) Lord Portmore *v.* Morris, 2 Bro. C. C. 219; 1 Hen. Blackst. 663, 664; Rosamond *v.* Lord Melsington, 3 Ves. jun. 40, n.

(1) Perhaps this case does not belong to this line of cases, but should be classed with those in which a term is omitted by mistake; of which *vide supra*.

contrary intention. The answer is, they admit it was not to be in the deed; and why was the Court to insert it, where two risks had occurred to the parties; the danger of usury, and the danger of trusting to the honour of the party?

19. But fraud is in equity an exception to every rule. In the case of Lord Irnham *v.* Child, Lord Thurlow distinctly said, if the agreement had been varied by fraud, the evidence would be admissible. If the bill stated that the clause was intended to be inserted, but it was suppressed by fraud, he could not refuse to hear evidence read to establish the rule of equity. Lord Kenyon advanced the same doctrine in the cases before him, and Mr. Justice Buller also thought that parol evidence was, in such cases, admissible (*y*).

20. The only difficulty in these cases is, to ascertain what shall be deemed fraud. If parties merely agree to a term, and then execute an instrument in which that term is omitted, without objecting to the omission of it, the Court cannot relieve the injured party (*z*). So where a lessor drew a lease for one year, instead of twenty-one, and then read it for twenty-one years, the lessee brought his bill to be relieved; but as he could read, it was deemed his own folly; and as the case was within the statute, his bill was dismissed with costs (*a*). Again, where in a lease the right to enter, cut, and carry away the trees, was reserved to the lessor, the lessee went into parol evidence to show that that was contrary to the original agreement, and proved a con-

(*y*) And see Taylor *v.* Radd, 5 Ves. jun. 395, cited; Henkle *v.* R. E. A. Office, 1 Ves. 317; and see Pitcairne *v.* Ogbourne, 2 Ves. 375; Countess of Shelburne *v.* the Earl of Inchiquin, 1 Bro. C. C. 338.

(*z*) See Rich *v.* Jackson, 4 Bro. C. C. 514; *et supra*, p. 235.

(*a*) Anon. Skin. 159; but *qu* the authority of this case.

versation previously to the execution of the lease, in which the landlord assured the lessee he should not cut the timber, and only reserved it in order that all his leases might be uniform. The plaintiff's counsel, however, gave up this part of the bill at the hearing (*b*), and Lord Rosslyn treated it as clearly wrong. So I am told that in a very recent case at law (*c*), *where a warrant of attorney* was given to confess judgment on the assurance of the creditor that no execution should issue for three years, and execution was, contrary to this parol agreement, issued immediately, the Court inclined, that as the defendant knew the contents, and had sufficient time to read the warrant of attorney, they could not relieve; and yet a court of law considers itself to have a considerable controlling power over its own judgments entered up under warrants of attorney, where the party entering them up has been guilty of a fraud (*d*). The case, however, went off on another ground.

21. In the Countess of Shelburne *v.* the Earl of Inchiquin (*e*), Lord Thurlow said, if two persons entrust a third person to draw up minutes of their intention, and such person does not draw them according to such intention, that case might be relieved, because that would be a kind of fraud.

22. And it is said, that in the case of Jones *v.* Sheriffe (*f*), there were heads of an intended lease taken by an attorney in writing; but upon proof that some other clauses were agreed on between the parties

(*b*) Jackson *v.* Cator, 5 Ves. jun. 688.

(*c*) Gennor *v.* Macmahon, M.T. 1806, B. R.

(*d*) See 1 H. Blackst. 63. 664.

(*e*) 1 Bro. C. C. 350; and see Crosby *v.* Middleton, 3 Cha. Rep. 99; Langley *v.* Brown, 2 Atk. 195; Baker *v.* Paine, 1 Ves. 6.

(*f*) 9 Mod. 88, cited.

at the same time, the Court decreed that those clauses should be put into the lease, notwithstanding the counsel on the other side strenuously insisted on the statute of frauds.

23. And if either party object to a conveyance, on the ground of a term of the agreement being omitted, and the other party promise to rectify it, whereupon the deed is executed, a specific performance of the promise will be enforced.

24. Thus in Pember *v.* Mathers (*g*), a bill was filed for a specific performance of a parol agreement by a purchaser of a lease under written conditions, to indemnify the vendor against the rent and covenants; and it was objected, on the part of the defendant, that the evidence was inadmissible, upon the ground, that where the parties have entered into a written agreement, no parol evidence can be admitted to increase or diminish such agreement. The rule, Lord Thurlow said, was right; but where the objection was originally made, and promised by the other party to be rectified, it comes amongst the string of cases where it is considered as a fraud. Then the evidence is admissible. There being some doubt as to the fact, Lord Thurlow ordered it to go to law upon an issue, whether there was such a promise on the day of the execution of the agreement. Upon the trial, the jury found there was such a promise, and the plaintiff had a decree for a specific performance.

25. So we have before seen, that where it is stipulated that the agreement shall be reduced into writing, and either party fraudulently prevents the agreement from being put into writing, equity will perhaps relieve the injured party (*h*).

(*g*) 1 Bro. C. C. 52; see 14 Ves. jun. 524.

(*h*) *Vide supra*, p. 199.

26. And it is perfectly clear that where fraud is distinctly proved, or the jury infer it from the circumstances, an agreement is invalid at law, as well as in equity (*i*); but the reducing the agreement to writing is, in most cases, an argument against fraud.

27. But it must be remarked, that a deed will not be rectified in equity on the ground of mistake or fraud, to the prejudice of a *bonâ fide* purchaser, without notice.

28. Thus in the case of Thomas *v.* Davis (*k*), although the lands passed at law, yet as the mistake was clearly proved, the words were restrained as between the person claiming under the wife, whose estate was comprised by mistake, and the heir of the husband, to whom the estate had passed by the error; but the same equity was not administered against the mortgagee, who was left in possession of the legal right which the generality of the conveyance had invested him with.

(*i*) Haigh *v.* De la Cour, 3 Camp. Ca. 319; Emanuel *v.* Dane, 3 Camp. Ca. 299; Solomon *v.* Turner, 1 Stark. Ca. 51.

(*k*) *Supra*, p. 253; Reg. Lib. B. 1757, fol. 33, 34; 1 Dick. 301.

# CHAPTER IV.

## OF THE CONSEQUENCES OF THE CONTRACT.

### SECTION I.

### OF THE PURCHASER'S TITLE FROM THE TIME OF THE CONTRACT.

1. *Seller trustee of estate for purchaser.*
2. *Bankruptcy does not discharge the contract.*
3. *Assignees put to their election.*
5. *Extent prevails over contract.*
6. *Purchaser without notice also.*
7. *Death of party immaterial.*
8. *Purchase-money assets of vendor.*
9. *Mortmain Act.*
10. *Purchaser not to cut timber.*
11. *Operation of contract where the purchaser is tenant.*
13. *Conveyance destroys covenants in lease.*
14. *Purchaser's power over the estate.*
15 to 42. His power of devising before 1 Vict. c. 26, *viz.*
21. *Effect of devise where the purchaser had a term of years.*
22. *Revocation of previous bequest of term.*
24. *Conveyance did not operate a revocation.*
25. *Unless new uses introduced.*
26. *Estates contracted for after the will not affected by it.*
27. *Republication.*
29. *Heir put to his election.*
30. *Cautions in purchasing from heir.*
31. *Copyholds.*
32. *Contract revoked* seller's *will.*
34. *Where the agreement could not be enforced in equity,* qu.
37. *Or has been abandoned,* qu.
38. *Devise by seller after the contract.*
39. *Estate converted, although election to buy given to purchaser.*
42. *So of timber.*
44. *Right of pre-emption enforced.*
45 to 65. Purchaser's right to devise since 1 Vict. c. 26.
48. *Operation of Act on Atcherley* v. *Vernon.*
50. *Operation upon previous bequest where the purchaser was a termor.*
52. *Operation of the Act upon general bequest and general devise, where the purchaser is a termor.*

53. *Where the fee is conveyed or the term assigned to attend.*

54. *Where the term is specifically bequeathed.*

56. *No form of conveyance a revocation.*

57. *Cautions in purchasing of heir.*

59. *Operation of Act on the seller's will.*

60. *Agreement void in equity not a revocation.*

61. *Nor an agreement abandoned.*

62. *Operation of Act on Knollys v. Shepherd.*

63. *And on Lawes v. Bennett.*

64. *General operation of Act.*

65. *Operation of Act on Arnold v. Arnold.*

66. *Demonstrative legacy.*

67. *Where heir of purchaser entitled.*

68. *His power over estate.*

69. *Executor must pay for the estate.*

71. *Death of vendor or purchaser and no title.*

72. *Where estate directed to be bought cannot be obtained.*

1. EQUITY looks upon things agreed to be done, as actually performed (*a*), (I); consequently, when a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold (*b*), and the purchaser as a trustee of the purchase-money for the vendor (*c*).

2. Therefore the contract will not be discharged by the bankruptcy of either the vendor (*d*) or vendee (*e*),

(*a*) Francis's Maxims, max. 13; 1 Trea. Eq. chap. 6, sec. 9. See Callaway *v.* Ward, 1 Ves. 318, cited.

(*b*) Atcherley *v.* Vernon, 10 Mod. 518; Davie *v.* Beardsham, 1 Cha. Ca. 39; and Lady Fohaine's case, cited *ibid.*; and see 1 Term Rep. 601; and Green *v.* Smith, 1 Atk. 572.

(*c*) Green *v.* Smith, *ubi supra*; Pollexfen *v.* Moore, 3 Atk. 272.

(*d*) Orlebar *v.* Fletcher, 1 P. Wms. 737.

(*e*) See 3 Ves. jun. 255; and Bowles *v.* Rogers, 6 Ves. jun.

(I) A lessee insured his house, the lease expired, and he contracted for a new lease. Then the house was burned, and the office insisted that at the time of burning it was not the plaintiff's house; but Lord Chancellor King, and afterwards the House of Lords, held otherwise. See printed cases, Dom. Proc. 1730.

and the observation of the Chief Baron in Goodwin *v.* Lightbody (*f*), that if one were to sell an estate, and, before the conveyance should be complete, were to become a bankrupt, his assignees might choose whether they would perform the contract or not, is not well founded. But an act of bankruptcy, although no commission had issued, heretofore prevented the execution of the agreement, as neither a buyer nor a seller could be assured that a commission might not issue in due time, in which case he could not retain the estate or money against the assignees (*g*). But this is now in part altered by an act just passed (*h*), which protects a *purchaser* who bought without notice of a prior act of bankruptcy (*i*). And the act of Geo. 4 seems to protect a payment (not being a fraudulent preference) to a seller who had not notice of any act of bankruptcy committed by the purchaser (*j*).

3. The Bankrupt Act, 6 Geo. 4 (*k*), enacts, that if any bankrupt shall have entered into any agreement for the purchase of any estate or interest in land, the vendor thereof, or any person claiming under him, if the assignees of such bankrupt shall not (upon being thereto required) elect whether they will abide by and execute such agreement, or abandon the same, shall be entitled to apply by petition to the Lord Chancellor, who may thereupon order them to deliver up the said agreement, and the possession of the premises, to the vendor, or person claiming under him, or may make such other order therein as he shall think fit.

95, n.; Whitworth *v.* Davis, 1 Ves. & Bea. 545.

(*f*) Dan. 156: the observation was, perhaps, made with reference to an act of bankruptcy prior to the contract.

(*g*) Lowes *v.* Lush, Franklin *v.* Lord Brownlow, 14 Ves. jun. 547. 550.

(*h*) 2 Vict. c. 11, s. 12.

(*i*) See *post*, ch. 12, and ch. 21.

(*j*) 6 Geo. 4, c. 16, s. 82.

(*k*) C. 16, s. 76.

4. Where a contract for sale is overreached by an act of bankruptcy before the conveyance, it seems to have been supposed that the assignees may compel the purchaser to complete the contract (*l*); but the case in which this point arose was decided upon the ground that the purchaser submitted to perform the contract, provided a good title could be made.

5. An agreement for sale, even with part of the money paid, has no effect against an extent by the Crown; for whilst no conveyance having been executed, the fee is in the seller, the agreement has no operation against the extent (*m*).

6. And if one agree to purchase an estate, and take a contract or covenant that the owner will sell that estate, and the latter should sell or mortgage it to another person who has no notice, the first purchaser has not any right to call on the second purchaser for the legal estate, but the latter may protect himself by the legal estate against the former (*n*).

7. The death of the vendor or vendee before the conveyance (*o*) or surrender (*p*), or even before the time agreed upon for completing the contract, is in equity immaterial (*q*).

8. If the vendor die before payment of the purchase-money, it will go to his executors, and form part of his assets (*r*); and even if a vendor reserve the purchase-

(*l*) See the marginal abstract of Goodwin *v.* Lightbody, Dan. 153.

(*m*) Rex *v.* Snow, 1 Price, 220, n. See 2 Vict. c. 11, s. 8, 9, 10.

(*n*) 8 Price, 488, 489, *per* Richards, C. B.

(*o*) Paul *v.* Wilkins, Toth. 106.

(*p*) Barker *v.* Hill, 2 Cha. Rep. 113.

(*q*) Winged *v.* Lefebury, 2 Eq. Ca. Abr. 32, pl. 43; cases cited *ante*, n. (*b*).

(*r*) Sikes *v.* Lister, 5 Vin. Abr. 541, pl. 28; Baden *v.* Earl of Pembroke, 2 Vern. 213; Bubb's case, 2 Freem. 38; Smith *v.* Hibbard, 2 Dick. 712; Foley *v.* Percival, 4 Bro. C. C. 419; and see

money, payable as he shall appoint by an instrument, executed in a particular manner, and afterwards exercise his power, the money will, as between his creditors and appointees, be assets (*s*).

9. If the estate is under a contract for sale at the date of the will, a devise of it to be sold for a charity, will not give the purchase-money to the charity, in consequence of the mortmain act, as it is called (*t*), although this point was in the first instance otherwise decided (*u*).

10. A vendee being actually seised of the estate in contemplation of equity, must, as we shall hereafter see, bear any loss which may happen to the estate between the agreement and conveyance, and will be entitled to any benefit which may accrue to it in the interim (*v*); but if he obtain possession of the estate before he has paid the purchase-money, and begin to cut timber, equity will grant an injunction against him (*w*).

11. If the purchaser was tenant at will of the estate, the contract determines the tenancy (*x*). And even if he was tenant for a term certain, the agreement determines the relation of landlord and tenant, and in equity the landlord cannot call for rent (*y*). Lord Eldon laid down the rule thus generally, in a case in which he had not to decide the point. But in a late case (*z*), where a tenant from year to year agreed to purchase, and was, by the implied terms of the contract, entitled to a good

Gilb. Lex Prætor. 243; Eaton *v.* Sanxter, 6 Sim. 517.

(*s* Thompson *v.* Towne, 2 Vern. 319. 466.

(*t*) Harrison *v.* Harrison, 1 Russ. & Myl. 71; 1 Taunt. 273.

(*u*) Middleton *v.* Spicer, 1 Bro. C. C. 201.

(*v*) See *post*, ch. 6.

(*w*) Crockford *v.* Alexander, 15 Ves. jun. 138.

(*x*) See *post*, that a purchaser generally cannot be charged as tenant.

(*y*) Daniels *v.* Davison, 16 Ves. jun. 252, 253.

(*z*) Doe *v.* Stamion, 1 Mees. & Wels. 695.

title, it was held that his tenancy did not cease. For where the purchaser is already in possession as tenant from year to year, it must depend upon the intention of the parties, to be collected from the agreement, whether a new tenancy at will is created or not, and from what time. If, the Court observed, by the true construction of the agreement, the defendant at a certain time was to be absolutely a debtor for the purchase-money, paying interest on it, and to cease to pay rent as tenant, a tenancy at will would probably be created after that time, and the acceptance of such new demise at will would then operate as a surrender of the former interest by operation of law. But if the agreement is conditional to purchase only provided a good title should be made out, and to pay the purchase-money when that should have been done and the estate conveyed, there is no room for implying any agreement to hold as tenant at will in the meantime, the effect of which would be absolutely to surrender the existing term, whilst it would be uncertain whether the purchase would be completed or not.

12. This case proves that the Courts will not hold a lessee's interest to have determined to his prejudice, unless compelled to come to that conclusion by the form of the contract; nor would the tenant be allowed to baffle the seller, and to withhold both the rent and the purchase-money. But it is proper upon a sale of an estate to the tenant to provide for the payment of the rent until the completion of the purchase, if that be the intention. When the purchase is completed, there will no longer be any difficulty, for the purchaser will be made to pay interest or rent for the time past, according to the provisions of the contract or the rights springing out of it.

13. Where the relation of vendor and purchaser is

formed by a *conveyance* of the inheritance, that puts an end to the covenants in the lease, though ever so large and general, which existed between the parties as lessor and lessee (*x*), and it is immaterial whether the lease was granted by the one to the other or not; it is sufficient that the relation of landlord and tenant subsisted between them under the lease. Lord Eldon observed, that undoubtedly the vendor may concede the advantage which by law he derives from the new relation of vendor and vendee, and the vendor may warrant, at the risk of damages, the privileges which he as lessor had agreed to give to the lessee before he became purchaser. But he added, such a contract between vendor and vendee must be expressed in terms which are free from all doubt or ambiguity. The terms of a contract so special must indicate unequivocally what was the intention of the parties (*y*).

14. It is a consequence of the same rule, that a purchaser may sell or charge the estate, before the conveyance is executed (*z*); but a person claiming under him must submit to perform the agreement *in toto*, or he cannot be relieved (*a*).

---

15. The power of devising is so greatly enlarged by the 1st Vic. c. 26, whilst the old law is still applicable to all titles where the will was made before the 1st of January 1838, and not since republished or revived by any codicil executed as required by the above statute, that it may be expedient, first, to consider the old law, as it applies to the latter class of cases; and secondly,

(*x*) See 1 Bligh, 69.

(*y*) 1 Bligh, 76.

(*z*) Seton *v.* Slade, 7 Ves. jun. 265; and see 1 Ves. 220; and 6 Ves. jun. 352; Wood *v.* Griffith, 12 Feb. 1818; MS. see *post.*; 2 Ball & Beat. 522.

(*a*) See Dyer *v.* Pulteney, Barnard. Rep. Cha. 160; a very particular case.

the new law, which applies to all wills executed upon or subsequently to the 1st of January 1838.

16. First, then, as to the law applicable to wills executed before the 1st of January 1838, and not republished or revived by any codicil since that date.

17. A man having contracted for an estate, might devise it, if freehold (*b*), before the conveyance; and if copyhold, before the surrender (*c*); and that, although the estate was contracted for at a future day (*d*), or the contract was entered into by a trustee for him (*e*); and the devisee would be entitled to have the estate paid for out of the personal estate of the purchaser (*f*).

18. The rule that an estate contracted for might be devised before it was conveyed or surrendered to the purchaser, had become a land-mark, and could not have been shaken without endangering the titles to half of the estates in the kingdom. The applicability of the rule to freehold estates had, I believe, never been questioned, but in Ardesoife *v.* Bennet (*g*), where the point arose as to a copyhold estate, Sir Thomas Sewell decided the case on another ground, and appears to have avoided sanctioning the rule in question; and in a manuscript note of this case by the name of Wilson *v.* Bennet, it is

(*b*) Darris's case, 3 Salk. 85; Milner *v.* Mills, Mose. 123; Alleyn *v.* Alleyn, Mose. 262; Atcherley *v.* Vernon, 10 Mod. 518; Gibson *v.* Lord Montfort, 1 Ves. 485.

(*c*) Davie *v.* Beardsham, 1 Cha. Ca. 39; Nels. Cha. Rep. 76; 3 Cha. Rep. 2; Greenhill *v.* Greenhill, 2 Vern. 679; Prec. Cha. 329; Atcherley *v.* Vernon, 10 Mod. 518; Robson *v.* Brown, Oct. 1740, S. P.; and see 9 Ves. jun. 510.

(*d*) Commissioner Trimnel's case, Mose. 265, cited; and see Atcherley *v.* Vernon, 10 Mod. 518; Gibson *v.* Lord Montfort, 1 Ves. 485.

(*e*) Greenhill *v.* Greenhill, 2 Vern. 679.

(*f*) Milner *v.* Mills, Mose. 123; Broome *v.* Monck, 10 Ves. jun. 597.

(*g*) 2 Dick. 403; and see 15 Ves. jun. 391, 392, n.

said that the Master of the Rolls was of opinion that the copyhold estate did not pass by the will. This opinion was clearly extra-judicial, and cannot be deemed subversive of the numerous cases which have established the contrary doctrine; and, indeed, in a case before Sir Thomas Sewell, a few years after that of Ardesoife *v.* Bennet, he seems to allude to a devise of a copyhold estate contracted for, as sanctioned by practice (*h*).

19. An estate contracted for will pass by a general devise of all the lands purchased by the testator, although he may have purchased some estates which have been actually conveyed to him, and would therefore of themselves satisfy the words of the will (*i*).

20. On the other hand, it seems that estates recently purchased *and actually conveyed,* will pass with estates contracted for, by a general devise of all the manors, &c. for the purchase whereof the testator has *already* contracted and agreed (*k*), (1). But a devise of estates "for the purchase whereof the testator has *only* contracted and agreed," would not pass estates actually conveyed to him before the will, unless perhaps they were recently purchased, and the testator had not contracted for any other estate.

21. If a man possessed of a term of years contract for the purchase of the inheritance, the term, by construction of equity, instantly attends the inheritance; and therefore, by a devise of the estate subsequently to

(*h*) Floyd *v.* Aldridge, 1777, 5 East, 137, cited; and see Vernon *v.* Vernon, 7 East, 8.

(*i*) Atcherley *v.* Vernon, 10 Mod. 518.

(*k*) St. John *v.* Bishop of Winton, Cowp. 94; Lofft, 113. 349, S. C.; and 2 Blackst. 930.

(1) This, however, must depend upon the particular circumstances of each case. The case referred to can scarcely be cited as a binding authority establishing a general rule. It seems that the House of Lords was taken by surprise in affirming the judgment.

the contract, the fee-simple would have passed although not actually conveyed, and the term as attendant on it (*l*).

22. And if the purchaser had, previously to the purchase, made his will, by a general bequest in which the term would have passed, yet the legatee would not be entitled to it, although the bequest were not expressly revoked; because the term, by the construction of equity, attended the inheritance immediately on the purchase of the fee, and it must therefore follow it in its devolution on the heir or devisee (*m*).

23. The same rule, it seems, must prevail where the term is even *specifically* bequeathed; for if the fee had been actually conveyed, the conveyance would have operated as a revocation (*n*); and as the vendee is seised of the fee in contemplation of equity, although the conveyance be not executed, the same rules ought to be adhered to in each case.

24. Although the estate may, subsequently to the will, be conveyed, or surrendered, either to the purchaser (*o*), or to a trustee for him (*p*), yet that will not operate as a revocation of his will (I). The legal estate

(*l*) *Per* Sir Wm. Grant, in Capel *v.* Girdler, Rolls, 16 May 1804, MS.; 9 Ves. jun. 509; Cooke *v.* Cooke, 2 Atk. 67.

(*m*) Capel *v.* Girdler, *ubi sup.*

(*n*) Galton *v.* Hancock, 2 Atk. 424. 427. 430.

(*o*) Parsons *v.* Freeman, 3 Atk. 741; Amb. 116; and see 1 Ves. jun. 256; 2 Ves. jun. 429. 602; 6 Ves. jun. 220; 8 Ves. jun. 127; and Prideux *v.* Gibbin, 2 Cha. Ca. 144.

(*p*) Jenkinson *v.* Watts, Lofft, 609, reported; cited *nom.* Watts *v.* Fullarton, Dougl. 718; Rose *v.* Cunynghame, 11 Ves. jun. 550.

(I) In Brydges *v.* Duchess of Chandos, 2 Ves. jun. 429, Lord Rosslyn, in treating of this point, said, "Another case is supposed to arise, in which this Court determines upon a principle of equity, it is not said directly against the rule of law, but without attending to what the law would be; that is the case where an equitable estate is devised, and after the will the legal estate is taken, the Court has said that does

will of course descend to the heir at law, and he will in equity be deemed a mere trustee for the devisee, unless

---

not revoke the will. It is difficult to state that, at this time of day, in a court of law, which could not look at the equitable interest, but looks only at the legal; but as the legal interest is only a shadow, the justice of the case is very evident; but it is a decision in conformity to the like case at law. The very case occurred at law in Roll. Abr. 616, pl. 3. *Cestui que use*, before the *statute of uses*, devises; afterwards the feoffees made a feoffment of the land to the use of the devisor; and after the statute the devisor dies; the land shall pass by the devise; because, after the feoffment, the devisor had the same use which he had before. That is exactly the case of an equitable estate devised, and a conveyance taken afterwards of the legal estate; and this Court was so far from determining without considering what the rule of law would be, that here is the very point decided by a court of law."

The case referred to is thus stated in Rolle :--" *Si home aiant feffees a son use devant le statut de* 27 *H.* 8. *ust devise le terre al auter, et puis les feffees font feffment del terre al use del devisor et puis le statut le devisor morust, le terre passera per le devise, car apres le feffment le devisor avoit mesme l'use que il avoit devant.*"

The case then appears to be this. The *cestui que use* made his will, and the feoffees afterwards made a feoffment of the lands to his *use*; that is, enfeoffed other persons to the use of him. This appears by the reason given for the decision, namely, " because after the feoffment the devisor had the same use which he had before." Whereas, if the facts of the case were as Lord Rosslyn supposed, the devisor would, before the feoffment, have been a mere *cestui que use*, entitled at law to neither *jus in re*, nor *jus ad rem*; and after the feoffment he would have been actually clothed with the legal seisin of the estate; the case, therefore, seems only a decision, that where a man devises an equitable estate, a transfer of the legal estate to other persons, in trust for him, is not a revocation of his will. And such is still the rule of law (Doe *v.* Pott, Dougl. 2d edit. 710.) as well as of equity, Jenkinson *v.* Watt, Lofft, 609.

It may, however, be objected, that the devisor did not die till after the statute of uses; and therefore admitting the force of the foregoing remarks, it still appears that the legal estate was, by the operation of the act, vested in the devisor. To this it may be answered, that the statute was expressly passed to prevent alienation of estates by devise,

the devisee, thinking the estate did not pass by the will, permit the heir to take the estate, and acquiesce in this

---

although it declared that wills made before the statute, by persons who were or should be dead before the 1st of May 1536, should not be invalidated by the act. We must therefore presume that the devisor died before that time; otherwise the will would have been void by virtue of the act itself, as was expressly decided in a case where *cestui que use* before the statute devised the use; and then came the statute, which transferred the use into possession; and although the testator survived *the statute of wills*, yet the *operation* of the statute of uses was holden to be a revocation, *because the use was thereby gone*. 1 Roll. Abr. 616, (R.) pl. 2; Putbury v. Trevalion, Dyer, 142, b.—Indeed the statute of uses could not have come in question in the above case, if the feoffment had been made to the devisor himself.

Lord Hardwicke seems to have construed the case in Rolle in the same manner as Lord Rosslyn did, (see Sparrow v. Hardcastle, 3 Atk. 798; Ambl. 224), although he appears to have been struck with the reason given for the decision; in explanation of which, he is in Atkyns stated to have said, "The use at law was the beneficial and profitable interest, the same as a trust in equity, and which remained in the same manner after the feoffment as before, and the feoffees there granted the dry legal estate to the devisor." In Ambler, his Lordship is reported to have said, "Thus the law considers two interests in the land: the legal estate, and the use: now the use remains the same at the making the devise, and at the death of the devisor; and therefore accepting the grant of the feoffees makes no alteration in it."

Lord Hardwicke's attempt to reconcile what he conceived to be the decision in this case, with the reason given for it, evinces the impossibility of making them consistent. According to his argument, the equitable interest was not merged by its union with the legal estate, but still subsisted in the contemplation of law.

In the case of Willet v. Sandford, 1 Ves. 186, Lord Hardwicke classed the different interests in land into three kinds: First, the estate in the land itself; the ancient common-law fee. Secondly, the use; *which was originally a creature of equity*; but since the statute of uses it draws the estate in land to it; so that they are joined, and make one legal estate. Thirdly, the trust; *which the common law takes no notice of*, but which carries the beneficial interests and profits *into this court, and is still a creature of equity, as the use was before the statute.*

This judicious classification proves (what indeed could not be doubted),

for a long while; in which case equity will not relieve him (*q*).

25. But in analogy to the decisions upon legal estates (*r*), it has been held, that a devise of a freehold estate contracted for, is revoked by a subsequent conveyance to the usual uses to bar dower (*s*), even where the contract was by parol (*t*), but it is difficult to say, in the latter case, that a conveyance to the usual uses to bar dower is not within the contract of the parties. If, however, it were stipulated in the contract that the estate should be conveyed to the purchaser in fee, or to such uses as he should appoint, a conveyance to uses to bar dower, would not, it is apprehended, operate as a revocation of the will.

26. Estates contracted for *after* the will, will not pass by it (*u*); nor will lands pass by the will, although conveyed to the purchaser subsequent to his will *in pur-*

(*q*) Davie *v.* Beardsham, 1 Cha. Ca. 39; and see Pigott *v.* Waller, 7 Ves. jun. 98.

(*r*) See Tickner *v.* Tickner, 3 Atk. 742, cited; Kenyon *v.* Sutton, 2 Ves. jun. 600, cited; and Nott *v.* Shirley, *ibid.* 604, n.; and see 2 Ves. jun. 429. 600; 6 Ves. jun. 219; 8 Ves. jun. 115. 211; 10 Ves. jun. 249. 256. See also Luther *v.* Kidby, 3 P. Wms. 170, n.; and observe the distinction.

(*s*) Rawlins *v.* Burgis, 2 Ves. & Bea. 382. There was an appeal to the Lord Chancellor, which was for particular reasons withdrawn. Buller *v.* Fletcher, 1 Kee. 369; 2 Sugd. Pow. 6.

(*t*) Ward *v.* Moore, 4 Madd. 368.

(*u*) Langford *v.* Pitt, 2 P. Wms. 629; Alleyn *v.* Alleyn, Mose. 262; Potter *v.* Potter, 1 Ves. 437; and see 1 Atk. 573; White *v.* White, 2 Dick. 522; Reg. Lib. B. 1775, fol. 650.

---

that the true principles of this subject were familiar to this great master of equity, and that he was led into a false argument by endeavouring to account for a principle which did not exist.

Upon the point in this note, see further, n. (*a*) to 2 Ves. & Bea. 385, and note (I) to 2 Sugd. Powers, 6.

*suance of a contract prior to the will,* unless it was a valid binding contract (*x*).

27. Any codicil executed according to the statute of frauds amounted to a re-publication of a prior will of lands; and therefore, if a purchaser, previously to a contract, made a *general devise of all his lands,* and after the contract executed a codicil, according to the statute of frauds, unless an intention appeared not to affect it (*y*), the after-purchased estate passed under the devise in the will, although legacies only were given by the codicil, and no notice was taken of the estate (*z*)

28. It was thought that this rule would not apply where the devise in the will was of "the estates of which I am *now* seised;" but the codicil made the will speak as from the date of the codicil, and therefore there seemed to be no solid ground for the supposed distinction.

29. And if a purchaser, previously to a contract, by a will duly executed according to the statute, directed his after-purchased lands to be conveyed to the uses of his will and made a provision for his heir at law, and afterwards died without republishing his will, and the after-purchased lands devolved on the heir at law, equity would put the heir to his election, and not permit him to take both the descended estate, and the provision made for him by the will (*a*). But to raise a case of election the words were required to be unequivocal; and therefore a direction to executors to sell whatever real estates the

(*x*) Rose *v.* Cunynghame, 11 Ves. jun. 50.

(*y*) Lady Strathmore *v.* Bowes, 7 Term Rep. 482; 2 Bos. & Pull. 500; Smith *v.* Dearmer, 3 Yon. & Jerv. 278; Monypenny *v.* Bristow, 2 Russ. & Myl. 117.

(*z*) Barnes *v.* Crowe, 1 Ves. jun. 486; Pigott *v.* Waller, 7 Ves. jun. 98; Goodtitle *v.* Meredith, 2 Man. & Selw. 5; Hulme *v.* Heygate, 1 Merr. 285.

(*a*) Thellusson *v.* Woodford, MS. 13 Ves. jun. 209, affirmed in Dom. Proc.; and see Sugd. on Powers, ch. 10, sect. 5.

testator might die possessed of, was held not to mean after-purchased estates (*b*). And yet a devise and bequest of all my estate, rent and effects, real and personal, which I shall die possessed of, was decided to have that operation (*c*).

30. In purchasing, therefore, of an heir at law who claims an estate conveyed to his ancestor after the date of his will, when that will was executed before the 1st January 1838, and not revived or republished since that day, the purchaser should be satisfied of three points: viz. 1st, That the contract was not entered into by the testator previously to making his will. 2dly, That no codicil was afterwards executed by him, according to the statute of frauds, by which the lands, although not in contemplation, passed. And, 3dly, If the will affects to pass all the estates which the vendor might thereafter acquire, that the heir at law does not take any interest under the will; and these observations of course apply to titles depending upon purchases made under those circumstances from heirs at law, although completed by conveyance.

31. As to copyholds,—by the old law, if a man made a disposition by will of all his copyhold estates generally, and afterwards purchased other copyhold estates, and surrendered them to the uses declared by his will (*d*), or even to the uses declared by his will *of and concerning the same* (*e*), the after-purchased estates would pass under the general devise, although the will was not republished. Therefore, where a copyhold estate has been

(*b*) Back *v.* Kett, 1 Jac. 534; Johnson *v.* Telford, 1 Russ. & Myl. 244.

(*c*) Churchman *v.* Ireland, 4 Sim. 520; 1 Russ. & Myl. 250.

(*d*) Heylyn *v.* Heylyn, Cowp. 130; Lofft, 604. This point has since been so decided at *nisi prius*.

(*e*) Attorney-general *v.* Vigor, 8 Ves. jun. 256. See Smart *v.* Prujean, 6 Ves. jun. 565; and the last ed. of Gilbert on Uses, n. (5), p. 72.

surrendered to the use of a will, and the purchaser is buying of the heir at law, who claims in the absence of any devise subsequently to the purchase by his ancestor (the case not falling within the late act), he must be satisfied that the estate did not pass under any general devise in a will prior to the purchase.

The act for rendering a surrender to a will unnecessary (*f*), rendered it unlikely that this point should again arise, and now the doctrine is wholly confined to wills or codicils made before the 1st January 1838, for by the late statute, whatever copyholds a man may have at his death, whether there is a custom to devise them or not, and whether he has been admitted or not, and of course, therefore, although not surrendered to the will, will pass by it (*g*).

32. From the time of the contract, the purchaser, and not the vendor, being owner of the estate in equity, it followed that if a man devised his estate, and afterwards contracted for the sale of it, the devise would thereby be revoked *in equity* (*h*).

33. And even where an estate was by a will directed to be sold, and the money to be paid to certain persons, and the testator himself afterwards sold the estate, it was held, that the legatees were not entitled to the money produced by the sale (*i*), and it was immaterial that the contracts were abandoned by the purchasers because they could not obtain a conveyance from the devisees, who were infants (I), for although the con-

(*f*) 55 Geo. 3, c. 192.

(*g*) *Infra.*

(*h*) Ryder v. Wager, and Cotter v. Layer, 2 P. Wms. 332. 623; and see 2 Ves. jun. 436; Vawser v. Jeffrey, 16 Ves. jun. 519; 3 Russ. 479.

(*i*) Arnald v. Arnald, 1 Bro. C. C. 401; 2 Dick. 645. Kenbold v. Roadknight, 1 Russ. & Myl. 677; 1 Toml. 492.

(I) But now see 1 Will. 4, c. 60.

tracts were properly abandoned, yet the will was revoked (*k*).

34. If, however, an agreement were such as a court of equity would not carry into execution against the representatives, there seemed ground to contend that it would not revoke the will, because the agreement could operate as a revocation in equity only; and therefore, if equity would not sustain the agreement in respect of which the will was held to be revoked, there appeared to be no solid reason why the devise of the estate should not take effect. In Onions *v.* Tyrer (*l*), the Lord Chancellor held, that a second will, devising lands to the same person as the former, and revoking all former wills, but not duly executed, should 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 the meaning of the second will was to give 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 would have lost nothing.*

35. These principles ought, perhaps, to be referred to the words of the statute of frauds (*m*); but still as an agreement was only an equitable revocation, the same reasoning applied to the case before us. Where a man contracts for the sale of his estate, he intends to increase his personal estate, and not to benefit his heir; and if the Court will not carry the agreement into a specific execution for the benefit of the personal estate, "the personal estate takes nothing, and the devisee can have lost nothing."

36. In the two cases (*n*) in which it has been holden,

(*k*) Tebbott *v.* Vowles, 6 Sim. 40.

(*l*) 1 P. Wms. 345. See 7 Ves. jun. 379.

(*m*) See Pow. Dev. 641.

(*n*) Ryder *v.* Wager, and Cotter *v.* Layer, *ubi sup.*

that an agreement will revoke a will in equity, it makes a term of the proposition, that the agreement amount in equity to a conveyance. And it should seem that Lord Eldon was of this opinion, for in Knollys *v.* Alcock (*o*), where it was contended that an agreement in equity is a revocation only where it can be performed, he did not deny the rule as stated, but showed, that the agreement in that case was such as equity would perform (*p*), (I); and in Clynn *v.* Littler (*q*), Lord Mansfield laid it down, that covenants had never been allowed to be revocations, *unless where the covenantee has a right to a specific performance.*

37. Whether an *abandonment* of an agreement would prevent the contract from operating as a revocation of a prior will, seems to be a more doubtful point. In the case of Knollys *v.* Alcock, before referred to, it was also contended, that an agreement which was abandoned was not a revocation in equity; but Lord Eldon said, he did not admit, that if there is an agreement in equity which at the moment is a completely operative revocation, a subsequent abandonment will of necessity set up the will. He added, that he did not say whether it would be so or not, for he was of opinion he could not raise the question in the case before him, as the agree-

(*o*) 7 Ves. jun. 558. There was an appeal from the decision in this case, which was compromised; and see Mayor *v.* Cowland, 2 Dick. 563. See also 2 Ves. jun. 436.

(*p*) See Savage *v.* Taylor, Cases T. Talb. 234.

(*q*) 1 Blackst. 345.

(I) It appears by an abstract of the title to the estate, in respect of which the litigation in Savage *v.* Taylor was commenced, that the heir at law of the testator, in his answer to the bill of the devisee, insisted, that if the will was originally valid, yet it was revoked by the articles for sale, although the Court ought not to carry them into execution.

ment was never abandoned. Sir Wm. Grant upon the same point said, that he very much doubted whether the abandonment of the contract in the testator's lifetime would set up the will without a republication. But where the will was revoked *at the testator's death* by the contract, of course no subsequent event could render the will operative and effectual (*r*). In the first case in the books (*s*), in which the question arose whether a covenant to convey an estate devised should operate at law as a revocation of the will, it was holden, that such a covenant without more, was not any revocation of the will; because perhaps the devisor's intention would alter before performance of the covenant. At law, therefore, a contract does not revoke the will; but a conveyance in pursuance of the contract would of course operate as a revocation, or to speak more technically, as an ademption. Now it may be contended, that the same rule must prevail in equity, and that a contract for sale ought not to affect the validity of a prior will, until it is carried into execution, or, which in equity is tantamount to a conveyance, until the Court decree a specific performance of it. While an agreement rests *in fieri*, and the validity of it has not been acknowledged by a decree, it seems equitable that the owner should be at liberty, with the concurrence of the other party, to alter his mind. Indeed in the absence of intention there seems to be no weighty distinction between an agreement which has been abandoned, and an agreement which equity will not perform. If a man make a second will without expressly revoking the first, and afterwards cancel the second will, the first is revived, the second will being considered only intentional (*t*);

(*r*) Bennett *v.* Lord Tankerville, 19 Ves. jun. 170.

(*s*) Montague *v.* Jeffries, 1 Ro. Abr. 615 (P.), pl. 3.

(*t*) Goodright *v.* Glazier, 4 Burr. 2512.

and although it is true that a will is ambulatory till the death of the testator, yet the same ground may be taken in support of a will impliedly revoked by an agreement afterwards abandoned. Why should not a mere agreement be deemed ambulatory till it is completed, when it is clear that the parties may rescind the agreement, and the estate of the devisor is not altered so as to effect a revocation at law?

38. The seller after the contract and before the conveyance was not considered so absolutely a trustee as to prevent the estate from passing by a devise by him, subsequently to the contract, of his real estate to trustees to sell (*u*). But where an estate under contract was devised expressly by name, it was held that the legal estate only passed to enable the devisee to carry the contract into execution, and that the devisee was not entitled to the purchase-money beneficially (*x*). The principle of this decision will necessarily furnish many exceptions to the rule laid down in the case of Wall *v.* Bright.

39. When an estate is contracted to be sold, it is in equity considered as converted into personalty from the time of the contract (I); and this notional conversion

(*u*) Wall *v.* Bright, 1 Jac. & Walk. 490.

(*x*) Knollys *v.* Shepherd, 1 Jac. and Walk. 499, cited. This case was affirmed in 1825 in Dom. Proc. MS. The decision depended upon the particular terms of the devise.

(I) The decision in the case of Foley *v.* Percival, 4 Bro. C. C. 419, seems to depend on the personal estate having been charged with the legacies; and the *dictum* of the Lord Chancellor, that an estate contracted to be sold, is not converted into personalty, where it will disappoint the testator's intention as to the payment of legacies charged upon the estate by his will, appears not to be warranted by either principle or authority. The case of Comer *v.* Walkley, 2 Dick. 649, is misreported. See *post*, ch. 9.

takes place, although the election to purchase rests merely with the purchaser (*y*).

40. Thus in a case before Lord Kenyon, at the Rolls (*z*), Whitmore demised to Douglas for seven years, with a covenant, that if the tenant, after the 29th of September 1761, and before the 29th of September 1765, should choose to purchase the inheritance for 3,000 *l.*, Whitmore would convey to him. In 1761, before any election, Whitmore died, and left all his real estate to Bennett in fee, and all his personal estate to Bennett and his sister equally. In 1765, before the time mentioned, Waller, who purchased the lease and benefit of the agreement from Douglas, called on Bennett to convey for 3,000 *l.*; which conveyance was made in consideration of that sum. Afterwards the sister and her husband filed a bill against the representative of Bennett, claiming a moiety of the 3,000 *l.* and interest, and it was decreed accordingly.

This decision was followed by Lord Eldon, in a case (*a*) where the estate had not been devised. He observed, that he did not mean to say that a great deal might not be urged against it, but where there was a decision precisely in point it was better to follow it. There appears to have been no difficulty in the case before Lord Eldon, where the contest was between the heir at law and the personal representative only. It would have been difficult to have extended the rule to a devise of the estate by name, although every devise of real estate is in its nature specific. In deciding in favour of the conver-

(*y*) Lawes *v.* Bennett, 7 Ves. jun. 436; 14 Ves. jun. 596, cited; 1 Cox, 167, reported; S. C. cited, 16 Ves. 253, 254, *nom.* Douglas *v.* Whitrong; Ripley *v.* Waterworth, 7 Ves. jun. 425.

(*z*) Whitmore's case, *ubi sup.*

(*a*) Townley *v.* Bedwell, 14 Ves. jun. 591.

sion in Lawes *v.* Bennett, Lord Kenyon observed, that no stress could be laid upon the will of the testator, for that was expressed in very general terms. He had two species of property, one of which he gave to Bennett, the other to Bennett and his sister. Then which kind of property was the present? A contract to sell an estate made it personal property, and he thought it made no distinction that it was left to the election of the tenant whether it should be real or personal (*b*).

41. In these cases, until the option is declared, the rents belong to the heir or devisee.

42. Upon the same principle it has been determined, that if a man having a timber estate, agree to sell a given quantity per annum, to be chosen by the buyer, although the owner die, and the option is in the buyer, yet the timber cut after the owner's death, however large in quantity, will be part of his personal estate (*c*).

43. The rule established by these decisions must frequently subvert the vendor's intention; where, therefore, a vendor intends the estate, as between his real and personal representatives, to be deemed real estate, a declaration to that effect should be inserted in the agreement for sale.

44. We may here observe, that equity will not only enforce a contract to sell, although the election is in the other party alone, as in the cases above quoted, but would execute a will proposing a right of pre-emption (I). If an estate is stated in a will to have been valued at 50,000*l.*, and it is directed to be offered to a particular person at 30,000*l.*, clearly the Court would act. In the

(*b*) 1 Cox, 171.

(*c*) See 7 Ves. jun. 437; 1 Cox, 171.

(I) As to a right of pre-emption of timber which a lessee is authorised to cut down, see Goodtitle *v.* Saville, 15 East, 87.

more difficult case, where a testator directs trustees to offer the estate at such price and upon such terms as they may think proper to fix, the Court will, if the trustees will not act, place itself in their stead, and refer it to the Master to fix a price. Again, if the testator ordered the trustees to put a reasonable value upon the estate and to offer it to a particular person at that value, and they die or refuse to act, the Court might direct a reference to the Master to fix the value and execute the trust by proposing the estate to him at that value, and if he did not accept the proposal, putting it up by public sale (I). Neither the nature of the property nor the difficulty of executing the trust ought to alter the rule. Such a will amounts in substance to a devise of the estate itself, if the favoured object elect to take it. But he must in his lifetime or by his will do some act, denoting that he accepts the benefit, or the Court cannot consider him as the purchaser of the estate (*d*).

But the purchase must in substance be concluded within the prescribed time, as far as depends upon the purchaser, and therefore, where a devise to trustees was in trust, to permit the testator's son at any time within three months to become the purchaser at a certain price, and to convey the same to him in fee, but, should he not complete the purchase within the three months, to sell the same generally, a verbal intimation by the son of his intention to purchase, assented to by them, but not followed by payment of the money, and the title-deeds

(*d*) The Earl of Radnor *v.* Lord Eldon. Shafto, 11 Ves. jun. 454, 455, *per*

(I) This latter would be with a view to a *general* sale: it could hardly be another mode of leaving the favoured object to work out his right by buying at the auction.

were not delivered to the solicitor to the trustees with instructions to prepare the conveyance until the last day of the three months, was held not to give the son the right to enforce the sale to him, for the son ought at the least to have placed the purchase-money under the control of the trustees: a mere verbal notification of an intention to purchase could not be said to be a completion of the purchase (*e*).

We may further observe, that if a lease be granted, with power to the lessee to cut and sell the timber, and the lessee is required *when and so often* as he intends to sell the timber, or any part thereof, to give notice to the lessor to whom the pre-emption was given; the lessee having a *bonâ fide* intention to cut down all the timber, may give a general notice to the lessor, and if the lessor decline to purchase the timber, the lessee may cut it down at intervals and need not repeat the notice (*f*).

---

45. But, to return to the cases of devisees before or after contracts, secondly, we are to consider the law as it applies to wills executed upon or subsequently to the 1st January 1838. Every such will speaks and takes effect with reference to the property comprised in it, as if it had been executed immediately before the death of the testator, unless a contrary intention appear (*g*). And it passes all property, legal as well as equitable, and contingent as well as vested interests, even a hope of succession, if it be realised in the testator's lifetime, and also rights of entry, and copyholds as well as freeholds, and whether there is any custom to devise them or not, and although the devisor

(*e*) Dawson v. Dawson, 8 Sim. 346.

(*f*) Goodtitle *v.* Saville, 16 East, 87; see Doe v. Abel, 2 Man. & Selw. 541.

(*g*) 1 Vict. c. 26, s. 24; vide *infra*, ch. 11, s. 3.

shall not have surrendered the same to the use of his will, or not have been admitted. And of course all such estates, rights, and interests pass, although the testator became entitled to them subsequently to the execution of his will (*h*).

46. And no conveyance or other act done subsequently to the execution of a will relating to any estate comprised in it (except an act of revocation by a subsequent marriage (*i*), or by another regular will or codicil, or by destroying the will,) (*k*), will prevent the operation of the will with respect to such estate or interest as the testator has power to dispose of by will at the time of his death (*l*); in short, the will speaks, as we have already observed, as to the property, as if it had been executed immediately before the testator's death (*m*).

47. The operation of the Act is to confirm the right to devise an estate acquired by contract, whether the estate be copyhold or freehold.

48. But words of actual description, like the cases of Atcherly *v.* Vernon and St. John *v.* Bishop of Winton, must still be decided according to the intention. The power to devise in such cases is unquestionable: the intention to do so is to be collected from the terms of the devise (*n*).

49. The law is still the same as to a devise by a man who has *contracted* for the inheritance having already a term of years. The equitable fee would pass, and the term would attend it (*o*).

50. Whether, if such a purchaser had, previously to the purchase, made his will under the new law by a general

(*h*) Sect. 3.
(*i*) Sect. 19.
(*k*) Sect. 20.
(*l*) Sect. 23.
(*m*) Sect. 24.
(*n*) *Supra*, p. 280.
(*o*) *Supra*, p. 280.

bequest in which the term would have passed, the legatee will be entitled to it, although the bequest be not expressly revoked, is a point of some nicety (*p*). The rule of equity that the term attends the inheritance immediately on the purchase of the fee, still remains; but it must bend to the provisions of the Legislature. Now the statute provides that no act done subsequently to the execution of a will of real or personal estate (except a revocation within the terms of the Act, which the purchase of the inheritance would not amount to,) shall prevent the operation of the will with respect to such interest as the testator shall have power to dispose of by will at the time of his death (*q*); and that every will shall be construed with reference to the estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear *by the will* (*r*).

51. Now the rule of equity which denied to the legatee the right to the term, proceeded upon the rule that the term became attendant upon the inheritance, and no longer remained in the view of equity as a term in gross. But the statute, with few exceptions, prevents any act subsequently to the will from operating as an implied revocation of the gift of the estate which the testator has at his death; and although the case we are now considering was not in the view of the Legislature, yet the statute *seems* to save the bequest to the legatee for the term of years, because, notwithstanding the subsequent act, viz., the purchase of the inheritance, the will is still to operate with respect to the testator's interest at his death as far as that is disposed

(*p*) *Supra*, p. 281.
(*q*) Sect. 23.
(*r*) Sect. 24.

of by the will. But it may be urged that there is no specific gift of the estate, even for the years in the case supposed, and that it would probably be contrary to the intention of the testator that the term, after he has purchased the inheritance, should pass as part of his personal estate. The reply is, that by the statute the question must be, Does a contrary intention appear *by the will?* Now, *the will* only shows an intention to pass all the personal estate, of which this was a part, and at law still is. It may be urged, that by the statute the will is to be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will; and therefore that this will must be so construed as no contrary intention appears by it, and consequently it cannot pass the term of years, because, if a lessee for years, having contracted for the inheritance, were to make his will and simply bequeath his personal estate, the term of years would not in equity pass to the legatee. But it may be thought that the clause in question was intended to enlarge and not to restrict the testator's power, and that the case altogether depends upon the previous section. The term was bequeathed by the will as it stood, and the subsequent act is not to defeat its operation.

52. But a still more difficult case may arise. A lessee for years may make his will and give all his personal estate to *A*, and all his real estate to *B*, and afterwards contract for the fee, and then die without republishing his will. At the time he made his will it would have passed the lease to *A*, at the time of his death it will pass the fee to *B*. Is the legatee still entitled to the term? It would, perhaps, be held, that he is not, because it may be said the character of the

estate has changed in equity, and as the will by the statute will operate upon the whole fee, no provision of the Act would be contravened, and the will would speak and take effect as to the estate, as if it had been executed immediately before the death of the testator; for *such* a will, executed under such circumstances, immediately before the testator's death, would of course pass the fee to *B*, and the term would attend it. But this is not a clear point, and it might be considered more consistent with the statute to allow the term to pass to the legatee, and the fee (subject to the term) to the devisee.

53. But let us suppose that, in the case originally put, there was, after the contract, a conveyance of the fee to the purchaser, or the term was assigned to attend the inheritance, in either case it seems that the legatee would not take the term; for, in the first case, the term would have merged by its union with the fee, and no interest in the nature of personal estate would have remained to be acted upon by the will: in the latter case, there would be a new destination of the term; it would no longer be personal estate of the testator, either at law or in equity; but at law would belong to the trustee, and in equity would be attached to the inheritance.

54. If the term had been *specifically* bequeathed, the rule before the statute would, we have seen, have been the same (*s*). But that circumstance now would make a difference; not, however, in the cases last supposed; for an actual conveyance of the fee to the testator merging the term, or an assignment of the term to attend, would have the same operation, whether the term had been specifically bequeathed, or would have passed under a general bequest.

(*s*) *Supra*, p. 281.

55. But where the term is specifically bequeathed, a *contract* for the fee would not now, it is conceived, defeat the bequest; and if there were a specific bequest of the term to *A*, and a general devise of real estate to *B*, although the latter would pass the fee to *B*, by force of the statute, notwithstanding that there was no republication after the contract, yet the bequest of the term would, it seems, remain valid, for the thing itself would still subsist, and the testator, at his death, had power to dispose of it; and a similar gift in a will executed immediately before the testator's death, would have the same operation; and in this case no contrary intention would appear *by the will*. Indeed, it will perhaps be contended in such a case that the legatee of the term takes the fee; because the estate is given by the will, and the statute supplies words of inheritance (*t*), and makes the will speak as if executed immediately before the death; but this could not be maintained, because in such a case the term is given to the legatee, which prevents the operation of the clause in the statute vesting the fee, and a contrary intention would appear on the face of the will.

56. The statute altogether alters the law as to revocation by the mode of conveyance in pursuance of a contract; if there are sufficient words to pass the estate in the will, although made before the contract, no possible form of conveyance giving to the purchaser the beneficial interest in the estate can prevent it from passing by the will; it is unimportant, therefore, that the estate is conveyed to uses to bar dower; for whatever interest the testator has in the estate at his death, will pass by the will whenever executed. And questions cannot arise upon the new Act in regard to putting an heir to his election, where the testator assumes to devise his after-

(*t*) Sect. 28.

purchased estates (*u*), for they will actually pass, even under a general gift, and the heir at law will have no title.

57. In purchasing, therefore, from an heir at law, whose ancestor survived the 31st of December 1837, whether there was a contract or not, it must be ascertained that he did not execute at any time after that date any will or codicil in the presence of two witnesses, and attested by them and signed by them in his presence and in the presence of each other (*x*); for if he did by such a will devise his real estate, it is not likely that the heir at law has any right, for not only are words of inheritance now supplied, but lapsed devises of real estates fall into the residue, and the will, whenever executed, passes the property which the testator has at his death.

58. As to dispositions by *vendors*, under the old law, a contract by a man to sell his estate revokes his will in equity although not at law(*y*).

59. Upon this important point, which is constantly arising, it has been observed (*z*) that a question will no doubt be raised whether the law is altered by the recent statute, which, as we have seen, provides that no act made or done subsequently to the execution of a will of real estate, shall prevent the operation of the will with regard to such estate or interest in such real estate as the testator shall have power to dispose of by will at the time of his death. It may be argued, that, by force of this provision, the object of which was to prevent devisees from being disappointed by any partial disposition by the testator, the devisee would take all the interest which the testator himself had in the estate at his death, in which case he would take the estate as his

(*u*) *Supra*, p. 285.
(*x*) See H. Sugd. Wills.
(*y*) *Supra*, p. 287.
(*z*) H. Sugd. Wills, p. 53.

own, subject to perform the contract for his own benefit, and the money would not go to the executor. Besides, every will is made to speak as to the property comprised in it, as at the testator's death, unless a contrary intention appear upon the face of the will. Now, by the expressions in the will in this case, that is by the devise, the testator meant to give the devisee the beneficial interest in the estate: that, if not expressed, is necessarily implied. If, after a contract for sale, he were to devise the estate to any person with the same intention expressed, the devisee would, of course, take it for his own benefit, but subject to perform the contract. Now, as the will speaks as at the death, and, of course, in the same language, the devise is in operation of law by force of this statute a devise after the contract, and therefore, as no intention can be inferred to use the words in any but their original sense, for the intention that the will shall not speak as if made immediately before the testator's death must appear by the will, it may be held that the law is altered in this common but important case, and the purchase-money will go to the devisee, and not to the executor. The statute does not alter the force or meaning of the words in the will, but extends their operation over the property to the moment before the testator's death. On the other hand, it may be urged that the will, without the aid of the Act, will still operate on the property, carrying the legal fee to the devisee, and the right to the money to the executor; and that the intention of the Act was probably not to alter the rule of equity by which a contract for sale converts the estate into money. It is to be regretted that this case was not provided for by the Act. Litigation seems inevitable, in order to ascertain the construction upon this important point. If the law is altered, the profession will be taken by surprise. So

far were the Real Property Commissioners from intending to propose an alteration in the law in this respect, that they actually state that such a revocation is essential to the nature of a will, and cannot be altered.

60. If an agreement be such as a court of equity will not carry into execution, it is clear that the property will by the new law pass to the devisee, whatever might have been the true rule before (*a*).

61. So of course where the contract is abandoned, the devise will not now be affected (*b*), because, notwithstanding the act done, the will still operates on all the interest which the testator had power to dispose of by will at the time of his death, and speaks as to the property as at that time.

62. The leading object of the act being to pass to the devisee whatever devisable interest the testator had in the estate at the time of his death, notwithstanding any act done by the testator subsequently to the will, other than a revocation by another will or by marriage, it would now seem that a devise to a man of an estate contracted by the devisor to be sold would require stronger words than those used in Knollys *v.* Shepherd, to make the devisee a mere trustee instead of taking beneficially (*c*).

63. The law does not appear to be altered in such cases as Lawes *v.* Bennett (*d*), for there the will operates according to the intention *at the testator's death*, and its operation is afterwards changed by the subsequent conversion of the property, with which operation, or its effect upon the will, the statute does not seem to interfere.

64. But, in conclusion, we may observe, in the words

(*a*) *Supra*, p. 288.
(*b*) *Supra*, p. 289.
(*c*) *Supra*, p. 291.
(*d*) *Supra*, p. 292.

of another writer (*e*), that the act goes much further than simply to leave the will to operate on such interest as the testator *has left in him* by the effect of a conveyance subsequently to his will, for the will is to operate upon such estate or interest as the testator has power to dispose of by will *at the time of his death*. If, therefore, a man were to make his will disposing of his real estate, and afterwards were to convey the whole fee to uses or upon trusts, relimiting or leaving any interest in himself, that interest will pass by his will; but still further, if he were afterwards to convey to a purchaser his remaining interest in the estate, and at a subsequent period to repurchase the property, and die seised of it, it would pass by his will to the devisee.

65. In a case like that of Arnald *v.* Arnald, where the testator devises his estate to trustees to sell, and pay the money to certain legatees, and afterwards sells the estate himself, which we have seen under the old law was an ademption (*f*), the distinction now would seem to be this, that if the money has not been received by the testator it will pass to the legatees, because, notwithstanding the act done by the testator, viz. the sale, the will is still to operate on the estate, or interest in the estate, which the testator has power to dispose of by will at his death; and he has power at that time to dispose by will of the purchase-money, and has a lien on the estate for it, which he can also dispose of, and the case of the legatees is rather strengthened than weakened by the 24th section. But if the testator has received the money, the ademption appears to be beyond the reach of the statute: the testator has no longer any interest in the property given by his will, although his general personal estate is increased by the sale, and the case does not seem to be aided by the 24th section.

(*e*) H. Sugd. Wills, 52. (*f*) *Supra*, p. 287.

66. If a legacy be given as a demonstrative one, to be paid out of the proceeds of the sale of an estate for which the testator has contracted, it will be payable out of the general assets if the contract be rescinded (*g*).

67. In regard to cases common to the old and the new law, where an estate contracted for after the will does not pass by it, the heir at law will be entitled to have the estate purchased for his own benefit, out of the personal estate of his ancestor (*h*), and that, although he unite in himself the three characters of vendor, heir, and executor (*i*). The estate will, however, be assets in the hands of the heir.

68. So if the purchaser die intestate, the heir will in like manner be entitled to have the estate purchased for him: and if his ancestor die before the conveyance is executed, the heir may devise, charge, or sell the estate, in the same manner as the ancestor himself might have done (*k*), and it will now be subject to the dower of the purchaser's widow, unless he has deprived her of that right (*l*).

69. If the executor complete the purchase, and take the conveyance in his own name, he will be a trustee for the heir or devisee (*m*). And if the assets cannot be got in, and the real representative pay for the land out of his own pocket, he may afterwards call upon the personal estate to reimburse him (*n*). So, if the personal estate is insufficient to perform the contract, and

(*g*) Fowler *v.* Willoughby, 2 Sim. & Stu. 354; qu. When was the contract rescinded? Newbold *v.* Roadknight, 1 Russ. & Myl. 677.

(*h*) Milner *v.* Mills, Mose. 123; and see 2 P. Wms. 632; 3 P. Wms. 224; Broome *v.* Monck, 10 Ves. jun. 597.

(*i*) Coppin *v.* Coppin, Sel. Cha. Ca. 28; 2 P. Wms. 291.

(*k*) Langford *v.* Pitt, 2 P. Wms. 629.

(*l*) 3 & 4 Will. 4, c. 105, s. 2, and *post*, ch. 11, s. 1.

(*m*) Alleyn *v.* Alleyn, Mose. 262.

(*n*) See 10 Ves. jun. 614, 615.

the agreement is on that account rescinded, yet the heir or devisee will, it should seem, be entitled to the personalty as far as it extends. And it has been decided, that if by reason of the complication of the testator's affairs, the purchase-money cannot be immediately paid, and the vendor for that reason rescinds the contract, yet on the coming in of the assets, the devisee of the estate contracted for, may compel the executor to lay out the purchase-money in the purchase of other estates for his benefit (*o*).

70. But if the heir not being entitled to have the estate paid for out of the personal estate, actually obtain and apply the personal estate in payment of the purchase-money; the persons entitled to the personal estate will not be entitled to the lands, but only to a charge on it for the amount of the money wrongly applied (*p*).

71. But—to return to the point under consideration—if upon the death of the vendor a title cannot be made, or there was not a perfect contract, or the Court should think the contract ought not be executed, in all these cases there is no conversion of real estate into personal in consideration of the Court, upon which the right of the executor on the one hand, and of the heir or devisee on the other, depends; and therefore the estate will go to the heir at law of the vendor, in the same manner as if no contract had been entered into (*q*). So if upon the death of the purchaser a title cannot be made, or there was not a perfect contract, his heir or devisee will not be entitled to the money agreed to be paid for the

(*o*) Whittaker *v.* Whittaker, 4 Bro. C. C. 31; Broome *v.* Monck, 10 Ves. jun. 597. *Vide infra.*

(*p*) Savage *v.* Carroll, 1 Ball and Beatty, 265. See *post*, ch. 20.

(*q*) Lacon *v.* Mertins, 3 Atk. 1; Attorney-general *v.* Day, 1 Ves. 218; Buckmaster *v.* Harrop, 7 Ves. jun. 341; and see 8 Ves. jun. 274; Rose *v.* Cunynghame, 11 Ves. jun. 550.

lands, or to have any other estate bought for him (*r*). For although the purchaser himself, if alive, might elect to take the estate with the bad title (*s*), or where there is an outstanding interest with a compensation (*t*); yet where he is dead the Court cannot speculate upon what he would or would not have done; but, in these cases, the inquiry must be, whether at his death a contract existed, by which he was bound, and which he would be compelled to perform. That alone can give the heir of the purchaser a right to call for the personal estate to be applied, or to the personal representative of the vendor, a right to call upon his heir. The question must be the same, whether a purchase or a sale is insisted on. Was the ancestor himself bound? Was there such an agreement as converts the real estate into personal, or the personal estate into real? (*u*) (I). On this ground it has been decided, that where a man had a right of pre-emption of an estate under a will, and did not accept the offer in his life-time, or denote any intention by his will to do so, there was no subsisting contract, by virtue of which the right passed to the real representative, so as to enable him to call upon the

(*r*) Green *v.* Smith, 1 Atk. 573; Broome *v.* Monck, 10 Ves. jun. 597; Savage *v.* Carroll, 1 Ball & Beatty, 265. *Vide supra.*

(*s*) Western *v.* Russell, 3 Ves. & Bea. 187.

(*t*) Collier *v.* Jenkins, Yo. 295.

(*u*) *Per* Sir Wm. Grant, 7 Ves. jun. 344, 345.

(I) Note, in Potter *v.* Potter, 1 Ves. 438, a bill was filed to compel execution of the parol agreement in the testator's life-time; his agent gave a note for payment of part of the purchase-money, and *let the estate as he pleased.* Possession of the estate must, therefore, have been delivered to him. And the Master of the Rolls expressly said, that the agreement was so far carried into execution, even before the will, as to supply the want of writing. This case, therefore, like the others, only proves, that a *binding* contract in the testator's life-time will be enforced.

personal estate to pay for the estate, as if it had been contracted for (*x*). So where upon a parol treaty, the purchaser filed his bill for a specific performance of it, and the vendor submitting to perform it, a decree was made, that the purchaser should pay the money into the bank by a given day, or the bill should be dismissed; and the purchaser paid the money according to the decree: in a question between his heir and devisee it was determined, that the estate did not pass by a general devise in his will, which was made *prior* to the payment of the money (*y*). It will be observed, that in this case, neither of the parties was bound at the time the bill was filed; and if the purchaser had not paid the money, his bill would have been dismissed, and, in that event, no contract would ever have existed. It was therefore clear, that the inception of the contract was upon payment of the money, and the will, therefore, having been made *before* the contract, could not affect the estate. But now such a will would operate to pass the estate contracted for, although the contract was concluded *after* the execution of the will (*z*).

72. But if an estate directed to be bought, but not actually contracted for, is not, or cannot be bought, yet the money must be laid out in other lands, for the benefit of the devisee (*a*). And where a testator intends that the devisee of the contracted estate shall have another estate of equal value, in case a good title cannot be made to the one contracted for, an express declaration to that effect should be inserted in the will.

73. By this time we must have observed, that the

(*x*) Earl of Radnor *v.* Shafto, 11 Ves. jun. 448.

(*y*) Gaskarth *v.* Lord Lowther, 12 Ves. jun. 107.

(*z*) 1 Vict. c. 26. *Vide supra.*

(*a*) Whittaker *v.* Whittaker, 4 Bro. C. C. 31; and see 2 Atk. 369; Broome *v.* Monck, 10 Ves. jun. 597. *Vide supra.*

foregoing rules, as to the conversion of the estate, apply to those cases only where a court of equity will decree a specific performance: for if equity will not interfere, and the vendee be left to his remedy at law, the rules of law, and not those of equity, must then prevail, and consequently neither the vendor nor his heir would be considered as a trustee for the purchaser, but would only be subject to an action for breach of contract.

## SECTION II.

### OF OTHER RIGHTS AND LIABILITIES ARISING OUT OF CONTRACTS.


2. *Where purchaser liable to existing mortgage debt.*
4. *Stopping proceedings in ejectment.*
5. *Further advances to mortgagor after a sale by him.*
6. *Redemption of mortgages on distinct estates.*
7. *Loss of mortgage deed.*
8. *Production of mortgage deed.*
9. *Assignee of mortgagee subject to the account.*
11. *Annuity the price of an estate, how to be secured.*
12. *Purchaser to indemnify against charges.*
13. *As where he buys a lease.*
14. *Or an equity of redemption.*
15. *Remedy of surety against purchaser.*
16. *Agreement to give real security enforced.*
17. *Purchaser's remedy for rent and covenants.*
18. *Apportionment of rents.*
19. *Liquidated damages.*
20. *Purchaser of legacy entitled to stock investment.*
21. *Fraud in sale of life policy.*
22. *Where power to re-purchase makes a loan.*
23. *Payment to be made on condition.*
24. *Re-purchase on a condition.*
25. *Notice to purchase binding under Act of Parliament.*
27. *Purchaser bound by grant of stewardship for life.*


1. We have already considered the operation of a contract upon an existing tenancy, and we shall, in con-

sidering the remedy at law upon a contract, have occasion to show that the giving of possession to a purchaser before the conveyance does not create a tenancy (*a*).

2. Disputes often arise between the real and personal representatives, where a person purchases an equity of redemption; the real representative mostly claiming to have the mortgage money paid off out of the personal estate, and the personal representative resisting the demand. Unless the mortgage money form part of the consideration money for the estate, or the purchaser, by communication with the mortgagee, clearly take the mortgage debt on himself, as between his heir and executor, it will be considered a charge on the land; the mere covenanting with the mortgagor to pay the debt, will not make it his personal debt; and consequently his personal estate, as between the heir and executor, will only be the auxiliary fund for payment of it (*b*).

3. In cases of this nature equity always adverts to the intention of the purchaser, and disputes on this subject may therefore be prevented, by the insertion of a short declaration in the purchase-deed, whether the personal estate of the purchaser shall or shall not, as between his heir and executor, be the primary fund for payment of the mortgage money.

4. It seems that where a mortgagor has agreed to convey his equity of redemption to the mortgagee, the proceedings in an ejectment by the mortgagee cannot be stopped under the 7 Geo. 2, c. 20, for the effect of it would be to strip the mortgagee of his legal title, which might let in a posterior equitable right to the prejudice

(*a*) *Post*, sect. 4.

(*b*) On this point see Evelyn *v.* Evelyn, 2 P. Wms. 659; and the cases in Mr. Cox's note; to which add, Hamilton *v.* Worley, 2 Ves. jun. 62; Woods *v.* Huntingford, 3 Ves. jun. 128; Buller *v.* Buller, 5 Ves. jun. 517; Waring *v.* Ward, 5 Ves. jun. 670; and 7 Ves. jun. 332; Lord Oxford *v.* Lady Rodney, 14 Ves. jun. 417; Barham *v.* Lord Thanet, 3 Myl. & Kee. 607.

of the mortgagee, though he should thereafter obtain a decree for the performance of the agreement (*c*). But the relief will be granted to the mortgagor, where the mortgagee has not taken any steps to complete his contract for the purchase of the equity of redemption (*d*).

5. A mortgagee lending a further sum of money to the mortgagor, without notice of the sale of the equity of redemption, would bind the purchaser although his conveyance is registered (*e*); and therefore a purchaser of an equity of redemption of an estate should, immediately after the sale, give notice of it to the mortgagee, although the estate is in a register county, and his conveyance is duly registered.

6. Another powerful reason why a purchaser cannot safely buy an equity of redemption without the concurrence of the mortgagee, even where the mortgage is not intended to be paid off, is, that he may be compelled to redeem *another* estate, for a mortgagee of two distinct estates upon distinct transactions from the same mortgagor is entitled to hold *both* even against the purchaser of the equity of redemption of one of the mortgaged estates, without notice of the *other* mortgage until payment of the whole money due on both mortgages (*f*). The mortgages must, however, be of the legal estate (*g*), and to the same person; and although the doctrine has been sometimes doubted (*h*), yet it appears to be perfectly settled (*i*).

(*c*) Goodtitle *v.* Pope, 7 Term Rep. 185.

(*d*) Skinner *v.* Stacy, 1 Wils. 80.

(*e*) *Infra*, ch. 21.

(*f*) Ireson *v.* Denn, 2 Cox, 425.

(*g*) Jones *v.* Smith, 2 Ves. jun. 376.

(*h*) *Ex parte* King, 1 Atk. 300; Willie *v.* Lugg, 2 Ed. 77.

(*i*) Titley *v.* Davis, Ambl. 733, cited, where both mortgages were by the same deed. *Ex parte* Carter, Ambl. 733; Tribourg *v.* Lord Pomfret, ib. n. (2); Roe *v.* Soley, 2 Blackst. 726; Cator *v.*

7. If the mortgagee have lost the mortgage-deed, yet the purchaser, like every other mortgagor, would be compelled to pay the money upon a reconveyance, and an indemnity against the loss of the deed (*k*).

8. A mortgagee cannot be compelled to produce his deeds before he is paid off, unless he consents to a sale; for by that he submits to do everything that is necessary to a sale (*l*). This has often been ruled.

9. And here it may be remarked, that an assignment should not in any case be taken of a mortgage, without the privity of the mortgagor as to the sum really due; for although it undoubtedly is not necessary to give notice to the mortgagor that the mortgage has been assigned (*m*), yet the assignee takes subject to the account between the mortgagor and mortgagee, although no receipt be indorsed on the mortgage-deed for any part of the mortgage-money which has been actually paid off (*n*).

10. And I cannot refrain from observing, that there have been so many forged mortgages executed by persons in confidential situations, that no man should take a mortgage or a transfer of one without being well satisfied that it is a genuine instrument: the danger is not diminished now that the severity of the law against forgery has been relaxed.

11. Where a man sells an estate for an annuity without any agreement being made respecting the security to be given for it, he is entitled to have it secured, not only upon the estate, but also by the bond

Charlton, Collet v. Munden, 2 Ves. jun. 377, cited.

(*k*) Stokoe v. Robson, 3 Ves. & Bea. 54; 19 Ves. jun. 385; see Shelmardine v. Harrop, 6 Mad. 41.

(*l*) Anon. Mose. 246.

(*m*) See 9 Ves. jun. 410.

(*n*) Matthews v. Wallwyn, 4 Ves. jun. 118. See 9 Ves jun. 264.

of the purchaser, and a judgment to be entered up against him (*o*). In Ker *v.* Clobery (*p*), which came before the Court upon a petition between the heir and executor, it appeared that the equity of redemption was sold to the mortgagee for the mortgage-money, and a life-annuity to be paid to the seller and his wife, and the survivor of them, but nothing was said as to the mode in which the annuity was to be secured. It was held to be a purchase of the equity of redemption, subject to the annuity, which ought to be charged on the estate. It was an interest reserved by the seller out of the estate.

12. A purchaser of an estate subject to incumbrances must indemnify the vendor against them, although he did not expressly engage to do so.

13. Thus a purchaser of a leasehold estate must covenant with the vendor to indemnify him against the rents and covenants in the lease, although he is not required to do so by the agreement for sale (*q*).

14. So, although a purchaser of an equity of redemption enter into no obligation with the party from whom he purchases, to indemnify him from the mortgage-money, yet equity, if he receives the possession, and has the profits, would, independently of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the mortgage-money; for having become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage (*r*).

15. But where the mortgage was secured upon the estate sold, and also by a surety, and upon the sale the

(*o*) Remington *v.* Deverall, 2 Anstr. 550; *qu.* as to the right to a judgment.

(*p*) V. C. 27 Mar. 1819, MS.

(*q*) Pember *v.* Mathers, 1 Bro. C. C. 52, *et supra*, p. 64.

(*r*) See 7 Ves. jun. 337, *per* Lord Eldon.

purchaser covenanted with the seller and his surety to pay the money, and to indemnify the seller and his security from the payment of it, it was held, that the surety having been compelled to pay, could not recover in an action of assumpsit against the purchaser, but his only remedy was by an action by the seller upon the covenant. It was considered that it might have been otherwise, if there had been a mere conveyance without any covenant, for then the purchaser would have been the seller's substitute, and the surety would have been the surety of the purchaser (*s*).

And if a purchaser who has not obtained a conveyance sell to another, the second purchaser is, without entering into a covenant, bound to indemnify him against any costs incurred in proceedings for his benefit (*t*).

16. If a seller agree to give a real security as an indemnity to a purchaser upon his accepting the title, he will be compelled specifically to perform it, although he has not sufficient real estate, and offers a sufficient security upon personal estate (*u*).

17. A purchaser of an estate let to a tenant from year to year may, without a new contract, or any act corresponding to attornment, recover the rent; and nothing would be a good defence in an action brought for it but the fact that he did not know of the sale, and had paid his rent before to his lessor (*x*). So, if the estate is in lease, the purchaser is entitled to the benefit of covenants entered into by the lessee with the

(*s*) Crafts *v.* Tritton, 8 Taunt. 365; 2 Moo. 411.

(*t*) *Per* Lord Eldon, in Wood *v.* Griffith, 12 Feb. 1818, MS.

(*u*) Walker *v.* Barnes, 3 Madd. 247.

(*x*) See 1 Vern. & Scriv. 289; Birch *v.* Wright, 1 Term Rep. 378. See Lumley *v.* Reisbeck, 15 East, 99; Rogers *v.* Humphreys, 4 Adol. & Ell. 299.

vendor (*y*) and may recover for a breach of the covenants before his time, if he is seised of the reversion during the continuance of the term (*z*); and he may, after notice to the tenant of the conveyance, distrain for rent in arrear (*a*), whether the estate be freehold or leasehold (I). But he cannot recover arrears of

(*y*) See *post*, ch. 14.

(*z*) Davis's case, M. T. 42 Geo. III. Woodfall's Land. and Ten. 529, 2d edit.

(*a*) See Moss *v.* Gallimore, Dougl. 259; Pope *v.* Biggs, 9 Barn. & Cress. 245; 4 Man. & Ry. 193; Waddilove *v.* Barnett, 2 Bing. N. C. 538; Brook *v.* Biggs, *ib.* 572; Partington *v.* Woodcock, 6 Adol. & Ell. 690.

---

(I) It was recently proposed to deprive all middle-men, even in England, of the right to distrain for rent in arrear. Thus, suppose a building lease to be granted by John to James for ninety-nine years, at 10 *l.* a year; James builds a valuable house, and underlets to Joseph, for forty years, at 100 *l.* a year; and Joseph underlets to Jacob, for thirty years, at 120 *l.* a year; it is manifest that James has the greatest interest in the property; and, as the law now appears to stand, he can distrain for his rent, notwithstanding the last underlease. This right was proposed to be taken from him, but the measure was dropped.

In support of the measure, it was contended, that none but the original lessor is entitled to distrain for rent, according to the law of England; and therefore that, in the case which I have put, James would not be affected by the act; because he would not, as the law now stands, be entitled to distrain. The argument, which was managed with great ingenuity, was rested upon the statute of *quia emptores*, and some passages in Coke upon Littleton. When it is considered, that the right of distress, in the case above supposed, has never been disputed, it will not be matter of surprise, that the attempt to show that the practice is illegal did not succeed. That rent may be distrained for, although fealty is not incident to it, is laid down in Co. Litt. 142, b.; and it seems to be clear, that distress is incident to every rent at common law, where the lessor has a reversion; and that a reversion of a single day is, for this purpose, as operative as a reversion in fee. In the year book, 14 Edw. III, p. 8. Finchden thought, that if a lessee leased *all* his estate rendering rent, he could not distrain; he had no reversion. In the 2d Edw. IV. p. 11, the very objection was taken, where the lessor had a reversion; because it was only the reversion of a chattel; but it was held, that he had a

rent due before the assignment, although it will carry the right to the whole of the accruing quarter or half-year (*b*); nor can he recover if he purchase after the term ended for a breach during the term, although there has been a continuing tenancy, for the tenant is liable to his original landlord on his breach of covenant, and cannot also be liable to the purchaser, the new landlord, for the same damage arising from the breach of his implied undertaking. If the seller has sold the estate for a lower price because he is to have the remedy against the tenant, he may sue on his own account: if he has received the full price, on the ground that the damage is to be made good, he may sue as a trustee for his vendee (*c*).

18. And here we may observe, that by a late act (*d*), all rents service reserved on any lease by a tenant in fee, or for a life interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this act), and all other rents, &c., made payable or becoming due at fixed periods under any instrument executed after the passing of the act, or (being a will or testamentary in-

(*b*) Flight *v.* Bentley, 7 Sim. 149.

(*c*) Johnson *v.* Churchwardens of St. Peter, 4 Adol. & Ell. 520.

(*d*) 4 & 5 Will. 4, c. 22 (16 June 1834).

---

right to distrain. In Brooke's Abridgment, Distress, case 45, and Rents, case 17, it is laid down, on the authority of this case, that if a man lease for twenty years, and the lessee leases over for ten years, rendering rent, there, if he grant the rent over to another man, he cannot distrain; because he has not the reversion of the term, which gives the right to distrain: contrary, if he had granted to him, the *reversion* and the rent. Note the diversity. In Wade *v.* Marsh, Latch, 211, it was held, that the lessor having only a reversion for years, may, by the common law, distrain for the rent, by reason of the reversion, which causes privity. These cases appear to be quite decisive. The only difficulty has been to find a case; for the point has not been doubted for centuries.

strument) that shall come into operation after the passing of the act, are upon the death of any person interested in such rents, or on the determination by any other means, of the interest of any such person, made apportionable in favour of such person or his personal representatives, unless it shall be expressly stipulated that no apportionment shall take place.

19. Where a business is sold with a house, as in the case of a public-house, it is sometimes usual to insert an agreement that in case the seller carry on a similar business during a limited period within a specified distance of the house, he shall pay a sum named as liquidated damages. Where the agreement is properly framed and the instrument is under seal, and even perhaps if it be not under seal, the whole sum, in case of a breach, may be recovered, and at all events, although no damage is proved, yet the jury may give as damages the whole amount of the sum fixed (*e*). Where the parties have expressly stipulated that in case of a breach by either, he shall pay a sum named as liquidated damages, the whole sum may, if the agreement be broken, be recovered at law (*f*).

20. An assignment of a legacy as sterling money will carry the stock in which it is invested under a will, and the purchaser will be entitled to the rise, or must bear the fall, as the case may be, if the money was at the time of the sale invested in the funds, and the intention was to sell the fund in its actual state of investment (*g*).

21. Where a policy of assurance on a life was sold by auction, and the particulars did not state that the seller had only a redeemable interest in the life assured, and

(*e*) Crisdee *v.* Bolton, 3 Carr. & Pay. 240; see Randall *v.* Everest, 2 Carr. & Pay. 577, 1 Mood. & Malk. S. C.

(*f*) Reilly *v.* Jones, 1 Bing. 302; 8 Moo. 244.

(*g*) Lucas *v.* Bond, 2 Kee. 136.

the interest was afterwards redeemed, it was held that after the purchase was completed the purchaser could not recover damages for the fraud, as it was proved that the practice of the office was to pay such policies, although of course there was no legal right to recover under the policy (*h*).

22. A *bonâ fide* purchase of an interest will not be converted into a loan, on account of a power to re-purchase being given to the seller, although at an advanced price; but, if the purchaser, instead of taking the risk of the subject of the contract (*e. g.* an annuity) on himself, take a security for repayment of the principal, that will vitiate the transaction, and render it a mere mortgage security (*i*).

23. If a purchaser agree to pay an addition to the purchase-money, provided the adjoining property be improved in a stipulated manner before a day named, the money cannot be recovered if the seller do not make all the improvements before that day; in other words, the condition must be performed to entitle him to the money (*k*).

24. If a power to re-purchase be given upon a condition, for example, that rent be in the meantime regularly paid, the right cannot be enforced unless the condition has been complied with, for it is not a stipulation for penalty or forfeiture but a privilege conferred (*l*).

25. Where a power is given by an Act of Parliament to purchase the estate of a third person for a public purpose, with the usual provisions for ascertaining its value, if the terms offered are not accepted; the party

(*h*) Barber *v.* Morris, 2 Mood. & Malk. 62.

(*i*) Verner *v.* Winstanley, 2 Scho. & Lef. 393. See Sevier *v.* Greenway, 19 Ves. jun. 413.

(*k*) Maryon *v.* Carter, 4 Carr. & Pay. 295: see the form of the pleadings.

(*l*) Davis *v.* Thomas, 1 Russ. & Myl. 506.

empowered to purchase, if he give a regular notice to purchase, cannot withdraw from it, but will be compelled to take the estate (*m*).

26. If a man has agreed to grant a lease, he should be cautious in purchasing the interest of an under lessee or of an assignee of part, that he do not subject himself to the liabilities of the seller, and release the original lessee from his obligations (*n*).

27. It may here be observed, that the grant of the office of a steward of a manor for life is not revoked by a subsequent sale of the manor, but is binding on the purchaser; although, as lord, he will be entitled to the custody of the court-rolls. In purchasing a manor, therefore, the instrument by which the steward was appointed should be called for. This is a precaution which has never been attended to.

(*m*) The King *v.* Hungerford Market Company, 1 Nev. & Mann. 112.

(*n*) Jenkins *v.* Portman, 1 Kee. 435.

## SECTION III.

### OF SPECIFIC PERFORMANCE.

1. *Specific performance by Court of Review.*
2. *Form of decree.*
I. Against the vendor.
3. *Heir at law bound.*
4. *Infant heir of vendor.*
5. *Devisees in strict settlement of vendor.*
6. *Tenant in tail.*
7. *Provisions by statute.*
8. *Equitable tenant in tail.*
9. *Tenants in tail of copyholds.*
12. *Doweress.*
13. *Joint tenant.*
14. *Feme covert.*
15. *Where she has a power.*
16. *Decree against the husband.*
20. *Feme covert with separate estate, purchasing.*
21. *Lunatic; effect of lunacy on contract.*
23. *Trustees under power.*

24. *Infant.*

II. As regards the agreement.

28. *Sale of annuity, stock, &c.*

29. *Discretionary.*

30. *Misrepresentation by purchaser or seller.*

31. *Value.*

32. *Intoxication.*

34. *Where the action is lost.*

35. *Damages recoverable at law.*

36. *Hardship of sale upon seller.*

37. *Want of competency.*

39. *Purchase of lease or underlease.*

40. *Suppressio veri : suggestio falsi.*

41. *Mistake.*

42. *Surprise.*

44. *Sale by agent contrary to authority.*

45. *Breach of trust.*

46. *Discretionary power in trustees.*

49. *Seller not owner.*

50. *Want of title.*

53. *Purchaser nominal contractor.*

57. *Seller pretending to be an agent.*

58. *Sale of annuity for lives not named.*

59. *Specific performance where no action will lie.*

66. *Penalty : specific performance.*

67. *Penalty : action.*

---

The observations in a preceding section (*a*), lead us now to inquire, in what cases a court of equity will decree a specific performance; which, for the purposes of this work, may be comprised under two heads. First, with respect to the vendor; Secondly, with respect to the agreement itself.

1. I may premise that the Court of Review in bankruptcy has jurisdiction to compel a specific performance where an estate is sold under the common order of the court on the petition of an equitable mortgagee (*b*).

2. As to the form of the decree, Lord Eldon observed, that according to the old practice, there were two ways of framing a decree for specific performance. The one was to declare that the plaintiff was so entitled to a specific performance if a good title could be shown, and then to direct a reference as to the title; the other to refer the title to the Master, and to follow up that

(*a*) Section I.

(*b*) *Ex parte* Buttill, 3 Mont. & Ayr. 543.

direction by a declaration, that if a good title was shown the agreement ought to be specifically performed; and he added, that in his opinion, difficulties may often arise from omitting to make a declaration in the decree (*c*). And upon another occasion he observed, that in suits for specific performance, where the question of title is not the only issue, but the defendant insists that, whether the title be good or bad, the plaintiff is for any reason not entitled to specific performance, it is specially necessary that there should be in the first instance a declaration that the plaintiff is entitled to have the contract specifically performed if a good title be shown (*d*). But still, it is quite settled, that in the common case a mere reference of the title is an implied declaration of the plaintiff's right to a specific performance if the title prove to be good.

3. Now in regard to the vendor,—if a man, seised in fee-simple, or *pur autre vie* (*e*), contract for the sale of his estate, and die before the conveyance is executed, his heir at law will be decreed to perform the agreement *in specie*, although he covenanted for himself only, and not for his heirs (*f*).

4. It was a point of great controversy whether the 7 Anne, c. 19, enabled an infant heir at law to convey in performance of a contract made by his ancestor. It is now sufficient to refer to the cases (*g*), for that act was

(*c*) 3 Russ. 182.

(*d*) Pitt *v.* Davis, 3 Swanst. 182, n.

(*e*) Stevens *v.* Baily, 2 Freem. 199, cited; Nels. Cha. Rep. 106, reported; see Anon. 2 Freem. 155.

(*f*) Gell *v.* Vermedum, 2 Freem. 199.

(*g*) See *Ex parte* Vernon, 2 P. Wms. 549; Sikes *v.* Lister, 5 Vin. Abr. 541, pl. 28; Goodwin *v.* Lister, 3 P. Wms. 387; S. C. MS.; Hawkins *v.* Obeen, 2 Ves. 559; Fearne's *Posthuma*, 236; Jerdon *v.* Forster, 1 Sand. on Uses, 283, cited, 3d edit. *Ex parte* Janaway, 7 Price, 679; Smith *v.* Hibbard, 2 Dick. 730; Oneby *v.* Price, Fearne's *Post.* 239.

repealed by the 6 Geo. 4, c. 74; but even the latter act was held not to embrace constructive trusts (*h*). The law now depends upon the 1 Will. 4, c. 60, which enables conveyances to be made by committees of trustees and by lunatics, although not found so by inquisition, and by infant trustees; and (*i*) it provides that every person, being in other respects within the meaning of the act, shall be, and be deemed to be, a trustee within the act, notwithstanding he may have some beneficial estate or interest in the same subject, or may have some duty as trustee to perform. And it expressly enacts (*k*), that where any land shall have been contracted to be sold, and the vendor, or any of the vendors, shall have died, either having received the purchase-money for the same, or some part thereof, or not having received any part thereof, and a specific performance of such contract, either wholly or as far as the same remains to be executed, or as far as the same by reason of the infancy can be executed, shall have been decreed by the Court of Chancery (I), in the lifetime of such vendor, or after his decease (*l*), and where one person shall have purchased in the name of another, but the nominal purchaser shall on the face of the conveyance appear to be the real purchaser, and there shall be no declaration of trust from him, and a decree of the Court, either before or after the death of such nominal purchaser, shall have declared him to be a trustee for the real purchaser, then in every such case the heir of such vendor, or of such nominal purchaser

(*h*) Dew *v.* Clarke, 4 Russ. 511; King *v.* Turner, 2 Sim. 550.

(*i*) Sec. 15.

(*k*) Sec. 16.

(*l*) Prytharch *v.* Havard, 6 Sim. 9.

(I) The powers are extended to the Court of Exchequer, &c. &c. Sec. 26. 31.

or his heir, in whom the premises shall be vested, shall be a trustee for the purchaser within the act.

5. The act then provides (*m*), that where any land shall have been contracted to be sold, and the vendor or any of the vendors shall have died, having devised the same in settlement, so as to be vested in any person for life or other limited interest, with any remainder, limitation or gift, and which may not be vested, or may be vested in some person from whom a conveyance of the same cannot be obtained, or by way of executory devise, and a specific performance of such contract, either wholly or so far as the same remained to be executed, shall have been decreed by the Court, it shall be lawful for the Court to direct such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey the fee-simple or other the whole estate contracted to be sold to the purchaser, or in such manner as the Court shall think proper. The act is then (*n*) extended to other cases of constructive trusts, but is not to extend to a vendor, except in any case before expressly provided for (I).

(*m*) Sec. 17. (*n*) Sec. 18.

---

(I) The *general* powers of this act are extended to the heirs and devisees out of the jurisdiction, or the like, of a mortgagee where the latter was not in possession of the estate, or in receipt of the rents, and the money due shall have been paid or shall be paid to his executor or administrator. 1 & 2 Vict. c. 69. And by the 4 & 5 Will. 4, c. 23, the powers are extended to cases of trustees and mortgagees dying without an heir; and escheats and forfeitures as to trustees and mortgagees are abolished except to the extent of any beneficial interest; and even previous escheats and forfeitures are, within certain limits, relieved against.

Considerable difficulty has arisen in regard to mortgagees under these acts, and further provision appears to be necessary in order to clear up all doubt on this head. The 6 Geo. 4, c. 74, s. 5, included expressly persons seised by way of mortgage as well as those seised upon any trust within its general provisions. In the 1 Will. 4, c. 60, s. 8, the

6. An agreement by a man seised in tail was, of course, binding on himself, but it could not be enforced

---

words, *by way of mortgage*, were purposely omitted, and it was accordingly repeatedly decided that the latter act did not embrace mortgagees or their heirs : see Jemmett on the Statutes, p. 150. The 4 & 5 Will. 4, c. 23, which related to escheat and forfeiture, referred to the 1 Will. 4, c. 60, as if it did include the heir of a mortgagee. This was a palpable error, but it was decided that it had the effect of enlarging the previous statute of Will. 4, so that the heirs of mortgagees were included within its operation. *In re* Stanley, 7 Sim. 170 ; *Ex parte* Whitton, 1 Keen, 278. But this is a very doubtful point, and if this be the true construction, the remedy would apply to the mortgagee himself, which clearly was not intended, and this was the objection to the 6 Geo. 4, which, although it included mortgagees, made no provision for the payment of the mortgage-money.

In order to remove the existing difficulties, the 1 & 2 Vict. c. 69, was passed. It provides that where any mortgagee shall have died *without having been in possession of the land, or in the receipt of the rents and profits thereof*, and the money due in respect of such mortgage shall have been or shall be paid to his executor or administrator, and the devisee, or heir, or other real representative, or any of the devisees, or heirs, or real representatives of such mortgagee shall be out of the jurisdiction, or not amenable to the process of the Court, or it shall be uncertain, where there were several devisees or representatives, who were joint tenants, which of them was the survivor, or it shall be uncertain whether any such devisee, or heir, or representative be living or dead, or if known to be dead it shall not be known who was his heir ; or where such mortgagee, or any such devisee, or heir, or representative shall have died without an heir, or in case of neglect to convey, &c., the Court may appoint a person to convey, in like manner as, by the act of 1 Will. 4, c. 60, the Court is empowered in the place of a *trustee* or the heir of a *trustee*.

But it is provided that the acts of 1 Will. 4, c. 60, and the 4 & 5 Will. 4, c. 23, or either of them, should not be construed to extend to any case of any person dying seised of any land by way of mortgage other than such as were *therein before* expressly provided for.

This proviso was added under the impression that the act into which it was introduced provided for all the cases in which mortgages were to be affected in the hands of representatives ; but it seems that it does not include either the case of an infant heir of a mortgagee or the case

against the issue in tail, if the entail was not effectually barred, although the ancestor covenanted for that purpose (*o*), and received part, or even the whole of the

(*o*) Cavendish *v.* Worsley, Hob. 350; Jenkyns *v.* Keymes, 1 Lev. 203; Ross *v.* Ross, 1 Cha. Ca. 237; which overruled the *dictum* 171; Sayle *v.* Freeland, 2 Ventr. in Hill *v.* Carr, 1 Cha. Ca. 294.

---

where it is uncertain whether the mortgagee has left an heir, and yet it has been held that the *former* act still embraces both those cases, for the third section, it was said by the Court, was introduced into the act of 1 & 2 Vict. in order to confine *its* application to those cases which are expressly mentioned in it. That section, it was observed, was not intended to repeal any part of the two former acts, but that those acts were to be construed just as before, and the act of the 1 & 2 Vict. c. 69, was intended to apply to those cases only which it expressly provides for. *In re* Wilson: *In re* Gathorne, 8 Sim. 392.

Now the 1 & 2 Vict. c. 69, is properly confined to cases where the mortgagee has not been in possession of the land, or in the receipt of the rents or profits, and the money must have been or must be paid to his executor or administrator, and without those provisions it would not be proper to invest the Court with a summary jurisdiction in such cases, nor did the acts previous to the 1 & 2 Vict. intend to give any such powers; and yet it would follow from the decision above quoted, that the cases not included in the 1 & 2 Vict., but held to be within the acts of Will. 4, would fall within the powers of the latter, although the mortgagee had been in possession of the land or in the receipt of the rents or profits; and there is no provision for the payment of the mortgage-money in the acts of Will. 4.

It is submitted, however, that the terms and operation of the proviso in the 1 & 2 Vict. c. 69, were not correctly stated in the cases of Wilson and Gathorne, for the proviso is not that *that act* shall be confined in its application to the cases which are expressly mentioned in it, but that the acts of the 1 Will. 4, c. 60, and 4 & 5 Will. 4, c. 23, shall not extend to any case of a mortgage other than such as were, by the 1 & 2 Vict. c. 69, expressly provided for. It appears to be still necessary to have an act passed to include within the 1 & 2 Vict. c. 69, the cases of an infant heir, and the cases where it is uncertain whether there is an heir, *subject to the same guards* as are provided for the cases already within the act, and the cases of escheat will require to be reconsidered with reference to the 4 & 5 Will. 4, c. 23, and the provisions in the 1 & 2 Vict. c. 69, s. 1, coupled with the proviso.

purchase-money, and a decree was made against him, and he died in contempt, and in prison, for not obeying the decree (*p*): the ground of which determinations was, that the issue in tail claim *per formam doni*, from the creator or author of the estate tail; and therefore, though in the power of tenant in tail by a particular conveyance, that not being done, the Court cannot take away the right they derive, not from the tenant in tail, but from the author of the estate tail (*q*).

7. This was the old rule. And now that fines and recoveries have been abolished and new and simpler forms of barring entails have been established, it is specially provided that no disposition by a tenant in tail, resting only in contract either express or implied, or otherwise, and whether supported by a valuable consideration or not, shall be of any force at law or in equity under the act (*r*), and that in cases of dispositions by tenant in tail under the act, the jurisdiction of equity shall be altogether excluded on behalf of a person claiming for a valuable consideration in regard to the specific performance of contracts (*s*); but although this prevents a Court of Equity from treating a contract or an invalid disposition as a complete or valid bar upon the ground upon which contracts are specifically executed, yet it does not prohibit the exercise of the old power of enforcing a specific performance of a contract against the tenant in tail himself; and by another recent act the Court itself may execute the decree against a tenant in tail in custody for a contempt (*t*).

(*p*) Powell *v.* Powell, Prec. Cha. 278; Weal *v.* Lower, 2 Vern. 306, cited; Sangon *v.* Williams, Gilb. Eq. Rep. 104, cited; and see 1 Ves. 224.

(*q*) See 2 Ves. 634.

(*r*) 3 & 4 Will. 4, c. 74, s. 40; and see *post*, ch. 11, s. 4.

(*s*) 3 & 4 Will. 4, c. 74, s. 47; and see *post*, ch. 11.

(*t*) 1 Will. 4, c. 36, s. 15, Rule 15.

8. A distinction, however, was formerly taken, where the ancestor was only equitable tenant in tail; and the Court would in that case, it is said, relieve against the issue (*u*), because equitable estates tail are mere creatures of the Court, and not within the statute *de donis*. But later authorities (*v*) had settled that an equitable estate tail in freeholds could not be barred by a mere deed, but only by a fine or recovery, and now by the substitution for recoveries act it is provided that no disposition by a tenant in tail in equity shall be of any force unless such disposition would, in case of an estate tail at law, be an effectual disposition under the statute in a court of law; and the provisions before referred to, limiting the operation of contracts and excluding the jurisdiction of equity in cases of invalid dispositions, apply equally to a contract or disposition by an equitable tenant in tail (*x*). It follows, therefore, that equity could not consider the issue of an equitable tenant in tail to be bound by a mere agreement entered into by their ancestor.

9. The same observations seemed to apply to legal and equitable estates tail in copyholds, for a legal entail could only before the late act have been barred according to the custom of the manor of which the copyhold estate was holden; and perhaps the better opinion was, that the same steps must have been taken to bar an equitable estate tail in copyholds, as must have been

(*u*) Norcliff *v.* Warsley, 1 Cha. Ca. 234; Sayle *v.* Freeland, 2 Ventr. 350; and see 1 Pow. Contr. 126.

(*v*) Legate *v.* Sewell, 1 P. Wms. 91; Harvey *v.* Parker, 10 Vin. Abr. 266, pl. 6, affirmed in *Dom. Proc.*; Kirkham *v.* Smith, Ambl. 318; Radford *v.* Wilson, 3 Atk. 815; Boteler *v.* Allington, 1 Bro. C. C. 72; Burnaby *v.* Griffin, 3 Ves. jun. 266; and see Fletcher *v.* Tollet, 5 Ves. jun. 13.

(*x*) 3 & 4 Will. 4, c. 74, s. 47.

pursued in the case of a legal entail. Lord Hardwicke, however, appears to have thought (*y*) that a mere surrender was in every case sufficient to bar an *equitable* estate tail in copyholds; but the contrary opinion was entertained by the Profession, and appeared to be authorised by a case cited in several books from the papers of the late Mr. Powell (*z*), in which it was held, that a covenant by a tenant in tail in equity of a copyhold, in his marriage settlement, to surrender his copyholds to uses in strict settlement, was not of itself sufficient to dock the equitable entail; for if such an entail be created, a recovery in the court baron is necessary to dock it; *it being a rule, that the same steps must be taken to bar an equitable estate in tail, as would be requisite to bar it, were it a legal estate tail* (*a*), (I). Indeed the power of tenants in tail, to bind their issue, ought to be the same, whether the estate be freehold or copyhold, and whether the entail be legal or equitable; the analogy preserved between legal and equitable estates tail, and between limitations in freehold and copyhold estates, should have been adhered to in this instance.

10. But now, by the 3 & 4 W. 4, c. 74, a surrender is made a sufficient bar of even a legal estate tail, and equitable tenants in tail may bar the entail either by

(*y*) Radford *v.* Wilson, 3 Atk. 315; and see the judgment of Lord Chancellor Apsley, in Grayme *v.* Grayme, 1 Watk. Cop. 180; and see Pow. Contr. 126. See Pullen *v.* Lord Middleton, 9 Mod. 483.

(*z*) Hale's case, Ch. 11th Dec. 1764; and see Roe *v.* Lowe, 1 Henry Blackst. 446.

(*a*) And see 1 Walk. Copyh. 181; 1 Preston on Convey. 155.

(I) Note; this appears to be an extract from Mr. Booth's opinion on this case. The case itself appears to have been decided on the ground that the remainder-man claiming in equity under the covenant for the settlement was a mere volunteer.

surrender or by deed, accompanied by the solemnities required by the act (*b*). But in each case the provisions of the act must be complied with, or the issue will not be bound (*c*).

---

11. Where by the custom of a manor, and it is the custom of most manors, a tenant was complete master of his estate, independently of his wife, and could by his own act alone bar her free bench ; an agreement by him for sale of his estate would have been enforced against the wife, if he died before it was carried into execution (*d*).

12. But an agreement for sale of a freehold estate could not before the late act have been carried into execution against a widow entitled to dower. The distinction was founded upon this ground ; that a husband had it in his power, during his life, to sell his copyhold estates, and thereby bar his wife's expectancy ; but if a wife's right to dower once attached on a freehold estate, no act of the husband's alone could divest it. By the late act (*e*), however, a wife's dower is put altogether into the husband's power, and it is specially provided, that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his life-time, and that all partial interests, and all charges created by any disposition of a husband, and all contracts to which his land shall be subject, shall be valid as against the right of his widow to dower.

13. Equity will enforce an agreement by a joint

(*b*) Sec. 50–54.

(*c*) Sec. 40. 47, *supra*.

(*d*) Hinton *v.* Hinton, 2 Ves. 631. 638 ; Ambl. 277 ; Brown *v.* Raindle, 8 Ves. jun. 256, which overruled Musgrave *v.* Dashwood, 2 Vern. 45. 63.

(*e*) 3 & 4 Will. 4, c. 105, s. 4, 5.

tenant for sale of his share against the survivor, if the articles amount to an equitable severance of the jointure (*f*): and a covenant to sell, though it does not sever the joint-tenancy at law, will in equity (*g*).

14. An agreement by a *feme covert* for sale of her estate, cannot be enforced either at law or in equity (*h*), unless the estate be settled to her separate use, so as to enable her to dispose of it as if she were sole (*i*); nor will an agreement by her husband bind her (*j*). Of the incapacity of a married woman, or her husband, to bind her real estate, unless [formerly] by a fine or recovery, there is a striking instance in the year books in the reign of Edward the Fourth (*k*). A woman *cestui que use* and her husband joined in the sale of her estate; the wife received the money, and she and her husband begged her feoffee to convey the estate to the purchaser, which he accordingly did. The husband died, and then the wife filed a bill against the feoffee for a breach of trust. The cause was heard in the Exchequer Chamber, before the Chancellor and the judges of both benches, who held, that the sale was in fact the sale of the husband; that the receipt of the money by the wife was immaterial, and the sale was void; that the trustee was answerable for the breach of trust; and as the

(*f*) Musgrave *v.* Dashwood, 2 Vern. 45. 63. See 2 Ves. 634.

(*g*) See 3 Ves. jun. 257; Frewen *v.* Relfe, 2 Bro. C. C. 220.

(*h*) Emery *v.* Wase, 5 Ves. jun. 846.

(*i*) See Davidson *v.* Gardner, MS. *post*, ch. 19.

(*j*) See Daniel *v.* Adams, Ambl. 495; 1 Eq. Ca. Abr. 62, pl. 2, side note, which corrects the *dictum* in Baker *v.* Child, 2 Vern. 61. It was said by Murray, Solicitor-General, and agreed to by Lord Hardwicke, that there was no decree in Baker *v.* Child, in Reg. Lib., but it was referred to arbitration; and this is confirmed by a MS. in my possession, which states the reference to have been to Mr. Justice Rawlinson: and see Martin *v.* Mitchell, 2 Jac. & Walk. 413.

(*k*) 7 E. IV. 14, b.

purchaser knew he was buying a married woman's estate, that the wife might recover the estate from him.

15. And it is doubtful whether a married woman having a power of appointment can bind herself by a contract to sell the property. Sir Thomas Plumer thought not, because with a married woman there can be no binding contract, the instrument is not good as an agreement. Her disability as a married woman is taken away if she pursue her power. But where the instrument is not executed according to the power, it is nothing but an agreement signed by a married woman, and as an agreement it is invalid. But this opinion was extrajudicial, and he said he did not mean to give a definitive opinion (*l*).

16. If, however, a husband agree to convey his wife's estate, he will, according to some cases, be compelled to perform the agreement *in specie* (*m*); because it has been said, it is to be presumed that the husband, where he covenants that his wife shall levy a fine, has first gained her consent for that purpose (*n*); but this does not seem to be the true ground, for although the wife swear by her answer that she never assented to the agreement, yet the husband will not be let off (*o*). The principle upon which the Court proceeds, seems to be this, that if a person undertakes that another shall do a certain act, he is bound to procure him to perform it; and, therefore, where a father covenanted that his son,

(*l*) Martin *v.* Mitchell, 2 Jac. & Walk. 413; Daniel *v.* Adams, Ambl. 495; *semble* in favour of her being bound, see 2 Sugd. Pow. 104; and see *post*, pl. 21.

(*m*) Hall *v.* Hardy, 3 P. Wms. 187; Barrington *v.* Horne, 2 Eq. Ca. Abr. 17, pl. 7; Morris *v.* Stephenson, 7 Ves. jun. 474. See Wheeler *v.* Newton, Prec. Cha. 16; Haddon's case, Toth. 205; and see Griffin *v.* Taylor, *ib.* 106, edit. 1649.

(*n*) Winter *v.* Devreux, 3 P. Wms. 190, n. (B.)

(*o*) Withers *v.* Pinchard, 7 Ves. jun. 475, cited.

who was then under age, should convey lands to a purchaser, he was decreed to procure the son to convey on his coming of age (*p*), (I).

17. There have been instances of committing the husband to the Fleet, until the wife should convey the estate; but if he should make it appear, that he could not prevail on his wife to join, it seems that he must of necessity be discharged, upon placing the vendee in the same situation as if the agreement had never been executed (*q*).

18. In a late case (*r*) Lord Eldon seemed to be of opinion that if this alarming doctrine were perfectly *res integra*, he should hesitate before he would hold the husband bound to procure the wife to join. He said, that if a man chooses to contract for the estate of a married woman, he knows the property is hers. The purchaser is bound to regard the policy of the law; and what right has he complain, if she who, according to law, cannot part with her property but by her own free will, takes advantage of the *locus pœnitentiæ*: and why is he not to take his chance of damages against the husband? And after showing the absurdity which must arise by adhering to the contrary doctrine, he added,

(*p*) Anon. 2 Cha. Ca. 53.

(*q*) See note to Hall *v.* Hardy, 3 P. Wms. 187; Ortread *v.* Round, 4 Vin. Abr. 303, pl. 4; 8 Ves. jun. 510; and Emery *v.* Wase, 6 Ves. jun. 846; and see Sedgwick *v.* Hargrave, 2 Ves. 57.

(*r*) Emery *v.* Wase, 8 Ves. jun. 505; and see 16 Ves. jun. 367; Howell *v.* George, 1 Madd. 1.

(I) And it is no plea to an action at law for breach of the agreement, to say, that the third person had nothing to do with it, or no estate in it, for the defendant hath undertaken to procure it, and must at his peril.—Staughton *v.* Hawley, M. 1 W. and M. Rot. 662, B. R. judgment in H. after. MS. A question has been raised, whether if the husband having contracted to sell his wife's estate as owner, dies, she may enforce the contract against the purchaser. Humphreys *v.* Hollis, Jac. 73.

that there was difficulty enough to make him pause, before he should follow the two last authorities; and he was not sure, whether it was not proper to have the judgment of the House of Lords, to determine which of the decisions on this point ought to bind us.

19. And it now seems perfectly clear, that this jurisdiction is to be very sparingly exercised (I), and that equity will eagerly seize on any reasonable ground as a bar to the aid of the Court (*s*). Indeed in a late case (*t*) in the Court of Common Pleas, where an action was brought on a covenant by a husband, that he and his wife would levy a fine, and he could not procure her concurrence, the learned Chief Justice said, that the covenant upon which the action was brought was such as the Court of Chancery would not now enforce; and he added, that nothing could be more absurd than to allow a married woman to be compelled to levy a fine, through the fear of her husband being sued and thrown into gaol, when the general principle of the law is, that a married woman shall not be compelled to levy a fine. This observation of Lord Chief Justice Mansfield must have considerable influence on this subject, although, as we have seen, it is not settled that equity will, *in every case*, refuse to compel the husband to procure his wife's concurrence. The substitution for recoveries act (*u*), although it alters the mode of conveyance by a married woman, does not interfere with the rule in equity on this head.

(*s*) See Ortread *v.* Round, 4 Vin. Abr. 203, pl. 4; Emery *v.* Wase, *ubi sup.*; Daniel *v.* Adams, Ambl. 495.

(*t*) Davies *v.* Jones, 1 New Rep. 267; and see Martin *v.* Mitchell, 2 Jac. & Walk. 425.

(*u*) 3 & 4 Will. 4, c. 74, s. 77, *post*, ch. 11, s. 4.

(I) Upon this expression Lord Eldon observed, that certainly it was very satisfactory to be informed, that it is and it is not to be done. 8 Ves. jun. 516.

20. An agreement by a married woman having separate estate for the *purchase* of property, has been enforced against the seller, upon the ground that she may contract as if she were a feme sole for the purchase of an estate, and that her separate property will be bound by the contract although she do not refer to it (*x*)

21. But in a case (*y*) before Sir John Leach, where the contract was entered into by a married woman (living separately from her husband, and having a separate estate at her own disposal vested in trustees), to purchase a real estate, the contract was in her own name, and described her as the wife of J. Platt, living separate from her husband, and having a separate estate vested in trustees for her sole and separate use. A deposit was paid, and possession delivered to a servant of the lady's, but she by her answer denied that she had authorised possession to be taken, or had exercised acts of ownership. The bill was filed against the lady and her husband, and her trustees, and prayed that her personal estate might be declared liable to make good the purchase-money. The answer raised the point of liability. The title was referred to the Master without prejudice to the question of liability. An action had been brought for the recovery of the deposit in the name of the husband, and Sir John Leach, although the Master reported in favour of the title, dismissed the bill without costs, on the ground that a married woman could not by a general engagement bind specifically her separate estate, although she could by an informal instrument, as a bond or note.

22. An agreement by a lunatic cannot of course be carried into a specific execution; but the change of the condition of a person entering into an agreement by becoming lunatic, will not alter the right of the parties;

(*x*) Dowling *v.* Maguire, 1 Rep. t. Plunket, 1.

(*y*) Chester *v.* Platt, Rolls, Reg. Lib. A. 1829, p. 1770; see pl. 15, *supra*.

which will be the same as before, provided they can come at the remedy. As if the legal estate is vested in trustees, a court of equity will decree a specific performance; and the act of God will not change the right of the parties; but where the legal estate was vested in the lunatic himself, that would formerly have prevented the remedy in equity, and left it at law (*z*); unless the purchaser was satisfied with the enjoyment of the estate which a decree would give him, and chose to encounter the inconvenience of leaving the legal estate outstanding in the lunatic, in which case a specific performance would have been decreed in his favour (*a*). But this anomaly is now removed by the 1 Will. 4, c. 65 (*b*), which provides, that where any person has contracted to sell an estate, and afterwards becomes lunatic, and a specific performance of such contract, either wholly or so far as the same remains to be performed, has been decreed either before or after such lunacy, it shall be lawful for the committee, by the direction of the Lord Chancellor, to convey in pursuance of such decree, and the purchase-money, or so much as remains unpaid, is to be paid to the committee.

23. If trustees, under a power of sale, make a legal contract for sale of the estate, the contract binds the estate; and though, by the deaths of parties, the power should be extinguished, yet the contract must be executed by those who have got an interest by the extinguishment of the power (*c*).

24. If an infant enter into a contract for the sale or purchase of an estate, he cannot enforce it in equity, for the remedy is not mutual (*d*).

(*z*) Owen *v.* Davies, 1 Ves. 82.

(*a*) Hall *v.* Warren, 9 Ves. jun. 605.

(*b*) Sec. 7.

(*c*) Mortlock *v.* Buller, 10 Ves. jun. 292; and see Shannon *v.* Bradstreet, 1 Scho. & Lef. 52.

(*d*) Flight *v.* Bolland, 4 Russ. 298.

25. But although an infant cannot be compelled to complete a contract for the purchase of a property, yet if he contract for an estate, and pay a deposit, he cannot in the absence of fraud recover it back because he declines to complete the purchase. But if he could show that fraud had been practised upon him, it would be otherwise (*e*).

---

26. Secondly, We are to consider the rules by which equity is guided in granting a specific performance, with reference to the agreement itself.

27. We shall, in the subsequent chapters of this treatise, have occasion to consider rather at large in what cases equity will or will not enforce a specific performance of an agreement for sale of an estate; and it will in this place, therefore, be sufficient to state the *general* rules by which equity is guided in compelling the specific performance of agreements.

28. The original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground the Court, in a variety of cases, has refused to interfere, where from the nature of the case the damages must necessarily be commensurate to the injury sustained (*f*), as, for instance, in agreements for the purchase of stock, it being the same thing to the party, where or from whom the stock is purchased, provided he receives the money that will purchase it; and the Court never gives relief where the act is im-

(*e*) Wilson *v.* Keane, Peake's Add. Cas. 196.

(*f*) Errington *v.* Annesley, 2 Bro. C. Ca. 841; Flint *v.* Brandon, 8 Ves. jun. 363; Mitf. Pl. 109.

possible to be done, but leaves the party to his remedy at law (*g*). But the sale of an annuity payable out of dividends of a particular stock (*h*), or of the right to a dividend upon a bankrupt's estate (*i*), or even a contract for stock where the object is to obtain delivery of certificates which confer the legal title to it (*k*), may be enforced in equity. These cases show what were the grounds on which courts of equity first interfered, but they have constantly held that the party who comes into equity for a specific performance, must come with perfect propriety of conduct, otherwise they will leave him to his remedy at law (*l*).

29. The decreeing a specific performance is a matter of discretion, but it is not an arbitrary, capricious discretion; it must be regulated upon grounds that will make it judicial (*m*), and the period at which the Court is to examine the agreement between the parties, is the time when they contracted (*n*). And undoubtedly every agreement, of which there should be a specific execution, ought to be in writing, certain, and fair in all its parts, and for adequate consideration (*o*). The Court will never decree a specific performance, unless the case of

(*g*) Green *v.* Smith, 1 Atk. 572.

(*h*) Withy *v.* Cottle, 1 Sim. & Stu. 174, affirmed upon the hearing; 1 Turn. 78.

(*i*) Adderley *v.* Dixon, 1 Sim. & Stu. 607.

(*k*) Doloret *v.* Rothschild, 1 Sim. & Stu. 590.

(*l*) Harnett *v.* Yielding, 2 Scho. & Lef. 553. [misprinted in the book] *per* Lord Redesdale; and see Cadman *v.* Horner, 18 Ves. jun. 10.

(*m*) *Per* Lord Eldon, see 7 Ves. jun. 35; and see 1 Atk. 183; 4 Burr. 2539; Davis *v.* Symonds, 1 Cox, 402.

(*n*) Revell *v.* Hussey, 2 Ball & Beat. 288; Ellard *v.* Lord Llandaff, 1 Ball & Beat. 241.

(*o*) *Per* Lord Hardwicke, see 1 Ves. 279; and see 3 Atk. 386; Ellard *v.* Lord Llandaff, 1 Ball & Beatty, 241; Martin *v.* Mitchell, 2 Jac. and Walk. 413; Stanley *v.* Robinson, 1 Russ. & Myl. 527.

the plaintiff is perfectly clear from circumvention and deceit (*p*).

30. Therefore (*q*) where the purchaser was plaintiff, and was the seller's agent, a specific performance was refused, because he had represented to the seller that the houses had been injured by a flood, and would require between 40*l.* and 50*l.* to repair them, whereas 40*s.* would have repaired the damage. He was considered to have been guilty of a degree of misrepresentation operating to a certain though a small extent, and that misrepresentation disqualified him from calling for the aid of a court of equity, where he must come, as it is said, with clean hands. He must, to entitle him to relief, be liable to no imputation in the transaction. And in a later case (*r*), the Court observed, that there was no case where the Court had, when misrepresentation was the ground of a contract, decreed the specific performance of it, and nothing would be more dangerous than to entertain such a jurisdiction. The principle upon which performance of an agreement is compelled requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame; misrepresentation, even as to a small part only, prevents him from applying to equity for relief. He must come with perfect propriety of conduct; if he does not, that alone is a sufficient answer to him.

And accordingly, where a person for whose life the property was held, was described to be a very healthy gentleman, and in an another passage, a healthy gentleman, and the sellers had, shortly before the sale, insured the life at a sum exceeding the highest rate

(*p*) See 1 Cox, 407.

(*q*) Cadman *v.* Horner, 18 Ves. jun. 10.

(*r*) Lord Clermont *v.* Tasburgh, 1 Jac. & Walk, 112.

charged for a healthy life of the same age, the bill of the sellers for a specific performance was dismissed with costs (*s*).

But, as we have seen, general statements by a seller may not amount to a misrepresentation—as in the case before quoted, where the fine for renewal was stated to be a small one, and that the estate was nearly equal to freehold, and those representations were considered to be indefinite. Such representations ought to put a purchaser upon inquiry. But if the seller knew that a larger fine would be required, and that the purchaser entertained a different idea of the fine, that would be a ground for rescinding the contract. Where the purchaser wished to ascertain the fine, and offered 150 *l.* towards it, if the seller would pay the remainder, which he refused to do, the Court said that they could not put the purchaser in the situation in which he would have been, if the 150 *l.* had been accepted. That circumstance (the refusal to pay beyond the 150 *l.*) ought to have put him upon inquiry, and he did not bring himself within any rule to avoid the contract; and if he had, he could only have rescinded the contract (*t*).

31. A court of equity does not affect to weigh the actual value, nor to insist upon an equivalent in contracts, where each party has equal competence. When undue advantage is taken, it will not enforce the contract; but it cannot listen to one party, saying, that another man would have given him more money or better terms than he agreed to take. It may be an improvident contract; but improvidence or inadequacy do not determine a court of equity against decreeing specific performance (*u*).

(*s*) Brealey *v.* Collins, You. 317. 2 Cox, 363.

(*t*) Fenton *v.* Browne, 14 Ves. jun. 144. See Lowndes *v.* Lane, 477; *per* Hart, L.C.

(*u*) Sullivan *v.* Jacob, 1 Moll.

32. Equity will not decree a specific performance of an agreement made in a state of intoxication, although the party was not drawn in to drink by the plaintiff; nor will it decree the agreement to be delivered up; but will leave the parties to their remedy at law (*v*).

33. If it be stipulated in a contract, that immediate possession shall be given to the purchaser, which is done, but in consequence of disputes as to the title, the seller afterwards turn the purchaser out of possession, he abandons his right to a specific performance (*w*).

34. A court of equity frequently decrees a specific performance where the action at law has been lost by the default of the very party seeking the specific performance, if it be notwithstanding conscientious that that agreement should be performed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance; and to sustain an action at law, performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case (*x*).

35. Although damages may be recovered at law, yet equity is not therefore obliged to decree a specific performance; but the Court will judge on the whole circumstances of the case, whether it be such an agreement as ought to be carried into effect; for a jury, upon inquiry, may find very small damages, and then it would be very hard to carry such an agreement into execution in equity, when it would be greatly to the prejudice of

(*v*) Cragg *v.* Holme, 18 Ves. jun. 14, cited. See Say *v.* Barwick, 1 Ves. & Bea. 95.

(*w*) Knatchbull *v.* Grueber, 3 Mer. 124.

(*x*) Davis *v.* Hone, 2 Scho. & Lef. 341. 748. See Lennon *v.* Napper, *ibid.* 684.

the party against whom it should be decreed to be executed (*y*).

36. In a case where a man was entitled to a small estate under his father's will, given on condition that if he should sell it in twenty-five years, half the purchase-money should go to his brother; he agreed, in writing, to sell it, and afterwards refused to carry the sale into execution, pretending to have been intoxicated at the time. A bill was brought against him to compel a specific performance; and Lord Hardwicke held, that without the other circumstance, the hardship alone of losing half the purchase-money, if carried into execution, was sufficient to determine the discretion of the Court not to interfere, but leave them to law (*z*).

37. Nor will equity interpose, if the party who is called upon to do the act is not lawfully competent to do it; for that, amongst other inconveniences, would expose him to a new action for damages (*a*).

38. But although a covenant ought not to be performed literally, yet equity will execute it according to a conscientious modification of it, to do justice as far as circumstances will permit (*b*).

39. *Primâ facie*, a man who agrees to take an underlease must know that he is bound by all the covenants contained in the original lease, and therefore, such a purchaser cannot object to usual covenants. And as it is his duty to inform himself of the covenants contained in the original lease, if he enters and takes possession of

(*y*) *Per* Lord Hardwicke, MS. See Pope *v.* Harris, Lofft, 791, cited; White's case, 3 Swanst. 108, n.

(*z*) Fain *v.* Brown, 2 Ves. 307, cited; Costigan *v.* Hastler, 2 Scho. & Lef. 160. See 2 Ball & Beatty, 283; Howell *v.* George 1 Madd. 1.

(*a*) Harnett *v.* Yielding 2 Scho. & Lef. 554; Ellard *v.* Lord Llandaff, 1 Ball & Beatty, 241 See *post*, p. 347.

(*b*) Davis *v.* Hone, 2 Scho. & Lef. 348.

the property, he may be bound by even unusual covenants. And if the deeds are brought to his solicitor for inspection before the contract, who does, or might inspect them, he will be considered to have purchased with notice of the covenants (*c*). But although a man knows that the seller is only a lessee, yet if the agreement contains stipulations, the purchaser may rely upon them, because such an agreement amounts to a representation that the seller is not prevented from granting such terms, and if they are contrary to the covenants in the original lease, the purchaser is not bound (*d*). So if the purchaser state the object which he has in purchasing, and the seller is silent as to a covenant in the lease prohibiting that object, his silence would be equivalent to a representation that there was no such prohibitory covenant; and it is unimportant that the seller was not aware of the extent or operation of the covenant (*e*).

40. *Suppressio veri*, as well as *suggestio falsi*, is a ground to rescind an agreement, or at least not to carry it into execution (*f*), and even an industrious concealment, during a treaty, of the necessary repair of a wall to protect the estate from a river, which was a considerable outgoing, has been deemed a sufficient ground to withhold the aid of equity from a vendor (*g*).

41. So where there is a mistake between the parties as to what was sold, the Court will not interfere in favour of either party (*h*). And if a man, being em-

(c) Cosser *v.* Collinge, 3 Myl. & Kee, 283; Flight *v.* Barton, *ib.* 282; Propert *v.* Parker, *ib.* 280.

(*d*) Van *v.* Corpe, 3 Myl. & Kee. 269.

(*e*) Flight *v.* Barton, 3 Myl. & Kee. 282.

(*f*) See Buxton *v.* Cooper, 3 Atk. 383; S. C. MS.; Howard *v.* Hopkins, 2 Atk. 371; Young *v.* Clerk, Prec. Cha. 138; 1 Trea. Eq. ch. ii. s. 8; 1 Ball & Beatty, 241; Lord Clermont *v.* Tasburgh, 1 Jac. & Walk. 112.

(*g*) Shirley *v.* Stratton, 1 Bro. C. C. 410. See Small *v.* Atwood, Younge's Rep.

(*h*) See 1 Ves. jun. 211; 6

ployed to bid for an estate to prevent its being sold at an undervalue, by mistake buy another estate belonging to another person previously put up on the same day and place, by the same auctioneer, the Court will not compel him to complete the purchase, but will leave the seller to his action for damages (*i*).

42. Even mere surprise on third persons at a sale by auction, has been deemed sufficient to prevent the Court from assisting a purchaser, as where the known agent of the seller bid for the estate on behalf of the purchaser, and other persons present thinking he was bidding as a puffer on the part of the vendor were deterred from bidding (*k*). So, in a recent case, where a purchaser, previously to the sale by auction, told the vendor that he would have nothing to do with the estate, but afterwards went to the sale, *where he was considered by the company as a puffer* (I), and bid 8,000*l.* for the estate, which was knocked down to him at that sum from the misapprehension of the person appointed to bid for the vendor, who ought to have bid 9,000*l.*, and the mistake was instantly explained, a specific performance was refused (*l*).

43. If the contract be founded on fraudulent misrepresentations, such as would in a court of law be sufficient to support an action on the case, it may in a

Ves. jun. 339; 13 Ves. jun. 427; Higginson *v.* Clowes, 15 Ves. jun. 156; Clowes *v.* Higginson, 1 Ves. & Bea. 524; Harnett *v.* Yielding, 2 Scho. & Lef. 554.

(*i*) Malins *v.* Freeman, 2 Kee. 25.

(*k*) Twining *v.* Morris, 2 Bro. C. C. 326. See 6 Ves. jun. 338; 10 Ves. jun. 305. 313. 398; and see Willan *v.* Willan, 16 Ves. jun. 72; Magrane *v.* Archbold, 1 Dow, 107.

(*l*) Mason *v.* Armitage, 13 Ves. jun. 25. See Hill *v.* Buckley, 17 Ves. jun. 394.

(I) This is stated in the judgment, but *qu.* whether it appeared in evidence.

court of equity be rescinded. Now the fraud may consist in the misrepresentation of a fact material to the contract, where the truth of that is known to the one party, and unknown to the other, and the misrepresentation is intentionally made with a view of procuring a more advantageous contract than the real facts, if truly stated, would have warranted; and in such a case equity would rescind the contract (*m*).

44. If an agent, employed to sell an estate, sells it in a manner not authorised by the authority given to him, a specific performance will not be decreed against the principal, although the estate be sold for a greater price than he required for it (*n*). At least, it is clearly settled, that if an agent is empowered to sell an estate by public auction, a sale by private contract is not within his authority. For although the owner may have fixed the price, yet the estate might have sold for more at a public auction. But if an agent is directed to sell an estate by private contract, and he dispose of it by public auction for a larger sum than the principal required, it still seems open to contend that the purchaser may enforce a specific performance of the contract, unless some particular reason should occur to induce the Court to refuse its aid.

45. In Mortlock *v.* Buller (*o*), Lord Eldon said he should hesitate long before he should state as a clear proposition, that where the title to a specific performance is founded in a gross breach of trust by an agent to his principal, a court of equity would assist the plaintiff in

(*m*) Lovell *v.* Hicks, 2 You. & Coll. 46; *vide infra*, s. 4.

(*n*) Daniel *v.* Adams, Ambl. 495; *et vide* a *dictum* by Lord Eldon in Coles *v.* Trecothick, 1 Smith's Rep. 247.

(*o*) 10 Ves. jun. 292; and see the close of the judgment, Ord. *v.* Noel, 5 Madd. 438; Bridger *v.* Rice, 1 Jac. & Walk. 74; Turner & Harvey, Jac. 169; Neale *v.* Mackenzie, 1 Kee. 474.

the purpose of availing himself of that breach of trust; and whether the principle would not authorise the Court to leave him to law, and not to let him come for a remedy beyond that. There were, he added, *dicta* enough well to authorise that.

46. And where trustees for sale of an estate enter into a contract, which would be deemed a breach of trust, equity will not only refuse to interfere in favour of the purchaser, but will even at the suit of the *cestuis que trust* restrain the trustees from executing the contract, and the purchaser will be left to his remedy at law (*p*).

47. Where a power of sale is given to trustees, although to be executed at the request of the tenant for life, it is discretionary in them whether they will exercise the power, and therefore if they think it disadvantageous to their *cestuis que trust*, they cannot be compelled to adopt a contract entered into by the tenant for life for sale of the estate (*q*).

48. If a person, entitled in default of execution of a power of sale, contract to sell the estate, not as owner, but merely as the agent of the trustees, and the contract could not, under the circumstances, have been carried into execution against the trustees, it will not be enforced against the agent, although he himself become entitled to the estate before the decree (*r*), (I).

(*p*) Mortlock *v.* Buller, 10 Ves. jun. 292. See Hill *v.* Buckley, 17 Ves. jun. 394; Bridger *v.* Rice, 1 Jac. & Walk. 74.

(*q*) Thomas *v.* Dering, 1 Kee. 729; vide *supra*, ch. 2.

(*r*) Mortlock *v.* Buller, 10 Ves. jun. 292.

(I) From the papers in this cause, it seems that Mr. Buller treated with Mr. Mortlock as the owner of the estate, and this appeared from the receipt for the purchase-money, where the estate was called, "the

49. Where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor has it in his power by the ordinary course of law or equity to make himself so; though the owner offer to make the seller a title, yet equity will not force the buyer to take it, for every seller ought to be a *bonâ fide* contractor (*s*): and it would lead to infinite mischief if one man were permitted to speculate upon the sale of another's estate. Besides, the remedy is not mutual, which perhaps is of itself a sufficient objection in a case of this nature. In Armiger *v.* Clarke (*t*), a tenant for life contracted to sell the inheritance; after his death, his son, who was entitled to the estate in remainder, and was not bound by his father's covenant, brought a bill for a specific performance against the purchaser, and it was dismissed chiefly upon this principle, that the remedy was not mutual. And in Noel *v.* Hoy (*u*), it was said, that if *A* sells *B*'s estate, although *B* is willing to confirm the contract, *A* cannot enforce it: there is no mutuality. So an infant cannot specifically enforce a contract by himself for sale, because there is no mu-

(*s*) Tendring *v.* London, 2 Eq. Ca. Abr. 680, pl. 9. See 10 Ves. jun. 315; and 1 Jac. & Walk. 421; and *query*, whether there is *any* case, in which a man, knowing himself not to have any title, has been allowed to enforce the contract by procuring a title before the report. See Bryan *v.* Lewis, 1 Mood. & Ry. 386.

(*t*) Bunb. 111; see *post*, ch. 7; Hamilton *v.* Grant, 3 Dow, 33.

(*u*) V.C. 23 Feb. 1820, MS.

---

property of John Buller, Esq.," and Mr. Mortlock had not any knowledge whatever that the estate was in settlement. See Lawrenson *v.* Butler, 1 Sch. & Lef. 13.

Since this note was written, an action brought by Mr. Mortlock against Mr. Buller, for breach of contract, came on for trial, when it was compromised on terms very advantageous to the plaintiff. See 2 Ball & Beatty, 60; and see 2 Dow, 518.

tuality (*x*). But in Williams *v.* Carter (*y*), the estate was sold, and it was afterwards discovered that it was bound by marriage articles, which it was decided in a suit instituted for the purpose, authorised the introduction of a power of sale in the trustees, and thereupon a bill was filed by them and the seller for a specific performance. The Vice-Chancellor overruled the objection, that there was no mutuality in the agreement, and decreed a specific performance.

50. And on the other hand, where a *bonâ fide* vendor has not a title to the estate, the Court will leave the purchaser to his remedy upon the articles at law (*z*), where in most cases he would obtain nominal damages only (*a*). But where the purchaser is willing to take the title, such as it is, it is apprehended that he may do so (*b*).

51. But where a tenant for life with a power of sale, first settling other estates of equal or better value, sold the estate under an apprehension that he had power to convey the fee, the Court refused to compel him to settle another estate, in order to enable him to complete his contract (*c*).

52. To enable the Court to decree a specific performance against a vendor, it is not, however, necessary that he should have the legal estate; for if he has an equitable title, a performance in specie will be decreed (*d*),

(*x*) Flight *v.* Bolland, 4 Russ. 298.

(*y*) MS. V.C. 1821.

(*z*) Crop *v.* Norton, 2 Atk. 74; 9 Mod. 233; Cornwall *v.* Williams, Colles, P. C. 390; Benet College *v.* Carey, 3 Bro. C. C. 390.

(*a*) Fleaureau *v.* Thornhill, 2 Blackst. 1078; and see 3 Bos. & Pull. 167. See Brig's case, Palm. 364. *Vide post.*

(*b*) See Harnett *v.* Yielding, 2 Scho. & Lef. 549; and *post*, ch. 10.

(*c*) Howell *v.* George, 1 Madd. 1.

(*d*) Crop *v.* Norton, 2 Atk. 74. See Costigan *v.* Hastler, 2 Scho. & Lef. 160.

and he must obtain the concurrence of the persons seised of the legal estate.

53. Although, as we have seen, a vendor cannot demand the aid of equity, unless he is a *bonâ fide* contractor, yet the circumstance that the purchaser is a nominal contractor, and purchases in trust for another person, is immaterial; for it happens, in a vast proportion of cases, that the contract is entered into in the name of a trustee (*e*), and the mere fact of a quarrel having taken place between the vendor and the real purchaser, totally unconnected with the subject of the contract (*f*), or even a bare refusal by the vendor to deal with the real contractor (*g*), is not a sufficient ground to refuse a performance in specie of the agreement.

54. But if a person apply to purchase an estate, and the vendor expressly refuse to treat with him, unless the money is paid down, which he is unable to do, but procures some other person to purchase the estate on his account, it seems clear, that at least the time appointed for payment of the money will be deemed of the very essence of the contract (*h*) (I). So if a person apply to purchase an state on behalf of *A*, for whom the vendor

(*e*) Hall *v.* Warren, 9 Ves. jun. 605.

(*f*) S. C.

(*g*) Lord Irnham *v.* Child, 1 Bro. C. C. 92.

(*h*) Popham *v.* Eyre, Lofft, 786. Mr. Brown's note of this case evinces the danger of relying on short notes of cases; see 1 Bro. C. C. 95, n. See O'Herlihy *v.* Hedges, 1 Schoales & Lefroy's Rep. 123; but note, that case was between *landlord and tenant;* and see Featherstonhaugh *v.* Fenwick, 17 Ves. jun. 298.

(I) The L. C. B. in delivering judgment in Davis *v.* Symonds, 1 Cox, 407, observed, that in Eyre *v.* Popham [according to the false report of it], it seemed as if concealing the name of a purchaser was a sufficient reason for not decreeing a performance; adding, however, we may doubt particular cases without shaking the principle [upon which the Court acts in refusing to interfere], which is clear.

has a great value or affection, and the vendor is induced to take less for the estate than he otherwise would have done; or even, perhaps, without this circumstance, the agreement cannot be enforced against the vendor, if it be made on behalf of any other person than *A*; but if *A* will patronise the sale, execution of the agreement must be compelled, although he may sell the estate the next day to the fraudulent purchaser (*i*) (I).

(*i*) Philips *v.* Duke of Buckingham, 1 Vern. 227.

(I) In Mr. Raithby's edition it is said that a specific performance was decreed. The principle, however, is now well established. In Roger North's Life of the Lord Keeper (vol. ii. p. 130, 131), he thus states the case:—

I may state another case, in which it appeared his Lordship's consideration of justice surmounted his will, which was always inclined to be good to those of his profession, especially if he had a real value and esteem for them. The Duke of Bucks was disposed to sell an estate in Leicestershire. It was while my Lord Nottingham had the great seal. His son Heneage, a celebrated orator in Chancery practice, had formerly bought of the duke an estate at Aldborough in Sussex: and not a few suits depended in court between his grace and his creditors and trustees, in which the contention ran high. Mr. Ambrose Philips, an eminent practiser in the court, sought to buy the Leicestershire estate of the Duke of Bucks, and contrived to use the name of Mr. Heneage Finch in the treaty. On the other side, it was told the duke that, if he let Mr. Finch have the purchase at an easy rate, it would be taken as a respect, and turn to an account in his causes. So the matter went on, and the purchase, by payment and sealing, finished. Then the duke found out he had been imposed on, and that Philips, and not Finch, was the real purchaser; which if he had known before, he would not have taken under 2,000*l.* more than the price he had received. He was so unsatisfied, that he brought a bill against Philips to be relieved as to this 2,000*l.*, and, by circumstances in the cause, it was plain to his lordship that the duke's price took in that 2,000*l.*, but that, for Mr. Finch's sake (or rather his father's), he had bated it; and also, that it was so pretended to him only to make him bate that sum; so that his lordship decreed Philips to pay that

55. The case of Scott *v.* Langstaffe (*k*), was decided on the same principle. A purchaser of a house adjoining to a house occupied by the vendor, agreed with the vendor, though it was not made part of the written contract, that he would not lease the house to any person not agreeable to him. Langstaffe applied for a lease, and stated that he knew the vendor intimately, and that there would be no objection to grant him a lease. The vendor, however, disapproved of Langstaffe, and, so far from knowing him intimately, had only seen him at a tavern. Lord Camden said, this was the case of Philips *v.* the Duke of Buckingham. Nobody, who had read that case, could easily forget it. And his Lordship set aside the agreement which Langstaffe had obtained, with costs.

56. A similar case is mentioned in Hawkins's life of Johnson, which was also decided on the authority of Philips's case. Peele the bookseller had a house near Garrick's at Hampton. Peele had often said, that as he knew it would be an accommodation to Garrick, he had given directions that at his decease he should have the refusal of it. On Peele's death, a man in the neighbourhood applied to his executors, pretending that he had a commission from a friend or relation of Peele's, who lived in the country, to buy the house at any price, and he accordingly obtained a conveyance of it to a person nominated by him under a secret trust for himself. Garrick filed a bill against him, and the purchase was decreed fraudulent, and set aside with costs.

(*k*) Lofft, 797, 798, cited; and see Bonnett *v.* Sadler, 14 Ves. jun. 527; Fellowes *v.* Lord Gwydyr, 1 Sim. 63.

---

sum, over and above his purchase-money; which 2,000 *l.* he had got off by a wily false pretence of Mr. Finch's being the purchaser.

57. But although a seller falsely assume the character of an agent to another, when he is himself the real seller, and the purchaser be deceived by the representation, yet it has been decided that if the purchaser cannot prove damage, or that the misrepresentation induced him to enter into the contract, a specific performance will not be refused (*l*). But where a purchaser had a suspicion of the ownership of the subject offered for sale—a Claude—and the ownership, in his view, enhanced the price, and the seller's agent knowing that the purchaser laboured under a deception, permitted him to remain in it, although the point was one which he thought material to influence his judgment, the contract was held to be void at law (*m*).

58. An agreement for the sale of an annuity for three lives, to be named by the purchaser, and to commence immediately, will be decreed, although the lives have not been named, if the delay has been occasioned by the seller (*n*).

---

59. In some cases (*o*), it has been holden, that where no action at law will lie to recover damages, equity will not execute the agreement in *specie*; for equity will never make that a good agreement, which is not so by law; but, in other cases (*p*), the contrary has been

(*l*) Fellowes *v.* Lord Gwydyr, 1 Sim. 63; 1 Russ. & Myl. 83. See Crosbie *v.* Tooke, 1 Myl. & Kee. 431.

(*m*) Hill *v.* Gray, 1 Stark. Ca. 434; Pilmore *v.* Hood, 5 Bing. N. C. 97.

(*n*) Pritchard *v.* Ovey, 1 Jac. & Walk. 396.

(*o*) The Marquis of Normanby *v.* Duke of Devonshire, 2 Freem. 216; Dr. Betesworth *v.* Dean and Chapter of St. Paul's, Sel. Cha. Ca. 66; and see 2 Eq. Ca. Abr. 15, 23, *notis*; and Fonbl. n. (*c*) to 1 Trea. Eq. 138, and n. (*h*) to p. 204, *ibid.*

(*p*) Winged *v.* Lefebury, 2 Eq. Ca. Abr. 32, pl. 43; Acton *v.* Pierce, 2 Vern. 480; Cannel *v.* Buckle, 2 P. Wms. 243; Norton *v.* Mascall, 2 Vern. 24; and Hall

holden, and relief been given accordingly. Perhaps the following distinctions are authorised by the cases, and will reconcile them.

60. First, That although the agreement be void at law, yet a specific performance will be decreed, if there is a clear ground for the interference of equity, according to the general rules of the Court; and, however unqualifiedly the contrary rule may have been laid down, there is not (that I am aware of) any case clearly entitled to the aid of the Court, to which this rule has been successfully opposed as a bar to the relief.

61. Thus a bond from a woman to her intended husband has been enforced in equity, although void at law by the intermarriage; and an agreement for sale of an estate has been decreed against an heir at law, although his ancestor died before the time appointed to convey the estate, and therefore no action would lie against him. In the first of these cases the impropriety of the security was deemed immaterial; for it was sufficient that the bond was a written evidence of the agreement of the parties, and the agreement being upon a valuable consideration, ought to be executed in equity. The decision in the other case depended upon the doctrine, that the articles were a lien upon the land; the contract being a purchase in equity. But,

62. Secondly, Equity cannot contradict or overturn the grounds or principles of law (*q*); and therefore, in many cases, it must be considered whether damages could be recovered at law, and the Court will be guided by the result (*r*).

63. Thus agreements for sale of an estate have (as

*v.* Hardy, 3 P. Wms. 187. See East India Company *v.* Donald, 9 Ves. jun. 275; 1 Smith's Rep. 213.

(*q*) See 2 P. Wms. 753; Earl of Bath *v.* Sherwin, 10 Mod. 1.

(*r*) See Hollis *v.* Edwards, 1 Vern. 159.

we have already seen) been decreed on mere letters which have passed between the parties, but not unless all the terms of the agreement were therein specified; and even this was going a great way. In the first case, therefore, in which even a trifling omission appeared in the letters, it was natural to pause before the performance of the agreement was decreed, and to ascertain whether damages could be recovered at law: for the statute of frauds and perjuries must receive the same construction in a court of equity as in a court of law, unless in the cause of fraud, &c. where equity interposes and relieves against the abuse, or allays the rigour of the law.

64. The case of the Marquis of Normanby *v.* the Duke of Devonshire, was, I believe, the first in which this point occurred; and, according to a manuscript note, it appears that Lord Somers called in the two chief justices on the point, whether the party, on the letters which had passed, could have recovered damages at law? They were of opinion that he could not, and Lord Somers accordingly dismissed the bill.

65. So there are very few cases in which a court of equity can decree a performance of an agreement upon which there can be no action at law, *according to the words of the articles, and the events that have happened* (*s*).

---

66. A proviso, in a contract for sale, that if either party break the agreement he shall pay a sum of money to the other, will only be considered in the nature of a penalty (*t*) (I); and consequently a specific perform-

(*s*) Whitmel *v.* Farrel, 1 Ves. 256.

(*t*) Howard *v.* Hopkins, 2 Atk. 371. See 2 Scho. & Lef. 684;

(I) As to liquidated damages, *vide supra*, s. 2, pl. 19.

ance will be decreed just as if no such proviso had been inserted. The defendant will not be allowed to forfeit the penalty, and get rid of the agreement (*u*).

67. Where an action is brought for the recovery of the penalty, to entitle the party bringing it to recover, he ought punctually, exactly, and literally, to have completed his part (*x*). And, it has been said, that if, for breach of an agreement, to which a penalty was annexed, either party recover damages at law beyond the penalty, equity will relieve against the verdict, on payment of the penalty only (*y*); but this is not well founded, for, if the party have two remedies at law, one for breach of contract upon the covenant, or agreement, *toties quoties;* the other for the penalty at once (*z*), there appears to be no pretence for equity to relieve; although where large damages have been recovered at law, under a covenant which it was unconscientious strictly to enforce, the party may be relieved in equity, upon offering to perform the covenant according to conscience: but even this seems, in some measure, to be usurping the province of a jury, and the equity is administered with great caution.

and Magrane *v.* Archbold, 1 Dow, 107; Davies *v.* Penton, 6 Barn. & Cress. 216, 9 Dowl. & Ry. 369.

(*u*) Hopson *v.* Trevor, 1 Str. 533; 2 P. Wms. 191; Parks *v.* Wilson, 10 Mod. 515; Belchier *v.* Reynolds, 2 Lord Keny. 2 part, 87.

(*x*) Duke of St. Alban's *v.* Shore, 1 H. Blackst. 270.

(*y*) Shenton *v.* Jordan, Bunb. 132; but the reporter adds a *query*, for this seems an extraordinary opinion.

(*z*) See Harrison *v.* Wright, 13 East, 343.

## SECTION IV.

## OF THE REMEDIES FOR A BREACH OF CONTRACT.

I. The remedy in equity.
2. *Injunction to prevent injury.*
3. *Reference of title.*
5. *Purchase-money ordered into Court.*
7. *Where not.*
11. *Time allowed.*
12. *Seller ordered to pay in deposit.*
13. *Multifariousness.*
15. *Adverse claimants not proper parties.*
16. *Mortgagee not a proper party.*
17. *Plaintiff proving different agreements.*
19. *Upon dismissal of bill, no account.*
20. *Damages to purchaser.*
23. *No compensation for defective title.*
24. *New defence by purchaser.*
26. *Seller cutting ornamental timber pending suit.*
27. *Bill for injunction and specific performance.*
II. The remedy at law.
28. *Action by purchaser for fraud after decree.*
29. *Party having waived, cannot bring action after decree.*
30. *Nor where bill dismissed for want of title.*
31. *Actions by parties after bill dismissed.*
32. *A second action not allowed.*
33. *Money had and received.*
38. *No damages for loss of bargain.*
40. *Loss by selling out of the funds.*
41. *Interest on deposit.*
42. *Expenses of investigating title.*
43. *Particulars of fact and law.*
47. *Averment of title : proof of title-deeds.*
48. *Action by heir or executor of purchaser.*
49. *Delivery of agreement to be stamped.*
50. *Agreement by letters, one stamp.*
51. *Mutual covenants.*
54. *Seller to execute conveyance before action.*
55. *Purchaser to tender conveyance and purchase-money.*
61. *Unless there is a bad title, or seller has re-sold.*
62. *Purchaser let into possession not a tenant.*
63. *Ejectment against him.*
65. *Condition that purchaser shall be deemed tenant.*
67. *Ne exeat.*

1. If either the vendor or vendee refuse to perform the contract, the other may bring an action for breach

of contract, or file a bill for a specific performance (*a*); although it appears to have been formerly thought that as a vendor only wants the purchase-money, his remedy was at law (*b*).

I. As to the remedy in equity.

2. If a bill be filed for a specific performance, the Court will enjoin either party not to do any act to the injury of the other. Therefore, if the purchaser is in possession, and has not paid the money, the Court will grant an injunction against his cutting timber (*c*); so, on the other hand, the vendor will be restrained from conveying away the legal estate in the property; because such a measure might put the purchaser to the expense of making another party to the suit (*d*); and, *à fortiori*, he will be restrained from selling the estate to a third person (*e*). But in Spiller *v.* Spiller (*f*), the Lord Chancellor expressly laid it down, that upon a bill filed for a specific performance, he wished it to be understood, that the Court would not take from a seller the disposition of his property. So injunctions may be granted against the agents of the parties. But an injunction will not be granted against a person who is not a party to the suit; and, in a late case, in which, upon a bill filed by a seller for a specific performance, and an injunction against the purchaser's proceeding at law to recover the deposit from the seller's attorney, to whom it was paid, Sir John Leach, V. C., refused the motion, with costs, because the attorney was not a

(*a*) Lewis *v.* Lord Lechmere, 10 Mod. 503.

(*b*) See Armiger *v.* Clark, Bunb. 111; Withy *v.* Cottle, 1 Sim. & Stu. 174. See Kenney *v.* Wenham, 6 Madd. 315.

(*c*) Crockford *v.* Alexander, 15 Ves. jun. 138.

(*d*) Echliff *v.* Baldwin, 1 Ves. jun. 267.

(*e*) Curtis *v.* Marquis of Buckingham, 3 Ves. & Beam. 168.

(*f*) 30 June 1819, MS. S. C. 3 Swanst. 556.

party to the suit (*g*). But in a later case, the same Judge granted an injunction to restrain the purchaser from proceeding in an action against the auctioneer, although he (the auctioneer) was not a party to the suit; the seller offering to bring the deposit into Court.

3. In all cases where a bill in equity is filed for a specific performance, either party may in general, if he please, have a reference as to the title. But we shall consider fully the relief afforded in equity, where the question of specific performance depends upon the state of the title, in the chapter devoted to Title (*h*); but we may here observe, that where the purchaser files a bill, and insists that the vendor *cannot* make a good title, equity can only dismiss the bill with costs, although the Court will compel him to make out the title if he have the ability (*i*).

4. We shall hereafter see that the title may be referred to the Master before the answer is put in, unless the purchaser's counsel can state that there are other objections (*k*); but in every case where the answer upon reasons solid or frivolous insists that the agreement ought not to be executed, the Court must first dispose of the question raised (*l*).

5. A new practice has sprung up, by which certainly some suits have been quickly disposed of, but which has been a great surprise upon many parties. I allude to the practice of ordering a purchaser *in possession of the estate* upon motion to pay the purchase-money into Court. This, under special circumstances, has even been

(*g*) Brown *v.* Frost, E. T. 1818. MS.

(*h*) *Post*, ch. 10.

(*i*) Nicloson *v.* Wordsworth, 2 Swanst. 365; see ch. 8 & 10, *post*.

(*k*) Matthews *v.* Danx, 3 Madd. 470, *post.*, ch. 8 & 10.

(*l*) *Post*, ch. 8 & 10.

done before answer (*m*); but the purchaser has, in some cases, had the option to pay the money, or give up possession (*n*); in others, an occupation rent has been set, deducting interest on the deposit (*o*); and, in others, a receiver has been appointed (*p*); and payment of the money will be ordered, although by the agreement it is payable by instalments, and a portion of it is to remain secured upon the estate (*q*).

6. This rule has been adopted where the possession has been given under a mutual apprehension that the title could be immediately made good (*r*)—where the purchaser had a sort of mixed possession with the vendor, and had paid part of the purchase-money, was insolvent, and had attempted without effect to sell the estate (*s*)—where the purchaser approved of the title and prepared a conveyance, and then raised objections (*t*)—where the purchaser had been guilty of laches, and cut underwood (*u*). Even in a case where it ap-

(*m*) Dixon *v.* Astley, 1 Mer. 133. See Burroughs *v.* Oakley, 1 Mer. 52. 376; Blackburn *v.* Stace, 6 Madd. 69.

(*n*) Clarke *v.* Wilson, 15 Ves. 317; Smith *v.* Lloyd, 1 Madd. 83; Morgan *v.* Shaw, 2 Mer. 138; Wickham *v.* Everest, 4 Madd. 53.

(*o*) Smith *v.* Jackson, 1 Madd. 618; Smith *v.* Lloyd, 1 Madd. 83.

(*p*) Hall *v.* Jenkinson, 2 Ves. & Beam. 125. See Clarke *v.* Elliott, 1 Madd. 606.

(*q*) Younge *v.* Duncombe, You. 275.

(*r*) Gibson *v.* Clarke, 1 Ves. & Beam. 500. See 1 Madd. 607.

(*s*) Hall *v.* Jenkinson, 2 Ves. & Beam. 125.

(*t*) Watson *v.* Upton, Coop. 92, n. But see Bonner *v.* Johnston, 1 Mer. 366; and see Crutchley *v.* Jerningham, 2 Mer. 502; Fournier *v.* Edwards, T. T. 1819, V. C. The deeds were executed, and an application was made for the completion of the purchase, but the purchaser had not the money. The motion was made upon the answer, by which the defendant claimed compensation for some charges.

(*u*) Burroughs *v.* Oakley, 1 Mer. 52. 376; Dixon *v.* Astley, 1 Mer. 133. 378, n.; Bradshaw *v.* Bradshaw, 2 Mer. 492.

peared on the face of the abstract that the title was bad, but the purchaser had sold and conveyed the estate to another purchaser (*x*). So where from circumstances an acceptance of the title was inferred (*y*)—again, where a time was fixed for payment of the purchase-money by instalments, and the property was a *coal-mine* (*z*). In all these cases the rule has been applied, and if the estate be sold under a *decree*, the purchaser, if he enters into possession, will be compelled to pay his purchase-money into court, unless he entered with the express consent of the *Court* (*a*).

7. But where the sale is not by the Court, and the seller has thought proper to put the purchaser into possession, with an understanding between them that he shall not pay his money until he has a title, the purchaser cannot be called upon to pay the money into court in this summary way (*b*), nor can the payment be compelled where the vendor gives possession without stipulation (*c*), or the purchaser was in possession under another title before the contract (*d*); or the possession was given independently of the contract, and the seller has been guilty of laches (*e*), although in such cases the purchaser may make himself liable to the demand, by dealing improperly with the estate, *e. g.* cutting trees, or selling it to another person (*f*). But the purchaser after a long period will not be permitted to keep pos-

(*x*) Brown *v.* Kelty, L. I. Hall, July 1816, MS.

(*y*) Boothby *v.* Walker, 1 Madd. 197; and see Smith *v.* Lloyd, 1 Madd. 83.

(*z*) Buck *v.* Lodge, 18 Ves. jun. 450.

(*a*) Anon. L. I. Hall, 16 July 1816, MS.

(*b*) Gibson *v.* Clarke, 1 Ves. & Beam. 500.

(*c*) Clarke *v.* Elliott, 1 Madd. 606.

(*d*) Freebody *v.* Perry, Coop. 91; Bonner *v.* Johnston, 1 Mer. 366.

(*e*) Fox *v.* Birch, 1 Mer. 105.

(*f*) Cutler *v.* Simons, 2 Mer. 103; Bramby *v.* Teal, 3 Madd. 219; Gill *v.* Watson, *ibid.* 225.

session of the estate, and also withhold the purchase-money: if a title has not been made, he will be put to his election within a reasonable time, *e. g.* two months, to give up the possession or pay the purchase-money (*g*).

8. If an agreement be by parol for sale at so much an acre, and possession be given to the purchaser without any understanding respecting the period when the purchase-money should be paid, and the bill alleges a quantity of land to be sold, which is denied by the answer, and the bill only seeks a performance as to the larger quantity, no money will be ordered into court (*h*).

9. Perhaps two simple rules may be deduced from the cases: 1st. Where the possession is taken under the contract, or is consistent with it, and the purchaser has not dealt improperly with the estate, the cause must take its regular course.

10. But 2d, If the possession by the purchaser, without payment of the money, is contrary to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership, for example, cutting timber, by which the property is lessened in value, or selling the estate, by which the first seller's remedy is complicated without his assent; in such cases, the Court will interpose and compel the purchaser to pay the purchase-money into court.

11. Where the sum is large, the Court has allowed a long day, for instance, three months for payment of the money (*i*); and under proper circumstances, the time

(*g*) Tindal *v.* Cobham, 2 My. & Kee. 385.

(*h*) Benson *v.* Glastonbury, N. & C. Compy. C. Coop. 42: this seems to be the point of the case.

(*i*) Townshend *v.* Townshend, L. I. Hall, March 3, 1817, Master of the Rolls for the Lord Chancellor. MS.

will be enlarged (*k*). Upon a motion for this purpose, affidavits may of course be filed after the purchaser has put in his answer, stating the collateral circumstances (*l*).

12. Where a vendor files a bill for an injunction and a specific performance, the Court will, upon granting the injunction, put him upon proper terms, and therefore will in most cases order him to pay the deposit into court. But where the seller at the time of the bill filed is able and willing to make a good title to the estate sold, and the purchaser improperly refuses to complete the contract, although the seller is in possession of the estate, he will not be compelled to pay the deposit into court, because it is the fault of the purchaser and not of the seller that the latter retains both the deposit and the estate (*m*).

13. Where an estate is sold in lots to different persons, the vendor cannot include them in one bill, for each party's case is distinct, and must depend upon its own peculiar circumstances, and there must be a distinct bill upon each contract (*n*). In demurring to a bill against distinct purchasers, as multifarious, the defendants need not deny combination (*o*), although that was formerly deemed essential (*p*).

14. A purchaser should not make the stewards or receivers of the vendor parties to his bill for a specific performance; for although, as we have already

(*k*) Brown *v.* Kelty, Michaelmas Term, 1816, MS., the Vice-Chancellor for the Lord Chancellor; Townshend *v.* Townshend.

(*l*) Bradshaw *v.* Bradshaw, 2 Mer. 492; Crutchley *v.* Jerningham, *ib.* 502.

(*m*) Wynne *v.* Griffith, 1 Sim. & Stu. 147.

(*n*) Rayner *v.* Julian, 2 Dick. 677; Brookes *v.* Lord Whitworth, 1 Madd. 86.

(*o*) Brookes *v.* Whitworth, 1 Mad. 86.

(*p*) Bull *v.* Allen, Bunb. 69.

seen, the vendor is deemed a trustee for the purchaser, yet this rule does not extend to the agents of the vendor (*q*).

15. And as a general rule, a purchaser ought not to make any person a party to his suit, in whom he alleges any adverse right to be vested: the question should be litigated between the seller and him alone, Can a good title be made? In one case, however, where the seller had obtained a settled estate, under the exercise of a power to substitute another estate of equal value, Lord Hardwicke compelled him, upon his bill for a specific performance against a purchaser of the estate originally settled, to make the persons who claimed under the settlement parties to the suit. This, however, cannot be relied upon as a precedent (*r*).

16. The general rule is, that neither the vendor nor the purchaser can involve third persons in a proceeding to enforce a specific performance any more than they could be made parties to an action for a breach of contract. Even where a mortgagee, claiming under the seller, is not willing to convey to the purchaser without having competent authority for so doing, he cannot be made a defendant to the purchaser's bill for a specific performance, nor can any person entitled to an interest in the equity of redemption be joined. The mortgagee is only subject to be redeemed, and is a stranger to the contract, and has no right to dispute the title, and the purchaser has no right to redeem until his contract is completed (*s*). The purchaser, of course, may, in a suit against the seller alone, if he is en-

(*q*) Macnamara *v.* Williams, 6 Ves. jun. 148.

(*r*) Lamplugh *v.* Hebden, 1 Dick. 78; Barnard, C. C. 371; 2 Eq. Ca. Abr. 170, pl. 29. See Tasker *v.* Small, 6 Sim. 633.

(*s*) Tasker *v.* Small, 3 Myl. & Cra. 63.

titled to the equity of redemption, compel him to redeem and to obtain a conveyance from the mortgagee.

17. Where the plaintiff, in a bill for a specific performance, cannot prove his agreement, as laid; but the defendant, who proves the agreement to be different, offers to perform specifically the agreement which he represents; the Court will execute the agreement as proved by the answer, without a cross-bill, although the plaintiff should wish to have the bill dismissed (*t*), if the Court think the defendant entitled to a specific performance (*u*).

18. But, if a plaintiff insist upon a particular construction of a contract, and the Court decides against him, he will not be allowed a specific performance according to the construction against which he has contended. It is not like the case of a plaintiff calling upon the Court to construe and execute an agreement according to the true construction; suggesting that which he conceives to be so (*x*).

19. If a bill for a specific performance be dismissed, it would require a clear and distinct case to be made out and prayed, to entitle the plaintiff to an account of rents, or the like (*y*).

20. If a purchaser have recourse to equity, and it appear that the vendor has, since the filing of the bill, sold the estate to another person, the Court will, it has been determined, refer it to a Master, to inquire what damage the purchaser has sustained; and the sum

(*t*) Fife *v.* Clayton, 13 Ves. jun. 546.

(*u*) Higginson *v.* Clowes, 15 Ves. jun. 516.

(*x*) Clowes *v.* Higginson, 1 Ves. & Beam. 524.

(*y*) Williams *v.* Shaw, 3 Russ. 178, and Stevens *v.* Guppy, 3 Russ. 171.

which shall be found due, together with costs, will be directed to be paid to him (*z*). This was decided by Lord Kenyon in Denton *v.* Stewart, and has since been followed by Sir W. Grant in Greenaway *v.* Adams.

21. In a recent case, upon a specific performance, where Lord Eldon refused to direct an issue or an inquiry before the Master, with a view to damages, he said, that the plaintiff must take that remedy, if he chooses it, at law. In Denton *v.* Stewart, the defendant had it in his power to perform the agreement, and put it out of his power pending the suit. That case, if it was not to be supported upon that distinction, was not according to the principles of the Court (*a*). In Jenkins *v.* Parkinson, before Lord Brougham, he observed that, in Todd *v.* Gee, Lord Eldon did not in express terms overrule Denton and Stewart, but he did everything short of denying it to be law; that in Greenaway *v.* Adams it was reluctantly followed, and in Gwillim *v.* Stone it was not followed; and he added, that the current of all the previous authorities against it, to which Lord Eldon refers in Todd *v.* Gee, may therefore be considered as restored after a temporary and dubious interruption, and it may now be affirmed that those two cases—Denton and Stewart and Greenaway and Adams—are no longer law (*b*).

22. In a late case (*c*), where a seller had, after a contract for sale, sold at an advance to another person,

(*z*) Denton *v.* Stewart, 1 Cox, 258; 1 Ves. jun. 329; 17 Ves. jun. 276, cited; Reg. Lib. A. 1785, fol. 552. 717; *supra*, p. 200 n.; Greenaway *v.* Adams, 12 Ves. jun. 395.

(*a*) Todd *v.* Gee, 17 Ves. jun. 273; Blore *v.* Sutton, 3 Mer. 237; Kendall *v.* Beckett, 2 Russ. & Myl. 88.

(*b*) 2 Myl. & Kee. 5, *sed qu.*

(*c*) Daniels *v.* Davison, 16 Ves. jun. 249.

the bill filed by the first purchaser prayed, that if the second purchaser bought without notice, the seller might account to the plaintiff for the advanced price. It was not necessary to decide the point; but Lord Eldon observed, that the estate by the first contract, becoming the property of the vendee, the effect was, that the vendor was seised as a trustee for him; and the question then would be, whether the vendor should be permitted to sell for his own advantage the estate of which he was so seised in trust, or should not be considered as selling it for the benefit of that person for whom, by the first agreement, he became trustee, and therefore liable to account. The ultimate decision was, that the first purchaser was entitled to a specific performance against the seller and the second purchaser, the latter being considered to take subject to the equity of the first purchaser, to have a conveyance of the estate at the price which he agreed to pay for it (*d*).

23. Equity cannot give the purchaser any compensation where he files a bill to have the contract delivered up on account of the defective title of the vendor. But he will obtain a decree for the delivering up of the contract without prejudice to his remedy at law for breach of it (*e*).

24. Nor where the contract has been executed, can a bill be filed simply for compensation, *e. g.* where the rental of the estate was represented higher than its actual amount (*f*).

25. If a purchaser take a line of defence which fails, yet if he have a good ground to avoid the contract, he

(*d*) 17 Ves. jun. 433.

(*e*) Gwillim *v.* Stone, 14 Ves. jun. 128, *sed qu.*, as to the latter branch.

(*f*) Newham *v.* May, 10 Price, 117.

may still avail himself of it as a bar to a specific performance (*g*).

26. A purchaser may of course have a right to avoid a purchase by matter *ex post facto*—as where the subject of sale was a gentleman's residence, and some of the ornamental timber was cut pending an investigation of the title (*h*).

27. If the abstract be not delivered in time, or objections arise to the title, the vendee may bring an action at law for non-performance of the agreement, in which case the vendor's remedy (if he can insist upon the contract being specifically performed) is, to file a bill for a specific performance, and an injunction to restrain the proceedings at law, and the vendor may file his bill for a performance in specie, although the vendee may have recovered his deposit at law (*i*).

II. Of the Remedy at Law.

28. If a purchaser, upon a bill being filed for a specific performance, pay the purchase-money without putting in an answer, and afterwards discover that a fraud was committed in the sale, he is not precluded from bringing an action for damages if he come recently after discovery of the deception (*k*).

29. But if a defendant in a suit for a specific performance, after a decree, bring an action at law against the plaintiff in equity for damages, and the decree proceeded upon the ground that he had waived the literal performance of the thing, for breach of which the action is brought, *e. g.* the time appointed for performance of the contract, equity will enjoin the action (*l*).

(*g*) Magennis *v.* Fallon, 2 Moll. 591.

(*h*) S. C.

(*i*) *Vide infra*, ch. 8 & 10.

(*k*) Jendwine *v.* Slade, 2 Esp. Ca. 257.

(*l*) Reynolds *v.* Nelson, 6 Mad. 290.

30. So equity will restrain the seller from bringing an action where the bill was dismissed because he had no title (*m*).

31. But although a seller's bill for a specific performance be dismissed, yet he may in general still bring his action at law for breach of the agreement; and there are instances of sellers recovering damages in such cases. When the Court refuses its interference, and yet thinks that the seller is intitled to enforce his contract at law, it is usual to add a declaration to the decree, that it is without prejudice to the plaintiff's remedy at law. In like manner, a purchaser, although he cannot prevail upon the Court to assist him, is frequently left at liberty to enforce his right to damages at law (*n*).

32. If a purchaser recover damages in an action for breach of the agreement, he cannot bring a second action, or resort to any other means to enforce the contract. The first action alleges the grievance to be the loss sustained by breach of the contract, and that is to be deemed an election as to the remedy sought (*o*).

33. Where the purchaser has paid any part of the purchase-money, and the seller does not complete his engagement, so that the contract is totally unexecuted, he, the purchaser, may affirm the agreement, by bringing an action for the non-performance of it, or he may elect to disaffirm the agreement *ab initio*, and may bring an action for money had and received to his use (*p*).

34. In this latter action, however, the plaintiff can-

(*m*) M'Namara v. Arthur, 2 Ball & Beat. 349.

(*n*) *Infra*, s. 5.

(*o*) 10 Bing. 537, 538. 540.

(*p*) See 2 Burr. 1011; Farrer v. Nightingale, 2 Esp. Ca. 639; Hunt v. Silk, 5 East, 449; Squire v. Tod, 1 Camp. Ca. 293. See Levy v. Haw, 1 Taunt. 65.

not recover more than the money paid, although the estate has risen in value; while, on the other hand, it may perhaps be thought, that if the estate has experienced a diminution in value, he can only recover the damages he sustained by the estate not being conveyed, that being the only money retained by the defendant against conscience; and therefore the plaintiff, *ex æquo et bono*, ought not to recover any more (*q*).

35. The right to disaffirm the agreement is, in some cases, of great importance. If an agent enter into an agreement on behalf of his principal, but on the face of the agreement the agent appear to be the real purchaser, and is so considered by the vendor, yet if the purchaser actually pay the deposit, although through the medium of his agent, and the vendor do not complete his engagement, so that the contract is rescindable, the purchaser himself may maintain an action for recovery of the deposit, which will be considered as money received by the vendor to the use of the real purchaser (*r*).

36. But if a man enter into a contract expressly *as agent for a third person*, although really for his own benefit, and the other party has no notice that the supposed agent is the principal, the latter cannot maintain an action upon the contract without first disclosing to the other party that he is the principal (*s*).

37. Although the contract is under seal, and the purchaser might for a breach of the contract maintain an action of covenant for the breach of the contract, yet he may also, if he have a right to rescind the contract,

(*q*) See Moses *v.* M'Farlan, 2 Burr. 1005; Dutch *v.* Warren, *ib.* 1010, cited; and Str. 406; S. C. Dale *v.* Sollet, 4 Burr. 2133, *sed qu.*

(*r*) Duke of Norfolk *v.* Worthy, 1 Camp. Ca. 337. See Edden *v.* Read, 3 Camp. Ca. 338; Bethune *v.* Farebrother, 5 Man. & Selw. 385. 391, cited.

(*s*) Bickerton *v.* Burrell, 5 Man. & Sel. 383.

bring an action for money had and received, to recover back his purchase-money. The seller holds the money against conscience, and therefore might be compelled to refund it by an action for money had and received (*t*).

38. We shall elsewhere see that, generally speaking, a purchaser, where a title cannot be made, is not entitled to damages for the fancied loss of his bargain (*u*).

39. And in a case (*x*) where an auctioneer who had advanced some money on an estate, sold it by auction after the authority from his principal had expired, and the principal refused to confirm the sale, the Court of Common Pleas, in an action brought by the purchaser, in which he declared on the agreement, and for money had and received, &c. would not allow him damages for the loss of his bargain, although it was proved that the estate was worth nearly twice the sum which he gave for it.

40. Nor in a case of this nature is a purchaser entitled to any compensation, although he may be a loser by having sold out of the funds, which may have risen in the meantime, because he had a chance of gaining as well as losing by a fluctuation of the price (*y*).

41. But a purchaser is entitled to interest on his deposit (*z*); and if the residue of the purchase-money has been lying ready without interest being made by it, he is entitled to interest on that (*a*). Where the plaintiff recovers under a special count on the original contract, which, we have seen, affirms the agreement, interest will be given as part of the damages for non-

(*t*) Greville *v.* Da Costa, Peake's Add. Cas. 113.

(*u*) *Infra*, ch. 8.

(*x*) Bratt *v.* Ellis, MS. Appendix, No. 7; and see Jones *v.* Dyke, MS. Appendix, No. 8.

(*y*) Flureau *v.* Thornhill, 2 Blackst. 1078.

(*z*) See ch. 16, *infra*.

(*a*) Flureau *v.* Thornhill, *ubi sup.*; Hodges *v.* Lord Litchfield, 1 Bing. N. S. 492.

performance of the agreement: where he can only recover under a count for money had and received, which disaffirms the contract—as if the contract was by parol for the sale of lands (*b*), or the seller had not bound himself by the signature of himself or his agent (*c*), he cannot recover interest, for, as a general rule, interest cannot be recovered in an action for money had and received (*d*) (I). But where the contract is a valid one, the deposit may be recovered as money had and received, and where there is a count for it, interest also, it should seem as damages sustained by the plaintiff by reason of the money having been withheld from him.

42. Where the agreement is a binding one, the purchaser may also, as we shall hereafter see, recover the expenses of investigating the title (*e*).

43. Where a vendee brings an action on account of the agreement not having been completed, he will be compelled to give the vendor a particular of every matter of fact which he means to rely upon at the trial, as having been a cause of his not being able to complete the purchase; but he is not bound to state in his particular any of the objections in point of law arising upon the abstract (*f*).

(*b*) Walker *v.* Constable, 1 Bos. & Pull. 306.

(*c*) Gosbell *v.* Archer, 2 Adol. & Ell. 500; 4 Nev. & Man. 485.

(*d*) Tappenden *v.* Randall, 2 Bos. & Pull. 472; Fruhling *v.* Schroeder, 2 Bing. N. C. 77; and see Dobell *v.* Hutchinson, 3 Adol. & Ell. 355, and 3 & 4 Will. 4, c. 42, s. 28.

(*e*) See *post*, ch. 8.

(*f*) Collet *v.* Thomson, 3 Bos. & Pull. 246; Roberts *v.* Row-

(I) Notwithstanding the observation in 2 Bing. N. C. 80, Lord Ellenborough, in De Bernales *v.* Fuller, 2 Camp. Ca. 426, does not appear to have laid down a general rule that interest cannot be recovered in an action for money had and received; see also De Havilland *v.* Bowerbank, 1 Camp. Ca. 50, and *post*, ch. 16.

44. But although the purchaser assign by way of special damage, that he has incurred certain expenses, yet he will not be compelled to furnish particulars of such special damage (*g*).

45. Where in a single count there were several allegations of damage, the vendor, the defendant, was not allowed to select some of the items and pay the money into court; the whole count taken together was in substance of a demand of unliquidated damages. As the seller had broken his contract with the plaintiff, the Court would not help him to pare down the demand so as to compel the plaintiff to go to trial at his own risk (*h*).

46. Where no particular has been obtained, the plaintiff is not confined to the objections which he may have stated to the defendant, but may take advantage of any other, which may entitle him to recover as for breach of the agreement (*i*).

47. We shall elsewhere consider how the title must be averred in order to sustain the seller's action (*k*), and whether it is necessary to prove the execution of the title-deeds (*l*); and also, whether a court of law can take notice of equitable objections to a title (*m*).

48. If the purchaser die, his heir cannot sue at law for a breach upon a mere agreement to sell, but where there has been a breach in the purchaser's life-time, and a loss to his personal property, his personal representative may maintain an action, *e. g.* for damage incurred by the loss of interest on the deposit, and the expenses of investigating the title (*n*).

lands, 3 Mees. & Wels. 543, *post*, ch. 8.

(*g*) Retallick *v.* Hawkes, 1 Mees. & Wels. 573.

(*h*) Hodges *v.* Lord Litchfield, 9 Bing. 713.

(*i*) Squire *v.* Tod, 1 Camp. Cas. 293.

(*k*) *Post*, ch. 8.

(*l*) *Post*, ch. 8, 9.

(*m*) *Post*, ch. 10.

(*n*) Orme *v.* Broughton, 10 Bing. 533 [misprinted in report].

49. If the agreement is in the hands of one of the parties, or his attorney, equity, in case a bill is filed, will compel it to be delivered up to the other party, in order that it may be stamped (*o*). So, in case of an action, if only one part of the agreement has been executed, the party, in whose possession it is, shall be compelled to produce it to the other party (*p*), and it is not important that the contract was made with the auctioneer, and not with the seller, who is the defendant (*q*). And if there are even two parts, but one only is stamped, the party having the unstamped part may give secondary evidence of the contents of the agreement, if the other, after notice, refuse to produce the stamped part (*r*). Where one party produces the agreement, under a notice from the other, the latter need not call the subscribing witness to prove the execution of the agreement, as the defendant takes an interest under it (*s*). Where the purchaser has signed an agreement, he cannot, in an action for the deposit, avoid producing the agreement, by merely producing the conditions of sale and the auctioneer's catalogue of sale (*t*).

50. An agreement, as we have seen, may be established by a correspondence, and in that case, the letters form the agreement, but one stamp only is required to them all, as constituting one agreement (*u*).

51. Before quitting this subject, it must be remarked, that in agreements for purchase, the covenants are construed according to the intent of the parties, and they are therefore always considered dependent where a con-

(*o*) *Supra*, p. 164.

(*p*) Blakey *v.* Porter, 1 Taunt. 386; Bateman *v.* Philips, 4 Taunt. 157; King *v.* King, *ib.* 666; Street *v.* Brown, 1 Marsh. 610.

(*q*) Ginger *v.* Bayly, 5 Moo. 71.

(*r*) Garnons *v.* Swift, 1 Taunt. 507. See Waller *v.* Horsfall, 1 Camp. Ca. 501.

(*s*) Bradshaw *v.* Bennett, 5 Carr. & Pay. 48.

(*t*) Curtis *v.* Greated, 2 Nev. & Mann. 449.

(*u*) Stead *v.* Liddard, 1 Bing. 196.

trary intention does not appear (*x*), (I). The true rule, Mansfield, C. J. (*y*), said, was, that it is not the employment of any particular word which determines a condition to be precedent, but the manifest intention of the parties.

52. The old law was certainly in favour of the contrary doctrine (*z*); but if, as Lord Kenyon observed, the Courts were to hold otherwise than they now do, the greatest injustice might be done; for supposing, in the instance of a trader who had entered into a contract for the sale of an estate, that between the making of the contract and the final execution of it he were to become a bankrupt, the vendee might be in the situation of having had payment enforced from him, and yet be disabled from procuring the property for which he had paid (*a*), (II).

53. If, therefore, either a vendor or vendee wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent; for he can-

(*x*) As to where covenants are precedent, and where dependent, see Mr. Serjeant Williams's note (4) to 1 Saund. 320; Dawson *v.* Dyer, 5 Barn. & Adol. 584.

(*y*) Smith *v.* Woodhouse, 2 New Rep. 233. See Havelock *v.* Geddes, 10 East, 555.

(*z*) 8 Term Rep. 370, 371.

(*a*) See Duke of St. Alban's *v.* Shore, 1 H. Black. 270; Goodisson *v.* Nunn, 4 Term Rep. 761; Glazebrook *v.* Woodrow, 8 Term Rep. 366; and Heard *v.* Wadham, 1 East, 619; and see Ameourt *v.* Elever, 2 Kel. B. R. 159; Carpenter *v.* Cresswell, 4 Bing. 409; 1 Moo. & Pay. 66.

(I) In Morris *v.* Knight, T. 2 Jac. II. B. R. there were mutual covenants: one agreed to pay a sum of money for a lease for years; the other covenanted that he should enter in twenty days, and that he would make a demise thereof, from, &c., and the plaintiff brought an action for non-payment of the money before the demise made, held not good, for the lease is the consideration: so judgment for the defendant. MS.

(II) As to this point in bankruptcy, vide *supra*, s. 1, and *post*, ch. 12 & 21.

not proceed against the other without an actual performance of the agreement on his part, or a tender and refusal.

54. Thus a vendor cannot bring an action for the purchase-money, without having executed the conveyance, or offered to do so, unless the purchaser has discharged him from so doing (*b*); but if the purchaser give a bill of exchange, or other security, for the purchase-money, payable at a certain day, he must pay it when due, and cannot resist the payment even in the case of a bill of exchange, on the ground that there was no consideration for the drawing of the bill, because the seller has refused to convey the estate according to the agreement. But he will have his remedy upon the agreement for the non-execution of the conveyance (*c*). And if the purchaser, had he actually paid the money secured by the note as a deposit, would have been entitled to recover it back—as where the agreement could not be performed by the seller—it is not clear that he, the purchaser, might not resist the payment of the note on the ground of want of consideration, but whilst the contract remains open, he cannot resist the payment of the note (*d*).

55. On the other hand, a purchaser cannot maintain an action for breach of contract, without having tendered a conveyance, and the purchase-money (*e*).

56. This last position has, however, been rendered doubtful by some recent *dicta* of the Judges (*f*), that it

(*b*) Jones *v.* Barkley, Dougl. 684; Philips *v.* Fielding, 2 H. Black. 123; and see 3 East, 443.

(*c*) See Moggridge *v.* Jones, 14 East, 486; 3 Camp. Ca. 38; and see Swan *v.* Cox, 1 Marsh. 176; Spiller *v.* Westlake, 2 Barn. & Adolp. 155.

(*d*) See 2 Barn. & Adol. 157, 158.

(*e*) See 1 Esp. Ca. 191; *ex parte* Hylliard, 1 Atk. 147.

(*f*) Lord Rosslyn, in Pincke *v.* Curteis, 4 Bro. C. C. 332;

is incumbent on the *vendor* to prepare and tender a conveyance, which, as a general rule, certainly seems to have prevailed when the simplicity of the common law prevailed, and possession was the best evidence of title; but upon the introduction of modifications of estates, unknown to the common law, and which brought with them all the difficulties that surround modern titles, it became necessary to make an abstract of the numerous instruments relating to the title, for the purpose of submitting it to the purchaser's counsel: and it then became usual for him to prepare the conveyance. This practice has continued, and is now the settled rule of the Profession: the rule is, indeed, sometimes departed from, but this seldom happens, except in the country, and it always arises from consent, or express stipulation.

57. In a late case (*g*), this point came distinctly before the Court of Exchequer, and it was, in conformity to the present practice of the Profession, decided, that the purchaser, and not the vendor, is bound to prepare and tender the conveyance. In the early case of Webb *v.* Bettel (*h*), the same rule was expressly recognised by Windham, J. and denied by no one. He said, "that where a person is to execute a conveyance generally, there the counsel of the purchaser is intended to draw it, and then the purchaser ought to tender it.

58. It is settled, that if a conveyance is to be prepared at the expense of a purchaser, he is bound to tender it (*i*). Now it is admitted on all hands, that the expense of the conveyance must be borne by the purchaser, if

Macdonald, C. B. in Growsock *v.* Smith, 3 Anstr. 877; Lord Kenyon, in Heard *v.* Wadham, 1 East, 627; and Lord Eldon, in Seton *v.* Slade, 7 Ves. jun. 278.

(*g*) Baxter *v.* Lewis, 1 Forrest's Rep. Exch. 61; and see Martin *v.* Smith, 2 Smith, 543; but see Standley *v.* Hemmington, 6 Taunt. 561; 2 Marsh. 276.

(*h*) 1 Lev. 44.

(*i*) Seward *v.* Willock, 5 East, 198.

there be no express stipulation to the contrary. Therefore, where there is no such stipulation, the purchaser is bound to tender the conveyance. In a late case in the Court of Exchequer, where a lease was to be prepared at the sole expense of the lessor, it was held that he was to prepare it, and not the lessee. It may be, indeed, that one may be bound by the express terms of a contract to prepare a lease or conveyance, and yet that it shall be paid for by another, for such stipulations are not inconsistent; but where all that is stipulated for is, that it shall be prepared at the expense of the lessor, and there is no contract to explain it, it must be intended that the lessor is to prepare it also (*k*).

59. Upon the whole, notwithstanding the recent *dicta* to the contrary, as the precise point came before the Court of Exchequer, in Baxter *v.* Lewis, and their decision accords with the *uniform practice* of conveyancers, which has always met with the greatest attention in courts of justice (*l*), we may be warranted in saying, that the purchaser, and not the vendor, ought to prepare and tender the conveyance.

60. If the purchaser is required by the agreement to prepare the conveyance, it is clear that the vendor may maintain an action, or file a bill, without tendering a conveyance (*m*); and therefore, to prevent all doubt on this point, it seems advisable to stipulate in the agreement or conditions of sale, that the conveyance shall be prepared by, and at the expense of, the purchaser. A purchaser must, however, prepare the conveyance, although it is merely declared that the conveyance shall be at his expense (*n*).

(*k*) Price *v.* Williams, 1 Mees. & Wels. 6.

(*l*) See 2 Atk. 208; 1 Term Rep. 772; Wilmot, 218.

(*m*) Hawkins *v.* Kemp, 3 East, 410.

(*n*) Seward *v.* Willock, 5 East, 198.

61. But although a purchaser is expressly required to prepare a conveyance, yet if a bad title be produced, he may maintain an action for recovery of his deposit, without tendering a conveyance (*o*). So where a vendor has, by selling the estate, incapacitated himself from executing a conveyance to the first purchaser, that renders further expense and trouble on his part unnecessary; and he may accordingly sustain an action without tendering a conveyance, or the purchase-money (*p*).

62. Where a purchaser is let into possession on a treaty for purchase, he does not become tenant to the seller; and if the seller cannot make a title, it is doubtful whether an action will, under any circumstances, lie against the purchaser (I). It is settled that the action will not lie where the occupation has not been beneficial to him (*q*), beyond the mere protection from the inclemency of the weather, and if he paid the money, of which the seller might have made interest, although the jury expressly find that the value of the house, during the occupation of the purchaser, exceeds the interest of the money paid, yet the seller cannot recover (*r*); for it is impossible to make the rules of law depend on the balance of loss or gain in each transaction: one party must take back his money, and the other take back his house. A contract cannot arise by implication of law, under circumstances, the occurrence of which neither of the parties ever had in their contemplation.

(*o*) Seward *v.* Willock, *ubi sup.*; S. P. ruled by Lord Ellenborough, C. J. in Lowndes *v.* Bray, Sitt. after T. T. 1810.

(*p*) Knight *v.* Crockford, 1 Esp. Ca. 189. See Duke of St. Alban's *v.* Shore, 1 H. Black. 270; Jackson *v.* Jacob, 3 Bing. N. C. 869.

(*q*) Hearne *v.* Tomlin, Peake's Ca. 192.

(*r*) Kirtland *v.* Pounsett, 2 Taunt. 45.

(I) See *supra*, s. 1, for the effect of a contract on an existing tenancy.

63. But as the possession is in these cases lawful, being with the assent of the seller, an ejectment will not lie against the purchaser without a demand of possession, and refusal to quit (*s*); unless upon possession being given to him, he agreed to quit possession if he should not pay the purchase-money on a given day, or the like; in which case an ejectment will lie, without notice, on non-performance of his agreement. The agreement operates in the same manner as a clause of re-entry on breach of covenant in a lease (*t*).

64. If possession be given upon payment of part of the purchase-money, and interest is paid upon the remainder, twenty years' possession by the purchaser is no bar in ejectment, because his possession was not adverse to the seller (*u*).

65. Where the conditions of sale stipulated for the delivery of an abstract, &c. by the sellers, and that in case the purchaser was let into possession before the payment of his purchase-money, he should be considered as tenant at will to the vendors, and pay interest after the rate of four per cent. upon the amount of his purchase-money, as and for such rent—the seller made default in delivering of the abstract, and the purchaser was let into possession—it was held, 1. That in the absence of an express contract by the purchaser to waive

(*s*) Doe *v.* Jackson, 1 Barn. & Cress. 448; Right *v.* Beard, 13 East, 210. See Hegan *v.* Johnson, 2 Taunt. 148; Doe *v.* Lawder, 1 Stark. 308; Doe *v.* Boulton, 1 Mood. & Malk. 148; Doe *v.* Waller, 1 Carr. & Payn. 595; Doe *v.* Miller, 5 Carr. & Payn. 595; Doe *v.* Pullen, 2 Bing. N. C. 749; Doe *v.* Stanion, 1 Mees. & Wels. 695.

(*t*) Doe *v.* Sayer, 3 Camp. Ca. 8. The same doctrine is extended to an *agreement* for a lease, Doe *v.* Smith, 6 East, 530; Doe *v.* Breach, 6 Esp. Ca. 106.

(*u*) Doe *v.* Edgar, 2 Bing. N. C. 498; see ch. 11, s. 5, *post*.

the non-fulfilment of the condition to deliver an abstract, no such contract could be implied at law, from the mere circumstance of the purchaser being let into possession: the remedy was to be sought in equity.—2. That use and occupation would not lie, for the condition under which the purchaser was said to have occupied, supposed that the vendors would have performed their parts of the previous contract, and provided for the case of default after such performance: the law would not imply that the vendee had subjected himself to such a condition by being let into possession while the title remained incertain. 3. That if the purchaser had agreed to be bound by the condition, the action ought not to have been for use and occupation, but the declaration should have been special on the contract to pay four per cent. upon the purchase-money, a contract in the nature of an agreement for a tenancy, but not amounting to that (*x*).

66. And in a case where power was given, in a contract under seal, to a purchaser to leave the purchase-money as a charge upon the property for a given period at interest, and it was stipulated that the purchaser should be deemed tenant to the seller at a rent equal to the interest, and the seller was to have power to distrain, though the agreement was acted upon, yet the instrument was held not to be a lease, but substantially a contract for purchase, and that the power of distress did not alter the nature of the contract between the parties. And this construction was held to prevail even in the event of the bankruptcy of the purchaser (*y*).

(*x*) Seaton *v.* Booth, 4 Adol. & Ell. 528, where the purchase was in lots, and the sellers had not a joint title. The statement in the text is from the judgment of Mr. Justice Littledale; see the opinions of the L. C. J. and Mr. Justice Coleridge.

(*y*) Hope *v.* Booth, 1 Barn. & Adol. 498.

67. A writ of *ne exeat regno* lies against a purchaser who has not paid the purchase-money, upon his threatening to go abroad, if the vendor's title has been accepted (*z*), or there has been a decree for a specific performance after the title has been investigated (*a*). But although the purchaser has taken possession of the property, and received the rents after the delivery of the abstract, yet the writ cannot issue; for unless the Court can make it out to be quite clear that there must be a specific performance, it cannot grant the writ (*b*).

(*z*) Goodwin *v.* Clarke, 2 Dick. 497; and Anon. *ibid.* note; see Jackson *v.* Petrie, 10 Ves. jun. 164.

(*a*) Boehm *v.* Wood, Turn. & Russ. 332.

(*b*) Morris *v.* M'Neil, 2 Russ. 604.

## SECTION V.

### OF RESCINDING AND OF CONFIRMING A CONTRACT.

1. *Notice of rescinding.*
3. *Doctrine of rescinding a contract.*
4. *Concealment of a fact by a purchaser.*
5. *Dealing unduly with purchaser.*
6. *Misrepresentation by a purchaser.*
7. *Whether fraud be necessary.*
8. *Seller believing his own misrepresentation.*
9. *Party left to his remedy at law.*
11. *Doctrine of rescinding a conveyance.*
11. *For unreasonableness of price.*
12. *For inadequacy.*
13. *Because trustee sold to himself.*
14. *Where by mistake a man bought his own estate.*
15. *Because improvidently made.*
18. *Because defect in title concealed.*
19. *Eviction not necessary to relief.*
20. *Because remainder sold had been barred.*
21. *Action of deceit.*
22. *Dobell v. Stevens.*
24. *Rule in equity.*
25. *Purchaser's general remedy.*
26. *Acquiescence bars right.*
27. *Confirmation releases right.*

28. *Although new circumstance of fraud discovered.*
29. *Acquiescence where fraud and oppression.*
31. *Confirmation where fraud.*
32. *Whether fraudulent transaction can be purged.*
33. *Requisites to valid confirmation.*
36. *Time a bar to relief.*
38. *Statutory bar.*
40, 49, 50. *Profit and loss by stock: interest.*
42. *Purchaser, how charged.*
43. *Occupation rent: improvements.*
44. *Not interest upon interest.*
46. *Repairs after notice of defect in title.*
47. *Conversion of shop into private house.*
49. *Power of Court where bill is dismissed.*
52. *After an injunction: interest.*
54. *Re-transfer of sums after reversal of decree.*
55. *No interest upon costs.*
56. *Power of Court after reversal, and cause remitted.*
57. *Whether purchase-money can be followed.*

1. Where one party fails in performing the contract, the other, if he means to rescind it, should give a clear notice of his intention (*a*).

2. The right to rescind a contract arises either before the completion of it—as for the want of title, for example—or after the contract is completed. The first class of cases we have already considered generally (*b*), and we have now only to inquire in what cases a party may require a contract to be delivered up; and, 2dly, under what circumstances a party may rescind the contract after the execution of the conveyance. And, first, as to the delivering up of a contract.

3. Few cases, Lord Eldon observed, turn on greater niceties than those which involve the question whether a contract ought to be delivered up to be cancelled, or whether the parties should be left to their legal remedy (*c*).

4. Where a man, knowing of the death of a person, by whose death the value of the property in the hands

(*a*) Reynolds *v.* Nelson, 6 Madd. 18.

(*b*) *Vide supra*, s. 5.

(*c*) Jac. 172.

of assignees of a bankrupt was improved, purchased the property, and did not disclose the fact, and they were unaware of it, although it was publicly known, Lord Eldon ordered the contract to be delivered up (*d*).

5. In a case (*e*) where, pending the investigation of a point upon the title to a part of the estate, the seller and his solicitor, in the absence of the purchaser's solicitor, went to the purchaser and induced him to pay the purchase-money, and to execute two deeds of covenant for the production of title-deeds to the estate, which were not in his possession, and the seller gave him a written acknowledgment for the money, which he undertook to return in case the title to the premises should not be complete: the purchaser's solicitor disapproved of this proceeding, and the seller then insisted that the purchaser had accepted the title. The Court held, that a case of fraud had been established against the seller; and as the seller had retained the money and the deeds of covenant after the objection made by the purchaser's solicitor, and had put his defence upon the acceptance by the purchaser of the title, and three years had elapsed since the bill was filed, the purchaser was entitled to have the contract rescinded without reference to the validity of the objection to the title, or to what part of the estate the objection applied. The seller was ordered to repay the purchase-money with interest, and to repay the auction-duty paid by the purchaser, and also to pay all costs, charges, and expenses which had been incurred by the purchaser in consequence of and incident to the purchase and the costs of the suit (*f*).

6. In the great case of Small *v.* Attwood (*g*), which

(*d*) Turner *v.* Harvey, Jac. 169; see *post*.

(*e*) Berry *v.* Armistead, 2 Kee. 221.

(*f*) See accordingly, Edwards *v.* M'Leay, Coop. 318.

(*g*) You. 407; 3 You. & Coll. 105, *infra*.

from its complicated facts can hardly perhaps be cited as an authority for anything beyond the general principle, that in the absence of actual fraud, representations and assertions upon a treaty are concluded by a contract in which no notice is taken of them, the learned Judge who decided the case in the first instance considered that there was a mis-statement of the basis of the agreement; there was a mis-statement with the knowledge of the party, and therefore it came within the principle, that if a case of deception is made out, which would entitle the purchaser to recover for a deceitful misrepresentation, it is a ground in a court of equity, to which an application may be made to set aside a contract (*h*); but the House of Lords came to a different conclusion, and dismissed the purchasers' bill with costs.

7. Unless a clear fraud be established, there ought to be no relief in equity, for there is a great difference between establishing and rescinding an agreement. In Small *v.* Attwood, for example, it was not too much to expect that if, in a purchase of such magnitude, in which of course there was previous inquiry, the purchasers bought on the representations of the seller as to the cost of producing pig iron, they should have required him to bind himself *by the contract* to those representations, and to agree to reduce the purchase-money if they proved to be incorrect. Such a simple precaution would have prevented the vast litigation in that case; but it is clear that if such a demand had been made, it would not have been acceded to, and that if it had been refused, the purchasers would have executed the contract without it.

8. At law, upon a sale of chattels—pictures, for ex-

(*h*) See You. 487. 462, 463; and see Lovell *v.* Hicks, 2 You. & Coll. 51.

ample—where there is no express warranty, but only a representation, the seller will not be answerable, although the representation prove to be untrue, if he believed it to be true (*i*).

9. There are cases, as we have already seen, in which, in dismissing a bill for a specific performance, the decree is expressly made without prejudice to the plaintiff's remedy at law upon the contract. In Mortlock *v.* Buller (*k*), where Lord Eldon refused a specific performance to the purchaser, who was plaintiff, he observed that there was nothing in the circumstances which could induce him to think the plaintiff could be restrained from using all the remedies he might have at law if a bill had been filed [by the seller] to have the contract delivered up. It was much too late to discuss then whether a court of equity ought to order a contract that it would not specifically perform to be delivered up, and to decree the performance of a contract which it would not order to be delivered up, for the distinction was always laid down, that there are many cases in which the party has obtained a right to sue upon the contract at law, and under such circumstances, that his conscience cannot be affected in equity so as to deprive him of that remedy; and yet, on the other hand, the Court declaring he ought to be at liberty to proceed at law, will not actively interpose to aid him, and specifically perform the contract.

10. So in Cadman *v.* Horner (*l*), where Sir W. Grant refused a purchaser a specific performance on account of a slight misrepresentation by him, he observed, that this was not a case where the Court was called upon to rescind an agreement, and to decree the conveyance

(*i*) De Sewhanberg *v.* Buchanan, 5 Carr. & Payn. 343.

(*k*) 10 Ves. jun. 308; Day *v.* Newman, 2 Cox, 77.

(*l*) 18 Ves. jun. 10.

executed in pursuance of it to be delivered up to be cancelled, which would admit a different consideration.

11. Secondly. We have elsewhere shown that there are few cases in which a purchaser can rescind a contract after the conveyance is executed, and the purchase completed, on account of the price being unreasonable (*m*).

12. Nor, on the other hand, can the vendor easily obtain relief on account of the inadequacy of the consideration after the conveyance is executed (*n*).

13. A *cestui que trust*, whose trustee has sold the estate to himself, may rescind the sale; but this subject is fully discussed in a subsequent part of this work (*o*).

14. Where a man having a right to an estate, purchased it of another person, being ignorant of his own title, the vendor was compelled to repay the purchase-money, with interest from the time of filing the bill, and costs; for the report says, though no fraud appeared, and the defendant apprehended he had a right, yet there was a plain mistake such as the Court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right (*p*).

The facts, as they appear in the registrar's book, are shortly these (*q*): John Bingham devised an estate tail in certain lands to Daniel, his eldest son and heir, with the reversion in fee to his (the testator's) own right heirs. Daniel left no issue, but devised the estate to the plaintiff in fee. The bill stated that the latter being ignorant of the law, and persuaded by the defendant and his

(*m*) See ch. 6.

(*n*) Ch. 6.

(*o*) See ch. 19.

(*p*) Bingham v. Bingham, 1 Ves. 126.

(*q*) Reg. Lib. 1748, A. fol. 154.

scrivener and conveyancer that Daniel had no power to make such devise, and being also subjected to the action of ejectment, purchased the estate of the defendant for 80*l.*, and it was conveyed to him by lease and release. The bill was to have the money repaid with interest. The defendant, by his answer, insisted that Daniel had no power to make such devise, but if he had, then he insisted that the plaintiff should have been better advised before he parted with his money, for that all purchases are to be at the peril of the purchaser.

15. Lord Redesdale observed, that if it were clear that a man had the fee simple, and that fraud, or perhaps mere ignorance, had induced him to accept a lease from another person, the Court might control the setting up of the lease: in a case of fraud it certainly might; in a case of mere ignorance, though he inclined to think it might, yet, after looking a little into the subject, he found great difficulty in holding that a court of equity would interfere (*r*).

16. The authorities certainly are not easily to be reconciled on this head, although there are several in which relief has been given on the mere ground of mistake as between parties not standing in the relation of vendor and purchaser (*s*).

17. In a case where a devisee under a tenant in tail, who had not barred the entail, obtained a conveyance from the heir at law, a poor man, who upon being sent for by a friend of the family, in company with a solicitor, agreed to convey to the devisee for 200*l.*, but did not know the value of the estate, nor that the devise was void, and afterwards conveyed, there having been

(*r*) Saunders *v.* Lord Annesley, 2 Scho. & Lef. 101.

(*s*) Lansdown *v.* Lansdown, Mose. 364; Leonard *v.* Leonard, 2 Ball & Beat. 171; and see 2 Mer. 233.

time for deliberation, Lord Kenyon, Master of the Rolls, upon a bill to set aside the conveyance, as obtained by fraud and imposition, observed, that no case had been cited, and therefore the case before him must stand upon its own circumstances, which were such as did not, in his opinion, amount to a proof of fraud and imposition. If the plaintiff after the offer had gone home and consulted his friends, and had afterwards accepted it, and joined in the conveyance, he thought he ought not to be relieved; but from its being suddenly accepted, without further inquiry or information, the conveyance ought to be set aside as improvidently entered into, and therefore decreed for the plaintiff (*t*).

18. In a modern case, where the sellers knew of a defect in the title to a part of the estate, which was material to the enjoyment of the rest, and did not disclose the fact to the purchaser, and it could not be collected from the abstract, the purchaser was relieved against the purchase in equity. The sellers were decreed to repay the purchase-money, with costs, and likewise all expenses which the purchaser had been put to relative to the sale, together with an allowance for any money he laid out in repairs during the time he was in possession (*u*). This is a case of the first impression.

Sir W. Grant observed, that the bill was rather of an unusual description. It could not certainly be contended that, by the law of this country, the insufficiency of a title, even when producing actual eviction, necessarily furnishes a ground for claiming restitution of the purchase-money. By our law the vendor is, in general, liable only to the extent of his covenants; but it had

(*t*) Evans *v.* Llewellyn, 2 Bro. C. C. 150.

(*u*) Edwards *v.* M'Leay, Coop. 308; affirmed by Lord Eldon on appeal, 11 July 1818, with a reservation of the question as to repairs. MS. S. C. 2 Swanst. 287.

never been laid down that, on the subject of title, there could be no such misrepresentation as would give the purchaser a right to claim a relief to which the covenants do not extend. Whether it would be a fraud to offer as good a title which the vendor knew to be defective, it was not necessary to determine; but if he knows and conceals a fact material to the validity of the title, he was not aware of any principle on which relief could be refused to a purchaser.

Lord Eldon affirmed the decision upon appeal: he observed, that the case resolved into this question, whether the representation made to the plaintiff was not in the sense in which we use the term fraudulent. He was not apprised of any such decision, but he agreed with the Master of the Rolls, that if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, the Court will rescind the contract (*x*).

19. Where a purchaser is entitled to be relieved on the ground of concealment of a fact establishing the invalidity of the title, it is not important that he has not been evicted: if the rightful owner is not barred by adverse possession, though he may never assert his right, the purchaser cannot be compelled to remain during the time to run in a state of uncertainty whether, on any day during that period, he may not have his title impeached. A court of equity is bound to relieve a purchaser from that state of hazard into which the misrepresentation of the seller has brought him (*y*).

20. Where a person sold a remainder expectant upon an estate-tail, and both parties considered that the remainder was unbarred, and it afterwards appeared that a recovery had been suffered before the contract, the

(*x*) 2 Swanst. 287.

(*y*) Edwards *v.* M'Leay, Coop. 308.

purchaser was relieved against a bond which he had given for the purchase-money, and the seller was compelled to repay the interest which he had received (*z*). This was a strong decision. The purchaser might have ascertained the fact by search. The Chief Baron laid down some very general propositions; he said, "that if a person sell an estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase-money, that is certainly a fraud, although both parties should be ignorant of it at the time (*a*). Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact, am I to be allowed to receive 5,000*l.* and interest, because the conveyance is executed, and a bond given for that sum as the purchase-money, when, in point of fact, I had not an inch of the land so sold to sell (*b*)?" Both these cases, when they arise, will, it is apprehended, deserve great consideration before they are decided in the purchaser's favour. The decision must be the same, whether the money is actually paid or only secured. Lord Eldon, in a later case, expressed considerable doubts as to the doctrine in this case.

21. Although, as we have seen, the treaty for a contract is considered to be concluded by the terms of the contract itself, and they cannot be added to at all at law by parol evidence, nor even in equity, except as a defence, yet it is laid down that, where a misrepresentation of a material fact not within the observation of the opposite party is made, the person making the representation, knowing at the time that his statements are untrue, under such circumstances an action may be

(*z*) Hitchcock *v.* Giddings, 4 Price, 135.

(*a*) But see 2 Cro. 196; 2 Ld. Raym. 1118; 1 T. Rep. 755; 2 Freem. 106; and *post*, ch. 12.

(*b*) See ch. 6, *post*.

maintained at law for the purpose of recovering a compensation in damages for the injury the party has sustained, notwithstanding the contract was in writing, and notwithstanding those particulars may be no part of the terms of the written contract (*c*).

22. As an instance, we may refer to Dobell *v.* Stevens (*d*), where a purchaser was allowed to recover upon an action on the case for a deceitful representation of the trade and income of a public house, although the purchase had been concluded by the payment of the purchase-money and the assignment of the property. There was negligence, too, on the part of the purchaser, for the seller's books were in the house at the time of the treaty, and might have been inspected by the purchaser, and they would have shown the real state of the concern, but the purchaser did not examine them. The Court, upon a motion for a new trial, relying on the early case of Lysney *v.* Selby (*e*), observed, that the purchaser relied upon the assertion of the seller, and that was his inducement to make the purchase. The representation was not of any matter or quality pertaining to the thing sold, and therefore likely to be mentioned in the conveyance, but was altogether collateral to it.

23. This is not a very satisfactory distinction, and it is very difficult to draw a precise line between representations and demands which are terminated by the contract, and which, if they were allowed to be brought forward, would endanger the validity of the great majority of contracts, and such representations as give a

(*c*) *Per* Lord Lyndhurst, C. B. You. 461, 462.

(*d*) 3 Barn. & Cress. 623; Pilmore *v.* Hood, 5 Bing. N. C. 97. A false and fraudulent statement by the seller, communicated by an intended purchaser to a substituted purchaser, gives the latter a right of action.

(*e*) 2 Lord Raym. 1118, *supra* p. 5.

right of action, notwithstanding the written contract is silent as to them, and has been performed. Consistently with the general rule of law and with the statute of frauds, the only sure ground to take is not to allow any action for a misrepresentation, where the misrepresentation would not have been a defence to an action on the contract,—that is, not unless the contract was a nullity even at law, on the ground of fraud. The statement, however, must not only be false, but fraudulent (*f*). Where the purchaser has a right to rescind the contract, he may bring an action for money had and received to recover the purchase-money (*g*).

24. It has been considered to follow from the authorities at law, that in a court of equity a party would be entitled to come forward for the purpose of obtaining redress, in order to get rid of a contract founded on fraudulent representations (*h*). But perhaps this rule is too broadly laid down. Cases may occur where a purchaser might recover damages at law for a false representation, and yet be prevented by his own conduct from rescinding the contract in equity, and the relief in equity can only be to rescind the contract. Damages or compensation must be sought at law. In equity, after the contract is executed by payment of the money and a conveyance, a bill cannot be filed for a compensation (*i*).

25. Generally speaking, a purchaser after a conveyance has no remedy, except upon the covenants he has obtained, although evicted for want of title; and however fatal the defect of title may be, if there is no frau-

(*f*) Vide *post*. Early *v.* Garrett, 4 Mann. & Ryl. 687.

(*g*) Greville *v.* Da Costa, Peake's Add. Ca. 113, *supra*, s. 4, pl. 37.

(*h*) See You. 402, *supra*, p. 383.

(*i*) Lenham *v.* May, 13 Price, 749.

dulent concealment on the part of the seller, the purchaser's only remedy is under the covenants (*k*).

---

26. We may now observe that a right to rescind a contract may, like most other rights, be lost by acquiescence or relinquished by confirmation.

27. If a party with full information freely confirms a contract, which he was at liberty to rescind, he will be bound by it, and no new consideration is requisite to give validity to the confirmation (*l*).

28. If a purchaser, instead of repudiating the transaction, deal with the property as his own, he is bound, although he afterwards discover a new circumstance of fraud, for that can only be considered as strengthening the evidence of the original fraud, and it cannot revive the right of repudiation which has been once waived (*m*).

29. But where the contract itself is founded in fraud or oppression from the nature and terms of it, with which of course the party is from the first aware, acquiescence whilst he is under the same difficulty and embarrassment as he was at the time of the transaction, will not of itself bar his right to relief (*n*).

30. It has been said that where the original transaction is fraudulent, and the fraud is clearly established by circumstances not liable to doubt, a confirmation of such a transaction is said to be so inconsistent with justice, so unnatural, so likely to be connected with fraud, that it ought to be watched with the utmost strictness, and to stand only upon the clearest evidence as an act done

(*k*) Vide ch. 12, *post*.

(*l*) Chesterfield *v.* Janssen, 2 Ves. 146. 149. 152. 158, 159; Roche *v.* O'Brien, 1 Ball & Beat. 355; Cole *v.* Gibbons, 3 P. Wms. 290; Morse *v.* Royal, 12 Ves. jun. 355.

(*m*) Campbell *v.* Fleming, 1 Adol. & Ell. 40; 3 Nev. & Mann. 834.

(*n*) Wood *v.* Downes, 18 Ves. jun. 130.

with all the deliberation that ought to attend a transaction, the effect of which is to ratify that which in justice ought never to have taken place (*o*).

31. In one case, where the original purchase from an expectant heir was deemed fraudulent, it was set aside, notwithstanding letters from the seller after the estate fell into possession, recognising the transaction, and a bill filed to be relieved was dismissed without further proceedings, and a deed executed by the seller reciting the bill filed and that the purchase was a fair one, and confirming the purchase, and afterwards there was a settlement of accounts with the intervention of a common friend, whom the seller thanked for his kindness. As the original purchase was deemed fraudulent, and the seller was considered to have never been fully apprised of his rights, but was continued in a state of delusion by the purchaser, who imposed upon him in every transaction, the stopping the suit in chancery and the release thereupon given were considered a double hatching the fraud, and the purchase, notwithstanding the acts of confirmation, was set aside even after the seller's death (*p*).

32. The reporter says in a note, that the judges said there was no instance where the original contract was fraudulent, that any subsequent act could purge it. But this carries the rule too far, although a contract not affected by fraud may be held to be confirmed by an act which might not be deemed a confirmation of a really fraudulent transaction.

33. To give validity to a confirmation of a voidable conveyance, the party confirming must not be ignorant of his right, nor of course must his right be concealed from him by the person to whom the confirmation is

(*o*) *Per* Lord Erskine, 12 Ves. jun. 373, 374.

(*p*) Baugh v. Price, 1 Wils. 320.

made (*q*). He must know the transaction to be impeachable that he is about to confirm, and with this knowledge and under no influence he must spontaneously execute the deed (*r*).

34. The act of confirmation must of course, therefore, take place after he has become fully aware of the fraud that has been practised; but it is not necessary that the party should be aware of all the circumstances of the transaction, but he must be aware that the act he is doing is to have the effect of confirming an impeachable transaction, otherwise the act amounts to nothing as a confirmation (*s*).

Nor can a man be held by any act of his to have confirmed a title, unless he was fully aware at the time, not only of the fact upon which the defect of title depends, but of the consequences in point of law (*t*).

35. No act of confirmation will be valid if not given freely, but under the influence of the former transaction (*u*), and therefore a deed of confirmation called for under the pressure and influence of the former transaction, when the confirming party cannot be represented as a free agent, will not avail (*x*).

36. Time might of itself bar the remedy (*y*), even where the old statutes of limitation afforded no bar.

37. If a purchaser of a mine in which there is a fault

(*q*) Cann *v.* Cann, 1 P. Wms. 723.

(*r*) Dunbar *v.* Tredennick, 2 Ball & Beat. 317. Perhaps relief ought not to have been given in Roche *v.* O'Brien, 1 Ball & Beat. 330.

(*s*) *Per* Lord Redesdale, in Murray *v.* Palmer, 2 Scho. & Lef. 486

(*t*) Cockerell *v.* Cholmeley, 1 Russ. & Myl. 425.

(*u*) Crowe *v.* Ballard, 3 Bro. C. C. 117.

(*x*) Wood *v.* Downes, 18 Ves. jun. 120.

(*y*) See Medlicot *v.* O'Donel, 1 Ball & Beat. 156; Morse *v.* Royal, 12 Ves. jun. 374.

which has been concealed, is let into possession, and must immediately have known of the circumstances connected with the fault, it would be too late, at the expiration of six months, on that ground, to file a bill for the purpose of setting aside the contract (*z*).

38. And now suits in equity are expressly confined to the period allowed for actions at law (*a*), although in the case of a concealed fraud, the right to relief is deemed to first accrue at the time when the fraud shall or, with reasonable diligence, might have been known or discovered; but such relief is not given against a *bonâ fide* purchaser for valuable consideration without notice (*b*).

39. But though this is the limit, yet the act does not interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by the act (*c*). The time may be shortened, it cannot be lengthened.

40. In a case where a conveyance was set aside upon inadequacy of consideration and fraud, and the purchase-money had been secured at interest, which had been paid thereon, the Court, beyond the repayment of the principal, went further, and considered the payments of interest as made, not as interest (for the transaction was avoided), but as principal, making the seller, who was relieved from the sale, chargeable with interest on all the sums received by her, whether received as interest or as principal. Avoiding the transaction, she was not entitled to any thing as interest (*d*).

(*z*) Small *v.* Attwood, You. 503; and see Lovell *v.* Hicks, 2 You. & Coll. 46.

(*a*) 3 & 4 Will. 4, c. 27, s. 24; see *post*, ch. 11, s. 5.

(*b*) Sect. 26.

(*c*) Sect. 27.

(*d*) Murray *v.* Palmer, 2 Scho. & Lef. 488.

41. And the interest has been ordered to be paid at five per cent (*e*).

42. But a purchaser, where the contract is rescinded, is not to be charged with what, without wilful default, he might have made: it is not like the case of mortgagees, who are thus charged in order to make them sufficiently alert in receiving the rents (*f*).

43. In a case where a sale of leasehold houses was set aside, and the purchaser had been in possession, an occupation rent was set upon the houses, the purchaser being allowed for lasting repairs and substantial improvements, and he was to be repaid the purchase-money with interest, and there was to be a set off; and ultimately, annual rests were directed, so as to apply the excess of the rent above the interest in reduction of the principal. The purchaser had got possession of the seller's estate, the seller ought to have had it; on the other hand, the purchaser ought to have had the money; this was to be set right, and in that view the excess of the rent ought to be set off annually against the principal. The rent, if applied to reduce the principal, would gradually sink the whole of it. Now the rent belonged to the seller, and ought to have been paid to him; the purchaser kept it, and had the benefit. Was he to go on receiving the same amount of interest whilst he had this fund in his hands (*g*)?

44. But the purchaser in such a case is not to pay interest upon interest after the annual rent has liquidated the whole of the principal: after that it becomes merely an account of the occupation rent, which is to be taken without interest (*h*).

(*e*) Donovan *v.* Fricker, Jac. 165; Turner *v.* Harvey, Jac. 169; Edwards *v.* M'Leay, 2 Swanst. 287.

(*f*) Murray *v.* Palmer, 2 Scho. & Lef. 489.

(*g*) Donovan *v.* Fricker, Jac. 165.

(*h*) S. C.

45. And although the purchaser is allowed the sums expended for lasting repairs and substantial improvements, with interest, yet the decree in this respect will not go beyond the prayer of the bill (*i*).

46. A purchaser, after he knows of the defect of the title, cannot, it was said by great authority, claim an allowance for subsequent repairs (*k*). But this would hardly be extended to such repairs as, during the litigation or preparatory to it, were necessary to the upholding of the premises in common condition.

47. If a purchaser of a house, the contract for which is rescinded, have converted a private house into a shop, he may be compelled at his own expense to reinstate it as a private house (*l*).

---

48. It next comes in order to consider questions regarding interest and other allowances and costs where a suit is instituted; and the effect of a reversal of the decree below upon those questions.

49. If pending a suit by a purchaser to rescind a contract, interest on the purchase-money, which by the contract he was to pay at stated periods, is ordered to be paid into court instead of being paid to the seller, the seller, if the bill is dismissed, will be entitled to the stock in which the money may have been invested, and the accumulations of it, so that he will benefit by any rise in the funds, and have interest upon interest (*m*).

50. But in regard to the converse of this case, viz. the investment and the accumulations falling short of the amount of the instalments due to the seller, the Court, without giving any definite opinion upon that subject, thought it quite consistent with the opinion as to

(*i*) Edwards v. M'Leay, 2 Swanst. 287.

(*k*) S. C.

(*l*) S. C.

(*m*) Small v. Attwood, 3 You. & Coll. 105.

the reverse of the case, that the seller should be allowed in that case to pursue any remedy he had at law to recover the balance, and upon this plain principle, that the purchaser having prevented the seller from receiving the money at law, and having brought the money into court, could not bind him to take less than the amount whenever they paid it, which, by being brought into court, they had admitted he was entitled to (*n*).

51. A plaintiff in equity, who is under no order or condition imposed upon him by the Court to do anything for the benefit of the defendant in equity, cannot, if his bill be dismissed, be compelled by a subsequent order to give relief or satisfaction to the defendant for some matter not in the jurisdiction of the Court (*o*).

52. But if, in a suit by a purchaser to rescind a contract, an order be made for an injunction, and postponing the payment of interest stipulated for by the contract till the hearing of the cause, and the bill ultimately be dismissed, the Court will then order the plaintiff to pay the instalments of interest to the purchaser instead of leaving him to recover them at law (*p*). But the Court could not order the payment of any instalment which had not become due at the time of the decree.

53. But although the Court by its order has postponed the payment of interest beyond the time stipulated by the contract, and ultimately dismisses the bill, and orders the plaintiff (the purchaser) to pay the instalments due, yet interest cannot be given for the delay, for the Court has allowed the party to retain the money, and therefore cannot at the hearing order

(*n*) Small v. Attwood, *ubi sup.*

(*o*) Brown v. Newall, 3 Myl. & Cra. 558; 3 You. & Coll. 124.

(*p*) Small v. Attwood, 3 You. & Coll. 105.

interest upon it (*q*). The Court therefore ought not to make such an order, except upon terms which may ultimately enable justice to be done to the defendant.

54. If in such a suit, where the purchaser has a decree to rescind the contract, he obtains a transfer of a fund paid into court by himself, as instalments payable under the contract to the seller, but which the Court has intercepted and secured, and the decree be afterwards reversed, the seller is of course entitled to a retransfer of the fund if it remain unsold, and if the dividends have been received in the meantime by the purchaser, he is entitled to have the dividends also paid to him; but if the purchaser have in the meantime sold the fund, as he was entitled to do, the Court cannot compel him to pay interest upon it (*r*). The grounds of the distinction are not very obvious.

55. If a bill by a purchaser to rescind a contract be dismissed with costs, which are paid, and upon an appeal the decree is reversed and the bill dismissed with costs, the Court cannot give interest upon them. The costs were paid under an order which entitled the purchaser to them, and therefore, although upon the reversal of the order he is bound to repay them, yet he is not responsible for the interest (*s*). This rule is of general application, and the law would be the same if the case were reversed, and the plaintiff was the seller and the defendant the purchaser.

56. If a decree in a suit by a seller or purchaser be reversed in the House of Lords, and the cause be remitted to the Court below to do what is just, the Court has no jurisdiction to do what could not have been done at the time of the decree; therefore, if instalments of money were then due, which the Court, if it had dis-

(*q*) Small v. Attwood, *ubi sup.*
(*r*) Ibid.
(*s*) Ibid.

missed the bill (as it should have done), could not have ordered payment of to the defendant, the subsequent decree of reversal will not enable the Court below to order the payment of such instalments, although they may then have actually become payable (*t*).

57. In Small *v.* Attwood (*u*) the purchase was rescinded by decree: 200,000*l.* had been paid long before the bill was filed, and possession had been given to the purchasers of the estate, with which they had acted as owners. They had long had possession, which they still retained, and claimed a lien upon the estate for the portion of the purchase-money paid. After the decree they filed a supplemental bill, stating the payment of the 200,000*l.*, and tracing its investment in stock and the transfer of the stock to a third person without consideration, as it was alleged, and praying that they might, without prejudice to their lien on the estate, be decreed to be entitled to the specific stock, and Lord Lyndhurst, C. B., so decided, and accordingly granted an injunction.

58. This is the only case in which equity followed the purchase-money and ordered it to be specifically restored. There was an appeal against the order to the House of Lords, which it became unnecessary to prosecute, as the decree in the original suit was reversed, on the ground that no fraud was practised by the seller. But the decree could hardly have been maintained. It was a considerable argument against the relief, that it had never been administered, and the inconvenience is obvious. In the case of a mere naked fraud, which altogether vitiates a contract both at law and in equity, there is not much difficulty in attaching the money if it can be traced, as it never of right belonged to the seller.

(*t*) Small *v.* Attwood, *ubi sup.* (*u*) You. 407.

But in a case like Small and Attwood, the relief although granted, and upon the ground of a fraudulent concealment, proceeds rather upon equitable rules than upon absolute legal nullity. Much arrangement is required to do justice between the parties in such a case, and the following of the money does not seem to be justified by the practice of the court, nor can it perhaps be supported upon principle. In the case in question, the purchaser had possession of the seller's estate, and had had that possession for a long time, and dealt with it as owner, and continued to retain it, and insisted upon his right to do so, and to enjoy it as owner, subject ultimately to account, until the accounts were finally settled. By the injunction he obtained the security of the return of his money, as well as retained his lien on the estate for it, and possession of the estate itself. It had never before occurred to any one that such relief could be obtained. If the case had remained undisturbed, it would have introduced a practice of attempting in all such cases to follow the money, and for that purpose of introducing charges and interrogatories into bills which would tend to great prolixity, and expose every dealing and transaction of life of a defendant, between the receipt of the money and the time of answering.

# CHAPTER V.

## OF THE TIME ALLOWED TO COMPLETE THE CONTRACT.

### SECTION I.

### OF THE MATERIALITY OF TIME.

1. *Lunar or calendar months.*
2. *Time essence of contract at law.*
4. *Lang* v. *Gale.*
5. *Observations upon it.*
6. *Waived at law.*
7. *Waived or enlarged by writing or parol.*
8. *Where not material in equity.*

1. IN sales by private agreement it is usual to fix a time for completing the contract. In such a contract the word *month* may be construed either lunar or calendar, according to the intention of the parties, to be collected from the whole instrument taken together (*a*).

2. The time fixed is, at law, deemed of the essence of the contract (*b*); for it is the duty of the seller to be ready to verify the abstract on the day on which it was agreed that the purchase should be completed; and if he have not the title-deeds in his possession, or the abstract set forth a defective title, the purchaser may resist the completion of the contract, and recover his deposit.

3. But it is no objection that *at the time of the agreement* (*c*) matters remained to be done to complete the

(*a*) Lang *v.* Gale, 1 Man. & Selw. 111; see Hipwell *v.* Knight, 1 You. & Col. 419, which is, perhaps, not express enough to justify the marginal abstract.

(*b*) Berry *v.* Young, 2 Esp. Ca. 640, n.

(*c*) The marginal abstract is

title, which in their nature were capable of being effected before the completion of the purchase (*d*).

4. In a late case (*e*), upon a sale by auction, the conditions stipulated that the abstract should be delivered to the purchaser *within a fortnight*, and should be returned at the end of *two months*; that a draft of the conveyance should be delivered to the purchaser within *three months*, and be returned to the seller within *four months*; and that the remainder of the purchase-money should be paid on the 24th *day of June* then next (which was five months after the sale), when the purchaser should receive his conveyance duly executed by all parties; to be prepared by the seller's attorney, at the expense of the purchaser. It was contended that the stipulation in regard to the delivery of the conveyance was not a condition precedent, and it was compared to the case of Hall *v.* Cazenove (*f*), where a charter-party contained a covenant by the owner, that the ship should sail on a specified day, and the owner afterwards brought an action of covenant for the freight; it was held that he need not aver that the ship sailed on that day, although the defendant (the freighter) covenanted to pay the freight in consideration of every thing above mentioned. It was not necessary to decide the point; but Le Blanc, J. said, that it was clear that it was a condition precedent that a draft of the conveyance should be delivered to the purchaser; the question was, whether it must be done by a particular day. It was not necessary, however, to enter upon that question; if it were, it might perhaps be material to advert to the

wrong in substituting for the time of the agreement the time agreed upon for the assignment and giving possession.

(*d*) Stowell *v.* Robinson, 3 Bing. N. C. 928.

(*e*) Lang *v.* Gale, 1 Man. & Selw. 111.

(*f*) 4 East, 477.

rule, that where a condition does not go to the whole consideration (*g*) of the contract, but to a part only, it is not a condition precedent. Bayley, J. was of the same opinion. It was not a condition precedent that the draft should be delivered by a particular day, for he did not consider the precise time of the delivery as an essential ingredient in that condition, which was meant only to secure a delivery within a reasonable time.

5. The general opinion has always been, that the day fixed was imperative on the parties at law. This was so laid down by Lord Kenyon, and has never been doubted in practice. The contrary rule would lead to endless difficulties. In the above case, for example, the different times appointed, 1. for delivery of the abstract; 2. for the return of it; 3. for the delivery of the conveyance; 4. for the return of it; and 5. for the completion of the purchase, were all links of the same chain, and if one link were broken, the whole chain would be destroyed. If the time appointed for the delivery of the conveyance was not an essential ingredient, but was meant only to secure a delivery within a reasonable time, it follows that the same rule must apply to the time fixed for the return of it, and also to the time appointed for the completion of the purchase. The effect of this rule would be, that the appointment of a day would have no effect, and in every case it must be referred to a jury to consider whether the act was done within a reasonable time. The precise contract of the parties would be avoided, in order to introduce an uncertain rule, which would lead to endless litigation. This cannot be compared to a case like Hall *v.* Cazenove: there the ship did sail without being countermanded, and the substance of the covenant was considered to be,

(*g*) See Havelock *v.* Geddes, 10 East, 564.

that the ship should go to the place named on freight and return again, and if the freighter sustained any damage by reason of the ship not having sailed on the particular day, he might recover it by bringing an action on the covenant. In favour of justice the covenants were not considered as dependent on each other. It would be monstrous that the ship should be permitted to sail to the place named, and return again, and yet not earn any freight, because it did not sail on the day appointed. So where covenants go only to a part of the consideration, and a breach may be paid for in damages, the defendant has a remedy on the covenant, and shall not plead it as a condition precedent. If *A* covenant with *B* to build a house for him according to a certain plan, and *B* covenant with *A* to pay for the house so built, it is clear, notwithstanding some authorities to the contrary, that if *A* build a house, although not strictly according to the plan, yet *B* must pay for it, and may recover in a distinct action against the builder for any damage sustained by the departure from the plan. The justice of this is evident. But in the case under consideration, the agreements go to the whole consideration on both sides; they are mutual conditions; the one precedent to the other (*h*). If the draft of the conveyance, for instance, is not delivered on the day appointed, the party who ought to deliver it has broken his agreement, and therefore cannot recover upon it at law. This works no injustice; for the further execution of the contract is at once stopped; the seller retains his estate, and the purchaser his purchase-money, and the party making default is liable, as he ought to be, to an action for breach of his engagement. It is to be hoped,

(*h*) Boone v. Eyre, 1 H. Blackst. 273. See 10 East, 564; Lloyd v. Lloyd, 2 Myl. & Cra. 192; Franklin v. Miller, 4 Adol. & Ell. 599.

therefore, that the day appointed will always be deemed of the essence of the contract at law. It has so been held in a recent case in the Common Pleas (*i*). And in a later case upon a sale of goods, where fourteen days were allowed from the day of sale *to the purchaser* to clear away the goods, the seller was not prepared to deliver them the day after the sale to the purchaser, who applied for them; and it was held, that he (the seller) had broken his agreement, and could not recover against the purchaser, who refused to perform the contract (*k*). Where the purchaser by a covenant in the contract, was to pay a further sum of money, provided the adjoining houses should be completed, that is, paved in front, &c. before a day named, and the pavement was not completed until after the day appointed, although the delay was occasioned by the bad weather, which prevented the workmen from proceeding, yet the seller was held not entitled to recover the money (*l*).

6. But a party may even at law waive the forfeiture, and enlarge the time of his contract (*m*).

7. Yet where the contract is under seal, a subsequent agreement not under seal, made before breach of the agreement, enlarging the time for performance of the contract, is invalid at law (*n*). And even where the agreement is not under seal, a subsequent parol agreement to alter or enlarge the time is void (*o*).

8. But *equity*, which from its peculiar jurisdiction is

(*i*) Wilde *v.* Forte, 4 Taunt. 334.

(*k*) Hagedon *v.* Laing, 1 Marsh. 514; and see Cornish *v.* Rowley, *post*; Stowell *v.* Robinson, 3 Bing. N. C. 928.

(*l*) Maryon *v.* Carter, 4 Carr. & Pay. 295.

(*m*) Carpenter *v.* Blandford, 8 Barn. & Cress. 575; and *qu.* see Sweetland *v.* Smith, 1 Crompt. & Mees. 585; and see Stowell *v.* Robinson, 3 Bing. N. C. 928.

(*n*) Rippingall *v.* Lloyd, 2 Nev. & Mann. 410.

(*o*) Stowell *v.* Robinson, 3 Bing. N. C. 928.

enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will in certain cases carry the agreement into execution, notwithstanding that the time appointed be elapsed; and although there has been no waiver; for, as Lord Eldon remarks, the title to an estate requires so much clearing and inquiry, that unless substantial objections appear, *not merely as to the time*, but an alteration of circumstances affecting the value of the thing; or objections arising out of circumstances *not merely as to the time*, but the conduct of the parties during the time; unless the objection can be so sustained, many of the cases go the length of establishing, that the objections cannot be maintained (*p*).—Perhaps there is cause to regret that even *equity* assumed this power of dispensing with the literal performance of contracts in cases like these.

9. Objections on account of delay seem divisible into two kinds. The one where the delay is attributable to the neglect of either party; the other where the delay is unavoidably occasioned by the state of the title; and of each of these we shall treat in its order.

(*p*) *Per* Lord Eldon, see 7 Ves. jun. 274; and see Hearne v. Tenant, 13 Ves. jun. 287. See Lennon v. Napper, 2 Scho. & Lef. 683.

## SECTION II.

### OF DELAYS OCCASIONED BY THE NEGLECT OF EITHER PARTY.

1. *Time in equity: Gibson* v. *Paterson.*
3. *Purchaser must be prompt.*
5. *Diligence necessary in equity.*
6. *Agreement void at law if title not ready.*

8. *But in equity both parties must be active.*
9. *Waiver by receipt of abstract after the day.*
10. *Where vendor loses his remedy.*
12. *There must be gross negligence.*
14. *Time required for repairs, or to get possession.*
15. *Effect of delay by purchaser.*
16. *Unwilling purchaser.*
17. *Reversion sold: time important.*
18. *Or if sale is to pay debts, &c.*
19. *Or treaty be with ecclesiastical corporation.*

1. The time fixed on for the completion of a contract, had formerly less attention paid to it in equity than is now given to it, which seems to have arisen from the case of Gibson *v.* Paterson (*a*), where, according to the report, a specific performance was decreed in favour of the plaintiff, the vendor, without any regard had to his negligence in not producing his title-deeds, &c. within the time limited. And Lord Hardwicke is reported to have said, that most of the cases which were brought into the Court, relating to the execution of articles for the sale of an estate, were of the same kind, and liable to that objection; but that he thought there was nothing in the objection.

2. It appears, however, that this case is mis-reported; for Lord Rosslyn, in Lloyd *v.* Collett (*b*), said he had looked into the case of Gibson *v.* Paterson, in which the reporter had made Lord Hardwicke treat the time as totally immaterial. He said, it was to be observed, that the circumstances of that case, of which he had taken a copy, did not call for any such opinion. The purchaser, who hung back, had bought an estate in mortgage. The contract took place in November, and was to be completed in February; in that time, therefore, the mortgage could only be paid off by treaty with

(*a*) 1 Atk. 12.

(*b*) 4 Ves. jun. 690, n.; and 4 Bro. C. C. 497. See Radcliffe *v.* Warrington, 12 Ves. jun. 326; Alley *v.* Deschamps, 13 Ves. jun. 225.

the mortgagee. Upon the facts it appeared, that application had been made to the mortgagee, who consented to take his money. Drafts of conveyance were made, and countermanded by the purchaser. He had, after the contract, demised part of the estate to the vendor at a rent; and, upon application being made to him, every thing being ready, he said he would be off the bargain; he had no money to pay for it; and if they attempted to force him, he would go to Scotland to avoid it. Lord Rosslyn added, there could not be the smallest argument upon it, nor the least doubt about the decree.

3. But whatever opinion Lord Hardwicke entertained on this subject (*c*), it is now settled, that a man cannot call upon a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt and eager; and therefore time alone is a sufficient bar to the aid of the Court.

4. Thus in a case (*d*) where the parties differed as to the construction of an agreement, and after a delay of seven years one of the parties filed a bill for a specific performance, it was dismissed merely on account of the staleness of the demand.

5. A bill for a specific performance is an application to the discretion, or rather to the extraordinary jurisdiction of equity, which cannot be exercised in favour of persons who have long slept upon their rights, and acquiesced in a title and possession adverse to their claim. Due diligence is necessary to call the Court into activity, and where it does not exist, a court of equity will not lend its assistance; it always discountenances laches and neglect (*e*).

(*c*) See 1 Ves. 450.

(*d*) Milward *v.* Earl of Thanet, 5 Ves. jun. 720, n. (*b*). See Allen *v.* Deschamps, 13 Ves. jun. 225.

(*e*) *Per* Lord Manners, 1 Ball & Beatty, 68.

6. If the vendor be not ready with his abstract and title-deeds at the day fixed, the purchaser may avoid the agreement at law.

7. Thus, in a case (*f*) where upon a sale it was agreed that a good title should be made out by the 10th of July; in the beginning of July the purchaser called on the vendor to show him the title-deeds; but he not having them in his possession, gave the purchaser an abstract of the title, which did not contain any of the deeds; and although it was suggested that an application ought to have been made to the vendor at an earlier period, yet Lord Kenyon ruled otherwise, as the seller, he said, ought to be prepared to produce his title-deeds at the particular day.

8. This rule does not, however, prevail in equity; for it is there considered equally incumbent on the purchaser to ask for the abstract, as for the vendor to deliver it. And, therefore, if a purchaser do not call for the abstract before the time agreed upon for its delivery (*g*), or do not ask for it until it has become impossible to execute the agreement by the day fixed (*h*), equity will consider the time as waived.

9. So, if the purchaser receive the abstract after the day appointed, and do not at the time object to the delay, he cannot afterwards insist upon it as a bar to a performance *in specie* (*i*).

10. It is, however, clearly settled, that a specific performance will not be enforced, where no steps have been taken by the vendor, although in proper time urged by the purchaser to do so, and the purchaser,

(*f*) Berry *v.* Young, 2 Esp. Ca. 640, n.; *vide supra*, p. 402.

(*g*) Guest *v.* Homfrey, 5 Ves. jun. 818.

(*h*) Jones *v.* Price, 3 Anstr. 924.

(*i*) Smith *v.* Burnam, 2 Anstr. 527; and see Seton *v.* Slade, 7 Ves. jun. 265.

immediately when the time is elapsed, insists upon his deposit, and refuses to perform the agreement.

11. This was decided in Lloyd *v.* Collett (*k*); the case was, that on the 10th August 1792, the defendant contracted for the purchase of the estate, the purchase to be completed on or before the 25th of March 1793, and had frequently between those times applied for an abstract of the title, but could not obtain one. Shortly after the 25th of March 1793, the purchaser applied for his deposit, with interest from the 10th of August 1792, when he paid it; and afterwards repeatedly applied for it before the 10th of June 1793, when he brought an action for the deposit. On the 16th September 1793, an abstract was delivered; the purchaser was then out of town, and on his return, on the 25th of October, wrote, insisting that he would not complete his purchase. On the 6th of November the bill was filed by the vendor for a specific performance, and for an injunction to restrain the proceedings at law. Lord Rosslyn said, the conduct of parties, inevitable accident, &c. might induce the Court to relieve; but it was a different thing to say, that the appointment of a day was to have no effect at all, and that it was not in the power of the parties to contract, that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it. And he therefore considered the contract as at an end.

12. But where a vendor has proceeded to make out his title, and has not been guilty of gross negligence, equity will assist him, although the title was not deduced at the time appointed.

(*k*) 4 Bro. C. C. 469; 4 Ves. jun. 689. See 5 Ves. 737; 7 Ves. jun. 278; and see Pincke *v.* Curteis, stated *infra*; Potts *v.* Webb, 4 Bro. C. C. 330, cited; Paine *v.* Meller, 6 Ves. jun. 349; and Warde *v.* Jeffery, 4 Price, 294.

13. Thus, in Fordyce *v.* Ford (*l*), the purchase was to be completed on the 30th July 1793. The abstract was not delivered until the 8th, and the treaty continued until the 25th of September, on which day the deeds were delivered, and every difficulty cleared up; when the purchaser refused to proceed, alleging that he wanted the estate for a residence for the last summer, and insisting he was not bound to go on, on account of the delay. The Master of the Rolls said, the rule certainly was, that where in a contract either party had been guilty of gross negligence, the Court would not lend its assistance to the completion of the contract; but in this case he thought there had been no such negligence, and decreed accordingly; adding, that he hoped it would not be gathered from thence, that a man was to enter into a contract, and think he was to have his own time to make out his title.

14. If an estate was described as in good repair, and it turned out to be in bad repair, and several months may be required to repair it, yet the purchaser cannot resist the contract on the ground of time, unless it could be clearly shown, that he wanted possession of the house to live in at a given period, by which time the repairs could not be completed (*m*). So if the estate is in lease, and it was stated that the purchaser would be entitled to possession several months before the lease actually expire, yet he cannot rescind the agreement, unless the personal occupation of the estate was essential to him at the time appointed (*n*). In this last case, however, the jurisdiction should be sparingly exercised.

(*l*) 4 Bro. C. C. 494; Radcliffe *v.* Warrington, 13 Ves. jun. 323.

(*m*) See Dyer *v.* Hargrave, 10 Ves. jun. 505, *infra*, ch. 7.

(*n*) Hall *v.* Smith, Rolls, 18 Dec. 1807, MS.; S. C. 14 Ves. jun. 426; and see 13 Ves. jun. 77.

15. The rules on this subject apply, as they ought to do, to each party. And therefore, where a purchaser permits a long time to elapse, without evincing a fixed marked intention to carry his contract into execution, he will be left to his remedy at law, although he may have paid part of the purchase-money. He is not to be suffered to lie by, and speculate on the estate rising in value (*o*). Nor will he be assisted by equity, where he has made frivolous objections to the title, and trifled, or shown a backwardness to perform his part of the agreement, especially if circumstances are altered (*p*). And where the price is unreasonable or inadequate, or the contract is in other respects inequitable, equity will not assist either party, if he has permitted the day appointed for completing the contract to elapse without performing his part of the agreement (*q*).

16. It was observed by Hart, L. C., that if the principle of discharge by delay applies in the case of a willing purchaser, it is open to the other side to rebut that, by showing that the purchaser was not a willing purchaser, and that he ought not to be discharged on the ground of hardship of delay. He who relies on the allegation that he was always ready and willing, must be prepared to meet the allegation that he was tardy and reluctant (*r*).

17. The time, however, is more particularly attended to in sales of reversion; for it is of the essence of justice

(*o*) Harrington *v.* Wheeler, 4 Ves. jun. 686; Alley *v.* Deschamps, 13 Ves. jun. 225.

(*p*) Hayes *v.* Caryll, 1 Bro. P. C. 27; 5 Vin. Abr. 538, pl. 18; Spurrier *v.* Hancock, 4 Ves. jun. 667; Pope *v.* Simpson, 5 Ves. jun. 145; and Coward *v.* Odingsale, 2 Eq. Ca. Abr. 688, pl. 5; and see Green *v.* Wood, 2 Vern. 632; Bell *v.* Howard, 9 Mod. 302; and Main *v.* Melbourn, 4 Ves. jun. 720.

(*q*) *Vide post*, ch. 6; and Whorwood *v.* Simpson, 2 Vern. 186; Lewis *v.* Lord Lechmere, 10 Mod. 503.

(*r*) 2 Molloy, 584.

that such contracts should be executed immediately, and without delay. No man sells a reversion who is not distressed for money; and it is ridiculous to talk of making him a compensation by giving him interest on the purchase-money during the delay (*s*).

18. So time is very material where the estate is sold in order to pay off any incumbrance bearing a higher rate of interest than the vendor is entitled to receive, in respect of the purchase-money, during the delay (*t*); or the estate is sold for the purposes of a trade or manufactory (*u*); or the subject of the contract is in its nature of a fluctuating value (*x*).

19. Again, if a party is dealing with an ecclesiastical corporation, time must of necessity be in a very great degree of the essence of the contract, especially where the purchaser is not dealing for the purchase of a fee-simple estate in possession (in which case the interest of the purchase-money is considered as an equivalent for the rents and profits), but for a concurrent lease; in which case the lapse of every day changes the value and nature of the thing to be granted, and changes also the persons who are to participate in the sums to be paid (*y*).

(*s*) Newman *v.* Rodgers, 4 Bro. C. C. 391; and see Spurrier *v.* Hancock, 4 Ves. jun. 667; 1 Price, 298, and 1 You. & Col. 416.

(*t*) Popham *v.* Eyre, Lofft, 786; and see a case cited in 2 Scho. & Lef. 604.

(*u*) Parker *v.* Frith, 1 Sim. & Stu. 199; Wright *v.* Howard, *ib.* 190; Coslake *v.* Tilt, 1 Russ. 376.

(*x*) Doloret *v.* Rothschild, 1 Sim. & Stu. 590.

(*y*) Carter *v.* Dean and Chap. of Ely, 7 Sim. 211; *per* V. C.

## SECTION III.

### OF DELAYS OCCASIONED BY THE STATE OF THE TITLE.


1. *Delay through title not material.*
2. *Vendor should file a bill.*
3. *Procuring title after filing bill.*
4. *At law, where no time fixed.*
5. *Willet* v. *Clarke.*
6. *Title at time of trial not sufficient.*
9. *In equity, time allowed.*
10. *Purchaser not bound where new suit necessary.*
12. *Or an account of debts to be taken.*
14. *Title should be at date of report.*
15. *Purchaser proceeding with knowledge of defect.*
17. *Acceptance of abstract with notice.*
20. *Proceeding, but with protest.*
21. *Dormant treaty.*
22. *Title too late after purchaser has abandoned.*
23. *Delay in filing a bill.*
24. *Vendor may rescind contract where money cannot be paid.*
26. *Forfeiture of deposit.*
27. *Time in equity may be of essence of contract.*
29. *Gregson* v. *Riddle.*
33. *Observations on the rule.*
34. *Cannot be made of essence after contract.*
35. *Notice of abandonment: Reynolds* v. *Nelson.*
36. *Observations on the case.*
37. *Rule in equity where no time limited.*


1. It may be laid down as a general proposition, that a delay accounted for on the above ground will not prevent a specific performance from being decreed, where the time fixed for completing the contract is not material.

2. Where time is not material, and the title is bad, but the defect can be cured, if the vendee is unwilling to stay, the vendor should file a bill in equity to enforce the performance of the contract (*a*); for it is sufficient if the party entering into articles to sell has a good

(*a*) See 6 Ves. jun. 655; 10 Ves. jun. 315.

title at the time of the decree; the direction of the Court being, in all these cases, to inquire whether the seller *can*, not whether he *could*, make a title at the time of executing the agreement.

3. This principle was followed in a case of frequent reference (*b*). And in a late case (*c*), the vendor, at the time he filed the bill for a specific performance, had only a term of years in the estate, of which he had articled to sell the fee-simple, and after the bill was filed, procured the fee by means of an act of parliament; and as the day on which the contract was to be carried into execution was not material, a specific performance was decreed.

4. The same rule prevails at law, *where no time is fixed for completing the contract*, and an application for the title has not been made by the purchaser previously to an action by the vendor for breach of contract. For in Thompson *v.* Miles (*d*), a man agreed to sell a term of which he stated forty years to be unexpired. It appeared there were only thirty-nine, but by an agreement indorsed on the lease, the lessor agreed to add one year to the unexpired term. This agreement was dated after an action brought by the vendor for damages on breach of agreement; and Lord Kenyon ruled, that the vendor having at that time a good title was sufficient. He said, that it had been solemnly adjudged, that if a party sells an estate without having title, but before he is called upon to make a conveyance, by a private act of parliament gets such an estate as will enable him to make a title, that is sufficient: that here the plaintiff being enabled to make a title, and the

(*b*) Langford *v.* Pitt, 2 P. Wms. 629; and see Jenkins *v.* Hiles, 6 Ves. jun. 646; Seton *v.* Slade, 7 Ves. jun. 265.

(*c*) Wynn *v.* Morgan, 7 Ves. jun. 202.

(*d*) 1 Esp. Ca. 184; see Willett *v.* Clarke, 10 Price, 207.

defendant never having applied for it, he should not be allowed to set up against the plaintiff a want of title, though the power of making that title was obtained after the action was brought.

5. In Willett *v.* Clarke (*e*), an agreement for sale of an estate referred to the conditions of sale for the time of completing it, and difficulties arising, a second agreement was executed, by which possession, which had already been taken, was further assured to the purchaser, and he agreed to pay the residue of the purchase-money on the 25th of December next, upon the seller making a good title, or otherwise, if such title should not be then completed, upon the seller executing a bond to complete such title as soon as the same could be completed. A title was not made and a bond was not executed on the 25th of December, but one was executed, and it was tendered nearly two years after that date; and it was held at law, that no objection could be sustained on that ground, for there was nothing in the agreement requiring the bond to be executed within a given time; on the contrary, it was an alternative depending upon a very uncertain matter, the completing the title in the meantime. The time in this case was really not of the essence of the contract; it was not a contract of such a nature as to make the time essential.

6. But if the vendor cannot verify his abstract at the time appointed, or if he produce a defective title, and the purchaser bring an action for recovery of the deposit, the vendor having a title at the time of the trial will not avail him. Thus, in Cornish *v.* Rowley (*f*), where a purchaser sought to recover his deposit, it

(*e*) 10 Price, 207.

(*f*) B. R. Midd. Sitt. after M. T. 40 Geo. III.; 1 Selw. N. P. 160; Dobell *v.* Hutchinson, 3 Adol. & Ell. 335.

appeared that the abstract of the title began in the year 1793, and after reciting that the deeds relating to the estate had been lost, stated a fine and non-claim. Upon inquiry, it was found that the fact of the deeds having been lost was not true. The counsel for the defendant said they were ready to make out a good title. Lord Kenyon said, that the vendor must be prepared to make out a good title on the day when the purchase is to be completed. Indulgence, he was aware, was often given for the purpose of procuring probates of wills, &c. But this indulgence was voluntary on the part of the intended purchaser. It is the duty of the seller to be ready to verify his abstract at the day on which it was agreed that the purchase should be completed. If the seller deliver an abstract, setting forth a defective title, the plaintiff may object to it. No man was ever induced to take a title like the present. A fine and non-claim are good splices to another title, but they will not do alone. There are many exceptions in the statute in favour of infants, femes covert, &c. As a good title was not made out at the day fixed, he should direct the jury to find a verdict for the deposit, with interest up to that day. And a verdict was found by the jury accordingly.

7. So, in Bartlett *v.* Tuchin (*g*), assignees of a bankrupt sold an estate, and no time was fixed for completing the purchase. The purchaser upon a supposed defect of title abandoned the contract; *afterwards* the commission was superseded, and a new one issued, under which the same assignees were chosen. It was held that the purchaser might rescind the contract, for at the time he gave notice of his abandonment of the contract, the assignees could not make out a good title.

(*g*) 1 Marsh. 583. See Goodwin *v.* Lightbody, Dan. 153; Roper *v.* Coombes, 6 Barn. & Ald. 584.

And in a late case (*h*), the facts were, that upon a sale it was agreed that the purchase-money should be paid on or before Lady-day 1803, on having a good title. The vendors were assignees of a bankrupt who claimed under a will. They thought that he had an estate-tail under the will, and that therefore they could make a title; but under the devise he only took for life, with contingent remainders over. The bankrupt, however, being heir at law of the testator, could make a title by levying a fine, and was willing to join; but these facts were not stated in the abstract delivered, or communicated to the purchaser until a fortnight before the assizes. The Court, after showing that the bankrupt took only an estate for life under the devise to him, said, as it was stated, that previous to the time fixed for payment of the money, and completion of the purchase, or indeed till near the time of trial, no information was given to the purchaser that the bankrupt was heir at law of the testator, but the title of the assignees appeared to have been delivered in, on the supposition of the bankrupt being tenant in tail, they thought that the defendant had failed in making good the agreement on his part; and that thereupon a right of action at law had accrued to the plaintiff. How far the title since communicated might in another course of proceeding in another place, render the present proceeding abortive; and whether the plaintiff might not be ultimately compelled to fulfil his agreement, was not for them in that action to decide.

8. But a seller need not at law, any more than in equity, have those things done in regard to title, which may properly be effected before the completion of the

(*h*) Seward *v.* Willock, 5 East, 198; 1 Smith's Rep. 390, S. C.; and see Radcliffe *v.* Warrington, 12 Ves. jun. 326, where the purchaser recovered at law.

purchase; therefore, at the time of the contract, the want of a licence to assign, where one is requisite, or the neglect to register a deed which requires registry, is unimportant (*i*).

9. In an early case (*k*) the Court of Chancery carried the doctrine very far; for at the time of the articles for sale, or even when the decree was pronounced, Lord Stourton, the vendor, could not make a title, the reversion in fee being in the Crown; and yet the Court indulged him with time more than once for the getting in the title from the Crown, which could not be effected without an act of parliament, to be obtained in the following session: however, it was at length procured, and Sir Thomas Meers decreed to be the purchaser (I); and even at this day, although the Master report against the title, yet if it appear that the seller will have a title upon getting in a term, or procuring letters of administration, &c. the Court will not release the purchaser; but will put the vendor under terms to complete his title speedily (*l*). Or if a new fact appear which enables him to make a title when the cause is before the Court on further directions, the contract will be enforced (*m*).

10. But the Court will not extend the rule which it has adopted of compelling a purchaser to take the estate

(*i*) Robinson *v.* Stowell, 3 Bing. N. C. 928; 5 Scott, 196.

(*k*) Lord Stourton *v.* Sir Thomas Meers, stated in 2 P. Wms. 631; and see Sheffield *v.* Lord Mulgrave, 2 Ves. jun. 526; Ormerod *v.* Hardman, 5 Ves. jun. 722.

(*l*) Coffin *v.* Cooper, 14 Ves. jun. 205.

(*m*) Esdaile *v.* Stephenson, 8 Aug. 1822, MS. *infra*, ch. 8.

(I) Note, it appears that Sir Thomas Meers was mortgagee of the estate; (see Sir Thomas Meers *v.* Lord Stourton, 1 P. Wms. 46,) and it is therefore probable that at the time he entered into the contract he was aware of the defects in the title.

where a title is not made till after the contract, to any case to which it has not already been applied. Therefore in a case where upon a creditor's bill filed for sale of the real estate of a trader, the usual accounts were decreed and a sale ordered, and the estates were accordingly sold; but it afterwards appeared that the fact of the trading was not regularly proved, and then the cause was re-heard, the decree upon which re-hearing was also open to objection; the purchaser under the decree was upon motion relieved from his purchase, although the parties were willing to take steps to remove the objections (*n*).

11. Where a testator devised his real estates to trustees to pay debts, with a direction first to sell estate *A*, and if that were deficient, to sell estate *B*, and the trustees agreed to sell the latter estate, and upon a bill filed against the purchaser, the Master reported a good title, Lord Eldon held, that it was necessary to have a report of debts, in order to show that estate *A*, was insufficient. The sellers then proposed to get a report immediately; but the purchaser refusing to submit to any delay, Lord Eldon dismissed the bill. The vendees, however, refused to give up the contract, and they filed a bill to compel the vendors to execute it, praying the accounts, which, although objected to as vexatious, Lord Eldon held to be right, and they got a decree (*o*). But it may be observed that there was no proper suit in which to take the accounts, and the purchasers had a right to become plaintiffs, in order to obtain a title by their own diligence. If a purchaser were to obtain the dismissal of a bill against him, not on the ground that

(*n*) Lechmere *v.* Brasier, 2 Jac. & Walk. 287; Dalby *v.* Pullen, 3 Sim. 29; 1 Russ. & Myl. 296; Coster *v.* Turnor, 1 Russ. & Myl. 311; Magennis *v.* Fallon, 2 Moll. 566, 580.

(*o*) *Per* Hart, L. C., 2 Molloy, 566.

he would himself file a proper bill, but that he would not wait any longer, the Court would not relieve him if he were afterwards to file a bill.

12. So in a case in Ireland, it was held, that a purchaser cannot be kept without his title until an account of debts is taken. The Court cannot suspend a purchaser until a new decree is made and report had (*p*).

13. But although a seller has, upon the expressed opinion of the Court, filed a bill to take an account, yet if the purchaser seek to avoid the contract on that ground, the seller may argue the necessity of the measure. Conforming to the opinion of the Court does not bind the party complying not to controvert the necessity of such proceedings as the Court directed to be taken (*q*).

14. The general rule is, that if there is not a good title at the date of the report, the purchaser is entitled to be discharged, because a purchaser is not to be kept for future inquiries; a title is not to be made out by instalments, and not what the title is now, but what it was when the Master ruled the objections is the state of the title to be pronounced upon (*r*). But if the title is that originally produced, although the evidence to support it has varied, the purchaser is bound; for the evidence and not the title is altered, and evidence which may satisfy one man's mind may be unsatisfactory to another's (*s*).

15. Where a purchaser enters into, or proceeds in a treaty, after he is acquainted with defects in the title, and knows that the vendor's ability to make a good title depends on the defects being cured, he will be held to

(*p*) Magennis *v.* Fallon, 2 Mol. 561.

(*q*) S. C.

(*r*) Kirwan *v.* Blake, 2 Moll. 581, 582, cited; see Cowgill *v.* Lord Oxmantoun, 3 You. & Coll. 377.

(*s*) 2 Moll. 582.

his bargain, although the time appointed for completing the contract is expired and *considerable further time* may be required to make a good title.

16. Thus in a case (*t*), where it was agreed upon a purchase, that it should be completed on the 5th April 1792, it appeared that the purchaser had applied for an abstract at the latter end of January, or the beginning of February, which not being sent to him, he, after the expiration of the time for the completion of the purchase, applied for his deposit, saying, that he should not proceed in his purchase. About the 21st of April, an abstract was sent him, and it appeared that a suit in Chancery must be determined before a title could be made, upon which he again declared he would not proceed in the purchase, and again required his deposit. In Trinity term he brought an action for his deposit, and, on the 6th of November, the bill was filed. The purchaser, by his answer, stated that the suit was still depending, and that questions of law had arisen, which then stood for argument in the Court of King's Bench.

The Lords Commissioners Ashhurst and Wilson granted an injunction, which was continued by Lord Rosslyn, who said, in these contracts (sales by auction) in general, the time of completing the contract is specified, and a deposit is paid; and if the title is not made out by the time, the vendee is entitled to take back his deposit. But in this case *the vendee was apprised of the title depending on the ability of the vendors to make a good title, which itself depended on the event of a Chancery suit, and was, notwithstanding, willing to go on with his purchase; there had been a communication*

(*t*) Pincke *v.* Curteis, 4 Bro. C. C. 329; and see Smith *v.* Burnam, 2 Anstr. 527; and Paine *v.* Meller, 6 Ves. jun. 349; Warde *v.* Jeffery, 4 Price, 295; see Smith *v.* Sir Thomas Dolman, 6 Bro. P. C. 291, by Tomlins.

*of the delay of the suit, and the present bill was filed after great delay* (I). If the vendee had called for his deposit at the end of the time limited for completing the purchase, and insisted he would not go on with his purchase, the Court would not have compelled him. The cause was afterwards heard before the Master of the Rolls, who was also of opinion, that there had been a sufficient communication of the real state of the delay, and that the purchaser had acquiesced in it, or at least not sufficiently declared his dissent to go on with the purchase; and therefore it was referred to the Master to inquire as to the title.

17. So in Seton *v.* Slade (*u*), it appeared that the purchaser was aware of the objections to the title at the time he purchased the estate, and afterwards accepted the abstract within a few days of the time appointed for completing the contract. He had, however, previously declared, that if the title was not made out by the time, he would relinquish the contract; and the day after the time appointed he actually applied for his deposit, alleging that the abstract, so far from showing a right in the vendor to convey, stated merely a contract for the purchase by him, without noticing a suit in Chancery. But the purchaser having been aware of the objections to the title, and having afterwards received the abstract, a specific performance was decreed.

18. And even where the Court thought that time was of the essence of the contract, yet the purchaser was held to have waived it by receiving an abstract of an

(*u*) 7 Ves. jun. 265. See Wood *v.* Bernal, 19 Ves. 220; Hipwell *v.* Knight, 1 You. & Col. 401.

---

(I) The judgment shows the true ground of the decree; but according to the state of facts in the report, the case was similar to that of Lloyd *v.* Collett, stated *supra*, p. 411.

assignment upon which the title depended, and which would not be valid under the bankrupt law until a period subsequently to the time appointed for completing the contract, and by corresponding upon that abstract. The Court said that he ought to have refused to accept the abstract or to have sent it back forthwith (*x*).

19. Again (*y*), where personal representatives of a trustee, supposing erroneously they had power to sell, entered into a contract for sale, and when the mistake was discovered, the purchaser was apprised that the sellers would take the necessary steps to make a title, which they did, but before they were completed, the purchaser brought an action for his deposit, which he recovered, and then the sellers filed a bill for a specific performance; it was held that the purchaser, if he had thought fit, might have declined the contract as soon as he discovered that the plaintiffs had no title, and he was not bound to wait until they had acquired a title; but he not having taken that course, it was enough that at the hearing a good title could be made.

20. In a case before Hart, L. C., in Ireland, he observed that it was true, where a man having contracted goes on contesting the title without a protest against the delay, then the waiver is clear. But if he says, "I protest against the delay, but I am not sure my protest is valid, and I shall go on to make the best case I can to be discharged," that would go only to the costs, and not amount to acquiescence (*z*). This view, however, does not seem to be warranted by the authorities.

21. Although a treaty may have lain dormant for some time, yet if the contract is not abandoned, a per-

(*x*) Hipwell *v.* Knight, 1 You. & Col. 401.

(*y*) Hoggart *v.* Scott, 1 Russ. & Myl. 293.

(*z*) Magennis *v.* Fallon, 2 Moll. 576; see p. 422, *supra*.

formance will be decreed *in specie*. Thus in a case (*a*) where, upon objections to a title, the treaty had proceeded for about two years, when the vendor's solicitor wrote, calling for a distinct answer, saying, that otherwise he must be under the necessity of filing a bill. No answer was returned to the letter, nor was any notice given that the purchaser considered the contract as abandoned; neither had he brought any action for the deposit. The bill was filed after a delay of about fourteen months, and the defendant resisted a specific performance on the ground of delay, by which, he stated, he had suffered material inconvenience, having purchased the place as his residence, and that he was induced to consider the contract as abandoned. A specific performance was however decreed.

22. But if a purchaser object to the title, and declare he will not complete the contract, and the vendor acquiesce in this declaration, he cannot afterwards clear up the objections to his title, and compel the purchaser to perform the agreement. This was decided in the case of Guest *v.* Homfray (*b*). The purchaser took objections to the title, and was informed that no better title could be made; whereupon he said, he would not proceed in the purchase, and afterwards returned the abstract, at the desire of the vendor, at the same time acquainting him that he (the purchaser) still considered the contract was at an end. In about eight months after this the abstract was returned, with the objections answered, and the bill was filed upon the defendant refusing to complete the contract. But the bill was dismissed, although it was clear that the purchaser had almost all the time wished to be

(*a*) Marquis of Hertford *v.* Boore, 5 Ves. jun. 719. See Milward *v.* Earl of Thanet, 5 Ves. jun. 720, n. (*b*).

(*b*) 5 Ves. jun. 818.

off the bargain. Lord Alvanley, Master of the Rolls, said, they should have cautioned the purchaser, and told him they were going on to make out a title. If they had done all that, and shown a probable ground to the purchaser that they might make a good title, he said, he should perhaps not have thought a year too long.

23. In Watson *v.* Reid (*c*), the contract was in June 1826. An abstract was delivered, and a correspondence took place with respect to the title. On the 7th April 1827 the purchaser gave notice that he objected to the title, and abandoned the contract; and on the 1st May he demanded a return of the deposit. The seller refused to return it; and on the 25th April 1828 filed a bill for a specific performance, and the Master of the Rolls dismissed it with costs, upon the ground of unreasonable delay in filing it.

24. Where circumstances are such that the purchase-money cannot be paid for a length of time, as if the purchaser die, or become bankrupt before the contract be carried into effect, and his executors, or assignees, are not able to get in the assets or effects, the vendor is entitled to require the contract to be rescinded, and he will be allowed his costs (*d*); or he may demand a specific performance; and if the defendants are unable or unwilling to perform the contract, that the estates may be resold; and if the purchase-money arising by the resale, together with the deposit, shall not amount to the purchase-money, that the defendant may pay the deficiency.—A bill for the latter purposes was filed by a vendor against the assignees of a bankrupt, and a decree was made for resale. The deficiency upon that resale

(*c*) 1 Russ. & Myl. 236.

(*d*) Mackreth *v.* Marlar, 1 Cox, 259; Cox's n. (1) to 2 P. Wms. 67; Whittaker *v.* Whittaker, 4 Bro. C. C. 31. See Sir James Lowther *v.* Lady Andover, 1 Bro. C. C. 396; Dickenson *v.* Heron, *infra*, ch. 16, s. 1.

was 5,016 *l.*; and the cause coming on for further directions, Lord Rosslyn directed that sum to be proved under the commission; saying, the whole purchase-money was the debt, and the vendor had a lien on the estate (*e*); which proving by the resale deficient, the residue was to be proved under the commission (*f*).

25. In Wright *v.* Wellesley (*g*), upon a sale it was agreed that part of the purchase-money should be secured by mortgage. There was a decree for a specific performance, and a conveyance and mortgage were directed to be executed, and further directions were reserved. The Master made his report, by which it appeared that the purchaser had made default in bringing in the proper deeds, and he found what was due, which was regularly demanded, but not paid. The plaintiff, the seller, presented a petition, which came on with the further directions, praying the sale of the property, in consequence of the purchaser's default. It was objected that this could not be done; and that at all events a supplemental bill was necessary; but the Vice-Chancellor made the order as prayed for: as the defendant had evaded the decree of the Court, he would give the relief required by the new state of circumstances, and he thought that the petition was regularly presented.

26. In a late case, where an estate was sold by auction, in order to pay off incumbrances, under the usual conditions, and the purchase was to be completed on the 25th of March 1805, the estate was sold for 123,000*l.* and the purchaser paid only 4,000*l.* as a deposit, when he ought to have paid 24,000*l.* A short time previously to Lady-day he wrote a letter to the vendors, acknowledging his inability to pay, and request-

(*e*) *Vide supra*, ch. 1.

(*f*) Bowles *v.* Rogers, 6 Ves. jun. 95, n.

(*g*) V. C. 26 Feb. 1833. MS.

ing them to join in a resale, offering to pay any loss by the second sale. This they refused; and he not having the money ready, on the 27th of March 1805, filed a bill for a specific performance, evidently to gain time. The vendors filed a cross-bill; and afterwards the purchaser became a bankrupt, when the causes were revived. The expenses of the vendors, in payment of the auction-duty, &c. were very considerable. The cross cause came on first; the assignees of course could not bind themselves to pay the money; and the contract was decreed to be delivered up and cancelled, so that the vendors became entitled to the 4;000 *l.* deposit (*h*).

---

27. We are now to consider whether equity will permit the parties to make time the essence of the contract.

In Williams *v.* Thompson or Bonham (*i*), the bill was to carry into execution the trusts of a will, and for a specific performance of an agreement by Bonham, to purchase a real estate of the defendants. By the agreement, dated the 9th of July 1778, it was particularly expressed, "that in case a good title to the premises, discharged from all claims and demands whatsoever, should not be made out to the satisfaction of Bonham within three years from the date thereof, the agreement thereby made, so far as concerned the purchase of the premises (for the agreement contained other stipulations), should from thenceforth become void." The defendant was always ready to have completed his purchase, but the trustees under the will were incapable of making out a title without the aid of equity, and for that purpose the bill in question was filed in February

(*h*) Steadman *v.* Lord Galloway, *et è contra*, Rolls, 9th Feb. 1808.

(*i*) 4 Bro. C. C. 331, cited; Newl. Contr. 238, stated. See the case in Reg. Lib. B. 1781, fol. 564.

1781. The cause came to a hearing on the 29th of June 1782, when the defendant (Bonham) insisted, that the title not having been made out at the time mentioned in the agreement, he was discharged from his purchase. But Lord Thurlow was of opinion, that the time fixed by the articles for making a title to the defendant was only formal, and not of the essence of the agreement; and, as appears by the Registrar's book, he declared, that the three years being expired was not a sufficient objection to the agreement being performed.

28. This case depends so much on its own complicated circumstances, as scarcely to admit of being cited as an authority ruling any other case. I find, from the Registrar's book, that it was impossible to make a title without a decree. The agreement, which was very long and special, stated all the facts; and it was expressly stipulated, that the trustees should use their utmost endeavours to obtain a decree, and the purchaser was immediately let into possession. Now the bill was filed before the expiration of the three years, no laches was imputed to the trustees, and it did not appear that the purchaser had sustained any loss, or been put to any inconvenience. It would therefore have been a strong measure to hold, that the time was of the essence of the contract. The purchaser entered into the contract with full knowledge of all the obstacles in the way of making a title; and unless the purchase was completed, there was no mode of indemnifying the trustees for the expense incurred by the Chancery suit.

29. In the case of Gregson *v.* Riddle (*k*), which was also before Lord Thurlow, the agreement was for a particular day; with a proviso, that in case the title should not be approved in two months, the agreement was to

(*k*) 7 Ves. jun. 268, cited.

be void and of no effect. There was an outstanding legal estate, which could not be got in by that time. A bill was filed for a specific performance. The defendant resisting, a reference was directed, to see whether a good title could be made; Lord Loughborough, then Lord Commissioner, expressing an opinion that the terms of the agreement were complied with (I.) The report was in favour of the title. The cause coming on before Lord Thurlow, the performance was still resisted. Lord Thurlow said, it had been often attempted to get rid of agreements upon this ground, but never with success. The utmost extent was to hold it evidence of a waiver of the agreement; but it never was held to make it void. Mr. Mansfield, for the defendant, said, the intention was clearly to make it void; and that it would be necessary to insert a clause, that notwithstanding the decision of the Court of Chancery, it should be void. Lord Thurlow said, such a clause might be inserted; *and the parties would be just as forward as they were then.*

30. On this *dictum* it must be remarked, that the case did not call for it, as the agreement appears to have been *substantially* performed within the time. And it is said, that in Potts *v.* Webb, before Lord Thurlow, it being part of the terms that the purchase should be completed by a certain time, his Lordship thought that a good reason for not decreeing a specific performance (*l*). At the same time it must be admitted, that Lord

(*l*) 4 Bro. C. C. 330, cited.

(I) The stipulation was, that in case the title should not be approved of by the purchaser's counsel within two months, the articles should be void. The difficulty upon the title arose upon a settlement which the seller insisted was voluntary, and not upon a mere outstanding legal estate. The *seller* insisted upon being at liberty to rescind the contract, under the clause in the articles.

Thurlow entertained a floating opinion, that time could not in general be made of the essence of the contract. It does not appear, however, that any case ever came before him in which he was called upon to decide the point, and his opinion has not been followed in subsequent cases.

31. For in Lloyd *v.* Collett (*m*), in which the case of Gregson *v.* Riddle was cited, Lord Rosslyn said, the conduct of the parties, inevitable accident, &c. might induce the Court to relieve; but it was a different thing to say the appointment of a day was to have no effect at all, and that it was not in the power of the parties to contract, that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it.

32. And in the case of Seton *v.* Slade (*n*), Lord Eldon said, he inclined much to think, notwithstanding what was said in Gregson *v.* Riddle, that time may be made the essence of the contract.

33. The case under consideration has been assimilated to a mortgage, where, although the parties may have expressly stipulated, that if the money be not paid at a particular time, the mortgagor shall be foreclosed, yet equity will permit him to redeem, in the same manner as if no such stipulation had been entered into. There does not appear to be any analogy between the cases. In a mortgage such a declaration is inserted by the mortgagee for his own advantage; but as the land is merely a security for the debt, equity rightly considers that a mortgagee ought only to require his principal

(*m*) 4 Bro. C. C. 469; 4 Ves. jun. 689 note; stated *supra*, p. 411.

(*n*) 7 Ves. jun. 265; and see Lewis *v.* Lord Lechmere, 10 Mod. 503. See also 3 Ves. jun. 693; 12 Ves. jun. 333; 13 Ves. jun. 289; 2 Mer. 140; Levy *v.* Lindo, 3 Mer. 81; Warde *v.* Jeffery, 4 Price, 294.

and interest, and not to obtain the estate itself, by taking advantage of the necessities of the mortgagor. Once a mortgage and always a mortgage, has therefore become a maxim; and under this axiom equity is indeed administered; the parties being put in possession of their respective rights without detriment to each other. The same reasoning seems to apply to relief against a penalty. But in an agreement for sale of an estate, where it is expressly declared that the contract shall be void if a title cannot be made by a stated time, the parties themselves have *mutually* fixed upon a time; the *bona fides* of such a transaction seems to be a bar to the interference of a court of equity; and if the contract be vacated by virtue of the agreement, the parties will still be in the possession of their respective rights. We may therefore, perhaps, venture to assert, that if it *clearly appear to be the intention of the parties* to an agreement, that time shall be deemed of the essence of the contract, it must be so considered in equity (*o*). In the late case of Hudson *v.* Bartram (*p*), the Vice-Chancellor (Sir John Leach) said, that the principle was admitted now that time may be made of the essence of the contract. Why are not parties to insert such a stipulation in their contract? It is difficult to understand how the doubt arose, but it is now at an end; and in Lloyd *v.* Rippingale, where time was in those very words made of the essence of the contract, it was so decreed (*q*). In the later case of Hipwell *v.* Knight, Mr. Baron Alderson considered the rule to be, that the real contract and all the stipulations really intended to be complied with literally should be carried into effect.

(*o*) See Appendix, No. 6.

(*p*) 12 Dec. 1818, MS.; S.C. 3 Madd. 440; and see Boehm *v.* Wood, 1 Jac. & Walk. 419; Williams *v.* Edwards, 2 Sim. 78.

(*q*) 1 You. & Col. 410, cited. The writer thinks he was counsel in the cause.

He thought, that if the parties chose, even arbitrarily provided both of them intend so to do, to stipulate for a particular thing to be done at a particular time, such a stipulation ought to be carried literally into effect in a court of equity. That is the real contract; the parties had a right to make it; why then should a court of equity interfere to make a new contract which the parties had not made (*r*)?

34. Where time is not made of the essence of a contract by the contract itself, although a day for performance is named, of course neither party can strictly make it so after the contract; but if either party is guilty of delay, a distinct written notice by the other, that he shall consider the contract at an end if it be not completed within a reasonable time to be named, would have great weight in case a bill were filed after unreasonable delay.

35. In Reynolds *v.* Nelson (*s*), where the purchaser was in possession as tenant, the point arose, but the seller's notice was, that if the purchaser made default in attending on one of the days named in the notice to complete the purchase, he should consider him as refusing to perform the agreement and act accordingly: and the Vice-Chancellor observed, that although it might now be considered as the settled doctrine of the Court, that by the terms of the agreement time might be made the essence of the contract, yet it had not been decided that where there was no stipulation in the contract, time might be made essential by subsequent notice that it will be so considered, and in this case he might leave that point untouched. The notice given was not that the seller would consider the contract at an end if it was not completed within the time, and whether he would act as if the contract were abandoned, or would

(*r*) 1 You. & Col. 416. (*s*) 6 Madd. 18.

act by filing a bill for a specific performance, he left wholly in doubt; and it was to be observed, that he neither returned nor tendered the deposit which he had received. The usual reference as to the title was therefore made.

36. It may be observed, that the time allowed in this case by the notice was too short, being only three days; but where there has been delay, and the seller gives a proper notice to put an end to the contract in order to quicken the purchaser or to be released from the contract, it must not from the concluding observation in the judgment be inferred, that it is in all cases necessary to return or tender the deposit, for the purchaser by his neglect may have lost his right to have it returned, and the seller's notice, if disregarded, may not revive the purchaser's right to recover.

---

37. It remains to observe, that *where no time is limited for the performance of the agreement*, the cases considered under the first division in this chapter will assist the student in forming a judgment in what instances equity will assist a party who has been guilty of laches, although every case of this nature must in a great measure depend upon its own particular circumstances. The cases classed under the second divison apply, however, with greater force to cases where no time is limited than to those where a day is fixed, for in the former cases, the Court has not to struggle against an express stipulation of the parties.

38. A case came before the Lords Commissioners in 1792 (*t*), where no time was limited for performing the agreement. The plaintiff was one of two devisees in

(*t*) Tyrer v. Artingstall, Newl. Lib. B. 1792, fo. 28, nom. Tyrer Contr. 236. See the case in Reg. v. Bailey.

trust to sell, and pay debts, and had alone sold the estate (I), and entered into articles with the defendant. The co-trustee afterwards refused to join; and there was a mortgagee who refused to be paid off. Neither of these circumstances was disclosed to the purchaser, and upon this delay in the title he proceeded to bring his action against the vendor for a breach of the agreement. The plaintiff brought his bill to compel a specific performance, and to have the co-trustee join; and the mortgage redeemed, and to stay the action. The defendant suffered an injunction to go against him for want of an answer; and having afterwards answered, a motion was made to dissolve the injunction; and the cause shown by the plaintiff was, the possibility of making a good title by this very suit. The Court held the purchaser bound, and continued the injunction.

39. In this case it appears from the Registrar's book, that the purchaser insisted on his purchase, and that the injunction should be dissolved; which was certainly a very important feature in the cause. It was not the case of a man merely seeking to recover his deposit. It must, however, be repeated, that it is impossible to lay down any general rule applicable to cases where no time is appointed for performing the agreement. Indeed, throughout this chapter, it has been found impossible to treat the subject of it in an elementary manner.

---

(I) The estate was sold by auction *with the concurrence of the other trustee.* The plaintiff, however, alone signed the agreement.

# CHAPTER VI.

## OF THE CONSIDERATION.

### SECTION I.

### OF UNREASONABLE AND INADEQUATE CONSIDERATIONS.

1. *Unreasonable price, yet specific performance.*
2. *Unless there be fraud or concealment.*
3. *Or there is gross inadequacy.*
5. *Fall in value immaterial.*
6. *Purchaser seldom relieved after conveyance.*
8. *Inadequacy of price no bar.*
9. *Sale by auction.*
10. *Life annuity.*
11. *Concealment by purchaser.*
14. *Misrepresentation by purchaser.*
15. *Both parties ignorant of value.*
18. *Seller seldom relieved after conveyance: gross inadequacy.*
20. *Unless ignorant of right, and purchaser aware of it.*
21. *Or advantage taken of distress.*
23. *Heir dealing for expectancy favoured.*
24. *Although unprovided for.*
25. *Purchaser to prove adequacy.*
26. *Sellers of reversions not heirs.*
27. *Bulk sold reversionary.*
28. *Loan under mask of trading: King* v. *Hamlet.*
29. *Observations on that case.*
30. *Where sale of reversion valid.*
31. *Gowland* v. *De Faria: value by the tables, and market price.*
32, 35. *Observations upon that case.*
33. *Dews* v. *Brandt.*
36. *Scott* v. *Dunbar.*
37. *Hinksman* v. *Smith.*
38, 41. *Headen* v. *Rosher.*
39. *Potts* v. *Curtis.*
40. *Newton* v. *Hunt.*
42. *Wardle* v. *Carter.*
43. *Ryle* v. *Swindells.*
44. *Evidence of surveyors.*
45. *Sale by auction valid.*
47. *Or person in possession join.*
50. *Where contingency cannot be valued.*
53. *Mis-statement of consideration.*
54. *How adequacy to be shown.*
55. *Delay and confirmation.*
56. *Sale set aside, upon what terms.*
57. *Improvements allowed for.*
58. *Price to be fixed by arbitrators.*
60. *Cannot delegate authority.*

61. *Where Court will fix the price.*
62. *Not where parties chosen.*
64. *Failure of arbitration: death.*
65. *Nomination of arbitrator cannot be compelled.*
66. *Where award after death of party binding.*
67. *Acquiescence in informal award.*
68. *Attachment: action.*

1. IT seems that a court of equity cannot refuse to assist a vendor merely on account of the price being unreasonable (*a*): and a specific performance will certainly be enforced, if the price was reasonable at the time the contract was made, how disproportionable soever it may afterwards become.

2. If, however, a man be induced to give an unreasonable price for an estate, by the fraud (*b*), or gross misrepresentation (*c*), of the vendor; or by an industrious concealment of a defect in the estate (*d*), equity will not compel him to perform the contract.

3. And where these circumstances do not appear, but the estate is a grossly inadequate consideration for the purchase-money, equity will not relieve either party. Thus in a case at the Rolls before Lord Alvanley, by original and cross-bill, the estate was represented on the one hand of the value of 9 or 10,000*l.*; and on the other of only 5,000*l.* The contract was for 6,000*l.*, and 14,000*l.* at the death of a person aged sixty-five. Lord Alvanley said, it was not a case of actual fraud; but it

(*a*) City of London *v.* Richmond, 2 Vern. 421; Hanger *v.* Eyles, 2 Eq. Ca. Ab. 689; Hicks *v.* Philips, Prec. Cha. 575; 21 Vin. Abr. (E), n. to pl. 1; Keen *v.* Stukeley, Gilb. Eq. Rep. 155; 2 Bro. P. C. 396; Charles *v.* Andrews, 9 Mod. 151; Lewis *v.* Lord Lechmere, 10 Mod. 503; Saville *v.* Saville, 1 P. Wms. 745; Adams *v.* Weare, 1 Bro. C. C. 567; and the cases, as to inadequacy of price, cited *infra*.

(*b*) See James *v.* Morgan, 1 Lev. 111, a case at law. Conway *v.* Shrimpton, 5 Bro. P. C. by Toml. 187.

(*c*) Buxton *v.* Cooper, 3 Atk. 383.

(*d*) Shirley *v.* Stratton, 1 Bro. C. C. 440.

was insisted the bargain was grossly inadequate; and the inadequacy was very great: it was impossible upon the whole evidence to make the estate to be worth more than 10,000*l.*: though he ought not to decree a performance, yet as no advantage was taken of necessity, &c. he was not warranted to decree the vendor to deliver up the contract, the only inconvenience of which would be, that an action would lie for damages; and he accordingly dismissed both bills (*e*).

4. Indeed few contracts can be enforced in equity where the price is unreasonable, because contracts are not often strictly observed by either party; and if an unreasonable contract be not performed by the vendor, according to the letter in every respect, equity will not compel a performance *in specie* (*f*).

5. But a purchaser will be compelled to complete his contract although by the calamities of the times between the contract and the conveyance, estates generally are reduced several years purchase in value, for that ought not to rescind the contract (*g*).

6. But there are few cases in which a purchaser could be relieved after the conveyance is executed and the purchase completed, on account of the unreasonable price (*h*).

7. We have already considered whether the purchase-money can be followed so as to compel the restitution of it, or the property in which it is invested, even where the contract is set aside for misrepresentation of value (*i*).

(*e*) Day *v.* Newman, 2 Cox, 77; 10 Ves. jun. 300, cited; and see Squire *v.* Baker, 5 Vin. Abr. 549, pl. 12.

(*f*) See the cases cited in n. (*a*), *ante*; and Edwards *v.* Heather, Sel. Cha. Ca. 3.

(*g*) Poole *v.* Shergold, 2 Bro. C. C. 118.

(*h*) Small *v.* Attwood, You. 407.

(*i*) S. C. You. 507, *supra*, ch. 4, s. 5.

8. It appears to be settled, that mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance to a purchaser (*k*), particularly where the estate is sold by auction (*l*).

9. In White *v.* Damon, however, although the estate was sold by auction, Lord Rosslyn dismissed the bill merely on account of the inadequate price given for the estate, viz. 1,120*l.* and it was worth 2,000*l.*; but on a rehearing before Lord Eldon, although the decree was affirmed upon a different ground, yet he said, he was inclined to say that a sale by auction, no fraud, surprise, &c. cannot be set aside for mere inadequacy of value. It would be very difficult, he said, to sustain sales by auction, if the Court would not specifically perform the agreement. And in a subsequent case (*m*), he expressed the same opinion, and referred to the case of White *v.* Damon.

10. But if an uncertain consideration (as a life-annuity) be given for an estate, and the contract be executory, equity it seems will enter into the adequacy of the consideration (*n*).

11. Although a purchaser is not bound to acquaint the vendor with any latent advantage in the estate (*o*), yet any concealment, for the purpose of obtaining an estate at a grossly inadequate price, may be deemed fraudulent.

(*k*) Coles *v.* Trecothick, 9 Ves. jun. 234; Burrows *v.* Lock, 10 Ves. jun. 470. See Young *v.* Clark, Prec. Cha. 538; Barrett *v.* Gomeserra, Bunb. 94; Underwood *v.* Hithcox, 1 Ves. 279; Mortlock *v.* Buller, 10 Ves. jun. 292; and Lowther *v.* Lowther, 13 Ves. jun. 95; Western *v.* Russell, 3 Ves. & Bea. 187.

(*l*) White *v.* Damon, 7 Ves. jun. 30. See Collet *v.* Woollaston, 3 Bro. C. C. 228.

(*m*) *Ex parte* Latham, 7 Ves. jun. 35, note.

(*n*) Pope *v.* Root, 7 Bro. P. C. 184; Mortimer *v.* Capper, 1 Bro. C. C. 156; and Jackson *v.* Lever, 3 Bro. C. C. 605.

(*o*) See 2 Bro. C. C. 420.

12. Thus in the case of Deane *v.* Rastron (*p*), an agreement was made for sale of land at a halfpenny per square yard. The price was in all about 500*l.*, the real value 2,000*l.* The purchaser went out to an attorney, got him to calculate the amount, and desired him not to tell the vendor how little it was; then carried the agreement to the vendor, and prevailed on him to sign it immediately. The Court of Exchequer said, the desire of concealment would be such a fraud as to void the transaction, as parties to a contract are supposed, in equity, to treat for what they think a fair price.

13. So as we have seen, the not discovering to the seller, who was ignorant of the fact, the death of a party, which increased the value of the estate, although the death was publicly known, was deemed a sufficient ground to rescind the contract (*q*).

14. So a misrepresentation by the purchaser, who was the agent of the seller, of the value of the estate, although it operated only to a small extent, has been held to be a sufficient defence against a bill for a specific performance; for to entitle a person to call for the aid of a court of equity, he must go there with clean hands (*r*).

15. Where neither of the parties knows the value of the estate, at the time the contract is entered into, no inadequacy of consideration will operate as a bar to the aid of equity in favour of the purchaser.

16. Thus, in a case (*s*) where a common was to be inclosed, one man having a right of common, agreed, be-

(*p*) 1 Anst. 64; and see Young *v.* Clerk, Prec. Cha. 538; Lukey *v.* O'Donnell, 2 Sch. & Lef. 466.

(*q*) Turner *v.* Harvey, Jac. 169; Brealey *v.* Collins, You. 317; *supra*, ch. 4, s. 5, pl. 4.

(*r*) Cadman *v.* Horner, 18 Ves. jun. 10; Wall *v.* Stubbs, 1 Madd. 80.

(*s*) Anon. 1 Bro. C. C. 158; 6 Ves. jun. 24, cited; but see 2 Atk. 134.

fore the commissioners had made any allotment, or any one could know what it was to be, to sell his allotment for 20*l.* Afterwards it turned out to be worth 200*l.* Sir Joseph Jekyll said, the contract ought to be enforced, as no one could know what the allotment would be; and both parties were equally in the dark; *but it might be different if the circumstances had been known to the plaintiff.*

17. But, whether an estate is sold by auction, or by private agreement, equity will be as vigilant in discovering an excuse for refusing to perform the contract, where the price is inadequate, as it will where the consideration is unreasonable (*t*).

---

18. A conveyance executed will not, however, be easily set aside on account of the inadequacy of the consideration; for there is a great difference between establishing and rescinding an agreement (*u*). It is not sufficient to set aside an agreement in equity, to suggest weakness and indiscretion in one of the parties who has engaged in it; for supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing only, unless he can show fraud in the party contracting with him, or some undue means made use of to draw him into such an agreement (*x*). To set aside a conveyance, there must be an inequality so strong,

(*t*) Whorwood *v.* Simpson, 2 Vern. 186; Emery *v.* Wase, 5 Ves. jun. 846; 8 Ves. jun. 505; Twining *v.* Morris, 2 Bro. C. C. 326; and see the cases cited in n. (*a*), *supra*; and see Mortlock *v.* Buller, 10 Ves. jun. 292; Maddeford *v.* Austwick, 1 Sim. 89, and 1 Molloy, 335.

(*u*) See Dews *v.* Brandt, Sel. Cha. Ca. 7; Cases, *Dom. Proc.* 1728; Hamilton *v.* Clements, Cas. *Dom. Proc.* 1766. See Small *v.* Attwood, You. 407, *supra*, ch. 4, s. 5.

(*x*) *Per* Lord Hardwicke, Willis *v.* Jernegan, 2 Atk. 251.

gross and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it (*y*). The truth is, that in setting aside contracts, on account of an inadequate consideration, the Court proceeds on fraud. In all such cases, however, the basis must be gross inequality in the contract, otherwise the party selling cannot be said to be in the power of the party buying; unless actual imposition is proved by gross inequality, other circumstances of fraud will pass for nothing; the basis must be gross inequality (*z*).

19. In a case where the purchaser had by the rents received back the price he paid, and the degree of inadequacy was very great, although the purchaser was dead, and his devisees by their answer stated themselves to be ignorant of all the circumstances connected with the sale, yet the Court before the hearing appointed a receiver, and thus turned the representatives of the purchaser out of possession (*a*).

20. But a conveyance obtained for an inadequate consideration, from one not conusant of his right, by a person who had notice of such right, will be set aside, although no actual fraud or imposition improved (*b*).

21. So if advantage is taken of the distress of the

(*y*) *Per* LordThurlow in Gwynne *v.* Heaton, 1 Bro. C. C. 1; and see Stephens *v.* Bateman, 1 Bro. C. C. 22; Floyer *v.* Sherard, Ambl. 18; Heathcote *v.* Paignon, 2 Bro. C. C. 167, and the cases there cited; Spratley *v.* Griffiths, 2 Bro. C. C. 179, n.; Low *v.* Barchard, 8 Ves. jun. 133; Underhill *v.* Horwood, 10 Ves. jun. 209; 14 Ves. jun. 28; Verner *v.* Winstanley, 2 Scho. & Lef. 393; Mac Ghee *v.* Morgan, Bruce *v.* Rogers, *ib.* 395; Darley *v.* Singleton, Wight. 25; Evans *v.* Brown. *ib.* 102; *Ex parte* Thistlewood, 1 Rose, 290.

(*z*) *Per* Lord Thurlow in Gartside *v.* Isherwood, 1 Bro. C. C. 558.

(*a*) Stilwell *v.* Wilkins, Jac. 280.

(*b*) See Evans *v.* Luellyn, 2 Bro. C. C. 150; and the cases cited in the next note.

vendor, the sale will be set aside (*c*): and this was done in one case, although the purchaser was really run to great hazard, and was to be at great expense and trouble in many foreseen and unavoidable law-suits about the estate, the issue of which was very doubtful (*d*).

22. The reader will perceive that in this chapter a distinction is taken between contracts in *fieri*, and contracts actually executed; but in the case of Coles *v.* Trecothick (*e*), Lord Eldon appears to have been of opinion, that no such distinction exists. He said, that unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not a sufficient ground *for refusing a specific performance.*

---

23. In treating of inadequacy of price, we must be careful to distinguish the cases of reversionary interests, the rules respecting which, especially where an heir is the vendor, depend upon principles applicable only to themselves, and not easily definable (*f*). The heir of a family dealing for an expectancy in that family, is distinguished from ordinary cases, and an unconscionable bargain made with him, is not only to be looked upon

(*c*) Herne *v.* Meers, 1 Vern. 465; 1 Bro. C. C. 176, n.; Gould *v.* Okenden, 4 Bro. P. C. by Toml. 193; Farguson *v.* Maitland, Gro. and Rud. of Law and Eq. p. 89, pl. 1; Pickett *v.* Loggon, 14 Ves. 215; Murray *v.* Palmer, 2 Scho. & Lef. 474; Bowen *v.* Kirwan, Rep. t. Sugd. 47.

(*d*) Gordon *v.* Crawford, before the House of Lords; Gro. and Rud. of Law and Eq. p. 92, pl. 16; Printed Cases *Dom. Proc.* 1730.

(*e*) 9 Ves. jun. 234; *sed qu.* and see the cases cited in this chapter.

(*f*) See 9 Ves. jun. 243; 2 Pow. Contr. 181; 3 Wooddes. 460, s. 7; Gilb. Lex Prætor. 291; 1 Trea. Eq. c. 11, s. 12, and Mr. Fonblanque's notes, *ibid.*

as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed (*g*). There are two powerful reasons why sales of reversions by heirs should be discountenanced; the one, that it opens a door to taking an undue advantage of an heir being in distressed and necessitous circumstances (*h*), which may perhaps be deemed a private reason: the other is founded on public policy, in order to prevent an heir from shaking off his father's authority, and feeding his extravagances by disposing of the family estate (*i*). Every case of this nature must, however, depend on its own circumstances; the Courts profess not to lay down any particular rules, lest devices should be framed to evade them.

24. The circumstance of the heir being unprovided for, will not prevail much in the purchaser's favour: the remoteness or uncertainty of the interest is not material, if the terms be unreasonable, nor can much stress be laid upon the purchaser incurring the risk of the loss of his money, in case the heir die before he come into possession; nor will the acquiescence of the seller during the continuance of the same situation in which he entered into the contract prejudice him (*k*).

25. The adequacy of the consideration is considered with reference to the time of the contract and not to the

(*g*) *Per* Lord Thurlow, 1 Bro. C. C. 10. See Nott *v.* Hill, 1 Vern. 167; 2 Vern. 27; Berney *v.* Pitt, 2 Vern. 14; Earl of Ardglasse *v.* Muschamp, 1 Vern. 237; Twisleton *v.* Griffith, 1 P. Wms. 310; Curwyn *v.* Milner, 3 P. Wms. 293, n. (C); Sir John Barnardiston *v.* Lingood, 2 Atk. 133; Baugh *v.* Price, 1 Wils. 320; Gwynne *v.* Heaton, 1 Bro. C. C. 1; Bernal *v.* Donegal, 3 Dow, 133; Blakeney *v.* Bagott, 3 Bligh, N. S. 237.

(*h*) Sir John Barnardiston *v* Lingood, 2 Atk. 133.

(*i*) Cole *v.* Gibbons, 3 P. Wms. 290. See Barnard. Cha. Rep. 6.

(*k*) Gowland *v.* De Faria, 17 Ves. jun. 20; *supra*, ch. 4, s. 5.

event, and the burden lies on the *purchaser* in these cases to show that a full and adequate consideration was paid (*l*).

26. A very anxious protection is also extended by equity to persons selling reversionary interests, who are not heirs, although certainly the same reasons do not occur in support of it (*m*).

27. And although the bargain include property in possession, yet if the bulk of the property is reversionary, the whole contract will be set aside (*n*).

28. So where a loan is effected under the mask of trading, and an extraordinary rate of interest is in that way gained, the Court will relieve against the transaction, particularly in the case of an expectant heir (*o*). In the late case of King *v.* Hamlet, the heir was not relieved, although after a treaty for a loan, goods to the value of 8,000 *l.* were sold at the shop prices to an expectant heir, who had sold his only immediate provision, and a mortgage and other securities were taken as upon an actual advance of 8,000 *l.* in money, carrying five per cent. interest from the time of sale, although it was proved that where ready money was paid (and here the security carrying interest was equal to ready money), a rebate of five per cent. was allowed in the ordinary way of trade by the defendant, which would have amounted to 400 *l.*, but no such allowance was made to the plaintiff, and his goods were detained until the securities were perfected. The goods were of course resold, and

(*l*) Gowland *v.* De Faria, *ubi sup.*; Evans *v.* Griffith, Farmer *v.* Wardell, 17 Ves. jun. 24, cited; Medlicott *v.* O'Donel, 1 Ball & Beatty, 136; Kendall *v.* Beckett, 2 Russ. & Myl. 88.

(*m*) Wiseman *v.* Beake, 2 Vern. 121; Cole *v.* Gibbons, 3 P. Wms. 290; Bawtree *v.* Watson, 3 Myl. & Kee. 339.

(*n*) Lord Portmore *v.* Taylor, 4 Sim. 182.

(*o*) Barker *v.* Vansommer, 1 Bro. C. C. 149.

the plaintiff sustained a loss of about 60 per cent. upon the transaction (*p*).

29. The Court in deciding this case laid down two propositions as incontestable, as applicable to the doctrines of equity upon the subject of an expectant heir dealing with his expectancy.

1. That the extraordinary protection given in the general case must be withdrawn if it shall appear that the transaction was known to the father or other person standing in *loco parentis;* the person for example from whom the *spes-successionis* was entertained, or after whom the reversionary interest was to become vested in possession, even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him.—2. That if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not in any respect act upon it so as to alter the situation of the other party or his property; at least that if he does so the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing.

Now the first of these rules is supported by no previous authority, and as a general rule cannot, it is submitted, be maintained. The knowledge of the parent *may,* under some circumstances, remove one of the objections to such a transaction, but the others might still remain. The son is entitled to be relieved, although his father may witness his ruin with indifference. It is the son's equity, although partly grounded upon public policy. In many cases the person standing in *loco*

(*p*) King *v.* Hamlet, 4 Sim. 231; 2 My. & Kee. 456. See the reasons for the appellant in App. No. 13.

*parentis*, or from whom the *spes-successionis* is entertained, or after whom the reversionary contract is to become vested in possession, may be more than indifferent about the worldly prospects of the expectant heir. Even in the case of father and son, how frequently we find the expectant spendthrift only following his parent's example! The second rule, without the concluding qualification, could not be safely acted upon. In the case of goods substituted for money, and a security given over the buyer's reversionary property, the heir may offer to return the goods if the seller will relinquish the securities. If the offer is refused, and the heir then sell them—which is simply accomplishing the purpose for which they were bought,—it would not be possible to maintain that he had forfeited any equity which he originally had to impeach the transaction.

30. *A bonâ fide* sale of a reversionary estate cannot be set aside, whether the vendor be an heir or not (*q*), unless fraud or imposition be expressly proved, or be implied from the inadequacy of the consideration, or other circumstances attending the sale (*r*), although in the case of Gowland *v.* De Faria, it was deemed sufficient to avoid the contract (*s*), that the consideration was not equal to the calculated value in the tables.

31. That case was the sale of an annuity secured upon the reversion, with a warrant of attorney and judgment, and therefore clearly distinguishable from a sale of the reversion. The evidence of Mr. Morgan, the actuary for the plaintiff, the seller, proved the price to be greatly inadequate, and, according to the report,

(*q*) Dews *v.* Brandt, Sel. Ca. Cha. 8; and see 1 Bro. C. C. 6.

(*r*) Nicols *v.* Gould, 2 Ves. 422; Gwynne *v.* Heaton, 1 Bro. C. C. 1; Peacock *v.* Evans, 16 Ves. jun. 512; Ryle *v.* Brown, 13 Price, 758; Lord Portmore *v.* Taylor, 4 Sim. 182.

(*s*) Gowland *v.* De Faria, 17 Ves. jun. 20.

there was no evidence for the purchaser. Sir William Grant held that, according to the authorities, the purchaser was to show that a full and adequate consideration was paid. Upon the question of the adequacy of the consideration, the evidence was all one way. In many of these cases very opposite opinions are given by calculation, but here the plaintiff's witness was not contradicted. He must, therefore, take the value to be inadequate, and then he did not see how he could avoid setting aside the contract. The decision was appealed from, but the suit was compromised by the seller paying to the purchaser the costs, and a sum of money beyond the sum decreed to him at the Rolls.

32. The rule supposed to have been laid down in the above case would have a strong tendency to stop altogether the sale of reversions; but as this is not possible, it would have the effect of preventing the sale of reversions at their fair market value. It is perfectly well known that reversions upon sales, even by auction, fetch on an average only two-thirds of the sum at which they are valued in the tables: according to the case of Gowland *v.* De Faria (*t*), this does not seem to operate in a purchaser's favour, although the value of a thing is at last not to be regulated by calculation, but, as it is vulgarly termed, by what it will fetch. Experience has shown, that, under the most favourable circumstances, reversions will not fetch their calculated value, which only allows the purchaser five per cent. interest, notwithstanding that his money may be locked up for many years. It seems, therefore, an equity not founded on reason or convenience, which in these cases inquires the calculated value of the subject

(*t*) *Supra*, p. 448. See *Ex parte* Thistlewood, 1 Rose, 290; Lord Portmore *v.* Taylor, 4 Sim. 182; Whichcote *v.* Bramston, *ib.* 202, n.

of the contract, instead of its value according to the well known market price. The effect of such an equity must ultimately be to injure the very persons in whose favour it was introduced. Reversions will never fetch their calculated value. Fair purchasers will not dare to purchase them at their market price, and consequently they will be thrown into the grasp of usurers, who will give very inadequate considerations for them, running the risk of a suit, in which event they will stand in as good a situation as if they had given the fair market price for them.

33. The true rule appears to have prevailed in an early case (*u*). A son, thirty years of age, tenant in tail in remainder expectant on his father's life estate, contracted to sell it at somewhat less than half of its present value when he came into possession, and interest was to be paid in the meantime. The father died within two years, but the Court refused to relieve the son. They truly observed, that a rule that an heir should not dispose of a reversion would be, that an heir should never be of age. If the bargain had been to pay when the possession had, that would have been a purchase in possession, and on account of the great undervalue bad. Had the bargain been to pay so much down in present money, undoubtedly it had been good, *else there was an end of all sales of reversions, and a man would be tantalized with having an estate of which he could make no use.* The payment of the interest they considered the same as buying the reversion for present money paid, and the agreement could not be affected by the accident of the early death of the father. That was a chance on both sides, and might have happened otherwise.

34. Sir W. Grant, in acting upon the rule, considered

(*u*) Dews *v.* Brandt, Sel. Cha. Ca. 7.

that to the class of expectant heirs the Court seemed to have extended a degree of protection approaching nearly to an incapacity to bind themselves by any contract (*x*).

35. But Gowland *v.* De Faria has not been approved of, and later cases, although not altogether satisfactory, appear upon the whole to place the doctrine upon the right footing, and the Court it seems will, in estimating the value, look at the real market as well as the calculated value, in order to ascertain whether the price be a fair one.

36. In a case in Ireland, before Hart, L. C. (*y*), he observed that he was not satisfied at the time, nor was he then, that Gowland *v.* De Faria was decided on the true principles of equity; but the ground upon which his objection turned seems to have been the length of time which had elapsed. There were, he stated, material facts in that case, which do not appear in the printed report, going further to disentitle the plaintiff. He was not a mere expectant when he made the contract, but a man in possession of a considerable income. He expected an accession, but he was opulent and he was prudent, for he raised that money not to squander it, but to lay it out profitably in the improvement of his estate. Sir A. Hart added, that he advised an appeal from that decree; and it would have been appealed from, but the plaintiff submitted to a compromise.

37. In Hincksman *v.* Smith (*z*), before Sir John Leach, Master of the Rolls, he observed that, in Gowland *v.* De Faria, Sir W. Grant did not consider himself as laying down a new rule, but as following the current of authority, and since that case the rule had been so

(*x*) Peacock *v.* Evans, 16 Ves. jun. 512. 458 (1828).

(*y*) Scott *v.* Dunbar, 1 Moll.

(*z*) 3 Russ. 433 (1827).

far regarded as the settled law of the court; that although he (Sir John Leach) had *upon more than one occasion judicially questioned both the principle and policy of the rule*, yet it would not become that Court to make a precedent in direct opposition to it. But he decided the case upon other grounds.

38. In a recent case (*a*) before Chief Baron Alexander, he refused to set aside a private sale of a reversionary interest, although Mr. Morgan the actuary's valuation was 928*l.* 8*s.*, and the price paid was only 630*l.*, rather more than two-thirds of the calculated value. The learned judge could not bring himself to adopt the principle laid down in Gowland *v.* De Faria. He observed, that in the case before him the price agreed on and actually paid was in his opinion the utmost that, according to every human probability, could have been obtained. He did not dispute Mr. Morgan's valuation, but the price put by the actuary can never be procured in fact; the witnesses for the defendant prove it, and it requires no witnesses. The price set was the arithmetical value. Now no man will part with his ready money, and all the advantages which the power over it confers, in exchange for a future interest, without some compensation beyond the dry arithmetical value of it. To set this bargain aside would be in effect to decree that no valid bargain for a reversion can be made except by auction; and he did not know how any other sale of such an interest could be sustained, unless judges proceeded on the same principle as he did. This would be a very inconvenient restraint on the power of the owners of such property. A private sale is no doubt, sometimes, an imprudent exercise of that power; but in many situations, and under circumstances of no unfrequent occurrence, it is wise and provident. Every

(*a*) Headen *v.* Rosher, 1 M'Clel. & You. 89 (1825).

case should turn on its particular circumstances; and he thought there were none in the present case which, either according to sound sense, or to any established course of precedents, affected it.

39. In the case of Potts *v.* Curtis (*b*), the bill was to compel a transfer of some stock, the reversion of which had been purchased by private contract by the plaintiff. The purchase was made in 1812 for 550*l.* The claim was resisted upon the allegation of undue advantage, which was abandoned, and inadequacy of consideration. The plaintiff examined two auctioneers to prove the value. The defendant examined two actuaries, an auctioneer, and a land agent; and in the result the purchase was supported. This case, for the first time, fairly introduced the question between the conflicting evidence of auctioneers and actuaries, or, in other words, between the market price of reversions, and their estimated value according to the tables. Lord Lyndhurst observed, that he had made a calculation as to the inadequacy. If the two calculations of Morgan and Ansell, the actuaries, and the average of their results be taken on the one side, and the calculations of the two witnesses for the plaintiff, and the average of their results be stated on the other side, and then the average of the whole, two on one side, and two on the other, be taken, the result is 597 *l.*, that is, 47*l.* more than the price actually paid. There are valuations on the one side, making it 530*l.* and 500 *l.*, adding them together, the sum is 1,030 *l.*, which divided by two, makes the average 515 *l.*, from which one-eighth being taken, in consequence of a mistake, reduces it to 450 *l.* Then, on the other side, taking the valuation of Morgan at 855 *l.*, and of Ansell at 847 *l.*, they make together 1,702*l.*, which divided by two, makes the average 851 *l.*, taking

(*b*) You. 543 (1832).

one-eighth from which, reduces it to 744 *l.*; so that the average on one side, after taking off the eighth, is 744 *l.*, and the average on the other side, after deducting the eighth, is 450 *l.* Now, adding the 744 *l.* to the 450 *l.*, they make together 1,194 *l.*, and this being divided by two, makes 597 *l.*, as the average of the whole, which is just 47 *l.* more than the price actually paid. It was quite clear that Sir William Grant, in Gowland *v.* De Faria, paused a moment as to an actuary's valuation; but then, he says, "there is nothing opposed to it; it is not questioned, but it is admitted." He (Lord Lyndhurst) took that as the basis upon which he should proceed. It was equally clear, he seemed to think, a question might arise as to whether an actuary's valuation was the real value. Sir William Alexander, in Headen *v.* Rosher, states that the sum at which an actuary values a reversion never can be obtained. He (Lord Lyndhurst) supposed it could not; for why should a party choose to lock up his money at the ordinary interest? Some deduction therefore should be made on that account; but in this case, making no deduction, and taking the valuations on both sides, the average is only 47 *l.* more than the money paid for the reversion. It was unnecessary for him to say what was the extent of the inadequacy of consideration which would vitiate a contract of this kind, for it did not appear to him that the consideration was inadequate when the subject was fairly considered. Undoubtedly in this case, Mr. Morgan and Mr. Ansell, who were both actuaries, and accustomed to make calculations of this description with great accuracy, stated that they calculated the value of this reversion at considerably more than the sum that was agreed to be paid for it. This brought him (Lord Lyndhurst) to the consideration of the doctrine in Gowland *v.* De Faria. In that case there was a calculated value,

and the Master of the Rolls not finding that calculated value opposed by any evidence, considered he was bound by it; and the calculated value being much more than the sum paid, he considered the contract was altogether void. But he (Lord Lyndhurst) thought the observations made upon that case by Sir William Alexander, very judicious and very proper. He says, "Calculated value is never actual value, and no person selling a reversionary interest can ever expect to get the calculated value." And his reason is extremely good and satisfactory. Sir William Alexander, therefore, would have come to the conclusion probably in Gowland *v.* De Faria, that according to his experience, he would not have been bound, as the Master of the Rolls conceived himself to be, by the evidence of the calculated value. The Master of the Rolls thought that the calculated value being opposed by no other evidence, was conclusive upon him. According to his (Lord Lyndhurst's) understanding of the judgment of Sir William Alexander, he would not have considered himself so bound; he would have exercised his own understanding and experience, and made certain deductions from the calculated value; but in the present case they have evidence not merely of the calculated value, but evidence independent of it. Now, the evidence of the calculated value of the two most experienced witnesses on the part of the defendant, those on whose judgment he should be disposed most to rely, Mr. Morgan and Mr. Ansell, was, that the calculated value amounted to 744 *l.* When he said 744 *l.*, that is the average of their valuation, after deducting one-eighth in consequence of their calculation having originally included 2,000 *l.*, which it turned out should have been omitted. Their estimated value, therefore, is 744 *l.*; two-thirds of that sum is 496 *l.* only. If you deduct, according to common experience,

a third from the calculated value, the proportion to which as the average price obtained (*c*), it would reduce the 744 *l.* to 496 *l.*, whereas the sum here contracted for amounted to 550 *l.* But what was the evidence on the other side? The evidence on the other side, of Mr. Fairbrother, was, that it was not worth to sell more than 530 *l.*: the evidence of Mr. Abbott, that it was not worth more than 500 *l.* Taking, therefore, the evidence of Mr. Fairbrother, and the evidence of Mr. Abbott, who were both experienced persons in selling property of this description, and contrasting that with the calculated value, the estimate they put upon the property was something more than two-thirds of the calculated value, and something less than the money actually given for the property. There was another way of considering it, which he had already presented to the parties: he would take Mr. Morgan and Mr. Ansell on one side, and take their average, and then Fairbrother and Abbott on the other side, and take their average, and then taking the average of the two sets of calculators, he found the estimated value upon that average was only 597 *l.*, which was only 47 *l.* more than the sum actually contracted to be paid.

40. In Newton *v.* Hunt, where Sir L. Shadwell, V.C., relieved against a sale by private contract at an undervalue, he observed, that it was insisted that the doctrine laid down in Gowland *v.* De Faria was over-ruled by the decision in Headen *v.* Rosher. But it was observable that in Headen *v.* Rosher the only evidence given by the plaintiffs was the opinion of Mr. Morgan, and for reasons which the V.C. stated, little reliance could be placed upon that opinion as evidence of value, whereas the defendant's evidence went directly

(*c*) Sug. Vend. & Purch. 239; [*supra*, p. 449, pl. 32.]

to prove that the price given by him was a fair price. And there was nothing in the case of Headen *v.* Rosher from which it could be inferred that any advantages had been unduly taken of the plaintiff by the defendant. That case was decided in 1825; and in 1827, the case of Hinxsman *v.* Smith occurred, in which Sir John Leach, Master of the Rolls, made the observations before quoted. He (the V. C.) could not, therefore, consider the judgment of the C. B. in Headen *v.* Rosher as having set aside the authority of Gowland *v.* De Faria, even with respect to inadequacy of price alone. Sir William Grant however had before him a case in which the defendant did take advantage of the plaintiff's difficulties.

41. The decision of the case of Headen *v.* Rosher may be capable of being referred to the grounds stated by the Vice-Chancellor; but Chief Baron Alexander clearly intended to decide that the market value, and not the calculated one, is the true guide in these cases; and so the decision was understood by Lord Lyndhurst, C. B.

42. In a recent case before the Vice-Chancellor (*d*), where the interest sold was a perpetual rentcharge, which the seller, although an heir, was enabled in effect to sell in possession, but a question arose upon value, and two actuaries for the seller gave the same evidence as to value, and were contradicted by two auctioneers and a surveyor for the purchaser, as to the market value or price by public auction; the Vice-Chancellor, in contrasting the evidence, observed, that both the actuaries singularly enough concurred in stating (probably they looked only at the tables) that a sum named was the value at the time of sale, but although cross-

(*d*) Wardle *v.* Carter, 7 Sim. 490.

examined as to the market value, they did not depose. But the other three persons spoke of the market value, and two of these witnesses added, that their estimate was made with reference to the state of the money-market (which was a very material circumstance) at the time of the sale, which they said was a very unfavourable time for the sale of property such as that in question. All the Judges therefore seem now to take the same view of this question, for the same point arose in Wardle *v.* Carter as in the other cases, viz. which is to be looked at, the calculated value or the market price, and it makes no difference whether the rule is applied to a reversion or to a subject like a rentcharge in possession, although when the value is ascertained, a consideration might be deemed adequate in the one case, which would be inadequate in the other.

43. In a case (*e*) where a tradesman for 30*l.* paid at the time of the agreement, and 570*l.* further part of 770*l.* to be paid at the time of the conveyance, sold eight-twelfths of a property in remainder expectant upon his father's death, and 200*l.* was to be retained by the purchaser, in order that if he were obliged upon the purchase of the remaining shares to give more than 100*l.* a piece, he might reimburse himself the excess, and pay the residue to the seller, and he was to pay interest on the 200*l.* in the meantime, the bill was filed by the purchaser for a specific performance.

The witnesses differed as to the value, but the Lord Chief Baron dismissed the bill as too favourable a bargain for the purchaser. The plaintiff's witnesses were farmers and tradesmen, and in the opinion of the Court they overvalued the father's life interest. It was, the Chief Baron said, thrown upon the plaintiff to make out a

(*e*) Ryle *v.* Swindells, M'Clel. 519.

case of adequacy, in order to entitle himself to a decree, and he had not done it in the way he ought; it was incumbent on him to have a valuation of the property made by a competent valuator, and an actuary should have stated what was the value of the father's life interest, and what would have been a fair consideration for the reversionary interest upon a view of all the circumstances. He thought no man capable of dealing prudently for his own interests (and the seller's condition was represented to be that of extreme indigence, ignorance, imbecility of intellect, and habitual inebriety), could have acceded to the stipulation as to the 200*l.*, by which it in fact depended upon the conduct of the vendee of the estate whether he should ever receive more of the residue of the purchase-money or not.

44. Upon the evidence of surveyors as to value, Lord Lyndhurst has observed, that he had been so long accustomed to courts of justice and to evidence of that description, he had seen so much of its flexible character, and its means of adapting itself to the interest of the party on whose behalf the evidence is given, that he placed very little reliance upon evidence of this nature (*f*).

45. In a late case (*g*), Sir John Leach held that the rule did not extend to sales by auction. He said, that the principle of the rule could not be applied to sales of reversion by *auction*. There being no treaty between vendor and purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser. The sale by auction is evidence of the market price. It was said, that pretended sales by auction may be used to cover private bargains; where such cases occur they will operate nothing.

(*f*) See You. 491. 232. See Fox v. Wright, 6 Madd.

(*g*) Shelly v. Nash, 3 Madd. 111.

46. And if a sale by private contract of one lot be oppressive, it may be relieved against, although assigned by the same instrument with another lot sold by public auction, in respect of which no relief can be granted (*h*).

47. It has also been held, that the rule did not apply to a sale by a father, tenant for life, and his son tenant in tail in remainder, for they form a vendor with a present interest, and meet a purchaser with the same advantages as if a single person had the whole power over the estate (*i*).

48. So where the seller had an annuity of 500 *l.* a year for the joint lives of himself and his father, remainder to his father for life, with remainder to himself in fee; a sale by him of a perpetual rentcharge of 500 *l.* was supported, as he stood in the situation of a person, who, if the purchaser did not make the objection, might be considered as capable of selling a perpetual rentcharge of 500 *l.* a year in possession (*k*).

49. So again, the case of a mere expectant, entirely without present enjoyment, differs from the case of a man in possession, and who having the rents and profits, bargains with his tenant for an extension of his term, and equity has no business to meddle with such a case as this more than with any ordinary transaction. One having the absolute dominion is not bound to wait until the actual expiration of a term to make a new contract, nor is that the kind of reversionary interest which courts of equity have ever protected in this way (*l*).

50. In Baker *v.* Bent (*m*), where the bill was filed to

(*h*) Newton *v.* Hunt, 5 Sim. 511 (1833).

(*i*) Wood *v.* Abrey, 3 Madd. 417.

(*k*) Wardle *v.* Carter, 7 Sim. 490.

(*l*) *Per* Hart, L. C. in Scott *v.* Dunbar, 1 Moll. 459.

(*m*) 1 Russ. & Myl. 224; see Sherwood *v.* Robins, 1 Mood. & Malk. 194.

set aside for undervalue a sale of a reversion expectant upon the death of a tenant for life without issue male, and subject to charges in other events, the Master of the Rolls said, that the probability that a testator of sixty-three will marry and have issue, depending upon the habits and disposition of the party, and the accidents of life, is not the subject of estimate or calculation, and he put out of his consideration all evidence which affected to set a value on that contingency. But as, in the case before him, the purchaser at the beginning of the treaty was not aware that such a contingency existed, and he put a value upon the plaintiff's interest, as if the reversion were actually to take effect upon the death of the tenant for life; and when he afterwards discovered the contingency he proposed to deduct one half of the sum he had just offered, and that proposal was ultimately the basis of the agreement; the learned Judge referred it to the Master to inquire, what was the value of the reversion, supposing it had been to take effect certainly at the death of the tenant for life, and by declaring that one half of such value is to be deducted in respect of the contingency.

51. It must not, however, be understood, that because there is a contingency which is not strictly the subject of valuation, a purchaser can sustain a purchase at an undervalue.

52. It has been laid down as a general rule, that when one purchases an annuity or a reversionary interest, or in expectancy, if that is quarrelled with, on the ground that the grantee or vendee did not pay the full valuable consideration stipulated to be paid by the deed, and the fact be so, the Court will set that aside as an annuity, or sale of a reversionary or expectant interest, and cut it down to a loan (*n*).

(*n*) Doughty *v.* Eustace, 1 Molloy, 328.

53. The practice has been condemned of signing an attestation of payment of the purchase-money, where no money passes (*o*). But a mere mis-statement of the consideration would not in itself be sufficient to vitiate a contract. Conveyancers are in the habit of stating the consideration in deeds differently from what it really is. To give a familiar instance, suppose a purchaser of an estate, who has not the whole of the purchase-money ready to pay down, and the parties agree that a portion of it shall remain in his hands, and be secured by a mortgage on the estate; the deed may state the entire sum to be paid, and a receipt may be signed and endorsed on the conveyance for the whole sum, and by a subsequent deed of the next day, reciting that so much of the purchase-money remains unpaid, the estate may be mortgaged for the residue, yet such a mis-statement will not vitiate the contract, but in such a case the consideration is in accordance with the actual agreement of the parties; it is not the case of one consideration bargained for and another given, so that a mere false statement would not in itself necessarily vitiate a deed. But false statements must always have great weight, and there may be cases where a false statement of itself may destroy the whole transaction (*p*).

54. It must be remarked, that we have no certain rule by which the inadequacy of a consideration can be ascertained. Our law, indeed, hath in one instance (*q*) adopted the rule of the civil law; by which no consideration for an estate was deemed inadequate which exceeded half the real value of the estate; and Lord Nottingham wished the rule universally prevailed in England (*r*).

(*o*) See 1 Molloy, 339.

(*p*) Bowen *v.* Kirwan, Rep. t. Sugd. 66, 67.

(*q*) *Vide* Duke, 177; *et infra*, ch. 22; and see Baldwin *v.* Rochfort, 2 Ves. 517, cited.

(*r*) See Nott *v.* Hill, 2 Cha. Ca. 120; 1 Treat. Eq. 119; Gro-

55. If a bill for relief be delayed for a great length of time (*s*), or the vendor, with full notice of all the circumstances, and of his right to set aside the contract, confirm the purchase (*t*), equity will not relieve against the sale, although the aid of the Court could not originally have been withheld.

56. Where a sale is set aside on account of the inadequacy of the consideration, it is upon the principle of redemption, and the conveyance will stand as a security for the principal and interest, and even costs (*u*); but compound interest will not be allowed, however long the purchaser has been kept out of his money (*x*); in many cases, therefore, the seller is not merely relieved against the contract, but a considerable benefit is given to him at the expense of the purchaser. In a late case, where interest had been paid on the purchase-money, the payments were considered to be of principal and not interest, and the seller was charged with interest on all the sums received by him, whether received as interest or as principal (*y*).

tius *de jure Belli ac Pacis*, L. 2, c. 12, s. 12.

(*s*) Moth *v.* Atwood, 5 Ves. jun. 845; but see Roche *v.* O'Brien, 1 Ball & Beatty, 330.

(*t*) Cole *v.* Gibbons, 3 P. Wms. 290; Chesterfield *v.* Janssen, 1 Atk. 301; 2 Ves. 549. See Baugh *v.* Price, 1 Wils. 320; Morse *v.* Royal, 12 Ves. jun. 355; Roche *v.* O'Brien, 1 Ball & Beatty, 330; *supra*, ch. 4, s. 5.

(*u*) Twisleton *v.* Griffith, 1 P. Wms. 310; Gwynne *v.* Heaton, 1 Bro. C. C. 1; Peacock *v.* Evans, 16 Ves. jun. 512; Bowes *v.* Heaps, 3 Ves. & Bea. 117; but in Nicols *v.* Gould, 2 Ves. 423, Lord Hardwicke thought he could not set aside the purchase without making the purchaser pay costs; and see Baugh *v.* Price, 1 Wils. 320; Gowland *v.* De Faria, 17 Ves. jun. 20; Morony *v.* O'Dea, 1 Ball & Beatty, 109, and the Reporters' note; Hilliard *v.* Gambel, Tomly. 375, n.; Wood *v.* Abrey, 3 Madd. 417; Bautrie *v.* Watson, 3 Myl. & Kee. 339.

(*x*) Gowland *v.* De Faria, 17 Ves. jun. 20.

(*y*) Murray *v.* Palmer, 2 Scho. & Lef. 474; see ch. 4, s. 5.

57. So the purchaser will be allowed for lasting and valuable improvements, and will not, like a mortgagee, be charged with what without wilful default he might have made (*z*).

---

58. If it be agreed, that the price of an estate shall be fixed by a third person, and such person accordingly name the sum to be paid for the estate, equity will compel a performance *in specie*; but if the referee do not act fairly, or a valuation be not carefully made, execution of the contract will not be compelled; especially if there be any other ground upon which the Court can fasten, as a bar to its aid (*a*). But generally speaking, the question is not what is the real value, for the parties have made the arbitrator their judge in that point; they thought proper to confide in his judgment, and must abide by it unless they can make it plainly appear that he has been guilty of some gross fraud or partiality (*b*).

59. By the civil law, also, a price was considered sufficiently certain, if it was to be fixed by a person named, and such person accordingly fixed the sum: but it appears by the Institutes (*c*), "*Inter veteres satis abundeque hoc dubitatur, constaretne venditio, an non.*"

60. Such arbitrators may take the opinion of a third person as evidence, but they cannot merely delegate their authority (*d*).

(*z*) Murray *v.* Palmer, *ubi sup.*

(*a*) Emery *v.* Wase, 5 Ves. jun. 346; 8 Ves. jun. 505; Hall *v.* Warren, 9 Ves. jun. 605; see Gourlay *v.* Duke of Somerset, 19 Ves. jun. 429.

(*b*) Belchier *v.* Reynolds, 2 Lord Keny. 2d part, 91, *per* Sir John Strange.

(*c*) III. xxiv. 1. For the cases arising out of this rule, *vide* Vinnius, 674.

(*d*) Hopcraft *v.* Hickman, 2 Sim. & Stu. 130; Anderson *v.* Wallace, 3 Clar. & Fin. 26.

61. If an agreement be made to sell at a fair valuation, the Court will execute it although the value is not fixed. For as no particular means of ascertaining the value are pointed out, there is nothing to preclude the Court from adopting any means adapted to that purpose (*e*).

62. But where parties agree upon a specific mode of valuation, as by two persons, one chosen by each, unless the price is fixed in the way pointed out, the Court cannot enforce the performance of the agreement, for that would be not to execute their agreement, but to make a new one for them. Therefore, where the agreement was to sell at a valuation by arbitrators, to be appointed, or their umpire, and arbitrators were appointed, and differed as to value, and could not agree upon an umpire, the Court refused to interfere (*f*).

63. In this respect our law accords with the civil law (*g*). The same rule is adopted in the Code Napoleon (*h*). After stating that the price ought to be fixed by the parties, it adds, "Il peut cependant être laissé à l'arbitrage d'un tiers : si le tiers ne veut ou ne peut faire l'estimation, il n'y a point de vente."

64. If therefore the medium of arbitration or umpirage is resorted to for settling the terms of a contract, and fails, equity has no jurisdiction to determine that though there is no contract at law, there is a contract in equity :—If the instrument assume that the award shall bind the parties personally, the death of one of them before the award will of course be a coun-

(*e*) See 14 Ves. jun. 407.

(*f*) Milnes *v.* Gery, 14 Ves. jun. 400 ; Gregory *v.* Mighell, 18 Ves. jun. 328 ; Gourlay *v.* Duke of Somerset, 19 Ves. jun. 429. See Cooth *v.* Jackson, 6 Ves. jun. 34 ; Pritchard *v.* Ovey, 1 Jac. & Walk. 396.

(*g*) *Vide supra.*

(*h*) Code Civil, Liv. 3, Tit. 6, ch. 1, s. 1592.

termand of the submission at law, and equity cannot enforce the contract (*i*). So if the arbitrators are named, and one party refuses to execute the arbitration bond, as it is not certain that any award will ever be made, equity will not interfere; for the relief sought is a specific performance by the defendant conveying at such price as the arbitrators named shall hereafter fix, and no award may ever be made (*k*) (I).

65. This proves that neither of the parties to such an agreement can be compelled to nominate an arbitrator under the agreement. The very point was decided in the case of Agar *v.* Macklew (*l*). A covenant was contained in a lease that the lessees might purchase the reversion at a valuation by two persons, one to be named by the lessor, and the other by the lessees, who were to name an umpire. The lessor refused to name an arbitrator, and upon demurrer it was held that the lessees could not file a bill for a specific performance, or to compel the lessor to nominate an arbitrator.

66. But where the seller and purchaser mutually agree to refer the price to a third person named in the agreement, and the seller covenanted for herself and her heirs to surrender the estate to the purchaser, and the purchaser covenanted for himself, his executors, &c., to pay her the money, the agreement was enforced although the seller died before the award, because the Court said this was an agreement to be executed by the parties or their representatives, and not an authority to be determined by their deaths (*m*).

(*i*) Blundell *v.* Brettargh, 17 Ves. jun. 232; and see 6 Ves. jun. 34.

(*k*) Wilks *v.* Davis, 3 Mer. 507.

(*l*) V. C. 9 Nov. 1825, MS.; 2 Sim. & Stu. 154, S. C.

(*m*) Belchier *v.* Reynolds, 2 Lord Keny. 2d part, 87.

(I) For the new powers given to arbitrators appointed by rule of Court, or the like, see 3 & 4 Will. 4, c. 42, s. 39, 40, 41.

67. And a party may bind himself by acquiescing in an award not made in the manner required (*n*). And in a case where the contract of sale was for twenty-five years' purchase, on an annual value to be fixed by a certain day, by referees named, and the seller prevented the valuation from being made, it was held that he should not be allowed to avail himself of his own wrong. The Court would compel him to permit the valuation to be made according to the contract (*o*).

68. Where the award is actually made, and the contract to refer is made by agreement a rule of Court, yet an attachment will not be granted, but the parties will be left to their remedy by action under the contract (*p*).

(*n*) See 17 Ves. jun. 241.

(*o*) Morse *v.* Merest, 6 Madd. 26.

(*p*) *In re* Lee and Hemingway, 3 Nev. & Man. 860.

## SECTION II.

### OF THE FAILURE OF THE CONSIDERATION BEFORE THE CONVEYANCE.

1. *Purchaser to bear loss by fire, &c. after contract.*
7. *Not where purchase under decree not confirmed absolute.*
8, 15. *Purchaser entitled to benefit.*
10. *Wyvill* v. *Bishop of Exeter.*
11. *Observations upon that case.*
13. *Validity of title.*
14. *Deeds destroyed by fire.*
16. *Lives dropping in.*
18. *Insurance.*
19. *Sale for life annuity: purchaser entitled though life drops.*
27. *Where seller may retain estate and purchase-money.*
29. *Sale of life annuity enforced though life drops.*
31. *Seller to become tenant.*

1. A VENDEE, being equitable owner of the estate from the time of the contract for sale, must pay the con-

sideration for it, although the estate itself be destroyed between the agreement and the conveyance; and on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim (*a*).

2. Nevertheless this doctrine, however it may seem to flow from the rules mentioned in the preceding chapter, has never been decided till lately.

3. For in Stent *v.* Baily (*b*), the Master of the Rolls said, "If I should buy a house, and before such time as by the articles I am to pay for the same the house be burnt down by casualty of fire, I shall not in equity be bound for the house (*c*)."

4. So upon a sale of a leasehold for lives (*d*), previously to the conveyance, one of the lives dropped; and although Lord Keeper Wright decreed a specific performance, yet the report states, that he seemed to think, that if *all* the lives had been dropped before the conveyance, it might have been another consideration, for that the money was to be paid for the conveyance, and no estate being left, there could be no conveyance.

5. The case of Cass *v.* Rudele, as it is reported in Vernon (*e*), is an authority against the *dictum* of the Master of the Rolls, in Stent *v.* Baily; but it appears (*f*) that the case is mis-stated in Vernon, and that the decree was founded on a good title having been conveyed.

6. In a late case (*g*), however, where *A* had contracted for the purchase of some houses which were

(*a*) See 2 Pow. on Contracts, 61.

(*b*) 2 P. Wms. 220; see Bacon *v.* Simpson, 3 Mees. & Wels. 78.

(*c*) As to accidents before the contract, unknown to the parties, see p. 388.

(*d*) White *v.* Nutt, 1 P. Wms. 62.

(*e*) 2 Vern. 280.

(*f*) See 1 Bro. C. C. 157, n.; and the note to Raith. edit. of Vernon.

(*g*) Paine *v.* Meller, 6 Ves. jun. 349; and see Poole *v.* Shergold, 2 Bro. C. C. 118; Revel *v.* Hussey, 2 Ball & Beatt. 280; Harford *v.* Purrier, 1 Madd. 532.

burned down before the conveyance, the loss was holden to fall upon him, although the houses were insured at the time of the agreement for sale, and the vendor permitted the insurance to expire without giving notice to the vendee; Lord Eldon being of opinion, that no solid objection could be founded on the mere effect of the accident; because, as the party by the contract became in equity the owner of the premises, they were his to all intents and purposes (I).

7. This decision proceeded on the only principle upon which it can be supported—that the purchaser was in equity owner of the estate. And therefore, in a case where a similar accident happened to an estate sold before a Master, and the report had only been confirmed *nisi*, the loss was holden to fall on the vendor (*h*); but in a later case (*i*), of a purchase before the Master of a life interest, where the report had been confirmed, and the question was from what time the purchaser was entitled to the income, Lord Eldon asked if anything could turn upon the report not being confirmed. There was a case, he said, about a house being burned down

(*h*) *Ex parte* Minor, 11 Ves. jun. 559. *Vide* p. 104. See Zagury *v.* Furnell, 2 Camp. Ca. 240.

(*i*) Anson *v.* Towgood, 1 Jac. & Walk. 637.

(I) In the 2d vol. of Coll. of Decis. p. 56, are the two following cases:—The peril of a house sold, and thereafter burnt, was found to be the buyer's, though the disposition bore an obligement to put the buyer in possession, because the buyer did voluntarily take possession and rebuild the house, and likewise was enfeoffed before the burning. Hunter *v.* Wilsons.—A house bought being burnt, the Lords found, that the property being transferred to the buyer, by his being enfeoffed, and the keys being offered to him, the accidental loss must follow the buyer, although there was a part of the price unpaid, there being a difference about it, which was referred to some friends to be determined, and which they had not done when the burning happened. Atchison *v.* Dickson.

before the confirmation of the report. But if the tenant for life had died the same night, must not the purchase-money have been paid? This is a distinction between a destruction of the property by accident before the confirmation of the report and the dropping of a life—an uncertain interest—for which the property was held.

8. The consequence of the rule is, that if after the contract the estate be improved in the interval between the contract and the conveyance, or if the value be lessened by the failure of tenants or otherwise, and no fault on either side, the vendee has the benefit or sustains the loss (*k*).

9. If a purchaser is guilty of delay, taking frivolous objections to the title, he will not be allowed any benefit accruing in the interval which can be separated from the estate itself.

10. This can hardly be laid down as a general rule, but it seems to be the point decided in Wyvill *v.* Bishop of Exeter (*l*), where a purchaser of an advowson, who had objected to the title for several years without filing a bill, but who was a defendant to a suit by a creditor of the seller, who had died after the contract, was held not to be entitled to a vacancy occasioned by resignation, although he was left at liberty to complete his purchase when the living was full. Macdonald, C. B. said, the result of the cases on this point was, that where a purchaser has actually accepted a title after contract for sale, if advantage arise on either side before the execution of the conveyance, as by the lapse of a life in the meantime, a court of equity will enforce a specific performance without regarding which party may be benefited or prejudiced by the accident of unforeseen

(*k*) See 1 Madd. 539, *post*, ch. 16.

(*l*) 1 Price, 294.

events, but where the title has not been accepted, the Court refuses to decree performance. The cases of Pope *v.* Root and Jackson *v.* Lever were material, but in those the titles had been accepted. The distinction between those cases is, that part of the consideration had been paid or tendered in one but not in the other. In Paine *v.* Meller, the decision turned wholly on the question, whether the title had been finally accepted and the previous objection abandoned before the day on which the premises contracted for had been destroyed by fire. If the title had not been acquiesced in, the Court would not have enforced a specific performance, but if it had, they would have decreed the execution of the agreement, notwithstanding certain objections had originally been made to the title.

11. The case may have been properly decided, and certainly the Court would not permit a purchaser to present to a vacancy which could not afterwards be recalled unless he accepted the title, where he had not already done so. But the cases do not authorise the judgment. In Pope *v.* Root, a specific performance was refused, and in Jackson *v.* Lever, the title accepted was to an estate belonging to the *purchaser*, which was to be an additional security to the seller for the annuity. Neither case, however, was decided upon the acceptance of the title, and in Mortimer *v.* Capper there was of course no acceptance of the title. In Paine *v.* Meller, the decree could not have been made unless the title had been accepted *before* the fire, because the seller had not a marketable title, and consequently the contract could not have been enforced against the purchaser if even there had been no fire, unless he had accepted the title. Lord Rosslyn did not consider it necessary that the title should have been accepted, and he accordingly made a common reference to the Master, to see whether a good

title could be made. Lord Eldon reversed that decree, and made a special reference as to the fact of the acceptance of the title, not because he thought the contract could not be enforced in such a case unless the title had been accepted *before* the accident, but because in that case the purchaser would not have been bound to take the title unless he had thought proper to do so. Lord Eldon placed the doctrine upon the operation of the contract. As to the mere effect of the accident itself, he said, no solid objection could be founded upon that simply, for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes.

12. Lord Eldon's decision in Paine *v.* Meller, exactly accords with the doctrine of the civil law. Indeed this very case is put in the Institutes (*m*). "*Cum autem emptio et venditio contracta sit, periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque si—aut ædes totæ, vel aliqua ex parte, incendio consumptæ fuerint—emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere.*"

13. It is hardly necessary to remark, that although the Court will enforce a specific performance, notwithstanding that the estate is destroyed, yet this will not be done unless the title be good, or the purchaser has, previously to the accident, waived any objections to it.

14. And if the muniments of title be destroyed by fire after the contract, but before the conveyance, so that there is not sufficient evidence of title left, the purchaser cannot be compelled to complete the purchase, although previously to the fire the abstract had

(*m*) III. xxiv. 3. Read Puff. *de Jure Naturæ et Gentium*, l. 5, c. 5, s. 3.

been examined by his solicitor with the deeds (*n*), and in other respects the seller has a good title.

15. The case of Paine *v.* Meller may be considered as having also settled, that a purchaser would be entitled to any benefit accruing to the estate after the agreement, and before the conveyance; for Lord Eldon said, "If a man had signed a contract for a house upon that land which is now appropriated to the London Docks, and that house was burnt, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it."

16. This also appears to have been admitted in a case (*o*) where a man contracted for the purchase of a reversion, and afterwards the lives dropped before the contract was carried into execution; for, although the Court did not decree a specific performance, they proceeded entirely on the laches and trifling conduct of the purchaser, and never even hinted that the contract should not be performed on account of the lives having dropped; and accordingly it was observed by Sir Thomas Plumer, when V. C., that if a reversionary interest is agreed to be purchased, and lives drop before the conveyance, the vendee has the benefit (*p*).

17. Indeed this point flows from the *decision* in Paine *v.* Meller; and it was the rule of the civil law, that the purchaser should benefit by the accretion to the estate before the conveyance: *nam et commodum ejus esse debet cujus periculum est* (*q*).

18. These cases suggest the observation that, in agreements for the purchase of houses, some provision should

(*n*) Bryant *v.* Busk, 4 Russ. 1; the purchaser had not accepted the title.

(*o*) Spurrier *v.* Hancock, 4 Ves. jun. 667; and see 1 P. Wms. 62.

(*p*) See 1 Madd. 539.

(*q*) Inst. *ubi sup.*

be made for their insurance until the completion of the contract.

---

19. It equally follows, from the general rule of equity, by which that which is agreed to be done is considered as actually performed, that if a person agree to give a contingent consideration for an estate, as an annuity for the life of the vendor, and the vendor die before the conveyance is executed, by which event the annuity ceases, yet the purchaser will be entitled to a specific performance of his contract. This, we observe, is a much stronger case than that before discussed. There a loss was actually sustained, and the only question was, upon whom it should fall. But in this case, if performance of the agreement were not compelled, the parties would stand in precisely the same situation as before the contract; whereas, by performing the agreement, the estate is given to the purchaser, without his paying any consideration for it. A steady adherence to principle compels the Court to overlook the hardship of this particular case, and the doctrine rests upon high authority.

20. Thus in the case of Mortimer *v.* Capper (*r*), *A* contracted to sell an estate to *B* for 200*l.*, and 50*l.* a year annuity; and two days after the contract was reduced into writing, *A* was found drowned: the Lord Chancellor directed an inquiry as to the value of an annuity for the life of *A*, in order to introduce the question, whether an estate being disposed of for an annuity, which is a contingency, the contract shall fall to the ground, if no payment of the annuity shall be made. He said, that he thought, if the price were fair, the

(*r*) 1 Bro. C. C. 156. See Wyvill *v.* Bishop of Exeter, 1 Price, 292.

contract ought not to be cut down, merely because the annuity, which was a contingent payment, never became payable.

The parties in the above cause were so well satisfied with the opinion of the Court, that they never, it is said, brought it back for further directions (*s*).

21. So in a later case (*t*), where *A* sold an estate by auction, in consideration of a life annuity (I), the first payment to be made on the 25th of December 1787; but in case he should die before the 29th of September 1787, up to which time he was to receive the rents, the contract should be void. *A* died on the 1st of February 1788, after a sudden and short illness of only two days; and owing to some delays, the conveyances were not executed. The quarter's payment, due at Christmas, was tendered to the vendor's agent by the purchaser, a few days after it became due; but the agent declined receiving it, saying that the conveyance would be soon completed, and that it was not necessary for the purchaser to make such payment in the meantime. On the first hearing, Lord Thurlow said, he did not see that if an annuity was contracted for why the consideration should not be paid. It was, he said, objected, that the contract could not be carried into execution *modo et forma,* and that had great weight where there had been no payment. He afterwards made a decree for a specific performance, on payment of the arrears of the annuity, the consideration for the purchase of the estate.

22. The case of Paine *v.* Meller bears on this point also. Lord Eldon, in delivering judgment, said, that as

(*s*) See 3 Bro. C. C. 609, *sed qu.* (*t*) Jackson *v.* Lever, 3 Bro. C. C. 605.

(I) See Appendix, No. 14, for a statement of the new Annuity Act.

to the annuity cases, and all others, the true answer had been given; that the party has the thing he bought, *though no payment may have been made*; for he bought subject to contingency; and in the later case of Coles *v.* Trecothick, he expressed the same opinion (*u*).

23. But if in a case of this nature, a payment of the annuity become due before the death of the vendor, and the purchaser *neglect to make or tender it*, he cannot insist upon a specific performance.

24. This was decided by the case of Pope *v.* Root (*x*). *A* contracted with *B* for the sale of an estate to him, in consideration of a life annuity, and the completion of the agreement was delayed by the illness of a mortgagee, who was to have been paid off. Two days after the time mentioned for completing the purchase, *A* met with an accident, and died within a few days. By the terms of the contract, the first payment of the annuity became due previously to the death of *A*, but it was not paid or tendered. And Lord Chancellor Bathurst dismissed the bill for a specific performance, and the decree was affirmed in the House of Lords (*y*) (I).

25. The reader will observe, that the decisions in the cases of Mortimer *v.* Capper and Jackson *v.* Lever, do not infringe upon that of the House of Lords, in the prior case of Pope *v.* Root, but reduce the rules on this subject to an equitable and uniform standard; for the only case in which a purchaser cannot require the assistance of equity, is where he has by laches forfeited his right to

(*u*) See 9 Ves. jun. 246.

(*x*) 7 Bro. P. C. 184.

(*y*) See Lord Bathurst's decision in Baldwin *v.* Boulter, 1 Bro. C. C. 156, cited.

(I) It seems to have been thought, that the inadequacy of the consideration influenced this decision; see 2 Pow. on Contracts, 76; but it does not appear that any inadequacy was actually proved.

its aid, namely, where a payment of the annuity became due, and he neglected to pay or tender it.

26. To obviate all doubt, it seems advisable in agreements for purchase, where the consideration is an annuity for the life of the vendor, to expressly declare, that the death of the vendor, previously to the completion of the contract, shall not put an end to it, although a payment of the annuity shall not have become due, or having become due, shall not have been made or tendered; but that, on the contrary, the purchaser shall be entitled to a conveyance, on payment of a proportionate part of the annuity up to the death of the vendor.

---

27. In the cases just dismissed, the *purchaser*, by the death of the vendor, obtained the estate without paying any, or only a nominal consideration for it. Perhaps a case may arise where the vendor having received the purchase-money, may, by the death of the purchaser, be entitled to retain the estate also, although he may not be his heir. This case was put in the argument of Burgess *v.* Wheate (*z*): a purchase, and the money paid by the purchaser, who dies without heir, before any conveyance. It was said, if the lord could not claim the estate, and pray a conveyance, the vendor would hold the estate he has been paid for, and keep the money too. Sir Thomas Clarke, in delivering his opinion, said, that he thought the lord could not pray the conveyance; to say he could was begging the question. And as to the vendor's keeping both the estate and the money, it was analogous to what equity does in another case; as where a conveyance is made prematurely, before money paid, the money is considered

(*z*) 1 Blackst. 123; see 4 & 5 Will. 4, c. 23.

as a lien on that estate in the hands of the vendee. So where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor, for the personal representatives of the purchaser; which would leave things in *statu quo*.

28. It may be doubted, however, whether this case, if it should ever arise, would be decided according to Sir Thomas Clarke's opinion. Where a lien is raised for purchase-money under the usual equity (*a*), in favour of a vendor, it is for a debt really due to him, and equity merely provides a security for it. But in the case under consideration, equity must not simply give a security for an existing debt; it must first *raise* a debt against the express agreement of the parties. The purchase-money was a debt due to the vendor, which upon principle it would be impossible to make him repay. What power has a court of equity to *rescind* a legal contract like this? The question might perhaps arise if the vendor was *seeking* relief in equity, but in this case he must be a defendant. It it should be admitted that the money cannot be recovered, then of course he must retain the estate also, until some person appear who is by law entitled to require a conveyance of it.

29. It has been decided that a specific performance will be decreed of a contract for sale of a life annuity, although the annuitant be dead before the bill be filed, provided the contract was a continuing one at his death (*b*). This is the converse of the point decided in Mortimer *v.* Capper, and that line of cases. The Vice-Chancellor (Sir John Leach) observed, that it may now be considered as the settled law of the court, by the cases of Mortimer *v.* Capper, and Jackson *v.* Lever, and the reported *dicta* of Lord Eldon, especially in the

(*a*) *Vide infra*, ch. 18.

(*b*) Kennedy *v.* Wenham, 6 Madd. 355; see Wilkinson *v.* Torkington, 2 You. & Coll. 726.

case of Coles *v.* Trecothick, that if the price of property be an annuity for the life of the vendor, his death before the conveyance will form no objection to the specific performance of the contract. The vendor agrees to sell for a contingent price, and those who represent him cannot complain that the contingency has turned out unfavourably. The same principle necessarily applies to a case where the life annuity is not the price, but is the subject of the sale. If the annuitant happens to die before the annuity is legally transferred to the purchaser, the death of the annuitant can form no objection to the specific performance of the contract. The purchaser agrees to buy an interest of uncertain duration, and he cannot complain that the contingency is unfavourable to him.

30. In the above case, the purchaser was entitled to arrears of the annuity, but the annuity was charged on the purchaser's own estate. It was argued that by the death of the annuitant, a legal transfer of the annuity was no longer necessary to the purchaser, and the only act to be done was the payment of a sum of money by him to the seller, and that the seller ought therefore to have proceeded at law and not in equity. The Vice-Chancellor said, that a court of equity entertains a suit for specific performance by a purchaser, in order to give him the very subject of his contract; and although the demand of a vendor be merely for a sum of money, it will entertain a similar suit for him, upon the principle that the remedies ought to be mutual. If the death of a life-annuitant were to happen at such a time that a purchaser in effect took no benefit under his contract, which might well happen where his title was to commence at a future time, there it might be made a question whether, as at the time of the bill filed a purchaser could file no bill in equity, the principle of mutual

remedy could enable the vendor to file such a bill. But that was not this case there; the purchaser had an equitable title to the arrears of the annuity between the time of his purchase and the death of the annuitant, which would in principle support a bill on his part for specific performance, although the facts of the case would not make such a bill advantageous to him. He considered this case, therefore, strictly a case of mutual remedy, so as to entitle the vendor to file a bill for specific performance; and it appeared to him to make no difference in principle that the annuity being charged upon the estate of the purchaser himself, he could practically satisfy his demand for arrears, by retainer, without the necessity of a legal grant.

31. Here we may refer to a case, where by the agreement the seller was to become tenant of the estate from year to year, and he became incapable by reason of his bankruptcy of performing that stipulation, and yet a specific performance was enforced against the purchaser because the tenancy was from year to year, which made it of no consideration (*c*). But the same rule ought to prevail whatever be the length of the term agreed upon. It is a consideration moving from the seller to the purchaser, to the benefit of which the latter is entitled.

(*c*) Lord *v.* Stephens, 1 You. & Coll. 222.

# CHAPTER VII.

## OF THE PARTIAL EXECUTION OF A CONTRACT, WHERE A VENDOR HAS NOT THE INTEREST WHICH HE PRETENDED TO SELL; AND OF DEFECTS IN THE QUANTITY AND QUALITY OF THE ESTATE.

### SECTION I.

### WHERE THE VENDOR HAS NOT THE INTEREST WHICH HE SOLD.


1. *Sale of lease for more years than seller has.*
3. *Power of redemption not stated.*
5. *Small deficiency of term: sale good in equity.*
10. *Underlease sold as original lease.*
11. *Whether purchaser of old lease bound to take a new one.*
12. *Or a seller to underlease who sold the whole lease.*
14. *Rent and interest on sale of leaseholds.*
17. *Purchaser of freehold not bound to take leasehold.*
19. *Nor copyhold.*
22. *Acquiescence by purchaser.*
26. *Purchaser not bound to take less than the entirety.*
27. *Of two-sevenths not bound to take one-seventh.*
28. *But may elect to do so.*
29. *Unless condition to the contrary.*
31. *Reversionary interests not forced upon purchaser of possession.*
32. *Purchaser's right against the seller.*
34. *Dale* v. *Lister.*
35. *Milligan* v. *Cooke.*
36. *Indemnity not compelled.*
38. *Contract upon mistake of interests.*
39. *Lawrenson* v. *Butler.*
41. *Sale by tenant for life, &c. not partially enforced against purchaser.*
43. *Lord Eldon's opinion of purchaser's right against seller.*
44. *Thomas* v. *Dering, right denied.*
45. *Observations on it.*
46. *Effect of expenditure by purchaser.*
47. *Misrepresentation by purchaser.*
48. *Void lease.*
49. *Rights incapable of compensation.*
50. *Acquiescence by purchaser.*
51. *Right of common not disclosed.*

52. *Limited right and unlimited sold.*
53. *Sheep-walk represented as freehold.*
54. *Right to dig mines.*
55. *Charge of repairs of chancel.*
56. *Fee-farm rent: at law.*
57. *Quit-rent: in equity.*
58. *Rentcharge: in equity.*
63. *Quit-rents less than stated.*

1. WHERE a person sells an interest, and it appears that the interest which he pretended to sell was not the true one; as, for example, it was for a less number of years than he had contracted to sell, the purchaser may consider the contract at an end, and bring an action for money had and received, to recover any sum of money which he may have paid in part performance of the agreement for the sale: and the vendor offering to make an allowance *pro tanto*, will make no difference; it is sufficient for the plaintiff to say, it is not the interest which I agreed to purchase (*a*).

2. But in a late case (*b*) at *nisi prius*, where the agreement was to sell "the unexpired term of eight years' lease and good will," &c. and it appeared that, at the date of the agreement, the unexpired term in the lease was only seven years and seven months, Lord Ellenborough said, that the parties could not be supposed to have meant that there was the exact term of eight years unexpired, neither more nor less by a single day. The agreement must, therefore, receive a reasonable construction, and it seemed not unreasonable that the period mentioned in the agreement should be calculated from the last preceding day when the rent was payable, and including, therefore, the current half year.

(*a*) Farrer *v.* Nightingale, 2 Esp. Ca. 639; and see Hearn *v.* Tomlin, Peake's Ca. 192; Thomson *v.* Miles, 1 Esp. Ca. 184; Mattock *v.* Hunt, B. R. 15 Feb. 1806; Hibbert *v.* Shee, 1 Camp. Ca. 113. See also Duffell *v.* Wilson, *ib.* 401; and see *infra*.

(*b*) Belworth *v.* Hassell, 4 Camp. Ca. 140.

Any fraud or material misdescription, though unintentional, would vacate the agreement, but the defendant might here have had substantially what he agreed to purchase.

3. Where a particular described the subject of sale to be an annuity of so much, payable out of the tolls of Waterloo Bridge, the Court considered that the purchaser would make some inquiry as to the annuity; but as the Bridge Act did not speak of any power to redeem the annuities to be granted, *and the annuity was made subject to redemption*, it was held that the contract was not binding on the purchaser; and the Court was of opinion, that sellers should be strictly bound to disclose the real nature of the subject of the contract (*c*).

4. But, notwithstanding that the vendor has a different interest to what he pretended to sell, equity will, in some cases, compel the purchaser to take it.

5. Thus, although the vendor may not be entitled to the estate for the number of years which he contracted to sell, yet, if the deficiency were not great, equity would certainly decree a performance of the contract at a proportionable price (*d*).

6. Lord Thurlow used to refer this doctrine of specific performance to this, that it is scarcely possible that there may not be some small mistake or inaccuracy, as that a leasehold interest represented to be for 21 years, may be for 20 years and nine months; some of those little circumstances that would defeat an action at law, and yet lie so clearly in compensation that they ought not to prevent the execution in a court of equity (*e*).

7. But if the number of years be considerably less

(*c*) Coverley *v.* Burrell, M. T. 1821. B. R. MS.

(*d*) See Guest *v.* Homfray, 5 Ves. jun. 818; and see Hanger *v.* Eyles, 21 Vin. Abr. (A.), pl. 1; 2 Eq. Ca. Abr. 689; see also 10 Ves. jun. 306; 13 Ves. jun. 77.

(*e*) Per Lord Eldon, 10 Ves. jun. 305, 306.

than the vendor pretended to sell, equity, so far from interfering in his favour, will assist the purchaser in recovering any deposit which he may have paid.

8. Thus, in Long *v.* Fletcher (*f*), *A* pretending he had a term of sixteen years to come, in a house, agreed to sell it to *B*, and *B* paid 100 *l.*, part of the consideration money, down. *B* entered, but finding that *A* had only a term of six years in the house, brought his bill to have an account, his money refunded, and the bargain set aside; and accordingly *B* was decreed to account for the profits, and the consideration money to be refunded, and *B*, upon his own account, to have tenant allowances made him.

9. So the purchaser will not be bound, as we have seen, where the probable duration of the interest is *misrepresented*, although it be in its nature an uncertain one; as where the property being held for life, the life was represented as a very healthy one, although the sellers had recently insured it at a premium exceeding the highest rate for a healthy life of that age: the seller's bill was dismissed with costs (*g*).

10. So, if a purchaser contract for what is stated to be an original lease, and it turn out to be an underlease for the whole term, wanting a few days, it should seem that equity would not compel the purchaser to perform the contract. It is impossible, from the nature of the thing, to make any compensation for the reversion outstanding, and yet it may become very valuable; and it is of great importance to a purchaser of a lease not to have any third person stand between him and the owner of the inheritance.

11. So, it is said, that a purchaser of an existing lease is not bound to take a new lease instead of the old one,

(*f*) 2 Eq. Ca. Abr. 5. pl. 4.

(*g*) Brealey *v.* Collins, You. 317; Turner *v.* Harvey, Jac. 169, *supra*, p. 441.

because the purchaser would become an original lessee instead of an assignee, and might therefore be subject to burdens to which he would not have been liable in the latter character (*g*).

12. Generally speaking, where the seller has not the whole interest which he sold, the *purchaser* may elect to take the interest which the seller has with a compensation; yet it seems that equity will not decree an under-lease on an agreement to assign, though it appear that the assignment cannot be made without a forfeiture; for the seller, in agreeing to assign, might intend to discharge himself from covenants to which he would continue liable by the under-lease (*h*). This is, however, a defence which a vendor can seldom set up against a purchaser's claim, where the purchaser chooses to accept an under-lease; for an assignee of a lease almost invariably covenants to indemnify his vendor from the rent and covenants in the lease, and from these covenants he cannot of course discharge himself by an assignment, any more than by an under-lease.

13. It frequently happens that a contract for a leasehold estate is not carried into execution at the time appointed, and the vendor continues in possession. The estate, of course, daily decreases in value, and a question constantly arises, whether the purchaser shall be compelled to pay the full price originally agreed to be given for the estate, or what arrangement shall be made between the parties.

14. In a case where two years of the lease, which was only for seven, had elapsed, the Court said they

(*g*) Mason v. Corder, 2 Marsh. 332.

(*h*) Anon. E. T. 1790; Fonbl. n. (*r*), to 1 Trea. Eq. 211, 2d edit. See Mason v. Corder, 2 Marsh. 332.

could only decree specific performance of the same contract, not of a different one. They could not make a new contract for a different sum, by apportioning the price according to the time which had yet to run (*i*). It does not appear who was in possession. But in a modern case (*k*), where this point arose, the Master of the Rolls said, the reasonable course which he should adopt was, that for the time elapsed before the execution of the agreement, in consequence of the pendency of the suit, interest should be paid by the purchaser, and a rent should be set upon the premises in respect of the possession of the vendor.

This rule at once provides for the interest of both parties, and accords with the maxim of equity, by which that which is agreed to be done, is considered as actually performed. The purchase-money, from the time of the contract, belongs to the vendor, who is entitled to interest on it while it is retained by the purchaser. The estate from the same time belongs to the purchaser, who is entitled to a rent for it while it is occupied by the vendor.

15. In the cases hitherto considered, the tenure was still that sold, viz. leasehold, although for a less term, or held differently from the interest pretended to be sold.

16. But a purchaser having bought an estate of one tenure, is not bound to accept it if it prove to be of another.

17. Therefore a purchaser will not be compelled to take a leasehold estate, for however long a term it may be

(*i*) King *v.* Wightman, 1 Anstr. 80; there had been a decree by consent which the Court could not rehear; Fenton *v.* Browne, 14 Ves. jun. 144; see the prayer of the cross bill.

(*k*) Dyer *v.* Hargrave, 10 Ves. jun. 505.

holden, where he has contracted for a freehold (I). Lord Alvanley expressed a clear opinion upon this point (*l*), and it was afterwards expressly determined by Sir Wm. Grant in a case (*m*) where the vendor was entitled to a term of 4,000 years vested in a trustee for him, and also to a mortgage of the reversion in fee expectant upon the term which was vested in himself and forfeited, but not foreclosed. The persons claiming under the mortgagor of the reversion refused to release, and thereupon the bill was dismissed.

18. So where the seller agreed to sell the fee simple of an estate, with some rights of water, and he had only a lease for 99 years of some of the rights, a specific performance against the purchaser was refused (*n*).

19. Neither is a purchaser compellable to accept a copyhold estate in lieu of a freehold (*o*) (II).

20. But if an estate is sold as copyhold, and represented as equal in value to freehold, it seems that the vendor will be compelled to perform the contract,

(*l*) See 2 Bro. C. C. 497; 1 Ves. jun. 226.

(*m*) Drewe *v.* Corp, 9 Ves. jun. 368. Lib. Reg. 1803, fol. 290. The Registrar's book appears to have been again referred to for this case, 1 Sim. & Stu. 201, n.; and see 13 Ves. jun. 78.

(*n*) Wright *v.* Howard, 1 Sim. & Stu. 190.

(*o*) See Twining *v.* Morrice, 2 Bro. C. C. 326; and Sir Harry Hick *v.* Philips, Prec. Cha. 575.

---

(I) As to making a title by feoffment and assigning the term to a trustee, see Saunders *v.* Lord Annesley, 2 Scho. & Lef. 73; Doe *v.* Lynes, 3 Barn. & Cress. 388; 5 Dowl. & Ryl. 160.

(II) In the case of Sir Harry Hick *v.* Philips, on account of the unreasonable price at which the estate was sold, a specific performance was refused, although the vendor offered to procure an enfranchisement of the copyholds. See 10 Mod. 504. But this case cannot be considered as an authority, except on the ground of the price being unreasonable, for equity will in ordinary cases grant the vendor time to procure the fee. See *supra*, ch. 5.

although the estate prove to be actually freehold (*p*). If, however, the contract for the sale of a supposed copyhold, stipulate that the sale shall be void if any part is freehold, the subject must be proved as described; and the circumstance of the seller himself, after the first contract, selling the estate to another as copyhold, is not conclusive evidence against him (*q*).

21. There is a singular case in the books (*r*), where, amongst other townlands, the lands of Ballyknockan, containing 700 acres, were put up to sale as land subject to a fee-farm grant of 100*l.* per annum, whereas the seller's title was to a fee-farm rent of that amount issuing out of those lands, and it was contended that the sale being of land subject to a fee-farm grant, it was to be considered as a rentcharge, chargeable on the other lands sold, and that the purchaser ought to be compelled to accept compensation. The argument proves how impossible it was to maintain the claim. For the purchaser bought the lands subject to a rentcharge, and the seller had not got them, but had a rentcharge issuing out of them. There was therefore no charge to throw upon the other lands; but the question simply was, whether a man having purchased a fee simple estate, subject to a perpetual rentcharge, could be compelled to take the perpetual rentcharge instead of the estate itself; and of course it was held that he could not. The lands were adjoining to other property belonging to the purchaser, and he desired to possess them, but without that circumstance he had a clear right to rescind the sale.

22. If a vendee proceed in the treaty for purchase

(*p*) Twining *v.* Morrice, 2 Bro. C. C. 326; and see Browne *v.* Fenton, *sup.* p. 4.

(*q*) Daniels *v.* Davison, 16 Ves. jun. 249.

(*r*) Prendergast *v.* Eyre, 2 Hogan, 81.

after he is acquainted with the nature of the tenure, and do not object to it, he will be bound to complete his contract, and cannot claim any compensation on account of the difference in value.

23. Thus, where an estate was sold as freehold, with a leasehold adjoining (*s*), and it turned out on examination that sixty-two acres were leasehold, and only eight freehold; yet, as the purchaser proceeded in the treaty after he was in possession of this fact, and did not object to the nature of the property, he was held to have waived the objection.

24. And if a purchaser do object to the tenure, yet, if he proceed in the treaty, it seems that he will be compelled to take the estate, on being allowed a compensation (*t*).

25. In the case of Wirdman *v.* Kent (*u*), upon a bill filed by vendors for a specific performance, it appeared that part of the lands sold to the purchaser had been previously sold to one Pavey; a specific performance was however decreed, and, as to the lands terriered to the defendant, but which had been sold to Pavey, it was ordered that the plaintiffs should procure Pavey to release them to the defendant, *or convey a like quantity of land of equal value to the defendant.*

The particular circumstances of this case do not appear in the report; but it must be presumed, that the land sold to Pavey was not the object of the purchaser; and that other land in the neighbourhood, of equal value, would suit him as well. Indeed, in one report of this case (*x*), it is said, that the grievances complained of were disregarded as frivolous.

(*s*) Fordyce *v.* Ford, 4 Bro. C. C. 494; and see 6 Ves. jun. 670; 10 Ves. jun. 508; Burnell *v.* Brown, 1 Jac. & Walk. 168.

(*t*) See Calcraft *v.* Roebuck, 1 Ves. jun. 221.

(*u*) 1 Bro. C. C. 140.

(*x*) 2 Dick. 594.

26. Although there be no misrepresentation as to the tenure of the estate, yet if the seller has not the entirety of the estate sold, he cannot compel the purchaser to accept at a proportionate price the shares which he actually has in the estate. And the rule is the same if the entirety is sold by several who are entitled to it amongst them in aliquot shares. Therefore if a man contract with tenants in common for the purchase of their estate, and one of them die, the survivors cannot compel the purchaser to take their shares, unless he can obtain the share of the deceased (*y*).

27. And in a case where under a decree a person purchased two-sevenths of an estate in one lot, and a good title was made to one-seventh only, the purchaser was allowed to rescind the contract as to the whole of the lot (*z*).

28. But the converse of this proposition does not hold good, for the purchaser may compel the survivors in the case before put to convey their shares to him, although the contract cannot be executed against the heir of the deceased (*a*), for a purchaser generally, although not universally, may take what he can get, with compensation for what he cannot have (*b*).

29. But where an agreement stipulated that errors in the description should not vacate the agreement, but a reasonable abatement or equivalent should be made or given, as the case might require; with a further stipulation that if the purchaser's counsel should be of opinion that a marketable title could not be made, the agreement should be void and delivered up to be can-

(*y*) Attorney-general *v.* Gower, 1 Ves. 218.

(*z*) Roffey *v.* Shallcross, 4 Madd. 227; Dalby *v.* Pullen, 3 Sim. 29; Casamajor *v.* Strode, 2 Myl. & Kee. 726.

(*a*) Attorney-general *v.* Gower, 1 Ves. 218.

(*b*) *Per* Lord Eldon, 1 Ves. & Bea. 353.

celled; and it appeared by such counsel's opinion that a title could be made to only two-thirds of the property, notwithstanding which the purchaser filed a bill for a specific performance with an abatement, his bill was dismissed with costs. The Court thought that as the above-mentioned stipulation was the contract of both parties, it could not make a new contract for them. They had stipulated, that in a given event, which had happened, the agreement should be void (*c*). The condition however hardly seemed to apply to the want of title to one-third of the property.

30. Cases, however, of much greater difficulty occur where the question turns not upon the length of the term or the nature of the tenure, or the want of title to the entirety, but where the seller, although he is interested as he represented in the entirety, yet has but partial and different interests from those which he represented. In general, a purchaser cannot be compelled to accept such interests.

31. Thus, if the estate be represented as a fee simple in possession, and it turn out to be only a remainder expectant upon a life interest, however advanced in life the tenant for life may be, the contract cannot be enforced against the purchaser (*d*). And, indeed, the same observation would apply to any existing lease where the purchaser has contracted for a vacant possession.

32. But we may observe, that in every case where an agreement would be in part executed in favour of a vendor, there is much greater reason to afford the aid of the Court at the suit of the purchaser, if he be desirous of taking the part or interest to which a title can be made. And a purchaser may, in some cases, insist

(*c*) Williams *v.* Edwards, 2 Sim. 78.

(*d*) Collier *v.* Jenkins, You. 295.

upon having the part of or interest in an estate to which a title is produced, although the vendor could not compel him to purchase it: it is true, generally, *but not universally*, that a purchaser may take what he can get, with compensation for what he cannot have (*e*).

33. If, Lord Eldon observed, a man having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of the contract. For the person contracting under these circumstances is bound by the assertion in his contract: and if the vendee chooses to take as much as he can have, he has a right to that, and an abatement (*f*). Upon another occasion (*g*) Lord Eldon said, that no one could dispute the proposition, that if a man agrees to sell me an estate in fee simple and cannot make a title to the fee simple, I can insist upon his giving me all the title he has: he cannot say he will give me nothing, because he cannot give me all I have contracted for. If he contracts to sell a fee simple, and has only a term of 100 years, I have a right to that term if I think fit.

34. Therefore in a case where the estate was sold for twenty-one years, and represented as held under a church lease, usually renewed every seven years, and it appeared that the seller was only entitled for lives to part; the *purchaser* filed a bill for a specific perform-

(*e*) See 1 Ves. & Beam. 353; Western *v.* Russell, 3 Ves. & Beam. 187; Wheatley *v.* Slade, 4 Sim. 126.

(*f*) *Per* Lord Eldon, 10 Ves. jun. 315, 316. 318. The same doctrine was laid down by his Lordship in Wood *v.* Griffith, 12 Feb. 1818; and see 2 Ves. jun. 439, acc. *per* Lord Rosslyn.

(*g*) Wood *v.* Griffith, 1 Wils. Cha. Ca. 44; S. C. MS.

ance, with a reduction. The seller insisted that the purchaser might have an option to put an end to the contract, but that he (the seller) ought not to be compelled to take less than the stipulated price. The decree, however, was for a specific performance, with a reduction of the purchase-money, the interest of the seller being less valuable than it had been represented to the purchaser (*h*). Lord Eldon has since observed, that the consequence of this decision was, that if the lives should endure beyond the period of twenty-one years, the purchaser would have the premises as well as the compensation. In that respect the case was new, and deserved great consideration. He added, that in a conversation which he had with the Master of the Rolls, they inclined to think it might be right upon this reasoning, that the estate was purchased subject to a contingency affecting its immediate value; he could not carry it to market, he could do nothing with it that would make it absolute property in him as if he had an absolute term of twenty-one years; but as the compensation might be aggravated enormously, beyond the actual value, so it might be much too small, and the Court would throw the chances together. The only other course was to adopt the principle of indemnity, either by taking security, or laying hold of part of the purchase-money, with a view to compensation if the case should arise, and that was open to this difficulty, that the property held subject to the question of indemnity remains unsaleable, unmarketable, and of infinitely less value than it would otherwise be.

35. In a later case (*i*), upon a sale of leasehold for

(*h*) Dale v. Lister, 16 Ves. jun. 7, cited; Hanbury v. Litchfield, 2 Myl. & Kee. 629: a singular case.

(*i*) Milligan v. Cooke, 16 Ves. jun. 1.

lives, the representation of the seller was held to amount to this: that the lessee thereof upon lives, under a church lease, granted the lease in question, with covenants, binding his real and personal representatives to procure renewals to make the complete term sold. It appeared, however, that the covenant to renew was limited, and not binding to the extent mentioned, the estate being in settlement, and the covenants not general. The *purchaser* filed a bill for a specific performance, with an allowance. In effect the difference was between a covenant by the lessor binding all his assets real and personal, and a covenant which only bound that property which the lessor might permit to go from him to his son, who would be entitled to the property under the settlement. Lord Eldon felt great doubt whether that could be made the subject of a valuation. The purchaser, however, only desired an indemnity upon a real estate; or by part of the purchase-money to be kept in Court, the sellers receiving the dividends. The Lord Chancellor decreed a specific performance, and directed an inquiry what was the difference between the value of the interest actually sold, and that represented, and such difference to be deducted from the purchase-money; and if the Master should find that he was unable to ascertain such difference in value, or if the purchaser should choose to take the title with a sufficient indemnity, he might, and the decree was affirmed upon a rehearing. He said, that if it could be the subject of immediate compensation it ought; if not, the purchaser would be entitled to all that he could have, certainly, with a deduction in respect of what he could not have, throwing back the benefit of the covenants to the vendor; or he might have the benefit of the covenants,

and an indemnity against those who could claim under the settlement against his engagement.

36. But Lord Eldon, himself, in another case, laid it down generally, that the Court can neither compel a purchaser to take an indemnity nor a vendor to give it (*k*); and it seems to be difficult to maintain that an indemnity ought to have been enforced in either of the cases above quoted.

37. And where, by an agreement, the title was to be made out to the satisfaction of a person named, upon a general reference to arbitration which was to settle all questions between the parties, and the arbitrator awarded the seller to convey to the purchaser the title contained in the abstracts, and the seller to execute a bond of indemnity to the purchaser, to secure him against eviction by reason of any defect in the title, the award was set aside as not being final, and being an excess of authority (*l*).

38. It has been determined by Lord Redesdale, that where at the time of the contract, the purchaser is fully aware that the vendor cannot execute the agreement, and, consequently, cannot enforce the performance of it; there the agreement must be presumed to have been executed under a mistake, and the purchaser cannot insist upon a performance as to the interest to which the vendor may be actually entitled (*m*).

39. And in a case where a tenant for life, with a power of leasing for twenty-one years at a rack-rent, agreed to execute a lease for twenty-one years, and a further lease for twenty-one years at any time during his life, consequently to execute a lease for twenty-one

(*k*) Balmanno *v.* Lumley, 1 Ves. & Beam. 225; Paton *v.* Brebner, 1 Bligh, 66; *infra*, ch. 10.

(*l*) Ross *v.* Boards, 3 Nev. & Per. 382.

(*m*) Lawrenson *v.* Butler, 1 Scho. & Lef. 13; see Mortlock *v.* Buller, 19 Ves. jun. 292.

years, whatever might be the increased value of the property at the time the lease should be granted; Lord Redesdale considered it a contract to act in fraud of the power, and that the lessee was not entitled to a specific performance. To obviate this objection, the lessee offered to take a renewed lease for twenty-one years, if the lessor should so long live; but Lord Redesdale thought that this was one of those cases where the plaintiff had no right thus to qualify the contract he insisted upon: there was nothing in the case to show that satisfaction in the form of damages was not an adequate remedy for him. If he had been put into a situation from which he could not extricate himself, the defendant might be called on to make the best title in his power, but nothing could be more mischievous than to permit a person who knows that another has only a limited power, to enter into a contract with that other person, which, if executed, would be a fraud on the power, and when that was objected to, to say, "I will take the best you can give me." A court of equity ought to say, to persons coming before it in such a way, "make the best of your case with a jury (*n*)."

40. It should be observed that there was another point in the above cause, and the decree was pronounced after considerable doubts. It seems difficult to reconcile the opinion expressed by Lord Redesdale with the current of authorities. It was not a necessary consequence of the contract that the lease agreed to be granted would be a fraud on the power, and the purchaser was willing to take the interest which the seller was enabled to grant without risk to himself or injury to the remainder-men.

41. Where an estate is in strict settlement, a tenant

(*n*) Harnet *v.* Yielding, 2 Scho. & Lef. 549; *vide infra*, ch. 8.

for life, with, for example, an ultimate remainder in fee, selling, as the owner of the fee, to a person ignorant of the state of the title, of course could not compel the purchaser to take his partial interest with a compensation.

42. And we have seen that if such a person contract to sell, not as owner, but merely as agent for the trustees, and the contract could not have been enforced against the trustees, it cannot be carried into execution against the tenant for life, although by the happening of events he himself has become entitled to the fee in possession (*o*).

43. But the rule laid down by Lord Eldon, which has already been referred to, was intended to, express his opinion, that where in such a case the tenant for life was the party really contracting, he was bound, at the election of the purchaser, to convey to him all the interest he had in the estate at a proportionate price.

44. This, however, was ruled otherwise in a late case at the Rolls (*p*), where the tenant for life, under a settlement, with full knowledge of the nature of his title, entered into a contract for sale of the estate as owner by letters to a purchaser who was ignorant of the title, and then desired to withdraw from the contract, and the trustees, in whom a power of sale was vested, refused to adopt the contract; the purchaser required the seller to convey to him his estate for life, which was without impeachment of waste, and his reversion in fee after an estate tail in his son, but this was refused. The Court observed, that without derogation in any respect from the jurisdiction, it was apparent that the Court would not in every case compel a vendor to convey such estate as he could. And upon the general

(*o*) Mortlock *v.* Buller, 10 Ves. jun. 292; *vide supra*, p. 345, pl. 48.

(*p*) Thomas *v.* Dering, 1 Kee. 729.

principle that the Court will not execute a contract, the performance of which is unreasonable, or would be prejudicial to persons interested in the property, but not parties to the contract, the Court, before directing the partial execution of the contract, by ordering the limited interest of the vendor to be conveyed, ought to consider how that proceeding might affect the interests of those who were entitled to the estate, subject to the limited interest of the vendor. The vendor had a life estate without impeachment of waste, with remainder to his sons in tail male, and having regard to the settlement, and the protection intended to be afforded to the objects of it (I),—conceiving that the consequence of a partial execution of this contract might be prejudicial to those objects, seeing the difficulty of ascertaining, upon satisfactory grounds, the just amount of abatement from the purchase-money,—(for it was more easy to compute a just compensation where it is to be given for the defect in the quantity or the quality of the land sold, than where it is to be given for the deficiency of the vendor's interest)—and considering also that nothing had been done upon the contract, so that the purchaser, though suffering the disappointment of not making himself the owner of an estate he desired to possess, had sustained no damage for which compensation might not be given by a jury, it appeared to the Court that a conveyance of the vendor's life estate and ultimate reversion to the purchaser ought not to be decreed.

45. There is no doubt great difficulty in these cases; but in the case just referred to, no circumstance existed on the part of the purchaser upon which relief could be refused to him against the seller. It was not denied that the seller was bound by the contract, and he took

(I) See the substitution for recoveries act, *post*, ch. 11, s. 4.

advantage of the state of the title to avoid the specific performance of a contract which he had entered into with full knowledge that he could not bind the whole fee, although the purchaser was not aware of the circumstance, and the seller even concealed for a time the objection made by the trustee to adopt the sale. Nor if the seller, according to the general rule, was bound to convey what interests he could at a proportionate price, did the difficulty of valuing those interests afford any solid objection to the relief. The estate for life was without impeachment of waste, and the purchaser, no doubt, might sell the timber, but the Court ought not, it is conceived, in such a case to look at the interests of the tenant in tail, nor indeed could it protect them; for the tenant for life might fell the timber, or sell his life estate, with the right to cut it the next hour, and equity could not refuse to perform such a contract, however injurious it might prove to the tenant in tail. Indeed, in this case the timber was not of large value, and the tenant for life, pending the suit, employed workmen to cut it, although of course he was stopped by injunction upon the purchaser's application. If a tenant for life *bonâ fide* apprehending that the trustees of the settlement will adopt his contract, sell, meaning only to concur in a sale of the fee, that might be a good defence in equity against a partial execution of the contract by the tenant for life alone. But such sales, where the settlement is concealed, deserve no favour, for there is no mutuality; the trustees, by their election, may force the purchaser to complete, although he cannot compel them to join, and they are too frequently mere instruments in the hands of the tenant for life, who procures them to concur in the sale or reject it, just as best suits his own views.

46. If in a case of this nature, the purchaser, on the

faith of the agreement, put himself in a situation from which he cannot extricate himself, and is therefore willing to forego a part of his agreement, that is a circumstance to induce a court of equity to give relief. Thus, in a case before Lord Thurlow, the incumbent of a living had, with full knowledge of the title, contracted with the tenant in tail, in remainder after a life estate, for the purchase of the advowson, and on the faith of that agreement had built a much better house than he would otherwise have done; the tenant for life would not join in suffering a recovery, and consequently a good title could not be made. Lord Thurlow held, that as the purchaser had, upon the faith of the contract, built a good house on the glebe, he ought to have the utmost the vendor could give him; and therefore directed the vendor to convey a base fee, by levying a fine with a covenant to suffer a recovery whenever he should be enabled to do so by the death of the tenant for life (*q*).

47. But if there have been misrepresentation on the part of the purchaser, he cannot insist upon having the estate, although he is willing to take subject to the outstanding interests. This is the case of Clermont *v.* Tasburgh (*r*). Upon a treaty for an exchange, Clermont informed Tasburgh that the tenants of the latter were agreeable to the exchange, and thereupon the agreement was made, which stipulated for possession on both sides. It appeared upon a bill filed by Clermont that the tenants had not consented. The bill sought that Tasburgh should buy out his tenants, or that the value should be proportionably reduced. The opinion of the Court being against the plaintiff, he offered to waive the part of the contract which stipulated for pos-

(*q*) Lord Bolingbroke's case, cited 1 Scho. & Lef. 19, n. (*a*).

(*r*) 1 Jac. & Walk. 112.

session, and not to require the tenants to be bought out. But this was denied to him, because, as the contract was obtained by misrepresentation, it was void both at law and in equity. When an agreement is obtained by fraud, the effect is not to cut it down or modify it only, but it vitiates it in toto, and the party who has been drawn in is totally absolved from obligation.

48. If the vendor has granted a lease of the estate, which is void by force of a statute, the Court will not on the request of the purchaser consider the lease as valid, and allow him a compensation in respect of it (*s*).

49. There are some rights which, although in themselves of small value, are incapable of compensation, and therefore, if undisclosed, vitiate the contract: for example, a right of sporting reserved over the estate, for it would not be possible to estimate what difference in value such a reservation made (*t*), and such a right would break in too much upon the enjoyment and ownership of a purchaser, to enable equity with propriety to compel him to take the estate with a compensation.

50. But a purchaser in this, as in every other case, may by his conduct, after having notice of a charge like this, which is a permanent one, waive his right to object to it, and even leave himself no right to a compensation (*u*).

51. It is a fatal objection at law, that an enclosed estate is subject to a right of common every third year, which was not noticed in the contract (*x*); and equity,

(*s*) Morris *v.* Preston, 7 Ves. jun. 547.

(*t*) Burnell *v.* Brown, 1 Jac. & Walk. 168.

(*u*) S. C. see *post.*

(*x*) Gibson *v.* Spurrier, Peake's Add. Cas. 49; as to footways, see *post.*

it is apprehended, would not hold it to be a subject for compensation against a purchaser, although he might be allowed to take the estate with a compensation.

52. But where an estate was sold with a representation in general terms that the purchaser would have an unlimited right of common, whereas it appeared that the right of common was limited to sheep only, that was held to be a subject for compensation (*y*).

53. But a seller cannot represent the estate as his freehold, and then require the purchaser to take what in effect are nothing but sheep-walks (*z*).

54. A right to dig for mines not disclosed would be a ground to set aside the contract at the instance of the purchaser (*a*). But where the purchaser does not object to the title on this ground, but insists upon a specific performance with a compensation, it will be decreed (*b*).

55. If the estate be liable to repair the chancel of a church, the purchaser, if he bought without notice of that liability, would not, it seems, be compelled to perform the contract with a compensation (*c*).

56. And where a house was sold by auction and no notice was taken of a fee farm rent of 5*s*. 4*d*. charged upon that and upon other property of very great value, the purchaser brought an action for breach of contract, and Sir Vicary Gibbs for the vendor, the defendant, declined arguing the point (*d*).

(*y*) Howland *v*. Norris, 1 Cox, 59.

(*z*) Vancouver *v*. Bliss, 11 Ves. jun. 458.

(*a*) *Infra*.

(*b*) Seaman *v*. Vaudry, 16 Ves. jun. 390.

(*c*) See Forteblow *v*. Shirley, 2 Swanst. 223, cited. This is evidently Horniblow *v*. Shirley, 13 Ves. jun. 81; see ch. 10, s. 2, *post*.

(*d*) Turner *v*. Beaurain, Sitt. Guildh. cor. Lord Ellenborough, C. J. 2d June 1806; and see Barnewall *v*. Harris, 1 Taunt. 430.

57. But in equity it has been held, that quit-rents are subjects of compensation, probably because they are regarded as incidents of tenure (*e*).

58. As Sir John Leach observed, in Esdaile *v.* Stephenson, rentcharges are not incidents of tenure, but are created by the voluntary act of the vendor or those under whom he claims; and he added, that it would be a good rule, that a purchaser should not be bound to complete his purchase unless they were noticed in the agreement or conditions of sale, but he feared that the habit of the Court had been, not to proceed upon the distinction between quit-rents and rentcharges, but to compel the purchaser to complete where the rentcharge is small.

59. In Lord Thurlow's time, the rule was larger than it is now. He laid it down as settled, that wherever it is possible to compensate the purchaser for any article which diminishes the value of the subject matter, he must be satisfied with such compensation, or to speak in the usual terms, wherever the matter lies in compensation; but he could not lay down this rule as universal, for a case might be so circumstanced, that the party might have purchased purely for the sake of the very particular wanting.

60. Acting upon this rule, where an estate had been sold as tithe free, which turned out to be, with other lands, subject to 14 *l.* per annum in lieu of tithes, Lord Thurlow held the charge to be a subject for compensation (*f*).

61. This was going a great way, and it has been justly observed, that no case is to be found where this

(*e*) Esdaile *v.* Stephenson, 1 Sim. & Stu. 122; Bowles *v.* Waller, 1 Hayes, 441.

(*f*) Howland *v.* Norris, 1 Cox, 59.

doctrine of compensation has been applied beyond rentcharges of small amount (*g*).

62. And as a general rule—if it admit of any exceptions, it must be in a rare case—the Court will not, as we have seen, compel the purchaser to take an indemnity, nor the vendor to give it (*h*). But this subject will be resumed when we come to the consideration of the title to which a purchaser is entitled.

63. Where the *benefit* of quit-rents is sold, a mistake in their amount will not be material. In Cuthbert *v.* Baker (*i*), the quit-rents of a manor were stated in the particulars of sale, to be 2 *l.* a year, and they amounted to only 30 *s.* a year; but a specific performance was decreed, and it was referred to the Master to ascertain what compensation should be allowed for the deficiency: and a mistake in the amount of quit-rents charged on the estate sold would be equally a subject of compensation.

(*g*) Prendergast *v.* Eyre, 2 Hog. 94; Portman *v.* Mill, 1 Russ. & Myl. 696.

(*h*) See 1 Ves. & Bea. 225, *post*, ch. 10, s. 2.

(*i*) Reg. Lib. A. 1790, fol. 442.

## SECTION II.

### OF WANT OF TITLE TO A PART OF THE ESTATE.

1. *Mistake as to what is sold.*
3. *Want of title to part fatal at law.*
4. *Separate valuations.*
5. *Enforced partially against purchaser where part small.*
6. *Sale of house and wharf.*
7. *Opinions upon it.*
8. *Not binding on purchaser where portion large.*
9. *Fee-farm rent.*
11. *Purchaser's right against seller where no title to large part.*

13. *Wheatley* v. *Slade.*
14. *Observations upon it.*
15. *Mutual contracts.*
16. *Lease containing more than is held under it.*
17. *Sale in lots good as to those with title.*
20. *Unless complicated with the rest.*
22. *Rule acted upon at law.*
25, 31. *Lord Kenyon's doctrine.*
27, 29, 30. *Lord Eldon's.*
28, 29. *Lord Brougham's.*
31. *The present rule.*
34. *Where the seller has not all the tithes he sells.*
35. *Where the estate is not tithe free.*
40. *Commutation of tithes by statute.*
41. *Land-tax and tithe-rent-charge.*
42. *Purchaser's right bound by his conduct.*

---

1. If a purchaser of an estate thinks he has purchased *bonâ fide* a part which the vendor thinks he has not sold, that is a ground to set aside the contract, that neither party may be damaged; because it is impossible to say, one shall be forced to give that price for part only which he intended to give for the whole; or that the other shall be obliged to sell the whole for what he intended to be the price of part only (*a*). Upon the other hand, if both understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so, if the buyer did not imagine he was buying any more than the seller imagined he was selling the part in question, then a pretence to have the whole conveyed is as contrary to good faith on his side as a refusal to sell would be in the other case (*b*).

2. A defect of the nature we are now about to consider, arises, either where the seller has not a good title to a portion of the estate which he has sold, or having a good title to the estate, it does not contain the quantity represented in the contract.

(*a*) See 13 Ves. jun. 427; and see Higginson *v.* Clowes, 15 Ves. jun. 516, stated, as to this point, *supra*, p. 61.

(*b*) *Per* Lord Thurlow; see 1 Ves. jun. 211; and see 6 Ves. jun. 339.

3. As to the first line of cases: where an estate is sold in one lot, either by private contract, or public sale, and the vendor has not a title to the whole estate, he cannot enforce the contract at law. At law, indeed, neither a vendor can, on an entire contract, recover part of the purchase-money, where he cannot make a title to the whole estate sold; nor would a purchaser be suffered in a court of law to say, that he would retain all of which the title was good, and vacate the contract as to the rest: such questions being subjects only for a court of equity (*c*).

4. In a case at law (*d*), where an estate consisting of a house and land was sold by private contract for 1000 *l.*, but there had been two distinct valuations, one of the house at 300 *l.*, and the other of the land at 700 *l.*, at which several prices the different properties, by a memorandum in writing signed by the sellers, had been agreed to be sold, previously to the more regular contract for the whole at one sum, the purchaser was evicted from the house for want of title in the sellers, before the conveyance was completed, and as he had built upon the land, he retained that, but brought an action for money had and received, to recover the money which he had paid for the land, in which he succeeded. Lord Alvanley, in delivering the judgment of the Court, observed, that his difficulty had been, how far the agreement was to be considered as one contract for the purchase of both sets of premises, and how far the party could recover so much as had been paid by way of consideration, for the part of which the title had failed, and retain the other part of the bargain. If the question were how far the particular part, of which the title had failed, formed an essential ingredient of the

(*c*) Johnson *v.* Johnson, 3 Bos. & Pull. 162.

(*d*) Johnson *v.* Johnson, *ubi sup.*

bargain, the grossest injustice would ensue if a party were suffered in a court of law to say, that he would retain all of which the title was good, and recover a proportionable part of the purchase-money for the rest. Possibly the part which he retained might not have been sold, unless the other part had been taken at the same time, and ought not to be valued in proportion to its extent, but according to the various circumstances connected with it. But a court of equity may inquire into all the circumstances, and may ascertain how far one part of the bargain formed a material ground for the rest, and may award a compensation according to the real state of the transaction. The Court, however, held that there were two distinct contracts for the house and land, and observed that it had not been suggested that they were necessary to the occupation of each other, and so the purchaser was allowed to recover.

5. But if the part to which the seller has a title was the purchaser's principal object, or equally his object with the part to which a title cannot be made, and is itself an independent subject, and not likely to be injured by the other part, equity will compel the purchaser to take it at a proportionate price; and in these cases it will be referred to the Master, to inquire, "whether the part to which a title cannot be made, is material to the possession and enjoyment of the rest of the estate (*e*)." The question generally arises where the part to which a title cannot be made is comparatively small, for if it be a considerable portion, that upon the face of it would be deemed material, for when a man buys a large estate, he must be supposed to want what he buys; on the other hand, it matters not how

(*e*) M'Queen *v.* Farquhar, 11 Ves. jun. 467; Reg. Lib. B. 1804. fol. 1095; Knatchbull *v.* Grueber, 1 Madd. 153; Bowyer *v.* Bright, 13 Price, 698; see Prendergast *v.* Eyre, 2 Hogan, 81.

trifling the subject is if it is necessary to the enjoyment of the rest, or was the purchaser's object in his purchase.

6. This equity was at one period exercised against purchasers to an extent which is not now followed, but the stream of authority sets the other way (*f*). In a case (*g*) before Sir Thomas Sewell, a man who had contracted for the purchase of a house and wharf, was compelled to take the house, although he could not obtain the wharf, and the wharf appeared to be the whole object of his making the purchase; indeed, it is stated that his object was to carry on his business at the wharf.

7. Lord Thurlow said, that if he had been to have judged of that case, and if it had appeared that the purchaser was in a trade, in which that wharf was essentially useful, and that he made that purchase for the sake of his trade, he (Lord Thurlow) should not have thought that it interfered with the general rule, if he had discharged him from his contract (*h*). But this has been carried much further. Lord Kenyon said it was a determination contrary to all justice and reason, and the case has never been quoted without being disapproved of (*i*). It is quite clear, that if such a case were now to call for a decision, although the purchaser did not require the wharf for his trade, yet if the house and wharf were connected together as one property, the want of title to the wharf, would authorise the purchaser to rescind the whole contract. It

(*f*) See 13 Price, 702.

(*g*) See 6 Ves. jun. 678; 7 Ves. jun. 270, cited; and see M'Queen *v.* Farquhar, 11 Ves. jun. 467.

(*h*) See 1 Cox, 61, 62.

(*i*) See 1 Esp. Ca. 152; 6 Ves. jun. 679; 13 Ves. jun. 78. 228. 427. In Stewart *v.* Alliston, 1 Mer. 26, Lord Eldon expressed himself much more strongly against the principle of these cases, than appears by the report.

would require some special ground in such a case to induce the Court to even direct an inquiry upon the subject.

8. This subject was fully discussed in a case before the late Master of the Rolls in Ireland, already referred to, where a title could not be made to one of the estates sold, containing 700 acres, which was sold subject to a fee-farm rent of 100 *l.* per annum (*k*), and the purchaser was released from the whole of the contract. The Court stated the result of the authorities to be, that though this principle of compensation had in some instances, in relation to some fragments or small parts of an estate sold, or of the rights appurtenant or incidental to it, been applied *in invitum* against a purchaser, that it was a principle that ought not to be extended to new classes of cases. There was no case of the sale of two distinct estates for one entire sum, in which the Court had undertaken, upon a failure of title as to one estate, to decompose the sum and fix a standard for adjusting the relative value of the two estates, which should bind the purchaser without regard to his views or estimate of relative value. It appeared to be inconsistent with the principles upon which the court professed to exercise jurisdiction in specific performance, to compel the purchaser, not bound by law, and who could not get the thing for which he contracted, to take one of the estates he purchased, and accept a compensation for the other estate. Where would you stop? The result appeared to be, that no cases were to be found where this doctrine of compensation had been applied beyond small parcels of land, and that no universal principle of compensation had been laid down which would apply to sales of distinct townlands or de-

(*k*) Prendergast v. Eyre, 2 Hogan, 81.

nominations. These appear to be the true principles, and they have always been acted upon in the English courts of equity; and in speaking of compensation generally, the rule has always been so understood.

9. And the rule would, no doubt, be the same, even where the estate to which a title cannot be made, is let upon a fee-farm grant at a large rent, for although the purchaser can only receive the rent, yet he may have an object in holding such a rent issuing out of an estate, particularly if the estate be connected with the other property or with his own. And where one of the subjects of sale is a rentcharge, to which a title cannot be made, he cannot be told that it is to be treated as a mere annuity unconnected with land (*m*).

10. There are many cases where the purchaser might elect to take the portion of the estate to which a title could be made, although the vendor could not compel him to do so.

11. We have seen that the purchaser cannot be compelled to take a compensation for a large portion of the estate. In regard to the limits of the rule, that a purchaser may elect to take the part to which a title can be made at a proportionate price, Sir W. Grant, Master of the Rolls, in Western *v.* Russell (*n*), observed, that it was said there, that there was a considerable portion of the estate to which no title could be made, and, therefore, there could be no execution of the contract. That defence, he said, simply so stated, was quite new in the mouth of the vendor. It was not necessary there to determine whether, under any circumstances of deterio-

(*m*) S. C. Neither of these points was decided in this case. There appears to be a mistake at the close of the judgment, p. 95, which will be seen by reference to p. 82.

(*n*) 3 Ves. & Bea. 187.

ration to the remaining property, the vendor could be exempted from the obligation of conveying that part to which a title could be made; but the proposition was quite untenable, that if there is a considerable part to which no title could be made, the vendor was therefore exempted from the necessity of conveying any part.

12. The observations of the Court, in Johnson *v.* Johnson, already quoted, bear also upon this point (*o*), and undoubtedly there may be cases where the hardship of enforcing a partial execution of the contract on the vendor, would be so great, that equity would not interfere. A seller, for example, could not, at the election of the purchaser, be deprived of his mansion-house and park, to which he could make a good title, whilst a large adjoining estate, held and sold with it, would be left on his hands with a proclaimed bad title.

13. In the case of Wheatley *v.* Slade (*p*), a lace manufactory was sold for 12,200 *l.*; it appeared that the sellers were entitled to nine-sixteenths only, and that the owner of the other seven-sixteenths had a lien on the entirety of the property for 10,000 *l.* and interest. The purchaser filed a bill for a specific performance as to the nine-sixteenths, at a fair proportion of the price. The Vice-Chancellor said, that in Hill *v.* Buckley, it was decided that a purchaser might file a bill and insist on having the agreement performed, as far as the vendor was capable of performing it, and that a deduction should be made to him in respect of the deficiency, *but that was not allowed where a large portion of the property could not be conveyed.* This sale, he observed, was made under the impression that they were possessed of the entirety of it; but that it afterwards appeared, that they could make a title to nine-sixteenths only of the

(*o*) *Supra*, p. 506. (*p*) 4 Sim. 126.

property, and that it was subject to a debt of 10,000 *l.* and interest, which would exhaust nearly the whole of the purchase-money. He therefore dissolved an injunction to prevent the sellers from selling to any other person, as the Court at the hearing would not deal with this case as it dealt with Hill *v.* Buckley.

14. This decision may, perhaps, be referred to the nature of the property—although the sellers' object appears to have been to get rid of one sale in order to join in another—otherwise it might be difficult to support it, for whatever was really the number of the shares to which the sellers were entitled, they were bound to that extent to pay the charges, and it is no objection to the performance of a contract that the charges on the estate, will, contrary to the sellers' expectation, exhaust the purchase-money. If the case be reduced to the simple one, that the sellers had only nine-sixteenths, although they considered they had the entirety, the authorities would seem to show that the purchaser had a right to those shares at a price *pro tanto:* no hardship would have been thrown upon the sellers; they would not have had the other shares left on their hands with a bad title, for the nine-sixteenths were all the shares they possessed; the owner of the other seven-sixteenths was a party to the suit, and his title was undisputed by the sellers of the nine-sixteenths.

15. A case may here be introduced of a contract by *A* to sell one estate to *B*, and by *B* to sell another estate to *A*. It has been held as a general proposition, that although entered into by the same instrument, they are several contracts, and either *A* or *B* may compel the other to convey his estate to him, although he himself cannot make a title to the estate which he contracted to sell. But it was said, that cases might undoubtedly be supposed, in which two transactions might be so com-

plicated together, that when they were made the subject of contract in one, or even in two different instruments, a purchase by one party should not be binding unless a sale to the vendor should also be completed. Where two estates were conterminous, or where there was a mixed case of enjoyment of the estates, as in the case of one of the parties having an easement over the property of the other, a contract depending upon such mutuality as to sale on one side and purchase upon the other might well exist (*q*).

16. And here we may notice a case where the estate sold consisted of several houses, which it was stated were held under lease from *A*, and upon examination it appeared that the lease comprised a small piece of ground formerly held with one of the houses, but divided from it previously to the lease, and let to another; the purchaser was allowed to recover his deposit. For he would be liable under the covenants for the whole as demised, and although he would have been entitled to relief in equity against the lessors, yet he was not to be satisfied with that in a court of law (*r*).

---

17. Where an estate is sold by auction, or before a Master, in lots, and the vendor has not a title to all the lots sold, equity will compel the purchaser to take the lots to which a title can be made, if they are not complicated with the rest; and will allow him a compensation *pro tanto*.

18. Thus in Poole *v.* Shergold (*s*), a man became the purchaser of several lots of an estate, to two of which no

(*q*) Croome *v.* Lediard, 2 Myl. & Kee. 251. 293.

(*r*) Tomkins *v.* White, 3 Smith, 435.

(*s*) 2 Bro. C. C. 118, 1 Cox, 273. See 6 Ves. jun. 676; 2 Myl. & Kee. 727.

title could be made, but there had been no reference on the question whether the lots were so complicated with each other as to render the lots to which there was no title necessary to the enjoyment of the others. And upon the Master's report Lord Kenyon said, he must take it for granted, these two lots were not so complicated with the others, as to entitle the purchaser to resist the whole; and therefore decreed a specific performance *pro tanto*.

19. But if a title cannot be made to a lot which is complicated with the rest, the purchaser will not be compelled to accept the lots to which a title can be made.

20. Thus, in the same case, Lord Kenyon said, if a purchase was made of a mansion-house in one lot, and farms, &c., in others, and no title could be made to the lot containing the mansion-house, it would be a ground to rescind the whole contract.

21. The same rule appears to prevail at law, for although where the same man purchases several lots at an auction, a distinct contract arises upon each (*t*); yet even a court of law is at liberty to look at the nature of the property, and will permit a purchaser to rescind the contract as to all the lots if a title cannot be made to any which are necessary to the enjoyment of the rest.

22. Thus in a case at *nisi prius* (*u*), where the property was represented as freehold, but no notice was taken that a meadow, part of it, was liable to a right of common every third year: the *plaintiff* purchased two lots, one a house, garden, &c., the other the meadow

(*t*) Emmerson *v.* Heelis, 2 Taunt. 38; James *v.* Shore, 1 Stark. Ca. 426; see Baldey *v.* Parker, 2 Barn. & Cress. 37; 3 Dowl. & Ryl. 220; Roots *v.* Lord Dormer, 4 Barn. & Adol. 77; Seaton *v.* Booth, 4 Adol. & Ell. 528.

(*u*) Gibson *v.* Spurrier, Peake's Add. Cas. 49.

close adjoining thereto, and which he wished to occupy with it: the question was, whether the purchaser could rescind the contract as to both lots in consequence of the right of common over the meadow, one of the lots. Lord Kenyon said, that if these lots were so near each other that the hope of possessing one as an appendage to the other was the inducement to the purchaser to purchase both, he ought not to be compelled to take one alone. This, he added, was not so much a question of law as a matter of convenience; it would be saddling a man with an estate for which he might have no use.

23. And in a late case (*x*), where a purchase by auction of a lot, numbered 13, was held not to be binding, because a right of way over it had not been sufficiently disclosed, and the same purchaser had bought an adjoining lot, No. 12, containing a house, which was to have a right of way over the lot 13, he was allowed to rescind the purchase as to lot 12 also, upon the ground that both lots had been included in one agreement after the sale at the aggregate price—which is not a very strong ground—and secondly, that he might be reasonably understood to have purchased lot 12, in order that he might by unity of seisin extinguish the right of way over lot 13, which before belonged to lot 12, and thereby render lot 13 more valuable as building ground, an object and purpose which was entirely defeated by the existence of the undisclosed right of way.

24. Lord Kenyon has been considered as having decided, in Chambers *v.* Griffiths, at *nisi prius*, that in no case could a contract be enforced even at law as to some lots if a title could not be made to all the lots sold.

(*x*) Dykes *v.* Blake, 4 Bing. N. C. 463.

25. In that case (*y*) he held, that the performance of a contract for the sale of some houses ought not to be compelled, as a title could not be made to all the houses bought; and this, notwithstanding they were sold in separate lots. He said, when a party purchases several lots of this description at an auction, it must be taken as an entire contract; that is, that the several lots are purchased with a view of making them a joint concern. The seller therefore shall not, in case of any defect in his title to one part, be allowed to abandon that part at his pleasure, and to hold the purchaser to his bargain for the residue. From such a doctrine much injustice might result, as the part to which a seller could not make a title might be so circumstanced, that without it the other parts would be of little, perhaps of no value; or it might leave it in the power of the seller, or any other person who might come to the possession of such part, to deprive the purchaser of every degree of enjoyment or beneficial use of that part which he had purchased. He added, that a case *under circumstances precisely similar to the present*, had been decided before him, when Master of the Rolls. That, on that case coming before him, he had found that his predecessor there, Sir Thomas Sewell, had ruled contrary to the doctrine he was now delivering; but that he at the Rolls had overruled Sir Thomas Sewell's determination, with the general approbation of the bar.

26. And the Court of Exchequer seemed to have been of the same opinion as Lord Kenyon. For in a case (*z*) where a person purchased several lots of an estate sold under a decree of the Court, and the biddings were

(*y*) Chambers *v.* Griffiths, 1 Esp. Ca. 149.

(*z*) Boyer *v.* Blackwell, 3 Anstr. 657.

afterwards opened as to one lot, the Court were of opinion, that he had an option to open the biddings as to the rest of the lots.

27. In a case before Lord Eldon (*a*), in which most of the authorities on this head were cited, that of Chambers *v.* Griffiths was not noticed, and the report of Gibson *v.* Spurrier was not then published. But Lord Eldon afterwards mentioned from the Bench, that he had met with the case of Chambers *v.* Griffiths, and he desired it to be understood, that he was not of the same opinion as Lord Kenyon; and in a still later case Lord Eldon expressed an opinion that Lord Kenyon's rule would not be followed unless it could be shown that there was an understanding that the purchaser was not to take any of the lots unless he could obtain them all (*b*).

28. In a late case before Lord Brougham, L. C. (*c*), in which he disagreed with Lord Kenyon's opinion in Chambers *v.* Griffiths, he observed, that Lord Eldon was said to have expressed a similar opinion in Drewe *v.* Hanson, but if so it had escaped the reporter. Lord Eldon's observation was mentioned shortly after it was made in the *first edition* of this work, and it was stated to have fallen from him *after* he had decided Drewe *v.* Hanson, which accounts for its having escaped the reporter. There is no doubt that Lord Eldon did make the observation, and the statement of it in this work must have been under his eye upon more than one occasion: we have therefore his great authority against the doctrine of Lord Kenyon. It was considered by the Court, in the case just referred to, that Chambers *v.*

(*a*) Drewe *v.* Hanson, 6 Ves. jun. 675.

(*b*) 16 July 1816. MS.

(*c*) Casamajor *v.* Strode, 2 Myl. & Kee. 724.

Griffiths was plainly overruled by the cases at law, establishing that a separate contract arises upon the sale of each lot. But that, although true as a general rule, does not, as we have seen, in proper cases, prevent even courts of law from allowing a purchaser to treat a bad title to one lot as affecting the sale of all the lots to the same purchaser, nor did the Courts in any of the cases referred to express any opinion adverse to that right.

29. It was further observed by the Court, in the case above quoted (*d*), that if Lord Kenyon's reported opinion, but which he probably never held, carried the rule so much too far in favour of the purchaser, perhaps an opinion ascribed to Lord Eldon, and mentioned in this work (*e*), carries the rule almost as far the other way—that the purchasers of different lots are not to be connected together, unless there has been an understanding that the buyer should not take any if he could not have all. Clearly it was said such an understanding will suffice to blend the whole into one contract; but it seemed equally clear, that the same complication may be effected or rather evidenced without any such understanding, that is without any express agreement to that effect.

30. Now, Lord Eldon, in the opinion which he gave, did not intend to touch the general rule, where it is shown that the lots are complicated with each other, but merely said that Lord Kenyon's rule would not be followed, unless it could be shown that there was an understanding to that effect; or, in other words, that where it is not shown that the lots are complicated with each other, a purchaser cannot for want of title to one

(*d*) 2 Myl. & Kee. 725. (*e*) *Supra*, p. 517.

lot rescind the sales as to all the lots, unless it could be shown that there was such an understanding.

31. There is no doubt that the rules laid down in the case of Poole *v.* Shergold, are the law of the Court (*f*). Lord Kenyon, in Gibson *v.* Spurrier, actually adopted in a court of law the rule in equity upon this subject; and it is clear, although the reference in Chambers *v.* Griffiths, to the case at the Rolls, is an inaccurate one (*g*), that Lord Kenyon did refer to Poole *v.* Shergold as having been decided by him with the general approbation of the bar. He intended therefore to follow, and not to overrule his own previous views when sitting as a judge in equity; and his opinion was probably grounded upon the nature and contiguity of the property; for he said that when a party purchases several lots *of this description* at an auction, it must be taken that the several lots are purchased with a view of making them a joint concern: he seems therefore rather to have been guided by the circumstances of the case, than to have intended to lay down a general rule. Indeed, he said, that his decision at the Rolls was in a case (Poole *v.* Shergold) *under circumstances precisely similar* to that of Chambers *v.* Griffiths. The seller, besides, sent an abstract of title to one lot only, and no abstract of title to the other lots. And of course in such a case, whatever may be the rule where a seller really has a bad title, which is produced, to some of the lots, he cannot be allowed at his pleasure to withhold any title to some of the lots, and enforce the contract as to the others.

32. The opinion expressed by the Court of Exchequer in Boyer *v.* Blackwell, before quoted (*h*), is a very just one; but it may be referred to a different ground,

(*f*) See Lewin *v.* Guest, 1 Russ. 325.

(*g*) See 2 Myl. & Kee. 725.

(*h*) See p. 516.

for there the seller was not unable to make a good title to all the lots, but he was desirous of withdrawing some of the lots from the purchaser, because he had a better offer for them. It would plainly be inequitable to allow such a proceeding. There appears therefore to be no authority against the settled rule in these cases, either at law or in equity.

33. We are now to examine the cases relating to tithe. Where they are sold as a distinct existing property, they are—regard being had to the different natures of the properties—subject to the rules already quoted, but where they are the tithes of the very land contracted to be purchased, they rather open to a different consideration.

34. In Drewe *v.* Hanson (*k*), which arose upon the sale of an estate, together with the valuable corn and hay tithes *of the whole parish*, it appeared that the principal object of the purchaser was the corn tithes, and that half the hay tithe belonged to the vicar, and the other half was commuted for by a payment of 2 *l.* per annum, the nature of which did not appear. Upon the facts, as they then appeared, Lord Eldon would not give judgment, but he seemed clearly of opinion that the hay tithe, if not of great extent *or of such a nature as to prejudice the corn tithe*, was a subject for compensation: but otherwise not, as the purchaser would not get the thing which was the principal object of his contract (*l*).

35. In a case (*m*) often cited, where a man had articled

(*k*) 6 Ves. jun. 675.

(*l*) See Vancouver *v.* Bliss, 11 Ves. jun. 458; Stapylton *v.* Scott, 13 Ves. jun. 425.

(*m*) Lord Stanhope's case, 6 Ves. jun. 678, cited; Lowndes *v.* Lane, 2 Cox, 363; 6 Ves. jun. 676, cited; but see Pincke *v.* Curteis, cited *ibid.*; and see Rose *v.* Calland, 5 Ves. jun. 186; Wallinger *v.* Hilbert, 1 Mer. 104.

for the purchase of an estate *tithe-free*, but which afterwards appeared to be subject to tithes, Lord Thurlow, it was said, decreed a specific performance, although the purchaser proved, that his object was to buy an estate tithe-free. This, however, to use Lord Eldon's words (*n*), is a prodigious strong measure in a court of equity to say, as a discreet exercise of its jurisdiction, that the contract shall be performed, the defendant swearing and positively proving that he would have had nothing to do with the estate if not tithe-free. But it now appears from the report of the case, published by Mr. Cox, that the estate was subject only to a money-payment of 14 *l.* in lieu of tithes (*o*); and therefore Lord Thurlow made no such decision. And in the case of Ker *v.* Clobery (*p*), where the estate was sold before the Master, and the particulars stated, that "the whole of the above lands are only subject to a modus for tithe hay of 2 *l.* per annum," Lord Eldon was of opinion, that a purchaser of an estate stated to be tithe-free, or subject to a modus, could not be compelled to take it with a compensation, if the estate is not tithe-free. He said, that he had so decided in a case from Yorkshire, in which he had told the purchaser, if he would take the estate with a compensation, he must undertake to pay the tithes to the vendor (I). The question therefore is now at rest.

(*n*) See 6 Ves. jun. 679; and see 17 Ves. jun. 280.

(*o*) Howland *v.* Norris, 1 Cox, 59.

(*p*) 26 Mar. 1814. MS.

---

(1) In Binks *v.* Lord Rokeby, where the purchaser had a compensation, as the fact was not satisfactorily established, Lord Eldon said there seemed little reason to doubt that the vendee [misprinted vendor] would eventually obtain both a compensation for a supposed liability of part of the estate to tithe, and also the advantage of the fact that it was not liable.

36. Where an estate is sold tithe-free, the question whether tithe-free is not a question of title but of fact: if the sale was of lands and of tithes, then the matter of tithe would be matter of title (*q*).

37. In a late case, upon a sale before a Master, where the particular stated *about* thirty-three acres to be tithe-free, and it was stipulated in the conditions of sale, that errors of description should not vitiate the sale, Lord Eldon held, that the principle laid down in Ker *v.* Clobery did not apply (*r*); but the purchaser must be satisfied with a compensation.

38. And where a mansion-house and pleasure-grounds, and seven acres of pasture were sold, without any mention of tithes, but it being discovered that the seller's conveyance contained a grant of the great tithes, which fact being communicated to the purchaser's agent, he included them in the written contract, but no additional price was put upon them, nor was there any treaty about them; upon an objection to the title to the tithes, the Court held, that the right to the tithes could not possibly be the inducement of the purchaser to enter into the contract; and it was not easy to see how they could be of the value of the smallest piece of coin, since, as an appendage to the enjoyment of the mansion-house, there was no probability that the seven acres would ever be productive of great tithes (I). The purchaser was not allowed to escape upon this pretence; and

(*q*) Smith *v.* Lloyd, 2 Swanst. 224, n; Wallinger *v.* Hilbert, 1 Mer. 104.

(*r*) Binks *v.* Lord Rokeby, E. T. 1818. MS.; S. C. 2 Swanst. 222; and see Smith *v.* Tolcher, 4 Russ. 302; where Binks *v.* Lord Rokeby is not accurately quoted in the judgment.

(I) Why not? If a crop of hay had been taken there would have been a great tithe.

it seems that no compensation would have been allowed him had not the seller offered it (*s*).

39. Where the particular described the estate as four hundred and twelve acres, two hundred and twenty-seven of which were tithe-free, paying a very small modus; and it appeared that part of the estate represented to be tithe-free was subject to tithes which the owner was willing to sell, Lord Eldon said, that the allegation was, that two hundred and twenty-seven acres "are tithe-free, paying a very small modus," not stating a positive exemption from tithes; and where the contract is to sell an estate tithe-free, the vendor not representing himself to have title to the tithes, without entering into the question, whether the purchaser ought to be compelled to take it if not tithe-free; yet, if he chooses to take it, he cannot compel the vendor to buy the tithes, if there is a positive title to them in pernancy; all he can have is compensation (*t*).

40. These points will soon cease to be important: for the commutation of tithes in England and Wales for rentcharges is provided for (*u*), and in due time, with few exceptions (*x*), all lands will be absolutely discharged from tithes (*y*); and corn-rentcharges will be payable in lieu of them, with powers of distress and entry and enjoyment of the land for securing them (*z*). And owners of both lands and tithes (*a*), even tenants for life (*b*), are empowered to merge the tithes in the lands; and in Ireland tithes are abolished, and rentcharges substituted for them (*c*).

(*s*) Smith *v.* Tolcher, 4 Russ. 302.

(*t*) Todd *v.* Gee, 17 Ves. jun. 273; *qu.* how is the compensation to be estimated? See Ker *v.* Clobery, *supra*.

(*u*) 6 & 7 Will. 4, c. 71; 1 Vict. c. 69.

(*x*) Sect. 90.

(*y*) Sect. 67.

(*z*) Sect. 81, 82, 83, 84, 85.

(*a*) Sect. 71

(*b*) 1 & 2 Vict. c. 64.

(*c*) 1 & 2 Vict. c. 109.

41. Tithe, like land-tax, has never been deemed an incumbrance, and therefore, if nothing is said upon the subject, the purchaser must take the estate subject to its liability; and where the estate is free from land-tax or tithe, and the non-liability is not mentioned, yet the seller cannot require any allowance on account of the estate being discharged. Now, the rentcharge will probably not be noticed, unless it be a low one; but although the particulars or agreement are silent on the subject of tithe, yet the purchaser will not have a right to object to the rentcharge, although a like rentcharge payable to an individual might be fatal to the contract, because every estate, where nothing is said to the contrary, is presumed to be subject to tithes, and now rentcharges are substituted for tithes.

42. If a purchaser, with notice of a defect in a title to a part of the estate which is complicated with the rest, or which is the principal object of his contract, take possession of the estate, and prevent the vendor from making a title, he will be compelled to perform the contract, notwithstanding that he insisted upon the objection at the time he entered (*d*). A deduction from the price will, however, be allowed him, although the situation of the land will not perhaps be taken into consideration.

43. To guard against the rules established by the foregoing decisions, an express declaration should be inserted in all agreements for purchase of estates, that if a title cannot be made to the whole estate, the purchaser shall not be bound to perform the contract *pro tanto*; and a similar provision should be made where an estate is bought free from tithes, or with any other collateral benefit, which the purchaser may wish to secure.

(*d*) See Calcraft *v.* Roebuck, 1 Ves. jun. 221.

## SECTION III.

## OF DEFECTS IN THE QUANTITY OF THE ESTATE.

1. *Compensation for deficiency.*
3. *Though not sold by the acre.*
4. *Lands conveyed by estimation.*
5. *Contract for sale by estimation.*
6. *By estimation, more or less.*
8. *Stipulation that excess or deficiency not to be answered for.*
9. *Fraudulent statement.*
10. *Purchaser's knowledge of estate.*
11. *About the quantity stated.*
12. *Principle of abatement.*
13. *Where quantity greatly exceeds that sold.*
14. *Lands shown to purchaser, but excepted in conveyance.*
15. *Sale by particular, and part omitted.*
16. *Where more is conveyed than was sold.*
18. *General description: copyholds.*
19. *Contents of an acre: old law.*
21. *Customary acres.*
23. *Contents of an acre: new law.*
24. *Contracts, how affected by statute.*

1. We are now about to consider those cases in which the whole of the estate is well vested in the seller, but the quantity of its acreage has been misrepresented. This is a question of quantity: the one already considered is a question of title.

2. If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation, although the estate was estimated at that number in an old survey (*a*).

3. The rule is the same, though the land is neither bought nor sold professedly by the acre; the presumption is, that in fixing the price, regard was had on both sides to the quantity which both suppose the estate to

(*a*) Sir Cloudesley Shovel *v.* Bogan, 2 Eq. Ca. Abr. 688, pl. 1.

consist of. The demand of the vendor, and the offer of the purchaser, are supposed to be influenced in an equal degree by the quantity, which both believe to be the subject of their bargain. The general rule therefore is, that where a misrepresentation is made as to the quantity, though innocently, the right of the purchaser is to have what the vendor can give, with an abatement out of the purchase-money, for so much as the quantity falls short of the representation (*b*).

4. But where the lands *in a conveyance* are mentioned to contain so many acres *by estimation*, or the words "more or less" are added, if there be a small portion more than the quantity, the vendor cannot recover it; and if there be a small quantity less, the purchaser cannot obtain any compensation in respect of the deficiency (*c*). Indeed, a case is said to have been decided, where a man conveyed his land by the quantity of one hundred acres, were it more or less, and it was not above sixty acres; but the purchaser had no relief, because it was his own laches (*d*).

5. That however was the case of an actual conveyance. Where the contract rests *in fieri*, the general opinion has been, that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contain the words *more or less*, or *by estimation* (*e*).

6. But in a case where the estate was stated to contain *by estimation* forty-one acres, *be the same more or less*; and upon an admeasurement, the quantity proved to be only between thirty-five and

(*b*) Hill *v.* Buckley, 17 Ves. 394, *per* Sir William Grant.

(*c*) Twyford *v.* Warcup, Finch, 310. See Marquis of Townshend *v.* Stangroom, 6 Ves. jun. 328; Rushworth's case, Clay. 46; Neale *v.* Parkin, 1 Esp. Ca. 229.

(*d*) Anon. 2 Freem. 106.

(*e*) Hill *v.* Buckley, 17 Ves. 394.

thirty-six acres; and the purchaser claimed an abatement; the Master of the Rolls decided against the claim. He said, that the effect of the words "more or less" added to the statement of quantity had never been absolutely fixed by decision; being considered sometimes as intending to cover only a small difference the one way or the other; sometimes as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it. In the instance before him, the description was rendered still more loose by the addition of the words "by estimation." The estimated extent of ground frequently proved quite different from its contents by actual admeasurement. It could not be contended that the terms "estimated" and "measured" had the same meaning. If a man was told that a piece of land was never measured, but was estimated to contain forty-one acres, would that representation be falsified by showing that, when measured, it did not contain the specified number of acres? The only contradiction to that proposition would be, that it had not been estimated to contain so much (*f*).

7. The case of Day *v.* Finn (*g*), however, seems a considerable authority, that at least the words *more or less* ought only to clear a small deficiency where the contract rests *in fieri*. There, in ejectment, the plaintiff declared on a lease for years of a house, and thirty acres of land in *D*; and that *J S* did let to him the said messuage and thirty acres, by the name of his house in *B*, and ten acres of land there, *sive plus sive minus*: it was moved in arrest of judgment; because that thirty acres cannot pass by the name of ten acres, *sive plus sive minus*; and so the plaintiff had not con-

(*f*) Winch *v.* Winchester, 1 Ves. & Beam. 375.

(*g*) Owen, 133; and see the cases cited above.

veyed to him thirty acres, for when ten acres are leased to him *sive plus sive minus,* these words ought to have a reasonable construction to pass a reasonable quantity, either more or less, and not twenty or thirty acres more. Yelverton agreed, for the word ten acres, *sive plus sive minus,* ought to be intended of a reasonable quantity, more or less, by a quarter of an acre, or two or three at most; but if it be three acres less than ten, the lessee must be contented with it. *Quod* Fenner and Crook *concesserunt,* and judgment was stayed.

8. And upon a motion in Portman *v.* Mill (*h*), it appeared that the lands were described as containing, by estimation, 349 acres, or thereabouts, be the same more or less, and the agreement stipulated that the parties should not be answerable for any excess or deficiency in the quantity of the premises, but that the premises should be taken by the purchaser at the quantity, whether more or less; and the actual number of statute acres was less by 100 acres than the number stated in the contract. Lord Eldon said, that as to this stipulation, he never could agree that such a clause (if there were nothing else in the case) would cover so large a deficiency in the number of acres as was alleged to exist there.

9. But however the rule may be finally settled, yet a seller knowing the true quantity, would not be allowed to practise a fraud, by stating a false quantity, with the addition of the words "more or less," or the like (*i*).

10. If an estate be represented as containing a given quantity, although not professedly sold by the acre, the circumstance that the purchaser was intimately acquainted with the estate, would not necessarily imply knowledge of its exact contents; while a particular

(*h*) 2 Russ. 570.

(*i*) See Duke of Norfolk *v.* Worthy, 1 Camp. Ca. 337; *supra,* p. 50, and 1 Ves. & Beam. 377.

statement of the quantity would naturally convey the notion of actual admeasurement: and therefore the Court would not be warranted in inferring that the purchaser knew the real quantity (*k*). For, if the purchaser did know the real quantity, of course he could not claim any allowance for the deficiency.

11. In a late case (*l*), the agreement was to sell an estate "containing the several quantities after mentioned, that is to say, by the plan drawn by Mr. *F* in 1792;" the agreement then proceeded to state the numbers and particular quantities of *each close*, and then proceeded to add, "containing altogether *about* 101ª 3ʳ 29ᴘ." There was a deficiency of 2ª in two closes which together were stated to contain 8ª 1ʳ 4ᴘ. It was held that the purchaser was entitled to an abatement, as the quantity of each close was particularly specified.

12. The principle upon which an abatement in these cases is made, is, to place the parties in the situation in which they would have stood, if there had been no misrepresentation. Therefore, where a man purchased a wood, which was, by mistake, represented to contain nearly twenty-six acres more than it did, but the purchaser was, in the course of the negotiation, furnished with the value of the woods *quâ* wood, so that he obtained the right quantity of wood but not of soil, the abatement was decreed to be only so much as soil covered with wood would be worth, after deducting the value of the wood (*m*).

13. In Price *v.* North (*n*), where the estate was described as seven fields 14ª more or less, with the

(*k*) Winch *v.* Winchester, 1 Ves. & Beam. 375.

(*l*) Gell *v.* Watson, 16 Nov. 1825, MS.

(*m*) Hill *v.* Buckley, 17 Ves. jun. 394.

(*n*) 2 You. & Coll. 620.

usual condition, that mistakes in description should not annul the sale, but be the subject of compensation, it appeared that the acres were customary ones, and were equal to 27 statute acres; the Lord Chief Baron observed, that he knew that courts of equity had gone a great way in allowing contracts of this nature to be altered on the ground of misdescription; but he owned it appeared to him, that such a misdescription as this would not be ground for modifying the contract, but for avoiding it altogether. This observation was made upon a petition against the purchaser, and no doubt it would be difficult in such a case to make a *bonâ fide* purchaser buy an estate twice as large as that for which he had contracted, and pay double the amount of the purchase-money for it, but he could doubtless enforce the contract upon payment of the additional price. The vendor alone was in fault.

14. Where lands are shown to a purchaser as part of his purchase, he will be entitled to them, although expressly excepted in his conveyance by name, provided he did not know them by that name (*o*).

15. So if a man purchase an estate by a particular, and in the conveyance part of the land is left out, equity will relieve him (*p*); but it must be clear that he did purchase by the particular, because it is not a writing within the statute of frauds; and, therefore, unless that be the case, or the agreement can be otherwise proved, the Court cannot relieve (*q*).

16. On the other hand, the Court will equally relieve a vendor, where more land has passed than was con-

(*o*) Oxwick *v.* Brockett, 1 Eq. Ca. Abr. 355, pl. 5.

(*p*) Prec. Cha. 307, *arguendo*; and see Nelson *v.* Nelson, Nels. Cha. Rep. 7.

(*q*) Cass *v.* Waterhouse, Prec. Cha. 29. See Clinan *v.* Cooke, 1 Scho. & Lef. 22; and see ch. 3, *supra*; and 2 Dow. 301.

tracted for; although in an early case (*r*) (I) this relief was denied; because the defendant was a purchaser upon valuable consideration. But it is now clear, that if land be expressly conveyed, or pass by general words, which was not mentioned in the particular by which the purchase was made, or was not intended to be conveyed, the purchaser will be decreed to re-convey it (*s*).

17. And where a purchaser took a conveyance of an estate from his own instructions, he was held not to be entitled to land answering the general description in the advertisements of sale, but which were not included in his conveyance, nor in a more particular description from which he prepared his instructions (*t*).

18. We may here observe, that old general or vague descriptions, particularly in the case of copyholds, will in most cases be held to pass the lands which have regularly been held under them (*u*).

19. To come to a right conclusion on this branch of our subject, we must be informed that an acre does not always contain the same superficial quantity of land. The word acre at first denoted, not a determined quantity of land, but any open ground or field. It afterwards signified a measured portion of land, but the quantity varied, and was not fixed until the statute (II) *de terris*

(*r*) Clifford *v.* Laughton, Toth. 83.

(*s*) Tyler *v.* Beversham, Rep. *temp.* Finch, 80; 2 Ch. Ca. 195. See Gibson *v.* Smith, Barnard. Ch. Ca. 491.

(*t*) Calverley *v.* Williams, 1 Ves. jun. 210.

(*u*) See Long *v.* Collier, 4 Russ. 267.

(I) Probably the defendant had purchased without notice from the *first* purchaser.

(II) It was formerly holden not to be a statute, but only an ordi-

*mensurandis* (*x*), according to which an acre contains one hundred and sixty square perches; so that every acre is a superficies of forty perches long, and four broad; or in that proportion, be the length or breadth more or less. The length of the perch was, previously to the statute of Edward, fixed at five yards and a half, or sixteen feet and a half, by the statute called *compositio ulnarum et perticarum* (*y*), and the act of Edward must of course be construed with reference to this standard. Lord Kenyon seems to have thought it impossible to contend, that a custom should prevail that a less space of ground than an acre should be called an acre (*z*); but in several places the perch is measured with rods of different lengths, and notwithstanding Lord Kenyon's *dictum*, *consuetudo loci est observanda* (*a*), so that a greater or less space of ground than a statute acre may, in compliance with the custom of the place where the land lies, be called an acre. In some places the perch is measured by a rod of twenty-four feet, in some by one of twenty feet (*b*), and in others by one of sixteen feet (*c*). And we are now to inquire in what

(*x*) 33 Edw. I.; and see 24 H. VIII. c. 4; 2 Inst. 737; Co. Litt. 69 a; Spelm. Gloss. v. *Acra, particata terræ, pertica, pes forestæ, roda terræ.* Cow. Interp. v. Acre.

(*y*) See 4 Inst. 274.

(*z*) Noble *v.* Durell, 3 T. Rep. 271; and see Hockin *v.* Cooke, 4 T. Rep. 314; Master of St. Cross *v.* Lord Howard de Walden, 6 T. Rep. 338.

(*a*) 6 Rep. 67 a.

(*b*) Crompt. on Courts, 222, who cites a case in the Exchequer, related to him by one of the Barons; and also 47 E. III. [fo. 18 a, pl. 35;] and see Barksdale *v.* Morgan, 4 Mod. 185.

(*c*) Co. Litt. 3 b. See Dalt. c. 112, s. 25.

---

nance. Stowe's case, Cro. Jac. 603; but this has since been overruled. Rex *v.* Everard, 1 Lord Raym. 638.

cases the custom of the country in this respect shall or shall not prevail.

20. In adversary writs the number of acres are accounted according to the statute measure (*d*), but in fines, and common recoveries, which were had by agreement and consent of parties, the acres of land are according to the customary and usual measure of the country, and not according to the statute (*e*).

21. So, which is more to our present purpose, where a man agrees to convey (*f*), or actually conveys (*g*) any given number of acres of land, which are known by estimations or limits, there the acres shall be taken according to the estimation of the country where the land lies, be they more or less than the measure limited by the statute; for they pass as they are there known, and not according to the measure by statute.

22. But if a man possessed of a close containing twenty acres of land by estimation, which is not eighteen, grant ten acres of the same land to another, there the grantee shall have ten acres according to the measure fixed by the statute, because the acres of such a close are not known by parcels, or metes and bounds, and so this case differs from the one immediately preceding it (*h*). And it is said, that if one sells land, and is obliged that it contain twenty acres, the acres shall be taken according to the law, and not according to the custom of the country (*i*).

(*d*) Andrew's case, Cro. Eliz. 476, cited.

(*e*) Sir John Bruyn's case, 6 Co. 67 a, cited; Waddy *v.* Newton, 8 Mod. 276. See Floyd *v.* Bethill, 1 Roll. Rep. 420, pl. 8; and see Treswallen *v.* Penhules, 2 Rolle's Rep. 66; 12 Vin. 240.

(*f*) Some *v.* Taylor, Cro. Eliz. 665.

(*g*) 47 E. III. 18 a, pl. 35; 6 Co. 67 a; Morgan *v.* Tedcastle, Poph. 55; Floyd *v.* Bethill, 1 Rolle's Rep. 420, pl. 8; Andrew's case, Cro. Eliz. 476, cited.

(*h*) Morgan *v.* Tedcastle, Poph. 55.

(*i*) Wing *v.* Earle, Cro. Eliz. 267.

23. But the law upon this subject is altered by an Act of the 5th of the late King, intituled, "An Act for ascertaining and establishing Uniformity of Weights and Measures," which provides, that (*k*) the straight line or distance between the centres of the two points in the gold studs in the straight brass rod now in the custody of the clerk of the House of Commons, whereon the words and figures, "standard yard, 1760," are engraved, shall be the original and genuine standard of that measure of length or lineal extension called a yard; and that all measures of length shall be taken in parts or multiples, or certain proportions of the said standard yard; and that one third part of the said standard yard shall be a foot, and the twelfth part of such foot shall be an inch; *and that the pole or perch in length shall contain five such yards and a half*, and it enacts, that (*l*) all superficial measure shall be computed and ascertained by the said standard yard, or by certain parts, multiples or proportions thereof; and that the rood of land shall contain 1,210 square yards according to the said standard yard; and that the acre of land shall contain 4,840 such square yards, being 160 square perches, poles or rods.

24. And it enacts (*m*), that from the 1st day of May 1825, all contracts, bargains, sales and dealings which shall be made or had within any part of the United Kingdom of Great Britain and Ireland, for any goods, wares, merchandise, or other thing to be sold, delivered, done or agreed for *by measure*, where no special agreement shall be made to the contrary, shall be deemed, taken and construed to be made and had according to the standard measures ascertained by this Act; and in all cases where any special agreement shall be made

(*k*) Sect. 1, c. 74.
(*l*) Sect. 2.
(*m*) Sect. 15.

with reference to any measure established by local custom, *the ratio or proportion which every such local measure shall bear to any of the said standard measures shall be expressed, declared and specified in such agreement, or otherwise such agreement shall be null and void:* and it is then enacted that (*n*) the several statutes, ordinances, and acts and parts of the several statutes, ordinances and acts thereinafter mentioned and specified, so far as the same relate to the ascertaining or establishing any standards of measures, or to the establishing or recognizing certain differences between measures of the same denomination, shall from and after the 1st day of May 1825, be repealed; and the enumeration includes the statutes or ordinances before mentioned in this section, which are therefore repealed.

25. This Act determines what now in law is the superficial quantity of an acre of land. A question will no doubt arise, whether s. 15 applies to contracts for land under the words "or other thing to be sold," or whether those words are not to be construed *ejusdem generis* with the preceding words, which are "goods, wares, merchandise." At all events, the section applies only to sales *by measure*. But wherever a purchaser is under a contract entitled to statute acres, the measure will be regulated by this Act.

26. If the 15th section of the statute applies to sales of land, a contract for sale of so many acres, customary measure, would be void, unless the proportion which the customary measure bears to the standard measure is specified in the agreement.

(*n*) Sect. 23, see 6 Geo. IV. c. 12.

## SECTION IV.

## OF DEFECTS IN THE QUALITY OF THE ESTATE.

2, 21. *Caveat emptor.*
3. *Right of way not stated.*
4. *Uncommonly rich water meadow.*
5. *Residence for a respectable family.*
6. *House in different county.*
7. *Where house will not answer for purpose intended.*
8. *Opinions on Shirley* v. *Davis.*
11. *False description of locality.*
12. *Of state of repair.*
13. *Notice to repair not disclosed.*
15. *Where purchaser knows the description is false.*
19. *Statement of annual produce of woods.*
22. *Repairs subject of compensation.*
23. *Cutting down ornamental timber after contract.*
26. *Latent defect which purchaser cannot discover.*
27. *Lord Kenyon's opinion although estate sold with all faults.*
28. *Lord Ellenborough's opinion.*
29. *Sir James Mansfield's.*
30. *Mr. Justice Heath's and Mr. Justice Gibbs'.*
31. *Observations on the rule.*
33. *The scienter.*
34. *In the case of title.*
36. *Concealment of defect.*
38. *Purchaser waiving his right.*

1. We have under a preceding head anticipated questions arising upon rights of sporting, of common, or the like, to which we must now refer (*a*).

2. In most cases on this head, the rule "*caveat emptor*" applies, and therefore, although there be defects in the estate, yet, if they are patent, the purchaser can have no relief (*b*).

3. Thus, where a meadow was sold to the owner of a house and ground adjoining without any notice of a footway round it, and also one across it, which of course

(*a*) *Supra*, s. 1; and see ch. 1, s. 3, pl. 22 39.

(*b*) See the introductory Chapter; and see Lowndes *v.* Lane, 2 Cox, 363.

lessened its value, Lord Rosslyn decreed a specific performance with costs, as *he could not*, he said, *help the purchaser who did not choose to inquire* (*c*.) *It was not a latent defect*. Lord Manners has said, that he believed the bar was not very well satisfied with the decision, although, as he observed, the purchaser was undoubtedly extremely negligent not to look at the estate before he purchased it (*d*). Had he used ordinary caution, he would have discovered the easement.

4. So a description, that the land was uncommonly rich water meadow, was held to be immaterial, although the property was imperfectly watered. The Court thought that it would be straining the meaning of the words "uncommonly rich water meadow land," if it were not confined to the quality of the land; and in that sense it professed to be nothing more than the loose opinion of the auctioneer or vendor as to the obvious quality of the land, upon which the vendee ought not to have placed, and could not be considered to have placed, any reliance (*e*).

5. So where a house was represented as a residence fit for a respectable family, the Court said the purchaser might see the house and judge for himself, and he could not complain when ordinary diligence would have enabled him to make sure. Therefore, if the house appeared in fact not to be such as we should understand by that description, nothing could be made of that. That was merely puff (*f*.)

6. And here a case (*g*) may be introduced, where the subject of the contract was a house on the north side of

(*c*) Oldfield *v*. Round, 5 Ves. jun. 508.

(*d*) 1 Ball & Beatty, 250; and see Legge *v*. Croker, *ib*. 506.

(*e*) Scott *v*. Hanson, 1 Sim. 13; *vide supra*, p. 4.

(*f*) Magennis *v*. Fallon, 2 Moll. 561.

(*g*) Shirley *v*. Davies, in the Exchequer, 6 Ves. jun. 678, cited.

the river Thames, supposed to be in the county of Essex, but which turned out to be in Kent; a small part of which county happens to be on the other side of the river. The purchaser was told he would be made a churchwarden of Greenwich, when his object was to be a freeholder of Essex; yet he was compelled to take the house.

7. This decision, however, seems to be opposed by a case before Lord Talbot. An agreement was entered into for the purchase of a house for a coffee-house. It was found that a chimney could not be made convenient for a coffee-house; but nevertheless, the vendor filed a bill against the purchaser, to compel him to perform the agreement. Lord Talbot dismissed the bill, merely because the tenant would be obliged to take it for a purpose he did not want (*h*).

8. The case, indeed, of Shirley *v.* Davis, and the cases of that class have constantly been disapproved of. In one case it was observed by the Court, that the principle was, that if substantially the purchaser can have the thing contracted for, a slight variation in the qualification of it will not disable the vendor from having a decree for specific performance, when compensation can be made pecuniarily for the difference. This was the sole principle on which the Court assumed jurisdiction to permit deviation in any degree from the strict right to have exactly the precise thing agreed for. There had been some very wild cases—Shirley *v.* Davis—animadverted on by Lord Eldon more than once, the tithe free land case, especially the house and wharf case, and the case of the manor with the right of shooting (I).

(*h*) 1 Russ. & Myl. 128; 1 Ves. 307; and see 13 Ves. jun. 78.

(1) This probably is an inaccurate reference to Burnell *v.* Brown, *supra*, p. 501.

But those cases were not to be followed. There was, the Court added, no case which was of authority deciding that in case of a contract for a peculiar object, having in the eye of the purchaser a particular value, from circumstances not capable of pecuniary compensation, the purchaser could be compelled to perform it if these be taken away (*i*).

9. But it may be remarked, that it is no bar to a specific performance, that the conveyance will not have the operation which the vendor thought it would. Thus, where a tenant for life of a copyhold purchased the reversion in the hope of extinguishing contingent remainders, and afterwards finding that the conveyance would not affect the remainders, brought a bill to be relieved against the security which he had given for the purchase-money; the Court gave him his option either to pay the principal, interest and costs, or to have his bill dismissed with costs (*k*).

10. So in a case where, under the *legal construction* of the terms of an agreement for a lease, the option to determine the lease was in the lessee only, and it was argued against a specific performance, that this was contrary to the intention, the Master of the Rolls said that a specific performance of a written agreement cannot be denied because the meaning of the parties does not appear (*l*).

11. But where a vendor gives a false description of the estate, the purchaser may at law rescind the contract, although it be provided that errors of description shall not vitiate the sale. As where before the Reform Act an estate was stated to be but one mile from a borough town, and it turned out to be between three and

(*i*) Magennis v. Fallon, 2 Moll. 588, 589, *per* Hart, L. C.

(*k*) Mildmay v. Hungerford, 2 Vern. 243.

(*l*) Price v. Dyer, MS., Rolls; S. C. 17 Ves. jun. 356.

and four, the contract was held to be voidable by the purchaser (*m*). And of course the same rule would prevail in equity.

12. So in a case where the estate was described to have lately undergone a thorough repair, whereas it was in a complete state of ruin, and ordered to be pulled down by the district surveyor, the purchaser was allowed to rescind the contract (*n*). And where the state of the house was not perfectly visible to every body, and the state of the repairs was falsely represented by the seller, knowing that the house had the dry-rot, without communicating that fact to the purchaser, who relied so much on the seller that he had not had the premises surveyed; upon a bill filed by the seller, a specific performance was decreed, but with a compensation to the purchaser (*o*), with which he was willing to complete the contract.

13. So where the purchaser of a leasehold house was aware of the ruinous state of the premises, but no mention was made at the sale by auction of a notice to repair given to the vendor by the lessor, on the day before the sale, under which the lessor re-entered and evicted the purchaser, he (the purchaser) was permitted to recover the deposit from the auctioneer, on the ground that in such transactions good faith was most essential, and the vendor or his agent was bound to communicate to the vendee the fact of such notice (*p*).

14. But if the purchaser knew that the description

(*m*) Duke of Norfolk *v.* Worthy, 1 Camp. Ca. 337; *vide supra*, p. 50; and see Fenton *v.* Browne, 14 Ves. jun. 144; —— *v.* Christie, 1 Salk. 28, by Evans; Trower *v.* Newcombe, 3 Mer. 704.

(*n*) Loyes *v.* Rutherford, K. B. 16 May 1809.

(*o*) Grant *v.* Munt, Coop. 173; the evidence hardly warranted the decree, but an issue as to the fact of the representations was declined.

(*p*) Stevens *v.* Adamson, 2 Stark. 422.

was false, he cannot, it seems, take advantage of it either at law or in equity.

15. Thus, in a case (*q*) where an estate was described as being within a ring fence, it appeared, that the estate was intersected by other lands, and did not answer the description, but that the purchaser knew the situation of the estate; Sir William Grant (after expressing a doubt whether such an objection was a subject of compensation, as it was not certain that a precise pecuniary value could be set upon the difference between a farm compact in a ring fence, and one scattered and dispersed with other lands), said, that the purchaser was clearly excluded from insisting upon that as an objection to complete the contract. He saw the farm before he purchased; he had lived in the neighbourhood all his life. This variance was the object of sense; he must have known whether the farm did lie in a ring fence or not; and upon the same ground, that the purchaser could not get rid of the contract on account of the difference in the description of the farm, he determined that he could not be entitled to compensation. If a compensation was given to him, he would get a double allowance; for if he had knowledge that what he proposed to purchase did not answer the description, it must be taken that he bid so much the less.

16. This case, we observe, went a step farther than either the case before the Court of Exchequer, or that before Lord Rossyln, in neither of which was there any warranty or false description. But in this case it was expressly stated, that the whole estate was within a ring fence; but the Master of the Rolls thought that circumstance immaterial, as the purchaser knew the description was false; and the decision appears to have

(*q*) Dyer *v.* Hargrave, 10 Ves. jun. 505.

been grounded on the doctrine, that even at law a warranty is not binding where the defect is obvious, and the learned Judge put the cases of a horse with a visible defect, and a house without a roof or windows warranted as in perfect repair; and in another case, where there was a representation as to the state of repair, he said that as to warranty, if the defect was patent or obvious, the warranty would not bind (*r*).

17. But where a particular description is given of the estate, which turns out to be false, and the purchaser cannot be proved to have had a distinct knowledge of the actual state of the subject of the contract, he will be entitled to a compensation, although he may be compelled to perform the contract.

18. Thus, in the case before the Master of the Rolls, the particular described the house as being in good repair, and the farm as consisting of arable and marsh land, in a high state of cultivation. It appeared, however, that the house was not in good repair, and that the land was not in a high state of cultivation. The learned Judge said, that the objections were such as a man might have an indistinct knowledge of, and he might have some apprehension that, in those respects, the premises did not completely correspond with the description, and yet the description might not be so completely destroyed as to produce any great difference in his offer. As to the marsh land, it was very uncertain, whether, by any view, it was possible for him to judge of that. It was stated by many witnesses, that the season of the year was just at the breaking of a frost, and represented that no man could, at that time, say whether the land was well or ill cultivated. So he might have seen some trifling defects in the house, and

(*r*) Grant *v.* Munt, Coop. 173.

might not intend to make the objection, if they turned out to be nothing more than they appeared upon the surface. He might consider them too trivial, and not mean to claim compensation for an objection so insignificant. But afterwards, when he came to examine, he discovered that the house was materially defective, and very much out of repair. Admitting that he might, by minute examination, make that discovery, he was not driven to that examination; the other party having taken upon him to make a representation: otherwise he would be exonerated from the consequence of that in every case where, by minute examination, the discovery could be made. The purchaser was induced to make a less accurate examination by the representation, which he had a right to believe. He therefore was entitled to compensation for the defects of the house, and the cultivation of the marsh land.

19. In a case where the woods were represented as actually producing 250 *l.* per annum, on an average of the fifteen preceding years; but the manner of making the calculation was explained at the sale, and it seems a paper was exhibited, which showed that the woods had not been equally cut, and the purchaser sent his own surveyors down, and they thought that the woods had been cut in an improper manner, Lord Thurlow refused the purchaser any compensation although the representation was not correct, for the communications to him put it on him to consider whether the manner of calculation was a proper one to ascertain the *permanent* income, and as he was apprised by his surveyors that the woods had not been regularly cut, with that knowledge it fell on him to take care of himself (*s*).

20. But if the representation had been made generally, and it had been distinctly proved that this part,

(*s*) Lowndes *v.* Lane, 2 Cox, 363.

though literally true, yet was made by racking the woods beyond the course of husbandry, that would have been a fraud in the representation which Lord Thurlow said might have been relieved against (*t*).

21. Lord Thurlow, in the above case, said that, as to the extent of the maxim, *caveat emptor*, he was willing to carry it to a great extent, but not to the extent of saying it should apply where there was a positive representation essentially material to the subject sold, and which at the same time is false in fact. He said he must consider any fundamental mistake in the particulars of an estate as furnishing a case in which the purchaser would be entitled to have the mistake set right if recently applied for.

22. Notwithstanding that the case of Dyer *v.* Hargreave has established that the repairs necessary to a house are a subject of compensation, although the house is described to be in good repair, yet the Court seemed to admit, that if the purchaser wanted possession of the house to live in at a given period, by which time the repairs could not be completed, he ought not to be bound to complete the contract (*u*).

23. Where a house was represented in the advertisements as fit for the residence of a family, and the demesne well wooded, and at the time of the sale a map of the estate was exhibited upon which several clumps and single trees were delineated, although nothing was said about ornamental timber, and after the sale, and pending the investigation of title, some of the ornamental timber exhibited on the map was cut down, the purchaser was relieved from the contract. The Court said, that there was now no case, which was of authority, deciding that in case of a contract for a peculiar object, having in the eye of the purchaser

(*t*) S. C. (*u*) *Vide supra*, ch. 5.

a particular value, from circumstances not capable of pecuniary compensation, where the purchaser can be compelled to perform it, if these be taken away. The house was represented as surrounded by ornamental timber, constituting a feature of beauty, and a purchaser could not replace the timber. The Court could not go into the question of despoliation of ornament; the destruction of one beautiful tree would be sufficient, and it did not admit of pecuniary compensation. The adventitious value was taken away, and there was no instance of a court of equity under such circumstances compelling a purchaser—contracting for the purchase of a house and demesne fit for residence, and embellished with ornamental timber, where ornamental trees have been cut down between the contract and possession given, or title shown—to complete the purchase (*x*).

24. This case proves that a purchaser is entitled to the subject as described, and that the alteration of it after the contract, and before the completion of the contract, in a subject which admits not of compensation, avoids the contract as against the purchaser.

25. But where ordinary timber is cut down after the contract, that may be a subject of compensation (*y*).

26. Where the defect is a *latent* one, and the purchaser cannot by the greatest attention discover it, if the vendor be aware of it, and do not acquaint the purchaser with the fact, he may set aside the contract at law, although he bought the estate *with all faults* (*z*); and equity would not enforce a specific performance.

27. This was decided at law by Lord Kenyon at *nisi prius*, upon the sale of a ship. It was insisted, for the seller, that the rule *caveat emptor* applied; but Lord Kenyon said, that there are certain moral duties, which

(*x*) Magennis *v.* Fallon, 2 Moll. 588.

(*y*) S. C.

(*z*) Mellish *v.* Motteux, Peake's Ca. 115.

philosophers have called duties of imperfect obligation, such as benevolence to the poor, and many others, which courts of law do not enforce. But in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith. This was a latent defect, which the plaintiffs could not, *by any attention whatever, possibly discover;* and which the defendants knowing of, ought to have disclosed to the plaintiffs. The terms to which the plaintiffs acceded, of taking the ship with all faults, and without warranty, must be understood to relate only to those faults which the plaintiffs could have discovered, or which the defendants were unacquainted with.

28. In a late case (*a*), the same point arose before Lord Ellenborough at *nisi prius*; but ultimately it was not necessary to decide it. Lord Kenyon's decision was cited. Lord Ellenborough said, that he could not subscribe to the doctrine of that case, although he felt the greatest respect for the authority of the Judge by whom it was decided. Where an article is sold *with all faults*, he (Lord Ellenborough) thought it was quite immaterial how many belonged to it within the knowledge of the seller, *unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser.* The very object of introducing such a stipulation is, to put the purchaser on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent. A man may be possessed of a horse he knows to have many faults, and wish to get rid of him, for whatever sum he would fetch. He desires his servant to dispose of him; and, instead of giving a warranty of soundness, to sell him *with all faults.* Having thus

(*a*) Baglehole *v.* Walters, 3 Camp. Ca. 154. See 1 Ball & Beatty, 515; Early *v.* Garrett, 9 Barn. & Cress. 928; 4 Man. & Ryl. 687; Bywater *v.* Richardson, 1 Adol. & Ell. 508.

laboriously freed himself from responsibility, is he to be liable, if it be afterwards discovered that the horse was unsound? Why did not the purchaser examine him in the market when exposed to sale? By acceding to buy the horse with all faults, he takes upon himself the risk of latent or secret faults, and calculates accordingly the price which he gives. It would be most inconvenient and unjust if men could not, by using the strongest terms which language affords, obviate disputes concerning the quality of the goods which they sell. In a contract such as this, he thought there was no fraud, unless the seller, by positive means, renders it impossible for the purchaser to detect latent faults; and he made no doubt, that this would be held as law when the question should come to be deliberately discussed in any court of justice.

29. In a still later case, upon the sale of a ship, the particular stated, amongst other things, that the hull was nearly as good as when launched. And after stating where she was to be seen, added, "with all faults as they now lie." Then followed an inventory of the stores, to which the following declaration was added, "the vessel and her stores to be taken with all faults as they now lie, without any allowance for weight, length, quality, *or any defect whatsoever*." The ship was quite unseaworthy. She belonged to underwriters to whom she had been abandoned. The agents for the sale must have known her defects, *and she was kept constantly afloat, so that her defects could not be discovered.* The person who framed the particular had not examined the vessel (*b*). Mansfield, C. J., said that these words were very large, to exclude the buyer from calling upon the seller for any defect in the thing sold, but if the seller was guilty of any positive fraud in the sale, these words would not protect him. There might be such fraud

(*b*) Schneider v. Heath, 3 Camp. Ca. 506.

either in a false representation, or in using means to conceal such defect. He thought the particular was evidence here by way of representation, that stated the hull to be nearly as good as when launched, and that the vessel required a most trifling outfit. Now, was this true or false? If false, it was a fraud, which vitiated the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent says, that he framed this particular without knowing anything of the matter. But it signified nothing whether a man represented a thing to be different from what he knew it to be, or whether he made a representation which he did not know at the time to be true or false, if, in point of fact, it turns out to be false. But, besides this, it appeared here that means were taken fraudulently to conceal the defects in the ship's bottom. These must have been known to the captain, who was to be considered the agent of the owners, and he evidently, to prevent their being discovered by persons disposed to bid for her, removed her from the ways where she lay dry, and kept her afloat in the dock till the sale was over. Therefore, consistently with the decided cases upon this subject, the learned Judge was of opinion, that the purchaser was entitled to recover back his deposit.

30. In a case which occurred a few months before, upon the sale of a ship, where the Court held that, in point of fact, there was no fraud, Mr. Justice Heath said, that the meaning of selling "with all faults" is, that the purchaser shall make use of his eyes and understanding to discover what faults there are. He admitted that *the vendor was not to make use of any fraud or practice to conceal faults.* The learned Judge adhered to the doctrine of Lord Ellenborough, above stated, without any difficulty. Mr. Justice Chambre held, there must be

evidence of fraud to enable the Court to depart from the written agreement. Mr. Justice Gibbs agreed with Lord Ellenborough's doctrine. Even if there had been a representation it would not have availed. He held, that if a man brought him a horse, and made any representation whatever of his quality and soundness, and afterwards they agreed in writing for the purchase of the horse, that shortened and corrected the representations, and whatsoever terms were not contained in the contract would not bind the seller. But the learned Judge agreed that *fraud* would not be done away by the contract (*c*).

31. It appears therefore to be settled that the condition "with all faults," excuses the seller from stating those within his knowledge, but he must not use any artifice to conceal them from the purchaser. Now this, which is quite right, seems hardly to meet the case before Lord Kenyon, where the seller knew of the defect and did not disclose it, although he also knew that the purchaser could not by any attention whatever possibly discover it. In such a case, no artifice need be resorted to by the seller to conceal the defect from the purchaser, and yet the man who sells such a subject with all its faults without disclosing the concealed one, seems only, in a moral view, on a level with him who, making a similar sale of a subject where a defect might by diligence be discovered, resorts to artifice to prevent the purchaser from coming to the knowledge of it. The question is not of more or less of turpitude, but whether in either case a fraud has not been committed. The rule is not that the seller may use his skill to conceal, and that the purchaser is to exercise his to discover the defects. The distinction therefore is but a thin one

(*c*) Pickering *v.* Dowson, 4 Taunt. 779. See Jones *v.* Bowden, *ib.* 847; Shepherd *v.* Kain, 5 Barn. & Ald. 240; Freeman *v.* Baker, 5 Barn. & Adol. 797.

between a man who has plastered over a rent in the main wall and papered it over, and then sells, subject to all faults, knowing that the purchaser cannot discover this fatal one which he does not point out, and a man who, knowing that the defect is thus concealed, sells the estate with all its faults without disclosing this, which he knows cannot be discovered: in either case the purchaser is deceived. In the first case, no doubt, the seller by his act hides the defect, but there is no positive fraud in hiding the defect; the fraud is committed, or at least consummated, when the seller by his silence induces the purchaser to buy without the means of knowledge. Now in this respect, the sellers in the two cases are upon a par, for each is aware that the defect is hid, and each is silent. Can it, in point of honesty, matter that the one covered the defect and that the other only knew that it had been covered.

32. But where even the estate is sold generally and not subject to all faults, the ground and basis of an action in a case of this nature, for recovery of a deposit, where the contract is *in fieri*; or of damages, where the contract is actually executed, is the *scienter*; and, therefore, if the vendor was not aware of the defect, he will not be answerable for it. Nor will trifling defects be a sufficient foundation for such an action.

33. Thus, in a case (*d*) where a purchaser brought an action against a vendor, to recover damages for having sold him a house, knowing it had the dry-rot (*e*); it appeared, that the house was situated in a clayey soil, and that the floor lay near the ground, by which some of the timbers had rotted; but the vendor was not aware of the defects, and the purchaser was nonsuited. Lord Kenyon said, the circumstances that had

(*d*) Bowles *v.* Atkinson, N. P. MS.; and see Legge *v.* Croker, 1 Ball & Beat. 506.

(*e*) See Grant *v.* Munt, Coop. 173, *supra*, p. 540.

been proved in this case might be described by a word that was used by one of the witnesses; they were mere *bagatelles*. If these small circumstances were to be the foundation of an action, every house that was sold would produce an action. If a broken pane of glass that might be found in a garret window, perhaps, had not been described by the seller, it would be the ground of an action. If he was to consider himself as a witness in the cause, he could say he had met with something of this kind, and he never thought himself imposed upon, because now and then some rotten boards and rotten joists might be found about a house. Besides, there was no imposition, no *mala fides* in this case.

34. And of course the same rule prevails where the question turns upon title, and the estate is agreed to be sold with all defects of title. Where, therefore, a leasehold estate, for which rent had been paid, had been sold by the lessee as a fee simple, which fee simple afterwards became vested in assignees of a bankrupt, who contracted to sell the estate to a person who agreed to accept a conveyance of such right or title as might be theirs, with all faults and defects, if any, and the purchase-money was paid, and afterwards the lessor recovered the property; the purchaser, before the execution of the agreement, asked the sellers whether any rent had ever been paid, and they replied, that no rent had ever been paid by the bankrupt or any person under whom he claimed; and the jury having found that the sellers believed their representation to be true, the purchaser, it was held, had no right to recover the purchase-money; for the concealment must be fraudulent, and the statement, though false, was not fraudulent (*f*).

35. Although the purchaser might, with proper precaution, have discovered the defect; yet if, during the

(*f*) Early *v.* Garret, 9 Barn. & Cress. 928; 4 Man. & Ryl. 687, *post*, ch. 1, 2, s. 2.

treaty, the vendor *industriously* conceal the fact, equity will not assist him.

36. Thus, upon a suit for a specific performance, the defence was, that the estate was represented to the defendant as clearing a net value of 90 *l.* per annum, and no notice was taken to him of the necessary repair of a wall to protect the estate from the river Thames, which would be an out-going of 50 *l.* per annum. And it appearing, upon evidence, that there had been an *industrious concealment* of the circumstances of the wall during the treaty, the Lord Chancellor dismissed the bill, but without costs (*g*).

37. So where, upon the sale of a house, the seller being conscious of a defect in a main wall, plastered it up and papered it over, it was held that, as the seller had actually concealed it, the purchaser might recover (*h*).

38. We may close this section by observing, that if a purchaser having a right to rescind a sale upon the ground of fraudulent representations, continue to deal with the subject of the sale as owner after he is aware of the fraud, he will be held to have waived his right of action (*i*).

(*g*) Shirley *v.* Stratton, 1 Bro. C. C. 140.

(*h*) 4 Taunt. 785, cited by Gibbs, J.

(*i*) Campbell *v.* Fleming, 1 Adol. & Ell. 40.

END OF VOL. I.

Printed by James, Luke G. and Luke J. Hansard,
near Lincoln's Inn Fields, London.

# INDEX

## TO THIS VOLUME.

The references to volumes ii. and iii. throughout this Index are to the Indexes of the second and third volumes of this work.


ABANDONMENT, Page
of contract, its operation on seller's will - - 289. 303
See WAIVER.

ABSTRACT,
of title to be perused before sale - - - - - 14
practice in Ireland - - - - - 115
cannot supply the want of an agreement - - 176
delivery of, not a part performance - - - 200
receipt of, where a waiver of time - - - 424
if it be not ready at the day, the vendor cannot enforce the contract at law - - - - - 402. 410
but if purchaser do not call for the abstract in time, or receive it after the day, equity will relieve the vendor - - - - - - - - 410
See TIME. Vol. ii.

ACCEPTANCE,
of offer, what sufficient - - - - - 164, 165
See Vol. ii.

ACCIDENT,
loss by fire before report of purchaser confirmed, does not fall on him - - - - - - - - 104
See BENEFIT. LOSS. Vol. ii. iii.

ACQUIESCENCE, Page
where binding - - - - - - - - - 392
not binding whilst same embarrassment continues - - ib.
in award - - - - - - - - - - 467
in tenure of estate - - - - - - - 489
See CONFIRMATION. Vol. iii.

ACCRETION,
to estate before conveyance belongs to purchaser - - 276

ACRES,
contents of an acre - - - - - - - 531
what deemed customary, and what statute - - - 532
operation of the statute for fixing the measure - - 535

ACT OF PARLIAMENT. See NOTICE. Vol. iii.

ACT OF BANKRUPTCY. See BANKRUPTCY, act of. Vol. ii.

ACTION,
for stipulated damages - - - - - - 63
for general damages, although special condition - - 66
penalty recoverable as liquidated damages, where - 317. 354
equity cannot relieve against - - - - - 351
by purchaser for breach before his time, where - - 315
by purchaser in case of fraud, although he paid the money under decree - - - - - - - 366
purchaser having waived an objection in equity, cannot after suit bring an action - - - - - - ib.
by seller or purchaser after bill dismissed, where - - 367
one, for breach of contract, the only remedy - - - ib.
interest, where it can be recovered - - - - 369
expenses of investigating title, recoverable in - - 370
not for use and occupation against purchaser, where no title - - - - - - - - - 377
by purchaser for non-performance, or for money had and received, where - - - - - - - - 367
nominal damages only where the vendor has no title - 369
or where an agent, without fraud, sells without authority - - - - - - - - - ib.
by purchaser, he must give the vendor a particular of facts - - - - - - - - - - 370
but not of special damage - - - - - 371
by vendor, title must be averred - - - - - ib.

ACTION—*continued.* Page
by heir or executor of purchaser, where - - - 371
by purchaser, he should tender conveyance and purchase-money - - - - - - - - - - 374
unless the title is bad, or vendor cannot perform agreement - - - - - - - - 377
by vendor, he should execute conveyance, or offer to do so 374
on the case for deceitful representation - - - - 390

See Abstract. Agent. Auctioneer. Compensation. Damages. Deposit. Infant. Interest. Nuisance. Purchaser. Title. Vendor. Vol. ii.

ACTUARY,
weight of valuation by - - - - - - 448

ADOPTION,
of act of alleged agent - - - - - - 187. 191

ADVOWSON,
statement, that a voidance was likely to occur soon, not binding - - - - - - - - - - - 4
vacancy by resignation after contract does not belong to purchaser, where there is delay - - - - 470
bought in fee of tenant in tail in remainder, partial performance enforced, where - - - - - 500

See Vol. ii. iii.

AGENT,
bidding beyond his authority, liable - - - - 72
direction to, by seller, for consideration, to pay proceeds to a third person, order binding - - - - 74
per-centage cannot be recovered until money is received by the principal - - - - - - - - 72
relief, where principal denies his authority - - - 72
swearing he was principal, may be proved to be agent - 73
may vary time of payment of purchase-money, where - ib.
after selling, cannot vary terms of contract - - - ib.
creditor of seller, and authorized to deduct his debt, purchaser paying stands in his place - - - - ib.
remitting money to bankers', &c., by seller's direction, is safe - - - - - - - - - - 74

AGENT—*continued.* Page

to sell, no authority to receive purchase-money - - 73
general, payment to him payment to principal - - 78
may pay to his principal, although embarrassed - - ib.
buying by parol and completing, principal bound - - 83
sale by, by private contract, not within authority to sell by auction - - - - - - - - - 87
purchase by, under decree, binding, unless fraud, although authority not proved - - - - - - 114
by parol to buy an estate, valid - - - - - 186
act of alleged, may be adopted - - - - ib. 191
buying of principal, must not misrepresent - - - 338
selling, and becoming owner, where not bound - - 345
purchaser assuming to be agent, must disclose that he is principal before he bring action - - - - 368
payment to agent of vendor before time appointed, purchaser liable - - - - - - - - - 74
his authority may be revoked, when - - - - 187
when not - - - - - - - - - 74
effect of his evidence against his signature as agent - 186
must be a third person - - - - - - 191
payment of deposit by agent for purchaser, may be recovered by the latter, where - - - - - 368
seller pretending to be an - - - - - - 351

See Attorney. Auctioneer. Evidence. Injunction. Notice. Vol. ii. iii.

AGREEMENTS,

should be signed after sale, though by auction - - 68
when signed, put an end to treaty and representations - 82
unless there be fraud - - - - - - - ib.
where agreement by letter must be delivered to be stamped 164
parties compelled to produce them, where - - - 372
where not necessary to prove execution by subscribing witness - - - - - - - - - - ib.
covenants in, dependent - - - - - - ib.
will be enforced in equity,
against the heir at law of a vendor - - - 321
a widow entitled to free bench, where - 329
the survivor of joint tenants, where - - 329

AGREEMENTS—*continued.* Page

will be enforced in equity—*continued.*

against a husband who has sold his wife's estate, where - 331

a person becoming lunatic after the contract - 334

the person entitled, where the contract was under a power of sale - - - - - 335

although the agreement is by parol, where - - 160. 192

the vendor or vendee become bankrupt - - 273

the vendor or vendee be dead - - - 275

the purchaser is a nominal contractor, where - 348

void at law, where - - - - 340. 351

a penalty be imposed - - - - - 353

the property be an annuity out of dividends - 337

or particular stock with certificates - - ib.

the contract be improvident - - - - 339

the estate is destroyed, where - - - 468

the consideration, being contingent, has failed - 474

the vendor has not the interest he sold, or a title to the whole estate - - - - 482

the purchaser knew the seller could not grant the interest sold, semble - - - - 496

the estate is freehold, and was sold as copyhold 487

the estate be defective, where - - - - 536

will not be enforced in equity,

against issue in tail - - - - - - - 324

a widow entitle to dower, where - - - 329

a feme covert - - - - - - - - 330

unless settled to her separate use - - ib. 334

an infant - - - - - - - - 335

where an agent has sold the estate in a manner not authorized by his authority - - - 344

an agent has committed a breach of trust upon his principal in the sale - - - - - ib.

so of a trustee - - - - - - 345

made in a state of intoxication - - - - 340

the seller has turned the purchaser out of possession contrary to the contract - - - - ib.

the property is stock - - - - - - 336

exceptions - - - - - - - 337

the party is not competent to do the act - 341

it would be hard on the party - - - - 341

AGREEMENTS—*continued.* Page

will not be enforced in equity—*continued.*

where there has been *suppressio veri*, or *suggestio falsi* - 342

or mistake or surprise - - - 343

or misrepresentation - - - 338

vendor has industriously concealed a patent defect 552

or not disclosed a latent defect - - ib.

or was not *bonâ fide* owner of the estate at the contract - - - - 346

or cannot make a title - - - 347

the remedy is not mutual - - - - - 346

the seller thinking he had the fee, has only a power of substitution - - - - - - 347

the seller has cut ornamental timber - - - 366

the purchaser can obtain only an undivided part of the estate contracted for - - - - 490

the estate is leasehold or copyhold, and the contract was for freehold - - - - - 487

but the purchaser may elect to take them - 490

general rules which guide equity in specific performance 336

to provide a purchaser for an estate, how performed - 84

See Consideration. Covenants. Purchaser. Statute of Frauds. Time. Vendor. Vol. ii. iii.

AMBIGUITIES,

may be explained by parol evidence, where - - - 250

ANNUITY,

false representation of circumstances of grantor - - 4

right to redeem, not stated in particulars, fatal - - 50

life, sold under decree, purchaser bound though life drop 104

purchaser of life annuity under decree, when entitled to it 108

of life interest, when entitled to dividends - - ib.

lives for annuity not named, immaterial where delay is in vendor - - - - - - - - - - 351

estate sold for an annuity must be secured, how - - 312

price for, where inadequate - - - - - - 448

estate sold for life annuity belongs to the purchaser, although the annuitant die before conveyance - - 474

unless payment became due, and it was not made - 476

life, sold, price must be paid, although annuitant die - 478

power to redeem, not stated on sale, fatal - - - 483

ANNUITY—*continued.* Page

agreement for, during three lives, valid, though lives not named, if the delay is in the seller - - - - 351

See Lives. Vol. ii. iii.

ANSWER,

confession of agreement by - - - - - - 194

reference of title before - - - - - - 357

payment of purchase-money into Court, before - - 358

See Bill in Equity. Demurrer.

APPRAISEMENTS,

duties on - - - - - - - - - - 85

ARBITRATORS,

where price fixed by, is not binding - - - - 464

may take the opinion of a third person - - - ib.

must fix the price, or no sale - - - - - 465

death of party, countermand of their power, where ib. 466

nomination of, cannot be compelled - - - - 466

where a valuation by, will be compelled - - - 467

contract to refer to, a rule of Court, no attachment - ib.

See Indemnity.

ASSENT,

to investment of deposit, where implied - - - 79

ASSETS,

purchase-money part of vendors, - - - - - 274

how applicable to payment of purchase-money, for the heir entitled to the estate - - - - - - - 305

See Executor. Mortgage. Purchase Money. Vol. iii.

ASSIGNEES OF BANKRUPTS,

what condition will confine the title to such as they have 43

when to sell - - - - - - - - - - 87

sale not to be postponed if a creditor object - - - ib.

not chargeable by attempt to sell lease by auction - - 92

accepting a lease relieves the bankrupt - - - - 93

buying in an estate without authority, personally bound 91

where sale for mortgagee, they cannot reserve a bidding ib.

estate liable for damages on sale by assignees, where - 92

liable to make the same title as vendors *sui juris* - - 94

cannot purchase the bankrupt's estate - - - - ib.

See Auction. Bankrupt. Deposit. Lien. Time. Title. Vol. ii. iii.

ASSIGNMENTS OF TERMS. See TERMS OF YEARS. Page
ATTESTATION,
of receipt of purchase-money, its effect - - - - 462
ATTESTED COPIES,
the expense of them should be provided for on sales - 63
should be taken of parcels, where estate is sold in lots - 83
See Vol. ii.
ATTORNEY,
not disclosing an incumbrance, responsible - - - 8
the vendor's, should not be employed by the purchaser - 9
where he may not disclose a defect - - - - 10
of the grantor of an annuity employed by the grantee, how far bound - - - - - - - - ib.
bidding beyond his authority, liable - - - - 72
but not unless he be limited as to price - - - ib.
has what remedy where the principal denies the authority ib.
buying without authority is personally bound - - 73
by what agreement personally bound - - - - 83
personal undertaking by, how enforced - - - ib.
buying in estate in sale by Court, bound - - - 130
See AGENT. Vol. ii. iii.
AUCTIONEER,
ought not to prepare particulars of sale - - - - 14
may deduct or recover auction duty - - - - 24
liable to duty where payable, if he represent he has given proper notices, &c. - - - - - - - - 25
cannot make verbal declarations at auction, contrary to the conditions of sale - - - - - - - 40
may demand the duty from the purchaser, where payable by him - - - - - - - - - - 38
selling without authority, liable to costs and interest 71. 369
not entitled to compensation, if sale defeated by his neglect - - - - - - - - - - ib.
amount of charge by, for commission - - - - ib.
commission for finding a purchaser - - - - 72
when commission is payable - - - - - ib.
cannot give credit for the purchase-money - - - 73
should keep deposit till contract is completed - - 75
an action will lie against him for recovery of the deposit ib.
may file a bill of interpleader, and for an injunction - 76
loss by his insolvency falls on seller - - - - 77

AUCTIONEER—*continued.* Page

is not liable to pay interest on deposit - - - - 78
liable to damages, unless he disclose the name of principal 78
agent for vendor and purchaser, upon sale by auction - 188
although the purchaser bid by an agent - - - 190
his clerk is agent for both parties - - - - - ib.
his receipt amounts to an agreement, where - - 167. 173
what entry by him is an agreement - - - - 174
action against enjoined, although no party to suit - - 357
See Agent. Auction. Auction Duty. Bidding. Damages. Deposit. Interest. Vol. ii. iii.

AUCTION DUTY,

its amount - - - - - - - - - - 15
not payable in respect of what estates - - - ib. 16
on fixtures - - - - - - - - - - ib.
bankrupt's estates, where liable to - - 16, 17. 21
what, payable where estates are in mortgage - - - 21
payable by the auctioneer, who may deduct or recover it ib.
not payable if estate be bought in by, or by order of the vendor - - - - - - - - - - ib.
or by, or by the order of his agent - - - 22
but proper notices must be given - - - 21, 22
payable although the sale is not by regular auction - 22
sale to highest bidder after the auction - - - ib.
what is an auction - - - - - - - 23
candlestick biddings - - - - - - - 24
marked paper biddings - - - - - - ib.
glass of liquor biddings - - - - - ib.
but putting up an estate, no liability - - - ib.
a charge not a penalty - - - - - - 25
may be made payable by the purchaser - - - 38
should be provided for in conditions - - - - ib.
will be allowed, if the vendor's title prove bad - - 26
can be recovered by the purchaser from the vendor, if title bad - - - - - - - - - 26
payment of duty, not a part performance of parol agreement - - - - - - - - - - 209
See Auctioneer Bidding. Conditions of Sale. Vol. iii.

AUCTION,

Dutch, how conducted - - - - - 29. n.

AUCTION—*continued.* Page

sales by, vitiated by the employment of puffers - - 27
putting up an estate by, will not charge assignees as owners - - - - - - - - - - 92
sales by auction within the statute of frauds - - - 103
sale by, not void for inadequate price - - - - 459

See Assignees of Bankrupts. Conditions of Sale. Deposit.

BANKERS,

deposit of money at, by purchaser, not binding on seller 79

See Agent. Cheque.

BANKRUPT,

sales of bankrupts' estates not liable to auction duty - 16
effect of estate being in mortgage - - - 16. 18. 21
biddings for his estate opened - - - - - - 93
seller, was to be tenant from year to year to purchaser, yet contract enforced - - - - - 480

See Agreements. Assignees of Bankrupts. Commissioners of Bankrupts. Lien. Time. Vol. ii.

BANKRUPTCY, ACT OF,

will not discharge a contract for sale - - - - 273
after, contract may be rescinded by Chancellor - - 274

See Assignees of Bankrupts. Specific Performance. Vol. iii.

BANKRUPT, ASSIGNEES OF. See Assignees of Bankrupts.

BARON AND FEME,

where his contract for sale of her estate will be enforced 331

See Agreements. Feme Covert. Vol. ii. iii.

BENEFIT,

to estate before conveyance belongs to purchaser, 276. 468. 473
as upon the dropping of lives - - - - 473
unless he is guilty of delay, where - - - 470

See Advowson.

BIDDING,

dumb bidding liable to auction-duty - - - - 24
of so much per cent. more than has been offered is binding - - - - - - - - - - ib.

BIDDING—*continued.* Page
private, on the part of owner, not fraudulent where real bidders - - - - - - - - - - 31
unless more than one bidder is employed - 32. 34
or there is an engagement there is to be no puffer ib.
or the estate is to be sold without reserve - - ib.
meaning of the words "without reserve" - - - ib.
may be countermanded before the lot is knocked down - 37
by a purchaser voidable unless he pay the auction-duty - 38
by an agent beyond his authority - - - - - 72
opened upon sale of bankrupt's estate - - - - 93
opened upon sales by courts of equity - - - - 121
See Attorney. Auction Duty. Sales before a Master.

BILL IN EQUITY,
several purchasers of lots cannot be included in one - 361
stewards or receivers should not be made parties - - ib.
adverse claimant should not be a party in a bill for specific performance - - - - - - - - 362
nor a mortgagee - - - - - - - - ib.
where different agreements are proved - - - - 363
may be filed by seller though deposit recovered - - 366
dismissed, what relief may be given against the plaintiff 398
See Action. Cross Bill. Injunction.

BILL OF EXCHANGE,
for purchase-money at day certain must be paid, although seller refuse to convey - - - - - - 374
when payment may be resisted - - - - ib.
See Vol. iii.

BOND,
of reference to fix price, an agreement - - - - 176
See Vol. ii. iii.

BREACH OF CONTRACT,
remedies for - - - - - - - - - 355
notice of intention to rescind contract, when to be given, 381. 434
See Action. Agreement. Rescinding. Vol. ii.

BUILDING,
included in lease removed, title bad - - - - 48
described as brick-built, its meaning - - - - 52

BUILDING—*continued.* Page
first-rate building-ground, its meaning - - - - 57
a part performance, where - - - - - 200, 201
See IMPROVEMENTS. Vol. ii. iii.

CAVEAT EMPTOR,
where the rule applies - - - - - - 536, 544

CALAMITIES OF TIMES,
affecting value, no ground of relief - - - - 439

CHANCERY. See SALES BEFORE A MASTER.

CHARITY. See DEVISE.

CHEQUE,
on banker for deposit may be refused payment where purchaser could recover the deposit - - - - 74

"CLEAR" YEARLY RENT,
what it is - - - - - - - - - - 48

CLERK,
to auctioneer, signing an agreement - - - - 181
cannot contract without authority - - - - 187
is seller's agent to take down names, &c., at auction - 188

COLLIERY,
purchaser under decree, when entitled to profits of - 109

COMMISSION,
of auctioneer - - - - - - - - - 71
when his commission, &c., allowed on bill filed - 76
of agents - - - - - - - - - - 72
See AUCTIONEER.

COMMON,
right of over inclosed estate fatal - - - - - 501
unlimited right of sold, limited right for sheep, bad - 502
sheep walks not forced on purchaser of freehold - - 502

COMPENSATION,
condition to take, in case of errors of description, its construction - - - - - - - - - 50
for rent where sale is by the court - - - - 99
purchaser may elect to take partial interests of vendor with compensation, where - - - - - 485
what misdescription of interest is a subject of - - 492

COMPENSATION—*continued.* Page
right of sporting not a subject of - - - - - 501
nor right of common - - - - - - ib.
nor right to dig for mines - - - - - 502
nor repairs of chancel - - - - - - ib.
nor large rents - - - - - - - 504
for small quit rents, &c. - - - - - 502. 504
for tithes - - - - - - - - 520
purchaser entering and interrupting seller bound to take compensation for part - - - - - - 524
purchaser entitled to, for a deficiency in quantity, in what cases - - - - - - - - 525
bill for, will not lie after conveyance executed - - 365
See Auctioneer. Conditions of Sale. Partial Execution. Quality. Quantity. Repairs. Tithes. Vol. ii.

CONCEALMENT,
where it amounts to a fraud - - - - - 7, 8
to what relief purchaser is entitled - - - 387, 388
where unreasonable price, sale set aside - - - 438
fatal, although sale with all faults - - - - 545
of repair of a river wall - - - - - 552
of a defect in a wall - - - - - - - ib.
See Rescinding. Vol. ii. iii.

CONDITIONS OF SALE,
liberally construed - - - - - - - 39
cannot be verbally contradicted - - - - - 40
although purchaser bind himself to abide by declarations made at the sale - - - - - 41
unless he have personal information - - - 42
that sale shall be void on non-performance of an act is at the option of the other party - - - - - 44
estate should be minutely described - - - - 44
"free public house," meaning of term - - - - 45
"common and usual covenants," the like - - - 49
rights of way, the like - - - - - - 45
lights - - - - - - - - - - 47
right to wall - - - - - - - - - ib.
brick-built, meaning of term - - - - 52, 53
clear yearly rent - - - - - - - - 48

CONDITIONS OF SALE—*continued.* Page

reading of lease, not material if terms misstated in particulars - - - - - - - - - - 48
what is a sufficient statement of covenants in lease - ib.
powers of redemption and pre-emption not stated - - 50
purchaser of under-lease cannot object to usual covenants in original lease - - - - - - - 341
where he is bound by notice of unusual covenants - 342
as to the payment for timber - - - - - 61
as to the payment for fixtures - - - - - ib.
as to the non-production of deeds - - - - 62
as to searches, assignments of terms, &c. - - - 63
as to the expense of attested copies - - - - ib.
as to the non-production of lessor's title - - - ib.
as to forfeiture of deposit, and right to re-sell - - 65
reference to, may supply terms omitted in the agreement 171
must be referred to, or annexed to agreement to be read - 174
pasted up in sight, will bind a purchaser, where - - 43
what provision should be inserted therein - - - 37
statement that property is in lease, binds the purchaser to covenants in it - - - - - - - 17, 49
if misrepresentation, purchaser entitled to compensation - 50
to guard against misdescription of estate, only guard against unintentional errors - - - ib. 58. 539
and error, must be fit subject for compensation - 51
and capable of having value fixed - - - - 57
and property must be identical - - - 52, 53
and be identified - - - - - - - - 53

See Auction. Auctioneer. Auction Duty. Bidding. Mistake. Vol. ii.

CONFIDENCE. See Attorney.

CONFIRMATION,

destroys right to rescind a contract - - - - 392
although new circumstance of fraud discovered - ib.
valid, although contract fraudulent, *semble* - - - 393
party must be aware of his right, and under no influence 394
and of the consequences in law - - - - ib.
but need not know all circumstances - - - ib.
must be given freely - - - - - - - - ib.

See Vol. iii.

CONSIDERATION, Page
unreasonable, no ground to refuse the aid of equity - 438
unless fraud, misrepresentation, or concealment - ib.
inadequacy not a ground for relief - - - - 440
value of life-annuity may be weighed - - - - ib.
concealment which leads to inadequacy, gives right to relief - - - - - - - - - - ib.
or misrepresentation, where - - - - - 441
inadequate, not material where value known to neither party - - - - - - - - - - ib.
after conveyance, inadequacy without fraud insufficient - 442
unless seller was ignorant and purchaser knew of his right - - - - - - - - - 443
or advantage is taken of seller's distress - - - ib.
inadequate, in sale by heir of expectancy, relieved against 444
although heir unprovided for and interest remote - ib.
purchaser must prove adequacy - - - - ib.
inadequate in sales of reversions a ground for relief - 446
although property part in possession - - - ib.
but sale binding if *bona fide* at market price - - 448
or sale is by auction - - - - - - 452
or sale is by tenant for life and remainder-man - 460
or seller can substantially grant a possession - - ib.
or landlord extends a tenant's term - - - ib.
but not if contingency is not the subject of valuation 461
receipt for consideration, operation of - - - - 462
inadequate, how ascertained - - - - 462, 448
inadequate, relief lost by delay or confirmation - - 463
relief upon the principle of redemption - - - - ib.
purchaser allowed, for improvements - - - 464
not charged for wilful default - - - ib.
contingent, failing before the conveyance, estate belongs to purchaser - - - - - - - - - 474
fixed by a referee, good, where - - - - - 464
agreed to be fixed by valuation, enforced - - - 465
but where persons are appointed, the sale is void, unless they act - - - - - - - - ib.
so if one of the parties die before the award - ib.
See AGREEMENT. ANNUITY. BANKRUPT. PRICE. Vol. iii.

CONTINGENCY, Page
not admitting of valuation - - - - - - 461
See Consideration. Vol. ii. iii.

CONSTRUCTION OF THE PARTIES,
not admissible to explain an instrument - - - 255

CONTRACT,
what are distinct contracts - - - - - - 230
the equitable consequences of it - - - - - 272
for sale of estate, converts it into personalty - - - 273
although the election to purchase is in the purchaser 291
unless a title cannot be made, or equity will not perform the contract - - - - - 306
when deemed complete - - - - - 307, 308
See Agreement. Devise. Purchaser.

CONVERSION,
contract to sell converts estate into personalty - - 291
although option to purchase is in a lessee - - 292
if no title, heir at law of seller takes - - - 306
and heir or devisee of purchaser not entitled to another estate - - - - - - - - 307
no conversion unless equity will enforce contract - 308

CONVEYANCE,
upon sale by court, by whom prepared and settled - - 109
draft of, approved, not an agreement - - - - 178
objected to, and one party agrees by parol to rectify it and the other executes it, agreement is binding - - 270
to lessee determines the covenants - - - - 278
from infants, lunatics, &c., trustees - - - - 322
from tenant for life or executory devisee to purchaser from devisor - - - - - - - - - 323
lands left out of, where purchaser is entitled to - 530, 531
lands inserted in, by mistake, seller entitled to - - ib.
not operating as purchaser supposed, no bar to seller's relief - - - - - - - - - - 539
should be stipulated that conveyance shall be prepared by and at expense of purchaser - - - - - 376
must be prepared and tendered by purchaser, although not bound to prepare it by agreement - - - 375

CONVEYANCE—*continued.* Page
but purchaser although required to prepare conveyance, need not, if title bad - - - - 377
See DRAFT. Vol. ii. iii.

COPYHOLDS,
contracted for, devisable before surrender, under old law - 279
passed under a general devise, if surrendered, although bought after the will - - - - - - 286
pass by will without custom, &c., under new law - - 287
sold as freehold, not forced on purchaser - - - 487
sold as equal to freehold, must be conveyed to purchaser though freehold - - - - - - - - ib.
sold with a stipulation to avoid sale, if they prove freehold, must be proved to be copyhold - - - 488
pass, by what description - - - - - - 531
See CONVEYANCE. Vol. ii. iii.

CORPORATIONS,
ecclesiastical, in sale by, time material - - - - 414
See Vol. iii.

COSTS,
of purchaser under decree to be paid if title bad - - 111
by the plaintiff, if no funds - - - - - ib.
repaid upon reversal, do not carry interest - - - 399
See REFERENCE TO MASTER. Vol. ii. iii.

COVENANTS,
in lease, where properly stated in particulars - - - 48
" common and usual," meaning of term - - - 49
in lease, enure to purchaser of reversion - - - 315
purchaser of underlease bound by usual covenants in original lease - - - - - - - - - 341
where bound by notice of unusual ones - - - 342
prohibitory covenant against purchaser's declared object and seller silent, fatal - - - - - - - ib.
in agreement for purchase, are dependent - - - 372
See Vol. ii. iii.

CROPS,
where they can be sold by parol - - - - 141. 144
purchaser of, how bound by statute - - - - 158

CROPS—*continued.* Page
stamp upon sale of - - - - - - - - 158
See Vol. ii. iii.
CROSS BILL.
not necessary where answer admits an agreement, though different from that stated in bill - - - - 363
See Vol. ii.
CROWN,
estates not liable to auction duty - - - - - 16
See EXTENT. Vol. ii.
COUNTERMAND,
of bidding - - - - - - - - - - 37
of authority of arbitrators by death of party - - - 465
COURTS OF EQUITY. See SALES BEFORE A MASTER. Vol. ii.
DAMAGES,
nominal, where the vendor has no title - - - - 369
so where auctioneer sells after his authority has expired - - - - - - - - - ib.
*sed qu.* as a general rule - - - - - ib.
in equity, where seller sold to a second purchaser pending suit - - - - - - - - - 363
whether they can be given in equity - - - - 364
none in equity for defective title - - - - - 365
nor for misrepresentation, after conveyance executed ib.
nor for loss by selling out of funds - - - 369
See Vol. ii.
DEATH,
of vendor or vendee, contract not affected - - - 275
DECEIT,
action by a purchaser for misrepresentation - - - 4
action against a purchaser - - - - - - - 7
DECREES OF EQUITY,
obtained by fraud, relieved against - - - - 102
purchaser, how far bound by error in, or disobedience of 102, 113, 114
DEEDS,
condition for delivery of them, as all he has, does not exclude right to good title - - - - - - - 43
what condition excludes the right to them - - - 62
may be required to prove title, although not to be delivered to purchaser - - - - - - - - - ib.
See Vol. ii. iii.

DEFECTS, Page
where to be disclosed to a purchaser - - - - - 2
DELAY,
may destroy right to be relieved on ground of mistake - 130
purchaser of advowson guilty of, not entitled to vacancy falling - - - - - - - - - - 470
See Improvements. Time. Vol. ii. iii.
DEMURRER,
lies to bill for a specific performance against distinct purchasers - - - - - - - - - - 361
DEPENDENT COVENANTS - - - - - - 372
DEPOSIT,
forfeited under conditions of sale - - - - - 65
where made recoverable as stipulated damages - - ib.
cheque for, may be refused payment, when deposit could be recovered - - - - - - - - - 74
returned, where after sale by assignees fiat is superseded 93
auctioneer's receipt for, where an agreement - - - 173
paid by an infant who declines to complete, cannot be recovered - - - - - - - - - 336
in hands of seller will be ordered into court, where - 361
recovered, yet seller may file a bill - - - - 366
should be retained by auctioneer till contract is completed 75
ordered to be paid into court, auctioneer's expenses to be deducted - - - - - - - - - 76
is a part payment - - - - - - - - 75
loss by insolvency of auctioneer, falls on vendor - - 77
purchaser may not forfeit, and abandon the contract - 80
investment of, in the funds, binding on a vendor or purchaser, where - - - - - - - - - 78
acceptance of less than, binding - - - - - 79
purchaser will be relieved against a forfeiture, where - 80
if purchaser's bill for specific performance be dismissed, court cannot order deposit to be returned - - - ib.
if seller's bill be dismissed, the court may compel him to repay deposit with interest - - - - - ib.
paid by an agent for purchaser, may be recovered by the latter, if breach of contract - - - - - 368
purchaser is entitled to interest on his deposit - - 369
See Action. Auctioneer. Interest. Investment. Sales before a Master. Vol. ii. iii

DESCRIPTION OF AN ESTATE, Page
false - - - - - - - - 537

DEVISEE,
of estate contracted for, not entitled to estate or purchase-money, if no title - - - - - - - - 307
*contra*, if an estate, not contracted for, is by will directed to be bought - - - - - 308
See Vol. ii. iii.

DEVISE,
under old law:
estates contracted for devisable, freehold and copyhold - 278
passed by general devise, where - - - - 280
did not pass, where - - - - - - - ib.
of estate under contract for sale for a charity, invalid - 276
of a term was revoked by the purchase of the fee - - 280
of an equitable estate, not revoked by a subsequent conveyance to the devisor - - - - - - - 281
unless to different uses - - - - - - 284
and then, although the contract was by parol - - ib.
revoked by a contract for sale - - - - - 287
unless equity would not perform the contract, *semble* 288
where the agreement was abandoned, *qu.* - - 289
republication, what amounted to - - - - - 284
where a case of election was raised - - - - 285
copyholds devised under old and new law - - 286, 287
by seller of estate agreed to be sold - - - - 291
under new law:
passes all property at testator's death - - - - 295
not revoked beyond interest subsequently created - - 296
unless by marriage, &c. - - - - - - ib.
of estates contracted for, valid - - - - - ib.
operation of, where a term passed and the fee bought - 296
operation of will of lessee giving realty and personalty, and then buying fee - - - - - - - 298
when the term is specifically given - - - 300
revocation confined to estates created - - - - ib.
election, now altered - - - - - - - - ib.
cautions in purchasing of heir at law - - - - 301
contract to sell, whether a revocation - - - - ib.

DEVISE—*continued.* Page
under new law—*continued.*
contract not executed by equity or abandoned, no revocation - - - - - - - - - - 303
by seller of estate contracted to be sold, its effect - - ib.
tenant for life, &c. to convey to purchaser from devisor - 323
See Conversion. Heir at Law. Legatee. Will. Vol. ii. iii.
DISCRETIONARY POWER,
in trustees, they cannot be compelled to exercise it - 345
DISTRESS,
for rent reserved upon lease of freehold or leasehold, where there is a reversion - - - - 315 n.
where a purchaser can distrain - - - - - 314
DOWER,
how affected by 3 & 4 Will. 4, c. 105 - - - - 329
DRAFT,
of conveyance approved, not an agreement - - 178. 185
nor although altered or written by party - - 184
approbation does not make it liable to a stamp - 185
See Conveyance. Vol. ii.
DRY ROT - - - - - - - - - - - 550
EJECTMENT,
where it can be brought without notice against purchaser in possession - - - - - - - - - 378
not barred by purchaser's possession - - - - ib.
See Mortgage.
ELECTION. See Heir at Law. Possession.
EQUITY,
after bill filed, will prevent act to the injury of either party 356
protects purchasers *bonâ fide* and without notice - - 268
See Agreements. Compensation. Penalty. Sales before a Master. Specific Performance. Vol. ii. iii.
EQUITY OF REDEMPTION. See Mortgage.
ERRORS,
of description - - - - - - - - - - 50
See Estate.
ESCHEAT,
as to trustees and mortgagees confined to beneficial interest - - - - - - - - - - 323

ESTATE, Page
should be minutely described in particulars - - - 44
rights of way - - - - - - - 45
plan of new street - - - - - - 47
lights - - - - - - - - - 47
right to wall - - - - - - - ib.
condition to guard against misdescription of, its effect - 50
must be *bonâ fide* - - - - - 51. 53
and property must be identical - - - - 52
and be identified - - - - - - - 53
substantial misdescription fatal - - - - 54
although not wilful - - - - - - 55
See CONDITIONS OF SALE. Vol. ii. iii.
ESTATE TAIL,
how far bound by contract - - - - - - 326
EVIDENCE,
between two purchasers of right to a wall - - - 47
EVIDENCE, PAROL,
admissible, where:
to prove consideration consistent with the deed - - 218
as a defence to a bill for specific performance on fraud, mistake or surprise - - - - - - 227
to explain latent ambiguities - - - - - 251
to explain the meaning of ancient instruments - - 256
to show what is parcel or not, of the thing conveyed - 250
to explain a mistake, where, and where not - - - 258
on the ground of fraud - - - - - - ib.
what is fraud - - - - - - - - 268
to correct a settlement contrary to intention - - - 260
to correct a deed made to prevent forfeiture - - - 266
not admissible, where:
to disannul or vary a written agreement - - - 218
to correct printed conditions of sale - - - - 220
to supply quantities omitted - - - - - 221
of what passed before agreement, to vary it - - - 219
that old or new style was intended - - - - 221
the rules are the same in equity - - - - - 222
as a defence, if the agreement was correctly reduced to writing - - - - - - - - - 229
of collateral matters, though not mentioned in the agreement - - - - - - - - - 233, 234

EVIDENCE, PAROL—*continued.* Page
not admissible, where—*continued.*
of the variation of an agreement - - - - 231. 237
unless the parol agreement has been in part performed - - - - - - - - - 242
of the waiver of a contract, except as a defence in equity, *semble* - - - - - - - - - - 249
to explain a patent ambiguity - - - - - 251
as the meaning of a word in a deed - - - ib.
or will - - - - - - - - - 252
or act of parliament - - - - - ib.
to restrain general words - - - - - - 253
of the construction of the parties - - - - 254, 255
where a provision was left out as illegal - - - 267
See Statute of Frauds. Witness. Vol. ii. iii.
EVICTION,
purchaser before, may be relieved against fraud - - 388
See Vol. ii.
EXECUTORY DEVISEE,
to convey to purchaser from devisor - - - - 323
EXECUTOR,
where bound to pay the purchase-money for the heir - 305
may maintain action for breach in purchaser's life, where 371
See Purchase-Money. Vol. iii.
EXPENSES,
of re-sale, where the purchaser becomes bankrupt - - 66
unusual, agreed to be paid by purchaser and omitted by mistake, a defence - - - - - - - - 226
of investigating a title, &c. to be paid to purchaser under decree, where no title - - - - - - 111, 112
upon private sale, may be recovered if no title - 370
of the conveyance fall on the purchaser, who prepares it 375
See Vol. ii. iii.
EXTENT,
sale under, where a title cannot be made - - - 131
contract with part of money paid overreached by - - 275
FALSE DESCRIPTION. See Conditions of Sale. Fraud. Quality. Quantity. Value.
FALSE REPRESENTATIONS,
by a stranger - - - - - - - - - 6
where it requires a writing - - - - - - 7
See Vendor.

Page

FAULTS,
sale with all - - - - - - - - - 536

FEME COVERT,
sale of her separate estate enforced - - - - 330
with power, whether contract binds it - - - - 331
with separate estate purchasing, enforced - - - 334
See Baron and Feme. Vol. ii. iii.

FINES,
on renewals, misstatement of - - - - - 4, 339
See Vol. ii. iii.

FIRE,
loss by, after contract, to be borne by the purchaser - 468
*contra*, where estate is sold before a master, and the report is not confirmed absolute - - - 469
deeds destroyed by, after contract, may prevent a good title - - - - - - - - 472
See Conditions. Vol. ii.

FIXTURES,
purchaser where entitled to - - - - - - - 61
sold by parol by tenant to landlord, valid - - - 145

FOOTPATH,
not mentioned, purchaser bound - - - - - 536

FORFEITURE. See Escheat.

FORGED MORTGAGES - - - - - - 312

FRAUD,
misdescriptions by - - - - - - - - 55
misdescriptions by error - - - - - 51, 55
representations by, during treaty, not excluded by agreement signed - - - - - - - - - 82
in the terms of agreement, specific performance denied - 225
avoids agreement in law and equity - - - - 271
in contract, purchase-money may be followed after conveyance - - - - - - - - - - 400

FREEHOLD,
sold, leasehold or copyhold not sufficient - - 486, 487
See Copyhold. Vol. iii.

FREE PUBLIC-HOUSE,
meaning of term in particulars - - - - - 45
See Vol. iii. [Public-House.]

Page

FUNDS. See Investment. Stock. Vol. ii. iii.

GENERAL WORDS,
restrained in equity, where mistake - - - - 255

GROUND RENT,
rack rent described as, fatal - - - - - 51

HEIR,
relieved against a sale, for an inadequate consideration - 444

HEIR AT LAW,
bound by ancestor's contract - - - - - 275
unless devisee permit him to take the estate for a long time - - - - - - - - 282
what should be attended to in buying of him where there is a will - - - - - - - - - 286, 301
entitled to lands contracted for by his ancestor, where - 305
his power over them - - - - - - - ib.
executor completing, a trustee for heir - - - 305
if heir pay, he is to be repaid out of the assets - ib.
if contract rescinded from temporary want of assets, another estate to be bought - - - - 306
if heir wrongfully apply personalty, to the purchase, it creates a charge - - - - - - - ib.
of purchaser, no claim if no title to estate contracted for, 307
put to his election, although testator had not the estate at the time - - - - - - - - - - 285
an infant can convey to purchaser from ancestor - - 322
infant, of nominal purchaser, when to convey - - 322
when he may maintain action for breach in ancestor's life - - - - - - - - - - 371
selling expectancy for inadequate price, relieved where - 444
See Agreements. Consideration. Vol. ii. iii.

HUSBAND AND WIFE. See Baron and Feme. Vol. ii.

IDENTITY,
of parcels where condition to guard against misdescription - - - - - - - - - - 53

IMPROVEMENTS,
where a part performance - - - - - 200, 201
purchaser allowed for, where sale set aside for inadequacy - - - - - - - - - - 464

IMPROVEMENTS—*continued.* Page

on adjoining property agreed to be paid by purchaser must be made by the day - - - - - - 318

by purchaser, where they give a right to a partial performance - - - - - - - - - 500

See Building. Vol. ii. iii.

INADEQUATE CONSIDERATION. See Consideration.

INCUMBRANCES,

should be disclosed to a purchaser - - - - - 8

denied to a purchaser, relieved against - - - - 11

if not suppressed, purchaser's remedy is under the covenants - - - - - - - - - - 10

purchaser should inquire of a supposed incumbrancer - 12

See Attorney. Purchaser. Vendor. Vol. ii. iii.

INDEMNITY,

by purchaser to seller of lease, against rent, &c. - - 63

to seller against mortgage, or incumbrance - - 313

agreement by seller to give indemnity on real security will be enforced - - - - - - - - 314

award directing an acceptance of title and indemnity, bad - - - - - - - - - - 495

vendor or purchaser not compelled to give or accept - 495

exceptions - - - - - - - - - 494

See Mortgagee. Purchaser. Vol. ii. iii.

INFANTS,

can convey to purchaser from ancestor - - - 322

cannot enforce contract for sale or purchase - - - 335

cannot recover a deposit if he refuse to complete - - 336

See Heir at Law. Vol. ii. iii.

INJUNCTION,

for auctioneer, on bill of interpleader - - - - 76

to restrain improvident sale by trustees - - 87, 90

to prevent waste by purchaser under decree - - - 114

or by purchaser by contract - - - - 276. 356

to prevent seller from conveying the legal estate - - 356

against agents not parties to suit - - - - - 356

for seller upon terms - - - - - - - 361

against purchaser bringing action after decree in suit - 366

INJUNCTION—*continued.* Page
against seller bringing action after bill dismissed for want of title - - - - - - - - - - 367
See Vol. ii. iii.
INSOLVENCY,
agent may pay to insolvent principal - - - - 78
of auctioneer, loss falls on the seller - - - - 77
See Vol. iii.
INSOLVENTS,
estates of insolvent debtors not liable to auction duty - 16
must be sold by auction - - - - - 87
within what time - - - - - - - - ib.
See Vol. iii.
INTEREST,
what allowed, on rescinding a contract - - - 396, 397
postponed in payment by plaintiff during suit, will be ordered to be paid if bill dismissed - - - - 398
but not interest on the interest for delay - - ib.
not upon costs repaid upon an order of reversal - - 399
paid by purchaser of leasehold; occupation rent by vendor - - - - - - - - - - 486
whether it can be recovered in action for money had and received - - - - - - - - - - 370
on deposit to be paid by vendor where he cannot make a title - - - - - - - - - - 369
and on purchase-money, if it has lain dead - - ib.
See Investment. Lessee. Vol. ii. iii.
ISSUE,
directed to ascertain whether there was a mistake - - 260
See Possession.
INTERPLEADER,
by auctioneer - - - - - - - - 76, 77
statute of - - - - - - - - - - ib.
INTOXICATION,
agreement during, not enforced in equity - - - 340
INVESTMENT,
of deposit in a cause binding on seller and purchaser - 78
purchaser not bound by, without his assent - - - 79
assent to, not implied from notice without reply - - ib.
vendor not entitled to benefit of, if not bound by - - ib.
so of a deposit at a banker's - - - - - ib.

INVESTMENT—*continued.* Page
on purchaser's application, and contract rescinded, he takes back stock - - - - - - - - 128
of legacy enures to purchaser of it - - - - 317
of interest payable to seller, during purchaser's suit, seller entitled to stock if bill dismissed - - - - 397
by purchaser of purchase-money followed after conveyance, if fraud - - - - - - - - - 400
See Stocks.

JOINT PURCHASERS,
contract for sale to, cannot be proved by parol to be for one with security to the other - - - - - 222
See Vol. iii.

JUDGMENTS,
sale by sheriff for creditors not liable to auction duty - 16
how far bound by sales by courts of equity - - - 102
See Vol. ii. iii.

LAND TAX,
sales for, not liable to auction duty - - - - 16
See Vol. iii.

LEASE,
should be inspected by purchaser - - - - 11
notice of, is notice of all the covenants in it - - - ib.
reading of, at auction, not material if terms misstated in particulars - - - - - - - - - 47
title bad, if any building has been removed - - - 48
covenants in, where properly stated in particulars - - ib.
conditions in, as to trades, &c. where properly stated - 55
upon sale of, purchaser to indemnify against rent, &c. - 63
for longer period than mentioned, where not an objection, 412
sold, held for less term than represented, where sale enforced - - - - - - - - - - 482
where contract delayed, seller pays occupation rent, purchaser interest - - - - - - - - - 486
not forced on purchaser for freehold - - - - ib.
underlease not decreed under agreement to assign - - 484
nor underlease forced on purchaser in lieu of original ib.
See Assignees of Bankrupts. Covenants. Purchasers. Vol. iii.

LEASEHOLD ESTATES, Page
condition against production of lessor's title - - - 63
See LEASE. Vol. ii. iii.

LEGAL ESTATE,
seller need not have, but must procure it - - - 347
See Vol. ii.

LEGATEE,
demonstrative legacy - - - - - - - 305
See INVESTMENT. Vol. ii. iii.

LESSEE,
selling, entitled to what indemnity from purchaser - 64
purchasing, tenancy is determined - - - - 276
although for a term certain, where - - - - ib.
covenants between him and lessor, determine on conveyance of inheritance - - - - - - - 278
improvements by, where a part performance - - 201
See DISTRESS. Vol. ii. iii.

LETTERS,
are agreements within the statute of frauds, where - 81. 163
a reference to, may supply the defect in an agreement - 171
abandoning contract cannot operate as a ratification - 173
must, to be added to agreement, refer to the same contract - - - - - - - - - - ib.
written to third persons, operate as agreements, where - 174
either an agreement, or evidence of a parol one - - 179
See STAMPS.

LICENCE,
by parol, valid - - - - - - - - - 138

LIEN,
of seller for expenses, &c. of resale in case of purchaser's bankruptcy - - - - - - - - - 66
whether any for money received by vendor before conveyance, where purchaser dies without heirs - - 477
See Vol. iii.

LIGHTS,
what will amount to a right upon sale to build against purchaser's lights - - - - - - - - 47

LIQUIDATED DAMAGES,
may be recovered, where - - - - - - 317

LIVES, Page
stated to be in existence in particulars, evidence not admissible of parol statement that one had dropped - 41
misstatement of age of tenant for life where reversion depends on his failure of issue, fatal - - - - 57
misrepresentation of value of life fatal, where - - 338
for an annuity to be granted not named, yet sale enforced if delay be in vendor - - - - - - - 351
for which estate is held dropped after contract, loss falls on purchaser - - - - - - - - 104. 468
dropping after contract for sale of the reversion, benefit belongs to purchaser - - - - - - - 473
death of vendor after contract, where the price is an annuity for his life, estate belongs to purchaser - - 474
See Annuity. Loss. Policy.

LOAN,
under the mask of trading - - - - - - 446
where purchase will be deemed a loan - - - - 318
See Vol. iii.

LOSS,
to estate before conveyance, falls on purchaser - 276. 468
as by dropping of lives or by fire - - - ib. 471
of mortgage deed, purchaser must pay an indemnity - 312
estate swept away by flood before sale, purchaser relieved - - - - - - - - - - - 389
by investment during a suit, falls on whom - - - 397
See Annuity. Lives. Stocks.

LOTS,
estate sold in, a distinct contract arises upon each - - 68
trust estate may be sold in - - - - - - - 87
part performance of one, not extended to others distinct - 210
sale in, purchaser compelled to take those not complicated with the rest if no title to all - - - - 513
but if lot without title so complicated, sale as to all bad - - - - - - - - - - 514
even at law - - - - - - - - ib.
See Stamps.

LUNATICS,
trustees, conveyances from - - - - - - 322
See Agreements. Vol. ii. iii.

MAP. See PLAN. Page

MARKET PRICE,
where it should prevail - - - - - - - 449

MASTER IN CHANCERY. See REFERENCE. SALES BEFORE A MASTER. Vol. ii.

MEADOW LAND,
sold as rich water meadow, but not so - - - - 4

MINES,
share in mining company, cannot be sold by parol - - 158
See Vol. ii.

MISDESCRIPTION,
of estate, &c. in particulars - - - - - - 40
condition to guard against, its operation - - - 50
where the error is unintentional - - - ib. 58
where it is by fraud - - - - - - 50
See MISREPRESENTATION.

MISREPRESENTATION,
of value - - - - - - - - - - 5
rent - - - - - - - - - 5. 99.
valuation - - - - - - - - - 5
circumstances of grantor - - - - - 4
fines on renewals - - - - - - - ib.
age of life - - - - - - - - - 57
value of life - - - - - - - - 338
material fact unknown to the other party - - 389
income of trade - - - - - - - 390
speedy avoidance of advowson - - - - 4
nature of tenancy - - - - - - - 99
incumbrances - - - - - - - - 8
title - - - - - - - - - ib.
by a stranger - - - - - - - - 6
by an attorney - - - - - - - - 8
in particulars, &c. of sale - - - - - 44. 99
if wilful, a fraud - - - - - - - 55
by mistake, how far fatal - - - - - ib. 58
by agent purchasing of principal - - - - 338
where price unreasonable - - - - - 438
by purchaser, he is not entitled to a performance in part - 500
See ATTORNEY. CONCEALMENT. CONDITIONS OF SALE. DECEIT. PURCHASER. VENDOR. Vol. ii. iii.

MISTAKE, Page

relieved against in purchase before a Master - - - 129
if a person buy his own estate he will be relieved - - 385
or take a lease of it, where - - - - - 386
a defence against a specific performance - - - 224
in written instruments corrected by equity according to parol evidence - - - - - - - - - 258
not to the prejudice of purchaser without notice - 271
condition that mistakes shall not affect the sale, only covers unintentional errors - - - - - 51. 55
mutual, as to part sold, equity will not assist either party, 505
in puffer bidding for the wrong estate, not enforced in equity - - - - - - - - - - - 343
contract before a Master rescinded on the ground of - 129
when discovered no delay must occur - - - - 130
denial of by defendant, effect of - - - - - 259
in agreements, issue directed where - - - - 260
presumed in agreement where purchaser knew the seller had not a title - - - - - - - - - 495
of the purchaser as to operation of his purchase, no bar to a specific performance* - - - - - - - 539
of a party of the legal construction of words, immaterial, ib.

See Evidence. Sales before a Master. Surprise. Will. Vol. ii. iii.

MORTGAGE,

purchaser of estate in mortgage makes his personalty the primary fund, where - - - - - - - 310
purchaser must indemnify vendor against the mortgage money - - - - - - - - - - 313
proceedings in ejectment not stopped, where mortgagee has agreed to purchase - - - - - - - 310
mortgagee's advances to mortgagor after sale by him without notice, binding - - - - - - - 311
purchaser of equity of redemption should give notice of sale to mortgagee - - - - - - - 311
otherwise might have to redeem another estate - 311

* *Vendor* is misprinted for *purchaser* in the text.

MORTGAGE—*continued.* Page
purchaser of mortgage should buy with privity of mortgagor - - - - - - - - - - 312
danger of forgery - - - - - - - - ib.
purchase will be deemed a mortgage, where - - - 318
See Auction Duty. Vol. ii. iii.

MORTGAGEE,
with power of sale, how to sell - - - - - - 86
of bankrupt selling, assignees cannot reserve bidding - 91
with power of sale, a trustee - - - - - - 94
liable to make a good title - - - - - - ib.
in foreclosure suit, cannot conduct the sale and bid - 100
whose debt exceeds his purchase money, when entitled to possession upon sale by court - - - - - - 108
may compel purchaser to pay upon indemnity, if deed lost - - - - - - - - - - 312
not compelled to produce deeds unless he consent to sale, ib.
where his heir is within the trustee act - - - - 323
should not be made a party to specific performance suit, 362
See Escheat. Vol. ii.

MONEY HAD AND RECEIVED,
where action for - - - - - - - - 367, 368
what may be recovered in action for - - - - 368
whether interest - - - - - - - - 370

MONTH,
in a contract may be lunar or calendar, according to intent - - - - - - - - - - 402

MULTIFARIOUSNESS. See Demurrer.

MUTUAL SALES,
between two parties, yet separate contracts in law, where, 512

NE EXEAT REGNO,
lies against a purchaser for purchase-money unpaid, where - - - - - - - - - - 380

NEGLIGENCE,
of auctioneer, whereby sale is defeated, no commission - 71
See Misdescription. Vol. ii.

NOMINAL CONTRACTOR,
contract by, enforced - - - - - - - - 348

NOMINAL CONTRACTOR—*continued.* Page
unless seller be led to believe the purchase is for his friend - - - - - - - - - 348
seller may pretend to be an agent, where - - - 357
NOMINAL PURCHASER,
where heir of is to convey to real purchaser - - - 322
See Vol. iii.
NOTICE,
purchaser without notice of prior contract, safe - - 275
deeds left with purchaser's solicitor for inspection, notice of covenants in them - - - - - - - 342
See Vol. ii. iii.
NUISANCE,
on property sold, purchaser liable - - - - 84
OCCUPATION RENT,
where set pending suit - - - - - - 358
OFFER,
in writing accepted by parol, binding - - - 165, 175
unless obtained by fraud - - - - - 165
OMISSION,
in agreement by mistake, fraud, or surprise, a defence - 225
OPENING OF BIDDINGS. See Biddings.
OPTION,
to purchase, its effect - - - - - - - 291
must be exercised within the time - - - - 294
See Conversion.
ORNAMENTAL TIMBER,
cut by seller after contract, avoids it - - - - 544
See Timber.
PARCELS,
attested copies of, where sale in lots - - - - 83
See Estate. Vol. ii.
PAROL CONTRADICTION,
of particulars, &c. of sale, void - - - - - 40
PAROL EVIDENCE. See Evidence, Parol.
PART PERFORMANCE,
of parol agreements - - - - - - - 198
delivery of abstracts, &c. not - - - - 200
delivery of possession is, where - - - ib. 201

PART PERFORMANCE—*continued.* Page

of parol agreements—*continued.*
payment of purchase-money not - - - - 202
nor of auction duty - - - - - 209
of one lot does not extend to others - - - 210
court after, will try to ascertain the terms - - - ib.
of parol variation, agreement enforced - - - - 242

See STATUTE OF FRAUDS.

PARTIAL EXECUTION OF A CONTRACT,
where it will be enforced under condition providing against misdescriptions - - - - - - - 50
where the number of years is less - - - - 482, 483
exact term not required at law - - - - ib.
if term much less, equity will set aside the contract, 484
not an underlease instead of an original one - - - ib.
nor a new lease in lieu of an old one - - - 485
vendor agreeing to assign is not bound to underlease, ib.
not a leasehold for a freehold - - - - - 486
nor a copyhold for a freehold - - - - - 487
not a rentcharge out of lands in lieu of the lands charged with a rent - - - - - - - - - 488
purchaser bound by acquiescence - - - - - 489
not a share instead of the entirety - - - - 490, 497
but a purchaser may require the share or partial interest - - - - - - - 490, 492, 497
not a reversion for a possession - - - - - 491
purchaser buying with notice of want of title, cannot enforce his contract - - - - - - - 495
unless he has improved the property - - - 500
not where there is a right of sporting - - - - 501
or a right of common over an inclosure - - - ib.
or a right to dig for mines - - - - - 502
or a liability to repair the chancel - - - - ib.
or rentcharges of a large amount - - - - 504
where there is a title to part only - - - - 506, 507
not if the other part is material to the enjoyment - 507
or if the part be large - - - - - - 510
but purchaser may elect to take, where - - ib. 511
where the sale is in lots, and there is not a title to all - 513

PARTIAL EXECUTION OF A CONTRACT--*continued.* Page
not where estate is subject to tithes - - - - 520
but a want of title to part of the tithes may be compensated, where - - - - - 520. 522
where the quantity is deficient - - - - - 525
See COMPENSATION. LOTS. QUALITY. QUANTITY. TENANT FOR LIFE. Vol. ii.

PARTICULARS,
what may be obtained in action - - - - 370, 371
See Vol. ii.

PARTICULARS OF SALE. See AUCTIONEER. CONDITIONS OF SALE. STATUTE OF FRAUDS.

PENALTY,
imposed, yet specific performance - - - - 353
See ACTION. AGREEMENTS.

PERJURY,
if a defendant deny parol agreement, he may be indicted 198
plaintiff a competent witness to prove the perjury - ib.
but equity cannot execute the agreement - - ib.
See STATUTE OF FRAUDS.

PLAN
of new street exhibited at sale, effect of - - - 47
of turnpike road, instead of footpath - - - - 58
may be identified where agreement refers to one - - 251

POLICY OF ASSURANCE,
on life, misrepresentation of - - - - - - 317

POSSESSION,
where purchaser may take - - - - - - - 12
taken by purchaser under decree, he must pay the money, 109
delivery of, a part performance of parol agreement, where - - - - - - - - - 200, 201
delivered to a purchaser does not create a tenancy - 377
may be determined - - - - - - - - 378
a ground for payment of the money into court, where 357, 358
purchaser in, put to his election where title bad - - 359
where possession, but fact of purchase disputed, an issue directed - - - - - - - - - - 216

POSSESSION—*continued.* Page

ejectment will lie against purchaser, where - - - 378

See PURCHASER. Vol. ii. iii.

POWER,

of redemption or pre-emption not stated in particulars - 50

of sale in trustees, how to be exercised - - - - 96

of sale, contract under, binds person entitled in default of power - - - - - - - - - - 335

of sale in trustees, they are not compelled to execute it - 345

reserved by seller, to appoint purchase-money, it is still assets - - - - - - - - - - 276

to re-purchase upon condition, the condition must be complied with - - - - - - - - - 318

by act of parliament to purchase, notice binding - - ib.

See MORTGAGEE. POWER. TENANT FOR LIFE. TRUSTEES. Vol. ii. iii.

PRE-EMPTION,

right of - - - - - - - - - 292, 293

PRICE,

whether admissible, in construing ambiguous instrument, 256

See CONSIDERATION.

PRINCIPAL. See AGENT.

PRINTED NAME,

a sufficient signature within the statute of frauds - - 180

PRODUCTION,

of agreement, where compelled - - - - - 372

See Vol. ii. iii.

PROFITS. See RENTS.

PROMISE,

by parol to vary written agreement, a defence - - 225

PROMISSORY NOTE. See BILL OF EXCHANGE. Vol. iii.

PROPOSAL. See OFFER.

PUFFER,

where he may be employed in auctions - - - - 27

if seller's agent bid for purchaser, and is considered a puffer, sale not enforced in equity - - - 35, 342

so if real purchaser is considered a puffer, and the puffer appointed neglect to bid - - - 36, 343

See BIDDING.

PURCHASER, Page
should not trust to vendor's statements of value - - 4
but may rely on statement of valuation or rent - 5
not bound to disclose latent advantages - - - 7
may misrepresent seller's chance of sale - - - ib.
must not conceal a death by which value is increased - ib.
must not misrepresent the estate - - - - - ib.
should inquire of an alleged incumbrancer - - - 12
should inspect leases for the covenants - - - - 11
what amounts to a waiver of objections by - - - 12
should inquire of trustees where interest is equitable and not in possession - - - - - - - - 13
a trustee for seller of purchase-money - - - - 273
should not employ the vendor's attorney - - - 9
should not take possession of the estate where the title is doubtful - - - - - - - - - - 12
but may take possession when contract is entered into - - - - - - - - - - 13
must not deter others from bidding - - - - 35
effect of his being considered a puffer - - - - 36
liable for nuisance on property purchased - - - 84
is a trustee for vendor of money - - - - - 273
his death does not avoid the contract - - - - 275
in possession will be ordered to pay his money into court, where - - - - - - - - - 357, 358
is not tenant to seller upon possession - - - - 377
and not liable to action for use and occupation - ib.
such possession may be determined - - - 378
agreeing to be treated as tenant - - - - - 378
of a leasehold estate, must indemnify the vendor against the rent, &c. - - - - - - - - - 63, 313
not where the assignees of a bankrupt are vendors - 64
of an equity of redemption must indemnify the vendor - 313
of an incumbered estate must indemnify the seller - - 313
selling before conveyance entitled to indemnity from sub-purchaser against costs for his benefit - - - 314
may sell or devise the estate before the conveyance - 279
entitled to rent and covenants in lease - - - - 314
bound by covenants in deeds brought to his solicitor for inspection - - - - - - - - - 342

PURCHASER—*continued.* Page
must bear any loss by fire, &c. before conveyance, and is entitled to any benefit in the interim - - - - ib.
will be compelled to take a part of the estate, where - 506
may insist upon a part performance, where - - - 510
may bind himself by his conduct to take compensation for part - - - - - - - - - - 524
will be relieved in respect of a defect in the quality or quantity of the estate, where - - - - 525. 536
See Action. Agent. Agreement. Attested Copies. Auctioneer. Bidding. Conveyance. Consideration. Covenants. Deposit. Devise. Fraud. Improvements. Incumbrances. Lessee. Mistake. Mortgage. Ne Exeat Regno. Notice. Power. Purchase Money. Possession. Reversion. Sales before a Master. Time. Title. Vol. ii iii.

PURCHASE MONEY,
credit for by auctioneer, he is liable - - - - - 73
payment of may be enlarged by agent, where - - ib.
payment of before time appointed, purchaser liable - 74
order for consideration to agent to pay it to third person binding - - - - - - - - - - ib.
agent to sell not authorized to receive - - - - 73
upon sale by court may be paid, when - - - - 106
in payment of incumbrances, where - - - ib.
must be paid when purchaser takes possession - 109
a deposit is part payment of - - - - - - - 75
payment of, not a part performance of parol agreement, semble - - - - - - - - - - 202
secured by purchaser at a day certain, must be paid, although seller break his agreement - - - - 374
purchaser is a trustee of, for the vendor - - - 273
is always assets of the vendor - - - - - 275
where payable out of assets for heir of purchaser - - 306
followed as ear marked where contract fraudulent, *qu.* - 400
unreasonable in amount - - - - - - 437
inadequate - - - - - - - - - - 440
receipt for purchase money where not paid - - - 462
paid before conveyance and purchaser dies without heir, who is entitled - - - - - - - - 477

PURCHASER—*continued.* Page

cannot be paid to agent, where - - - - - - 73
to be paid into court, if the purchaser is in possession, where - - - - - - - - - - 357
where not - - - - - - - - - 358
See AGENT. BILL OF EXCHANGE. CONSIDERATION. LIEN. Vol. ii. iii.

QUALITY OF AN ESTATE,

footpath not mentioned binds purchaser - - - 537
vague descriptions bind him - - - - 4. 537
uncommonly rich water meadow - - - - ib.
residence fit for respectable family - - - ib.
estate in a ring fence not a subject of compensation - 541
but purchaser bound by knowledge - - - ib.
repairs necessary, contrary to description, subject of compensation - - - - - - - - - 542
map representing ornamental timber, seller cutting any avoids the contract - - - - - - - - 544
latent defects in, concealed, affect the contract though sale with all faults - - - - - - - - - 545
false description of - - - - - - - - 307

QUANTITY OF AN ESTATE,

false description of - - - - - - - - 525
parol declaration of auctioneer as to abatement for less quantity, a defence - - - - - - - - 229
purchaser entitled to compensation for deficiency - - 525
"by estimation," "more or less," effect of - - 526, 527
condition for acceptance of quantity as stated, what it will cover - - - - - - - - - - 528
fraud in statement of, would be relieved against - - ib.
abatement for deficiency where quantity of each close specified - - - - - - - - - 529
allowance, how fixed - - - - - - - - ib.
whether purchaser can be compelled to pay for much larger quantity under common condition - - - 530
contents of an acre - - - - - - - - 531
See COMPENSATION. PARTIAL PERFORMANCE.

QUIT-RENTS,

where a subject of compensation - - - - 502. 504
See RENTS. Vol. ii.

RACK-RENT, Page
described as ground-rent, fatal - - - - - 51
RECEIVER,
where appointed pending suit - - - - - 358
See BILL IN EQUITY.
RECEIPTS FOR PURCHASE-MONEY,
are agreements within the statute of frauds, where - 163
auctioneer's receipt for deposit is an agreement, where - 173
are not conclusive, where - - - - - - 462
See Vol. iii.
REDEMPTION,
where a purchaser of an equity of, may be compelled to redeem two estates - - - - - - - 311
REFEREES. See ARBITRATORS.
REFERENCE TO A MASTER,
of title, in sale by court - - - - - - 111
of title, in suit for specific performance - - - - 357
to settle conveyance in sale by court - - - - 110
cost of, upon sale by court, to be paid to purchaser, where 112
general practice in making inquiries under - - - 224
See Vol. ii.
REMAINDER,
barred before it was sold, purchaser relieved - - 388
See Vol. ii.
RENTCHARGE. See RENTS. Vol. ii. iii.
RENTS,
false affirmation of amount of rent - - - - 5
construction of the word rents in particulars of sale - 39
of clear yearly rents - - - - - - 48
rack rent described as ground rent fatal - - - 51
purchaser under decree entitled to, from what time - 107
mistake of purchaser in amount of rents, a ground for relief - - - - - - - - - - 129
no account of, for plaintiff, where bill dismissed - - 363
may be recovered by purchaser, where - - - - 314
apportioned by statute - - - - - - - 316
rentcharge on land not forced on purchaser in lieu of land charged with rent - - - - - - - - 488
See Vol. ii. iii.

REPAIRS, Page
time required for, where estate sold as in good repair, where allowed - - - - - - - - 412
false statement avoids the contract, where - - - 540
unless purchaser knew its condition - - - 541
subject of compensation, where - - - - - 542
See Improvement. Vol. iii.
REPRESENTATIONS. See Treaty.
RE-PURCHASE. See Power.
RESCINDING A CONTRACT,
notice of, should be given - - - - - - 381
where there is delay - - - - - - 434
in case of concealment - - - - - - ib.
where purchaser was induced to execute deeds in the absence of his solicitor - - - - - - 382
upon mis-statement of basis of agreement - - - 383
whether there should not be fraud - - - - ib.
specific performance refused, but contract not ordered to be delivered up - - - - - - - 384
where, after conveyance executed - - - - - 385
not for unreasonable price in general - - ib. 438
nor for inadequate consideration - - - 385. 440
for a man buying his own estate - - - - ib.
for an ignorant man accepting a small offer without consulting his friends - - - - - 387
where the seller concealed the want of title to part - - - - - - - - ib.
although purchaser is not evicted - - - 388
where a remainder was barred before the sale - - ib.
where, upon fraudulent representations - - - 391
where right accrues - - - - - - - 395
right lost by confirmation - - - - - - 392
or by acquiescence - - - - - - ib.
or by time - - - - - - - - 394
or by short delay - - - - - - - 395
upon what terms - - - - - - - ib.
interest - - - - - - - 396, 397
costs - - - - - - - - - 399
occupation rent - - - - - - ib.

RESCINDING A CONTARCT—*continued.* Page
upon what terms—*continued.*
improvements allowed for - - - - - 397
unless made after knowledge of defect of title - ib.
reinstating a house altered into a shop - - - ib.
the purchase-money followed if fraud, *qu.* - - 400
where by death or bankruptcy money cannot be paid 427, 428
or seller, who is to make a mortgage, neglect to complete - - - - - - - - - 428
where the term of years is much less than that sold - 484
See ACQUIESCENCE. CONFIRMATION. CONSIDERATION.

REVERSAL,
effect of, upon interest, costs, &c. - - - - 397
in the House of Lords, how to be executed by court below 399

REVERSION,
time material in sale of - - - - - - 413
sale of, at inadequate price, where relieved against - 444
upon a life interest not forced on purchaser of the fee - 491
See CONSIDERATION. DISTRESS. TIME. Vol. ii. iii.

REVOCATION,
of power of agent - . - - - - - 187
See DEVISE. Vol. iii.

SALES BEFORE A MASTER,
not liable to auction duty - - - - - - 97
puffing at sale - - - - - - - - 98
reserved bidding, where authorized - - - - ib.
particulars, how prepared - - - - - - ib.
what they should state - - - - - - 99
misrepresentation of rent - - - - - ib.
advertisements prepared, by whom - - - - 98
conducted, how - - - - - - - - 100
new purchaser substituted, where - - - - - 101
purchaser re-selling at a profit without leave of court, estate entitled to profit - - - - - - ib.
of more than sufficient, binding - - - - - ib.
where proceedings irregular, how far purchaser is bound 102
how far binding on judgment creditors - - - - ib.
when the sale is complete - - - - - - 103

SALES BEFORE A MASTER—*continued.* Page

loss by fire, &c. before report confirmed falls on estate - 104
life interest sold, purchaser bound although life drop - ib.
to an insane person, re-sale - - - - - - ib.
purchase-money may be paid, when - - - - 106
may be applied in payment of incumbrances, where ib
costs of purchaser to be paid where no title - - - 111
and expenses of investigating title - - - - ib.
purchaser must procure a report of being the best bidder 103
is entitled to a conveyance, when - - - - 106
the conveyance to be drawn, by whom - - - 109
exceptions to conveyance or title - - - 110, 111
biddings will be opened, where - - - - - 121
practice with respect to opening biddings - - - 122
advance of price sufficient - - - - - ib.
amount required - - - - - - - - ib.
after report confirmed absolute, increase of price insufficient - - - - - - - - - 123
fraud a sufficient ground - - - 124, 125
advance to be paid on opening biddings - - - 125
estate may be allotted in a different manner - - 126
party may open biddings though present at sale - ib.
costs of opening biddings - - - - - 127
opening one lot opens all - - - - - ib.
several lots sold to several persons, separate motions to open biddings - - - - - - 128
purchaser will be compelled to complete, when - - 105
will be discharged, upon what terms - - - 113
entitled to costs if title bad - - - - - 111
may abandon the contract, and forfeit his deposit, where - - - - - - - - 128
may be discharged where he has, by mistake, given an unreasonable price - - - - - 129
but there must not be delay - - - - 130
is entitled to possession or rents, from what time - 107
not to profits belonging to another grantee - 108
when entitled to life annuity - - - - - ib.
when to dividends of life interest - - - - ib.
when to profits of colliery - - - - - 109
purchaser dying before confirmation of report, conveyance to his devisees - - - - - - - - 113

SALES BEFORE A MASTER—*continued.* Page
joint purchasers must pay their money together - - 106
estate directed to be sold before master cannot be sold otherwise - - - - - - - - - 113
purchaser with notice, without remedy - - - 114
are not within the statute of frauds - - - ib. 193
although an agent's authority could not be proved, unless there be fraud - - - - - - 114
purchaser will be enjoined from committing waste - ib.
the practice in Ireland - - - - - - - 115
investment by purchaser's desire to be returned to him if sale rescinded - - - - - - - - 119
solicitor buying in estate bound - - - - - 130
See Auction. Fire. Interest. Reference to Master. Title.
SALE OF EXTENDED ESTATE,
if no title, purchaser discharged, but no costs paid to him - - - - - - - - - 131
SECURITY. See Annuity. Indemnity.
SELLER. See Vendor. Vol. ii. iii.
SEPARATE ESTATE. See Feme Covert.
SETTLEMENT,
corrected, where - - - - - - - 260
SHARES,
purchaser of entirety not bound to take - - - 490
but may elect to do so - - - - - - ib.
SIGNATURE,
requisite to valid agreement - - - - - 180
must give authenticity to the whole instrument - - 181
at the beginning of the agreement sufficient - - - ib.
by party, as a witness, valid - - - - - ib.
so by agent, with authority - - - - - ib.
of name of bidder, though an agent, sufficient - - 183
of initials valid - - - - - - - - ib.
on the back of conditions, &c. valid - - - - ib.
supplied by signed writing referred to - - - - ib.
altering, &c. draft of conveyance, not a - - - 184
by party to be charged, sufficient - - - - 188
SOLICITOR. See Attorney. Vol. ii. iii.
SPECIFIC PERFORMANE.
form of decree - - - - - - - - 320

SPECIFIC PERFORMANCE—*continued.* Page
grounds of relief - - - - - - - - 336
where no action can be maintained - - - - 353
enforced by court of review, where - - - - 320
See AGREEMENTS. Vol. ii. iii.

SPORTING,
right of, not disclosed till after sale, but waived - - 12
not a subject of compensation - - - - 501
See STATUTE OF FRAUDS.

STAMPS,
where sale in lots, and none of 20 *l.* value - - - 68
where letters are an agreement, only one stamp - - 372
either party may obtain the letter or agreement from the other to stamp it - - - - - - - - 164
See AGREEMENT. CROPS. DRAFT. Vol. ii.

STATUTE OF FRAUDS,
contract for sale of lands to be in writing, and signed by the person to be charged - - - - - 132
nature of interests excepted - - - - - - 133
whether a licence is within the act - - - - 138
agreement by tenant, upon improvements by landlord, to pay an additional sum per annum, is binding - - 140
agreement for assignment of parol lease is within the act 138
so is a sale of a standing crop of grass - - - 142
or of poles, underwood, or timber growing - - ib.
or a share in a mining company - - - - 158
but a crop of wheat not - - - - - 142
or of timber as wood - - - - - - ib.
or potatoes in the ground - - - - - 143
or turnips - - - - - - - - - ib.
or growing hops - - - - - - - - ib.
sale of crops by parol between tenants valid - - - 144
where crops are goods and chattels within 17th section - ib.
agreement void as to part is void *in toto* - - - 159
signature of party to be charged sufficient - - - 160
a letter or a receipt is a sufficient writing - - 163, 164
but it must be stamped - - - - - 164
unless admitted by answer - - - - - ib.
and prove the agreement set up - - - - 173
and it must specify all the terms - - - - 166
for a trifling omission will be fatal - - - 168

STATUTE OF FRAUDS—*continued.* Page
a letter or a receipt is a sufficient writing—*continued.*
but if it refer to a writing not signed, containing the terms, it is valid - - - - - - 169
the paper must be clearly referred to - - - 172
how property may be identified - - - - - - 169
reply by letter to an offer must be a simple acceptance - - - - - - - - - - - 165
and if special acceptance necessary, it must be expressed - - - - - - - - - - 166
offer in writing fairly accepted binding - - - 165
what entry by auctioneer in his books will do - - 174
letter to third person, directing the agreement to be executed, sufficient - - - - - - - - - ib.
bond of reference to fix price operative - - - 176
rent rolls, &c. not an agreement although signed - - ib.
nor particulars of property - - - - - - 177
sending an agreement as instructions for a technical one is binding - - - - - - - - - - 178
draft of conveyance, reciting the terms and approved, insufficient - - - - - - - - - - ib.
what is a sufficient signature - - - - - - 179
agent may be authorized to contract by parol - - 186
but his clerk cannot act without special authority - 187
and authority may be revoked - - - - - ib.
auctioneer an agent for both - - - - - - 188
so his clerk - - - - - - - - - - ib.
sales by auction of estates are within the statute - - ib.
sales before a master not within the statute - - - 193
or under the authority of the court - - - - ib.
or where the agreement is confessed by the answer 194
unless the defendant plead the statute - - 197
which he cannot do by answer to amended bill, where agreement is admitted by first answer ib.
sales not within the statute where it would protect fraud, as where agreement is to reduce the contract into writing, and it is prevented by fraud - - 199
or an agreement partly performed - - - - ib.
delivery of possession in general a part performance - - - - - - - - 200
but ancillary acts are not - - - - - - ib.

STATUTE OF FRAUDS—*continued.* Page
sales not within the statute where it would protect fraud—*continued.*
where payment of additional rent or expending money on estate, will make a parol agreement for renewal binding - - - - - - 201
acts done to the defendant's own prejudice not part performance - - - - - - - - 209
nor payment of purchase-money - - - 202
or of auction duty - - - - 209
part performance as to one lot does not extend to other distinct lots sold - - - - - 210
where part performance, court will try to ascertain the terms - - - - - - - - - ib.
parol agreement by tenant for life, with power to lease, not binding on remainder-man - - - - - 215
unless expenditure and acquiescence - - - ib.
contract by, cannot be enforced by remainder-man - 346
contract by, may be adopted by trustees so as to bind purchaser - - - - - - - - - 347
See AGENT. AUCTION. EVIDENCE. PAROL CONTRADICTION. PERJURY. PRINTED NAME. SALES BEFORE A MASTER.

STEWARD OF A MANOR,
appointed for life not affected by sale of manor - - 319

STOCK,
purchaser of life interest in, entitled to first dividend - 108
sale of, where specifically enforced - - - - 337
loss of purchaser by sale of, no ground for compensation - - - - - - - - - - 369
See INVESTMENT. Vol. ii.

STYLE,
old or new intended, not to be proved by parol - - 221

SUGGESTIO FALSI,
a ground to refuse specific performance - - - 342

SUPPRESSIO VERI,
a ground to refuse specific performance - - - 342

SURPRISE,
a defence against a specific performance - - - 225

SURPRISE—*continued.* Page

where seller's agent bidding for purchaser was considered a puffer - - - - - - - - 343

where the purchaser was so considered - - - ib.

See AGREEMENTS. EVIDENCE.

SURVEYORS'

estimate of value, weight due to it - - - - 459

TAXES,

what is a sufficient statement of - - - - - 49

parol agreement to pay, cannot be proved for plaintiff - 235

TENANTS,

agreements for the sale and purchase of crops - - 144

See BANKRUPTS. COVENANTS. LESSEE. Vol. ii.

TENANT FOR LIFE,

when entitled to rents of estate directed to be sold - 95

trustees of power of sale not bound to adopt his contract 96

with power of leasing, cannot bind remainder-man by parol contract - - - - - - - - 215

under will to convey to purchaser under devisor - - 323

where compelled to partially execute a power of leasing - 495

with remainder in fee, selling in fee cannot enforce contract partially - - - - - - - - 497

but purchaser may take the partial interests, where ib.

may purchase settled estates, although his consent is required to the sale - - - - - - - - 96

See POWER. Vol. ii. iii.

TENANT IN TAIL. See AGREEMENTS. Vol. ii. iii.

TENDER,

conveyance must be tendered by the purchaser, where - 374

TERMS OF YEARS. See DEVISE. LEASEHOLDS. Vol. ii. iii.

TIMBER,

conditions for the payment for - - - - - - 61

quantities omitted, cannot be supplied by parol - - 221

what is considered so - - - - - - - - 61

purchaser restrained from cutting, before he has paid for estate - - - - - - - - - 276. 356

TIMBER—*continued.* Page
option to purchase, personal estate after seller's death - 293
power to cut, upon notice - - - - - - - 295
ordinary, cut by seller after contract, subject of compensation - - - - - - - - - - - 545
See Interest. Ornamental Timber. Valuations. Vol. iii.

TIME,
allowed by conditions, confined by implication to purchaser - - - - - - - - - - - 67
fixed for completing contract is at law the essence of contract - - - - - - - - - - 402
and cannot be enlarged by parol at law - - 240. 406
material in equity where a party has not shown himself ready - - - - - - - - 409
or where the sale is by ecclesiastical corporation - 414
if vendor take no steps, although urged in time, equity will not relieve him - - - - 410
vendor will be relieved after the day, if not guilty of gross negligence - - - - - - 411
or the purchaser has waived the time - - - 410
receiving an abstract, a waiver - - - 424
required for repairs of estate sold as in good repair not material, unless possession wanted - - - - 412
which a lease has to run not material, where - - - ib.
purchaser not relieved after long delay - - - 413
is most attended to in sales of reversions - - - 413
or where estate is sold, to pay incumbrances - - 414
delays occasioned by *defects in the title* not a bar in equity where time not material - - - - 415
allowed a vendor in equity to procure a title, where - 416
purchaser not to wait the result of new proceedings - 420
or until an account be taken - - - - - 422
not in general allowed after Master's report - - - ib.
not material where purchaser proceeds with knowledge of defects - - - - - - - - - ib.
at law, title at time of trial not sufficient - - - 417
dormant treaty enforced if contract not abandoned - 425
vendor bound by his acquiescence in purchaser's declaration to reject the title - - - - - - - 426

TIME—*continued.* Page

where by death or bankruptcy purchase-money cannot be paid, vendor may rescind - - - - - 427
may be made of the essence of contract, in equity - - 429
the effect of delay where no time is appointed - 416. 435
must be reckoned according to the new style - - 221
unless in a demise by parol, where intention governs ib.

See Delay. Month. Title. Vol. ii.

TITHES,

of land sold free from them, where a subject of compensation - - - - - - - - - 520. 523
whether estate is tithe-free is a question of fact - - 522
commutation of - - - - - - - - - 523
power to merge - - - - - - - - - ib.
not an incumbrance - - - - - - - 524

TITLE,

where it should be inspected before sale - - - 14
doubtful, purchaser should not take possession - - 12
right to, implied from contract - - - - - 42
what condition excludes the right to - - - - 43
not that deeds which are all that he has, shall be delivered up - - - - - - - - ib.
condition where vendor's title is deemed doubtful - - ib.
deeds may be required to prove title, although purchaser not entitled to their custody - - - - - 62
stipulation for, cannot be waived at law - - - 238
reference of, to Master - - - - - - 357
purchaser may take the title such as it is - - - 347
will be referred to the Master before the answer, &c. where 357
at what time title must be shown at law - - 402, 416, 419
sold with all defects, false statement, not fraudulent, immaterial - - - - - - - - - 551

See Action. Agreements. Auction Duty. Costs. Lease. Power. Time. Vol. ii. iii.

TITLE-DEEDS,

if lost, the contents and due execution must be shown - 472

See Attested Copies. Deeds.

TRADE. See Lease.

TREATY, Page
representations on, at an end when agreement signed 82. 389
unless there be fraud - - - - - - - ib.
See Vol. iii.

TRUST. See Statute of Frauds.

TRUSTEES,
answerable to purchaser for false representation of incumbrances - - - - - - - - - - - 12
notice of sale of equitable interest to be given to them - 14
should ascertain value of property before sale - - 86
reasonable price, what it means in trust for sale - - ib.
may sell by private contract, where - - - - ib.
may sell in lots - - - - - - - - - 87
sale by auction binding, although full price not obtained 88
selling without due diligence, purchaser not assisted - ib.
convenient speed, what it means in trust for sale - - 89
sale by, without proper notice, restrained by equity 87. 89
cannot sell without leave of court, where bill filed - - 90
cannot impose beneficial condition for creator of the trust 91
all liable, if sale not duly made - - - - - - ib.
or purchase-money is retained by one and misapplied ib.
liable to make the same title as vendors *sui juris* - - 94
purchaser from, entitled to compensation for deficiency in quantity - - - - - - - - - - ib.
cannot sell to themselves - - - - - - - ib.
of legal estate must convey to equitable trustees to sell - 95
of power of sale and exchange, how they should act - 95
acting *bonâ fide*, cannot be controlled by equity - 96
nor bound to adopt contract of tenant for life - - ib.
may sell to tenant for life, although his consent is required to the sale - - - - - - - ib.
their contract binds the estate - - - - ib
liability of, for costs - - - - - - - -
under disabilities, empowered to convey - -
See Escheat. Heir. Incumbrances. Nominal Contractor. Purchase-Money. Tenant for Life. Vol. ii. iii.

UNREASONABLE CONSIDERATION. See Consideration.

USE AND OCCUPATION,
action for, against purchaser, does not lie where no title 377

VALUE, Page
false affirmation of - - - - - - - - 5
See Vol. iii.

VALUATIONS,
duties on - - - - - - - - - 85
not a part performance - - - - - - 200
ambiguous statements as to what timber to be valued - 226
by actuary - - - - - - - - - 448
by surveyors - - - - - - - - 459
See Appraisements. Arbitrators. Bond. Consideration.

VARIATION,
by parol, not admissible in proof - - - - 231. 238
but if part performed, will be enforced by equity - 242
by parol, where agreement comprises lands and goods, void as to all - - - - - - - - 244

VENDOR,
ignorant of defects in estate not answerable - - - 2
not bound to disclose patent defects - - - - ib.
but must not conceal them - - - - - ib.
and is bound to disclose latent defects - - - 3
is not bound by false affirmation of value - - - 4
but is for false affirmation of rent - - - - 5
or of a valuation - - - - - - - ib.
must not conceal incumbrances - - - - - 8
of leasehold, entitled to indemnity - - - - 64
liable for loss by seller's insolvency - - - - 77
a trustee for purchaser - - - - - - 273
his death does not avoid the contract - - - - 275
may pretend to sell as agent, where - - - - 351
restrained from conveying away the legal estate - - 356
but not from disposing of his property - - - - ib.
See Action. Agreement. Annuity Attested Copies. Bankrupt. Conveyance. Purchaser. Time. Title. Trustees. Vol. ii. iii.

VERBAL CONTRADICTIONS,
of particulars, &c. of sale, void - - - - - 40
See Statute of Frauds.

VOID AND VOIDABLE, Page

nonpayment of auction duty by purchaser, sale voidable by seller - - - - - - - - - 38

sale to be void by default of either party, is at the option of the other - - - - - - - - - 44

WAIVER,

of objections, what amounts to - - - - - 12

of time, by receiving abstract, &c. - - 410. 422. 424

by parol of written agreement - - - - 245. 249

clear evidence required - - - - - 246

and contract must be dissolved - - - - 248

whether it operates at law - - - - - 249

of a parol agreement, effect of - - - - - ib.

See AGREEMENTS. Vol. ii.

WALL. See CONCEALMENT.

WASTE. See INJUNCTION.

WAY,

rights of, description in particulars - - - - 45

effect of exhibition of plan of new street, &c. - - - 47

See PLAN. Vol. ii.

WHARF AND HOUSE,

sold together, and title to one only - - - - 538

WILFUL DEFAULT,

purchaser not charged for in account, where sale set aside for inadequacy - - - - - - - - 464

See Vol. iii.

WILL,

mistakes in, corrected, where evident - - - 258, n.

unless the supplying of the words would defeat the testator's intention - - - - - - - ib.

See CONTRACT. DEVISE. Vol. ii. iii.

WITH ALL FAULTS,

sale, effect of concealment of defects - - - - 545

WITNESS, Page
signature by party as a, where binding - - - 180, 181
so by an authorised agent - - - - - ib.
may look at a paper if he can afterwards swear from memory - - - - - - - - - 12
See AGREEMENT. PERJURY. Vol. ii. iii.
WOODS,
representation of produce of - - - - - 543
See Vol. iii.

END OF VOL. I.

LONDON:
Printed by James, Luke G. and Luke J. Hansard,
near Lincoln's-Inn Fields.