A

TREATISE

ON THE

LAW OF MORTGAGE.

BY

RICHARD HOLMES COOTE, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.

SECOND EDITION.

LONDON:

SAUNDERS AND BENNING, LAW BOOKSELLERS,

43, FLEET STREET.

1837.

LONDON:
PRINTED BY C. ROWORTH AND SONS, BELL YARD,
TEMPLE BAR.

TO

LEWIS DUVAL, ESQ.

My dear Sir,

My labours in preparing this Edition for the press are at length brought to a close, and the pleasing task alone remains of addressing it to you.

I have long been desirous of thus publicly expressing my admiration of your talents, and the high regard which I entertain and feel for your continued friendship.

Your extensive learning and profound knowledge of the Law of Real Property, must have long since led you to the dignities of the Profession, had such been in the course of your career.

As it is, you must rest satisfied with being at the head of that branch of the Law which has been the peculiar subject of your Practice.

Trusting that lengthened life and health will be granted you, no less for the gratification of your Friends than for the advantage of the Public,

I remain,

My dear Sir,

Yours very truly,

RICHARD HOLMES COOTE.

1, Stone Buildings, Lincoln's Inn,
May, 1837.

PREFACE.

During the period which has elapsed since the publication of the former edition of this Treatise, so many important alterations have been made by the legislature in the Law of Real Property, that the labour of adapting the work to the present state of the law has been almost equal to that of its original production.

The Author cannot flatter himself that omissions and errors will not be discovered, but he can safely allege, that neither care nor time (so far as his other engagements permitted) has been spared in order to avoid them.

In some instances it has been impossible to predicate, with certainty, the full effect of the new Statute Law on the law as founded on the

decisions of the Courts, or, in other words, the effect of the *lex scripta* on the *lex non scripta*. An instance of this occurs under the statute of the 1 Will. IV. cap. 47, prohibiting the parol from demurring by reason of infancy, which raises the question whether that enactment will apply to the case of a decree of foreclosure against an infant mortgagor; and many similar doubts might be instanced which can only be set at rest by the decisions of Courts of competent jurisdiction.

An explanation may be due from the Author for the apparent contradictions in the passages to be found in pages 46, 48, 127, 435, 436, and 691. But the cause was this:—His Honor the Vice Chancellor, in the cases of Ex parte Goddard and Ex parte Stanley, had made decisions which, if the statute 1 Will. IV. c. 60, s. 8, on which they were founded, had stood alone, would clearly have been according to law.

It happened, however, that a subsequent statute (4 & 5 Will. IV. c. 23), mistakingly referred to the former statute, as containing a

provision which literally it did not contain, and it occurred to the Author, who so stated it, that such a reference by the legislature might possibly be sufficient by implication to give effect to that extent to the provisions in the former act.

The precise point was afterwards raised before the Master of the Rolls in Ex parte Whitton, and his Lordship's decision was in accordance with the view so taken and stated in the work by the Author. The Vice Chancellor subsequently, on consideration of both statutes, agreed with the Master of the Rolls, and made an order to that effect on a rehearing of the case Ex parte Stanley, as noticed in page 691.

An important decision came to the Author's knowledge, after the work had in part proceeded through the press, viz.:—the case of Peacock *v.* Burt, which will be found in the Appendix, and was decided by the present Lord Chancellor, in that clear and distinct manner which characterizes his Lordship's judgments.

This decision set at rest a doubt raised by Lord Eldon, as stated in page 286. The effect of the case is stated in pages 454 and 456, and the case itself at page 693.

The Author, in the former edition, ventured to differ with Sir Edward Sugden on a point of great nicety in respect of the doctrine of marshalling assets in cases relating to the vendor's lien on the land for the purchase money, and he had the satisfaction to find the ultimate decision was in favour of his view of the law, so far at least as regarded creditors, page 310.

The author also formerly suggested, that since the passing of the 57 Geo. III. cap. 99, charges on church livings were no longer legal. Various decisions have since taken place in affirmance of that doctrine, which will be found noticed in their proper place in this edition.

The Court of King's Bench has decided, in opposition to the opinion formerly expressed by the author, that the lessee of a mortgagor

under a lease granted subsequent to the mortgage is liable, on eviction by the mortgagee, to an action for mesne profits. The Author had stated his opinion to be, that he was not so liable, on the ground that the lessee might be considered as in some measure coming in by title; but, in the case of Pope *v.* Biggs, the opinion of the judges of the Court of King's Bench was to the contrary, page 408.

Another important point has been decided since the former edition on a question first raised by Sir Edward Sugden, in his Treatise on Vendors and Purchasers, viz.:—whether a judgment, although with notice, would affect a purchaser in case execution was not sued out, prior to the purchaser obtaining a conveyance from the trustee in whom the legal estate was vested. It has been decided that it will, page 77.

It is now settled that an appointee will not be affected at law by a judgment against the appointor, on the ground that he comes in above the appointor and under the deed cre-

ating the power. The Author entertained an opinion that this would not apply in *Equity*, in case the purchaser *had notice* of the judgment. The Vice Chancellor, in Eaton *v.* Sanxter, decided that the doctrine was applicable in both cases, page 78.

The Author has added Chapters on the Statutes of Fraudulent Devises, Tolls and Stamps, which he hopes will be found useful.

With these preliminary observations, he submits this edition of his work to the Profession, trusting to its lenient judgment on its faults and imperfections.

The Author takes the opportunity of acknowledging his obligations to Mr. Walters of Newcastle, Mr. Manning, and Mr. Charles Beavan, for their kind communications.

1, Stone Buildings,
May, 1837.

PREFACE

TO THE FIRST EDITION.

In bringing the present Treatise to a close, the Author is naturally anxious to address a few words in its behalf to the Public. He was induced to the undertaking by the general impression that a modern Work on the Law of Mortgage was wanting, and from his not being aware that any other gentleman was disposed to the task. Its appearance in Parts was a subject of regret to the Author, but circumstances, over which he had no control, rendered it unavoidable. Since the publication of the First Part, another Treatise on the same Subject has been published, as also a new edition of Mr. Powell's Treatise on Mortgages, with Notes. Had the Author been aware that any other Work on the same subject was in progress, he would readily have relinquished his engagement; but he was not acquainted with the fact, until it was too late for him to recede.

In reference to his own performance, he trusts he has been cautious in not drawing conclusions unwarranted by the authorities; he has been anxiously desirous, to the best of his abilities, in no instance to mislead his Readers.

The compilation of a Law Treatise has, from the number of our Reports, become a work of considerable labour; and in traversing so wide a field of inquiry as is presented on a review of the Law on Mortgage, errors will unavoidably arise, and many defects occur; but the Author has the satisfaction of knowing that those, who from their learning and talents are best enabled to form a judgment of his Work, will be the most inclined duly to appreciate its difficulties, and to make every candid allowance for its imperfections.

In conclusion, the Author hopes his efforts may, in some degree, prove useful to the Profession, and that he has not fruitlessly expended so much time and labour as have been devoted to the accomplishment of the present Work.

LINCOLN'S INN,
Michaelmas Term, 1822.

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ERRATA AND ADDENDA.

Page 46, note *m*. *add* "*sed vide contra, Ex parte* Whitton, 1 Keen, 279.
—— 48, line 5 from the bottom, *add*, "*Sed vide Ex parte* Whitton, *supra*."
—— 78, note *f*, *add* "*et vide* 6 Simons, 517."
—— 127, note *l*, *add*, "*Sed vide contra, Ex parte* Whitton, *supra*."
—— 128, line 2, *instead of* "In a Bill now before Parliament it is intended," *lege* "In a Bill late before Parliament it was proposed."
—— 286, note *k*, *add* "*Sed vide contra*, Peacock *v.* Burt, Appendix, *et vide* pages 455, 456."
—— 340, line 12, *for* "Dixon *v.* Evans" *lege* "Dixon *v.* Ewart."
—— 387, last line, *dele* "in the next session."
—— 416, line 21, *add* "and so decided in Rogers *v.* Humphrys, 4 Barn. & Ellis, 299."
—— 278, note *m*, *add* "confirmed, 1 Mylne & Craig, 547."
—— 456, note *b*, *for* "Joulmin *v.* Steere," *lege* "Toulmin *v.* Steere."
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A

TREATISE

ON

THE LAW OF MORTGAGE.

BOOK THE FIRST.

INTRODUCTORY CHAPTER.

A MORTGAGE may be defined to be (*a*) *a debt by specialty*, secured by a pledge of lands, of which the legal ownership is vested in the creditor, but of which, in equity, the debtor and those claiming under him remain the actual owners, until debarred by judicial sentence, by legislative enactment, or their own laches. It is a security founded on the common law, and perfected by a judicious and wise application of the principles of redemption of the civil law. An inquiry into its nature and practice will lead to the consideration of the origin and historical deduction of mortgages; their adoption by the common law, and the establishment of the equitable right of redemption. We shall be then led to inquire into

(*a*) 2 Atk. 435. *Sed vide infra*, Book V. Chap. iii. if the mortgagee have neither covenant nor bond.

the nature of an equity of redemption, its incidents and qualities, the division of the respective interests of the mortgagee and mortgagor in the land in pledge, into legal and equitable estates, and the ultimate establishment in equity of an actual ownership in the mortgagor, susceptible of the like limitations and modifications of interest as the land itself. It will then be expedient to take into consideration certain compulsory modes, by which land may become a security for debt by statutory enactments, and afterwards inquire into the different subjects and modes of mortgage. Our inquiry will subsequently lead to a consideration of the rights of parties entitled to the equity of redemption, the priority of incumbrances, of tacking, and the doctrine of notice as applied to mortgages; and in conclusion by what estate the mortgage debt must be discharged, of foreclosure, and of the several cases and authorities relating to devises of mortgaged lands, whether by the mortgagor or mortgagee.

Preceding writers have traced high the origin of mortgages. Pledges or pawns were probably known to the earliest nations(*b*). As soon as men recognize the rights of property, their necessities will suggest the idea of pledging that property, as the ready means of supplying their wants without departing with their absolute ownership. Their immediate personal property(*c*) may be the first objects of

(*b*) Mr. Ellis observes in his Journal of the late Embassy to China, page 157, that pawnbrokers' shops are as numerous in Chinese cities as in London.

(*c*) Deuteronomy, chap. 24.

pledge; afterwards articles of merchandize and barter; and ultimately land.

Mortgages of a peculiar nature are said to have been known amongst the Jews, from whom, according to the opinions of some writers, the notion of mortgaging lands had origin. Land could not, according to the Jewish law, be aliened beyond the next jubilee, which occurred every fifty years. The original owner might, at any time during the fifty years, redeem on payment of the value of the land, to be computed from the time of redemption to the next jubilee, and, at all events, when the day of jubilee arrived, the lands returned to the owner, discharged of the debt, and their loans were regulated accordingly.

From the Jews, the idea of mortgages is supposed to have passed to the Greeks and Romans. Pledges and pawns were well known to the Roman law. The Roman hypotheca closely corresponds with our idea of a mortgage. The subject in pledge was retained by the debtor, and the creditor was, in default of payment, driven to his actio hypothecaria to obtain possession, and at any time before sentence the debtor might redeem (*d*). By that law, the debt was the principal, the security an incident, and when the one ceased, the other ceased also, and until sentence, the ownership of the debtor was not displaced.

Doubts are entertained whether mortgages were

(*d*) Bac. Ab. vol. v. 2.

known to the Anglo-Saxons. We are in a great degree ignorant of the nature of their law of landed property. The most profound writers are at variance (*e*); the one side asserting the law of feuds or tenures to have been acknowledged; the other that it was not. But it seems to be admitted that a right of free alienation of property existed, which implies the right of mortgage or conditional sale; and whether the feudal law was recognized or not, it is manifest that it was not admitted with the burthensome restrictions afterwards introduced by the Norman feudists (*f*), and which we may conclude to have been those generally submitted to by the Normans themselves, and other continental nations then acknowledging the feudal law. It is not highly improbable, that the Saxons might on their conquest have found traces of the civil law introduced by the Romans, during the long period of their possession, and have engrafted them on the principles of the feudal law as then acknowledged by themselves, and which had not then arrived at the full maturity it subsequently attained.

After the Norman conquest, mortgages must, it should seem, have been for a time suspended. In the 20th year of William's reign, and on the completion of Domesday-book, he summoned a meeting of all the principal landholders in London and Salisbury, and accepted from them a surrender of their lands, and regranted them on performance of homage and

(*e*) Wright's Tenures, 47.

(*f*) Somn. Treat. Gavel. 87; Spel. Treat. of Feuds, 21.

the oath of fealty. The mesne lords, on their sub-infeudations, also demanded homage and fealty, and it was held the bond of allegiance was mutual, each being bound to defend and protect the other. From this flowed the doctrine that the tenant could not transfer his feud without his lord's consent, nor the lord his seignory without his tenant's consent, although the tenants (even of the crown it should seem) might grant subinfeudations (*i. e.* to hold of themselves) without licence. It was further held, the tenant could not subject his lands to his debts by execution of law, for if he could, he might have effected that circuitously, which he could not by direct means have accomplished. Nor, if the lands came to him by descent, could he alien them without the consent of the next collateral heir(*g*). By these restraints on alienation, mortgages of land must have been nearly extinguished(*h*).

A further considerable obstacle to mortgages arose and long continued from the prejudice of the times; for in analogy to the Jewish law(*i*), which forbade profit to be made on the loan of money from Jew to Jew, but not so on a loan from a Jew to a stranger, it was held to be usury for Christians to lend money at interest(*k*), and (in case on inquest after death it was found that a man had died an usurer) the offence

(*g*) Wright's Tenures, 168.

(*h*) "Feudalia, invito domino, aut agnatis, non rectè subjiciuntur hypothecæ, quamvis fructus posse esse, receptum est." Corvin. 268.

(*i*) Deut. chap. 23.

(*k*) 3 Inst. 88; Glanville, lib. 7, cap. 16.

was punishable by forfeiture of his lands, goods, and chattels(*l*). The consequence was, that the Jews became the great money-lenders of Europe; and in compliance with the subsisting prejudice, the common law of England held, that if lands were enfeoffed to the creditor, and the rents and profits were *ad interim* received by him, and not applied in reduction of the principal of his debt, it was a species of usury which, although not prohibited by the king's court, was punishable by the forfeiture of the lands and chattels of the creditor, if he died possessed of the pledge. And this, according to Glanville(*m*), was the original meaning of the term *mortuum vadium*, or mortgage, and not the meaning subsequently attached to the word by Littleton and others, as hereafter explained.

The improving spirit of the age struggled hard against the fetters on alienation, and at length the statute of *Quia Emptores Terrarum*(*n*), passed in the reign of a monarch deservedly stiled the English Justinian, gave a general licence of free alienation to all, except the immediate tenants of the crown, at the same time that it abolished the power of subinfeudation; thus at once simplifying the tenure, and giving freedom to the alienation of the land of the realm.

(*l*) When our old writers speak of an usurer, we must understand one who lent money at interest. It was not until the 37 of Hen. 8, cap. 9, that loans at interest were declared legal, if not exceeding 10*l. per cent.*

(*m*) Glanville, De Leg. lib. 10, cap. 6, cap. 8.

(*n*) 18 Edw. 1.

On the removal of the restrictions, which impeded the circulation of landed property, mortgages became general. Of these we shall treat in the following chapters.

Fines on alienation by tenants *in capite* were not abolished until the 12 Car. 2, cap. 24, put an end to the remaining feudal burthens.

CHAPTER II.

OF MORTGAGES AT COMMON LAW.

The common law recognized two kinds of landed security, viz. *vivum vadium* and *mortuum vadium*. The *vivum vadium* and also the *mortuum vadium* (according to Glanville), as at first known, were determinable or base fees, with a right of reverter in the feoffor and his heirs, on the payment of a given sum. The *mortuum vadium*, or mortgage ultimately known at the common law, was an absolute fee, with a condition annexed, making void the feoffment on payment of a given sum, which the common law allowed, if reserved to the feoffor or his heirs. The difference between the estates was striking. In the first instances, the creditor took an estate, which, as soon as his debt was satisfied, *ipso facto* ceased, and the feoffor might re-enter and maintain ejectment; in the latter instance the feoffee took the whole estate, subject to be defeated, but which, on the non-fulfilment of a certain engagement, became his own by an indefeasible title. In the first case the defeasibility was an inherent quality of the estate; in the other case the determination was collateral to the estate.

The *vivum vadium* consisted of a feoffment to the creditor and his heirs, until out of the rents and profits he had satisfied himself his debt; the creditor took actual possession of the estate, and received the rents, and applied them from time to time in liquidation of the debt. When it was satisfied, the debtor

might, as before observed, re-enter and maintain ejectment; and it is said to have been called *vivum vadium*, because neither debt nor estate was lost.

This mode of security was probably never general: it is ill adapted to the purpose of a pledge, whose object is the repayment of the loan in one entire sum at a given time, and not a repayment by small instalments, which in fact is eating out the debt piecemeal; and it seems now to have entirely ceased. A security in land, bearing a remote resemblance to the *vivum vadium*, may be considered as subsisting under the appellation of Welch mortgage; but there is this distinction between the securities, viz. that in the *vivum vadium*, the rents were applied in satisfaction of the principal, and in Welch mortgages they are received in satisfaction of the interest, while the principal remains undiminished. In one respect they agree,—the estate is never forfeited. The Welch mortgage seems in fact pretty closely to resemble the ancient *mortuum vadium*.

The *mortuum vadium*, or mortgage, is mentioned by Littleton, Coke, and others, as so called because on breach of condition the estate was rendered indefeasible in the mortgagee, and absolutely lost to the mortgagor. In this light it is placed by Lord Coke, in contradistinction to the *vivum vadium*, and such seems to be the opinion generally adopted. But Glanville, as has been observed (*a*), gives a different meaning to the origin of the term. He says, "Mor-

(*a*) Lib. 10, cap. 6.

tuum vadium dicitur illud cujus fructus vel redditus interim percepti in nullo se acquietant;" and applies it to the before-mentioned species of usury at common law, viz. a feoffment to the creditor and his heirs, to be held by him until his debtor paid him a given sum, and until which he received the rents without account, so that the estate was unprofitable or dead to the mortgagor in the mean time; and the exposition given by Glanville seems the more sound, as it was rendered at a very early period of our history, and while yet the fetters on alienation were unremoved. We may therefore consider the *vivum vadium* to have implied a security, by which the rents of land were from time to time applied in reduction of the principal of the debt; and the *mortuum vadium* to have originally implied a security, by which, until payment of a given sum, the rents of land were *ad interim* lost to the owner, and received by the creditor and unaccounted for, so that the debt remained undiminished, which was at common law, as before remarked, in the event of the creditor dying possessed of the pledge, punishable as usury; and it must be observed, there was the like advantage, in one respect, to the debtor in this form of mortgage, as in the *vivum vadium*, viz. that the estate was never lost.

There is no trace of the period when this mode of mortgage fell into disuse. In its stead arose the *mortuum vadium*, or mortgage, afterwards so well known at common law, and thus described by Littleton (*b*). "Item; if a feoffment be made upon such

(*b*) Sec. 332.

condition, that if the feoffor pay to the feoffee at a certain day, &c. forty pounds of money, that then the feoffor may re-enter, &c. In this case the feoffee is called tenant in mortgage, which is as much as to say in French, *come mortgage,* and in Latin, *mortuum vadium.* And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay, at the day limited, such sum or not; and if he doth not pay, then the land which is put in pledge, upon condition for the payment of the money, is taken from him for ever, and so dead to him upon condition, &c.; and if he doth pay the money, then the pledge is dead as to the tenant, &c."

It is somewhat singular that Littleton should not refer to the explanation of the term as rendered by Glanville; and we may conclude that the original *mortuum vadium* had by this time totally fallen into disuse, and become obsolete. The mortgage described by Littleton was strictly an estate upon condition, that is, a feoffment of the land was made to the creditor, with a condition in the deed of feoffment or in a deed of defeazance executed *at the same time* (for the common law does not allow a feoffment to be defeazanced by matter subsequent), by which it was provided, that on payment by the mortgagor or feoffor of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, and in him the legal estate instantly vested, subject to the condition (*c*).

(*c*) In Bacon's Abridgment, vol. v. p. 15, it is stated that "the mortgagor before forfeiture, and whilst it remains uncertain whether

If the condition was performed, the feoffor re-entered and was in of his old estate, paramount all the charges and incumbrances of the feoffee, whether in the *Per* or in the *Post*, or in other words, above all persons, whether claiming through the feoffee, as heir, widow, or purchaser, or paramount, or collaterally to the feoffee, as the lord by escheat and the husband by curtesy. If the condition was broken, the feoffee's estate was absolute and his estate was indefeasible, and all the legal consequences followed as though he had been absolute owner from the time of the feoffment. But until breach of condition, possession was not in general given, which was a further distinction between this mode of mortgage and the *vivum vadium* and old *mortuum vadium*. And in order to protect the mortgagor from the eviction of the mortgagee, to which he was become liable, a proviso was inserted, declaring, that until breach of condition, the mortgagor might hold the estate; and on the other hand, the mortgagor engaged, that in such event, he would do all lawful acts for further assurance.

Although the common law did not favour conditions, but required strict performance of them (*d*), yet it was in certain cases satisfied with the performance of the intent of the condition (*e*), though not performed in words; and although a difference

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he will perform the condition at the time limited or not, hath the legal estate in him." This is a mistake; the legal estate instantly vests in the mortgagee, subject to be defeated on performance of the condition by the mortgagor.

(*d*) Co. Litt. 205, a. (*e*) Shep. Touch. 139.

was taken(*f*) between conditions to preserve and conditions to destroy an estate, the former being allowed to be performed as near the condition as could be, and the latter being *strictissimi juris*, yet conditions in mortgages, the performance of which, in fact, destroyed the estate of the mortgagee, were favoured in the eye of the law, and rather considered as belonging to the class of conditions for preserving estates.

The general rules at common law regulating the performance of conditions in mortgage, were as follow :—

If time and place were appointed for payment of the money, tender must be made accordingly; but if no place were appointed, then (the money being a sum in gross, and collateral to the title to the land) the mortgagor was bound to seek the mortgagee and tender him the money personally, if within the realm, and it was not sufficient to tender it on the land(*g*).

If no time were appointed, the mortgagor had his whole life for payment of it(*h*).

If no time were appointed, and the condition were, if the mortgagor (without mentioning heirs, &c.) pay 10*l.* to the mortgagee, and the mortgagor died without paying it, the condition was broken and the

(*f*) Co. Litt. 206, a.
(*g*) Ibid. 210, b. (*h*) Ibid. 208, b.

estate absolute(*i*). But if a time had been appointed, and the condition had been that the mortgagor (without more) should pay to the mortgagee 10*l*., and the mortgagor died before the day(*k*), then his heir, executor, or administrator, or the guardian of the heir, might tender the money at the time, and save the condition.

If the words of the condition were for payment unto the feoffee or his heirs(*l*), the money could not be paid to the executor or the assign; if "to heirs or assigns," and the mortgagee transferred the mortgage to another, it might be paid to the first or second feoffee(*m*); or if the first feoffee was dead, to his heirs, but not to his executors(*n*), for the law will never seek an assign in law, where there is one in fact(*o*); if "to heirs, executors, or assigns," it might be paid to either(*p*).

If the condition was for payment by the mortgagor *and* I. S.(*q*), payment by I. S. alone, after the death of the mortgagor, was good; but not during his life.

The mortgagor might tender the money on the appointed day, at any convenient time in which the money might be counted before sun-set(*r*). And he might pay it tied up in bags, and it was at the peril

(*i*) Litt. sec. 337.
(*k*) Ibid. 334.
(*l*) 5 Co. 96; Co. Litt. 210.
(*m*) Ibid.
(*n*) 5 Co. 97; Dyer, 180.
(*o*) Co. Litt. 210.
(*p*) Ibid.
(*q*) Shep. Touch. 141.
(*r*) Wade's case, 5 Co. 115.

of the mortgagee to miscount it(*s*). And even if part of the money were counterfeit coin, and the mortgagee accepted it, it was a good performance(*t*).

A doubt was formerly entertained whether a tender in Bank of England notes (although a good ground for equitable relief) was a tender at law to save the condition, because although the legislature had enacted that on tender of bank-notes in satisfaction of a debt and refusal by the creditor, the debtor should not be held to special bail(*u*); yet the creditor might have proceeded against him by action at law. And although the debtor might on action brought pay the money into Court, and thus stop the course of the action(*x*); yet he was liable to costs up to that time: and it therefore seemed that a tender in bank-notes (if objected to by the creditor(*y*)) was not such a tender as would save the condition(*z*).

A recent statute(*a*) has removed this doubt; by which it is enacted, that after the 1st of August, 1834, unless and until parliament shall otherwise direct, a tender of a note of the Governor and Company of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note, and shall be taken to be valid as a tender to such amount, for all sums above 5*l.*, on all occasions on which any tender of

(*s*) Wade's case, 5 Co. 115.
(*t*) Ibid.
(*u*) 37 Geo. III. c. 91, s. 8.
(*x*) 52 Geo. III. c. 50.
(*y*) Wright *v.* Reed, 3 Term Rep. 554; and *vide* 2 Scho. & Lef. 534.
(*z*) Shep. Touch. 136.
(*a*) 3 & 4 W. IV. c. 98, s. 6.

money may be legally made, so long as the Bank of England shall continue to pay on demand their notes in legal coin; but it is provided that no such notes shall be deemed a legal tender of payment by the Governor and Company of the Bank of England, or any branch bank of the company. But the governor and company are not to be liable or be required to pay and satisfy, at any of their branch banks, notes of the company not made specially payable at such branch bank, although they are liable to pay and satisfy at the Bank of England in London, all notes of the company or any branch bank.

It was also held, that if an account were stated between the parties, and the balance paid(*b*), or if a new security were taken by bond or statute(*c*), it was a good performance. "And so in most cases, where by a condition a thing is to be done one way, and to be done to the party to the condition himself, and not to a stranger, and he doth accept it another way, this is a good performance of the condition, *volenti non fit injuria*(*d*)."

The law was stricter when the condition was to be performed to a stranger, or to affect the rights of third persons(*e*). Thus it was adjudged(*f*), that if the mortgagee before transfer or assignment received the money, and returned the whole or part to the mortgagor, it was a good performance of the con-

(*b*) Co. Litt. 213. (*c*) Ibid. 212.
(*d*) Shep. Touch. 143.
(*e*) 5 Co. 96; Cro. Eliz. 383; Moor, 708; Co. Litt. 209, b.
(*f*) Powell *v.* Bartholomew, Mich. 40, 41 Eliz. B. R.

dition; but where the condition was for payment to the feoffee, his heirs, or assigns(*g*), and the feoffee transferred the mortgage and died, and the mortgagor paid the money to the heir of the first mortgagee who returned part, this was held no good performance to divest the lands from the alienee, or to injure the rights of third persons.

If, at the appointed day, legal tender of the money was made and refused, or no person was ready to receive it, the condition was satisfied, and the mortgagor or his heirs might re-enter(*h*). But here a distinction was taken between a sum by way of gift secured on land, and a debt(*i*). The former was in such case absolutely lost, but the latter was considered as still subsisting as a personal duty, and might be recovered by action at law.

It must be further remarked, this right of re-entry on performance of the condition, was neither alienable nor devisable, and could be reserved only, as before-mentioned, to the feoffor or his heirs.

Thus mortgages stood at common law, incumbered with the system from which they originated, and attended with ruinous consequences to the unfortunate debtor; and it is difficult to conceive, had the Courts of Law been so inclined (which it does not seem they were), on what principle they could have proceeded in giving the debtor relief. The for-

(*g*) Goodall's case, 5 Co. 96.
(*h*) Dyer, 181; Co. Litt. 209.
(*i*) 5 Bac. Ab. 21; Co. Litt. 209, b.

feiture was complete; the mortgagee, by the default of the mortgagor, had become the absolute owner of the estate; it could not be divested from him without a reconveyance, and there remained no remedy short of an actual legislative enactment, without disturbing the settled land-marks of property(*k*).

Happily a jurisdiction was arising, under which the harshness of the common law might be softened without an actual interference with its principles, and a system established at once consistent with the security of the creditor, and a due regard for the interests of the debtor.

It may under this head be lastly remarked, that at the present day, if the condition, instead of determining the estate of the mortgagee, be that on payment, &c. the feoffee, &c. shall reconvey or reassign the estate, there, notwithstanding the performance of the condition by payment within the appointed time, an actual reconveyance or reassignment will be necessary.

(*k*) Notwithstanding the rigour with which the common law punished the breach of the condition, yet it is clear from the concurrent testimony of all our old dramatic writers, the chroniclers of their times, that the law was opposed to the better feelings of the people, and that a considerable degree of obloquy attended those who took advantage of it. Thus in Beaumont and Fletcher:

ALATHE.—Thou hast undone a faithful gentleman,
By taking forfeit of his land.

ALGRIPE.—I do confess. I will henceforth practise repentance.
I will restore *all mortgages*, forswear abominable usury.

The Night Walker, or Little Thief.

CHAPTER III.

OF MORTGAGE, WITH EQUITY OF REDEMPTION.

It has been already said, that by the civil law the debtor might redeem the estate on payment of his debt at any time before sentence passed. It has been seen how decidedly opposed to this is the doctrine of forfeiture at common law. The absolute forfeiture of the estate, whatever might be its value, on breach of the condition, was, in the eye of equity, a flagrant injustice and hardship, although perfectly accordant with the system on which the mortgage itself was grounded. No wonder then that our Courts of Equity, founded on the principles of the civil law, should, as they increased in power, attempt, by an introduction of those principles, to moderate the severity with which the common law followed the breach of the condition. They did not indeed make the attempt of altering the legal effect of the forfeiture at common law; they could not, as they might have wished, in conformity to the principles of the civil law, declare that the conveyance should, notwithstanding forfeiture committed, cease at any time before sentence of foreclosure, on payment of the mortgage-money; but leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam* and not *in rem*, they declared it unreasonable that he should retain for his own benefit, what was intended as a mere pledge; and they adjudged that the breach of the con-

dition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest, and costs, notwithstanding the forfeiture at law.

Against the introduction of this novelty, the judges of common law strenuously opposed themselves; and though ultimately defeated by the increasing power of equity, they nevertheless in their own courts still adhered to the rigid doctrine of forfeiture, and in the result, the law of mortgage fell almost entirely within the jurisdiction of equity. There is no record of the time when this equity was first granted. In the before-mentioned cases of Wade (*a*) and Goodall (*b*), which were decided towards the end of the reign of Queen Elizabeth, the parties do not seem to have entertained the idea of any remedy existing for the mortgagor's relief, if the forfeiture was established at law, although Tothill mentions a case in the 37th year of Elizabeth's reign (*c*), in which the equity was decreed; and it must soon after this time have been generally in practice, for there is a case decided in the first year of Charles the First (*d*), in which the doctrine seems fully admitted. It was a question as to a mortgage term which had been forfeited by non-payment according to the condition; and the Court held, that although the money was not paid at the day, but afterwards, yet the term ought to be void *in equity*, as well as

(*a*) 5 Co. 115. (*b*) Ibid. 96.
(*c*) Langford *v.* Barnard, Tothill, 134.
(*d*) Emanuel College *v.* Evans, 1 Rep. in Chancery, 10.

on a legal payment it would have been void at law. In the intermediate reign of King James the First, the Courts of Equity became established in power, and the same period may be reasonably assigned as that in which the doctrine of equity of redemption was fully recognised.

No sooner, however, was this equitable principle established, than the cupidity of creditors induced them to attempt its evasion, and it was a bold but necessary decision of equity that the debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from his right to redeem; for in every other instance probably, the rule of law, *modus et conventio vincunt legem,* is allowed to prevail. In truth it required all the firmness and wisdom of the eminent judges who successively presided in the Courts of Equity, to prevent this equitable jurisdiction being nullified by the artifice of the parties.

But those Courts, looking always at the intent, and not at the form of things, disregarded all the defences by which the creditor surrounded himself, and laid down as plain and undeviating rules (*e*), that it was inequitable the creditor should obtain a collateral or additional advantage through the necessities of his debtor, beyond the payment of principal, interest, and costs; and they established as principles not to

(*e*) Newcomb *v.* Bonham, 2 Vent. 364; 1 Vern. 7, 214, 233; Howard *v.* Harris, 1 Vern, 192; Jason *v.* Eyre, 2 Ch. Ca. 33.

be departed from, that once a mortgage always a mortgage; that an estate could not at one time be a mortgage, and at another time cease to be so, by one and the same deed; and that a mortgage could no more be irredeemable than a distress irrepleviable; that the law will control even an express agreement of the parties, and, by the same reason, equity will let a man loose from his agreement, and even against his agreement, admit him to redeem a mortgage (*f*); and that whatever clause or covenant there may be in a conveyance, yet if upon the whole it appear to have been the intention of the parties that such conveyance shall only be a mortgage, or pass an estate redeemable, a Court of Equity will always construe it so (*g*).

Acting on these principles, they decided that no condition could be valid restricting the right of redemption within a given or limited time, as in Kelvington *v.* Gardiner (*h*), where the right of redemption was attempted to be confined to the lifetime of the mortgagor; and in Newcomb *v.* Bonham (*i*), where the like attempt was made. And although the decree for redemption made by Lord Chancellor Nottingham in the last-mentioned case was ultimately

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(*f*) 1 Vern. 192, *et vide* East India Company *v.* Atkyns, Comyns, 349, where *arguendo* it is said, equity will relieve, even if the mortgagor take his oath not to redeem.

(*g*) 5 Bac. Ab. 5.

(*h*) Kelvington *v.* Gardiner, cited 1 Vern. 192, *et vide* Spurgeon *v.* Collier, 1 Eden's Rep. 55.

(*i*) Newcomb *v.* Bonham, 1 Vern. 7, *et vide* Jason *v.* Eyre, *supra*; Price *v.* Perrie, 2 Freem. 258.

reversed by Lord Keeper North, yet that was done on a principle which will be hereafter explained, and does not at all militate against the general principle above stated.

Nor did the attempt better succeed to confine the right of redemption to a particular line or class of heirs: for where a man having mortgaged his lands (*k*), amongst which were estates, which after marriage had been limited by way of additional jointure to his wife, and the proviso was, if the mortgagor, *or the heirs male of his body*, should pay, &c. then he or they might re-enter; and he covenanted that no one but himself, or the heirs male of his body, should be admitted to redeem; the jointress, after the death of her husband, without issue, filed her bill to redeem, and it was decreed, notwithstanding an attempt made by the mortgagee to support the agreement, on the pretence that he had purchased the estate from the father of the mortgagor, who was tenant for life only, and had afterwards been evicted by the mortgagor as tenant in tail male, and that the intention was, if the mortgagor had no issue male, to make the mortgagee some compensation for his loss; but of which understanding between the parties no proof was adduced.

The report of the above case states, that the Lord Keeper in decreeing redemption, added, he did so the rather, because the defendant had *a covenant* for the repayment of his money, and therefore it was in

(*k*) Howard v. Harris, 2 Chan. Ca. 147.

the power of the mortgagee to have made it a mortgage at any time, which would bring it within another rule hereafter mentioned, viz. that a mortgage cannot be a mortgage on one side only, but must be mutual. It is however clear, that the omission either of a bond or covenant, which are collateral securities, creating a personal obligation on the mortgagor, will make no difference in the right to redeem, for (*l*) every loan implies a debt; and the right to redeem proceeds on the principle before stated, viz. that a creditor shall not obtain an advantage by his security, beyond his principal, interest, and costs. The bond or covenant may tend to explain a transaction, and show the intention of the parties in a doubtful case to create a mortgage; it may be good matter of evidence; but neither of them is a necessary ingredient in the creation of mortgage; for, to apply the remedy, equity only requires to be satisfied that the conveyance was originally intended as a security for the payment of a sum of money, whatever form the security may take.

Accordingly equity will admit even *parol* evidence to shew the conveyance was intended by way of security only. A case decided by Lord Chancellor Nottingham is one of frequent reference (*m*). A man agreed to lend money on mortgage, and it was proposed, as was formerly practised, that the mortgagor should execute an absolute conveyance, and that there should at the same time be a deed of de-

(*l*) 1 Pr. Wms. 271; 2 Atk. 496.

(*m*) Sir G. Maxwell *v.* Lady Montacute, Pre. Cha. 526.

feazance from the mortgagee. The mortgagor executed the conveyance, and then the mortgagee refused to execute the defeazance. Lord Nottingham (after the statute of frauds) admitted parol evidence to shew the agreement, and decreed against the mortgagee.

So Lord Hardwicke says(*n*), "Suppose a person who advances money should, after he (the mortgagor) has executed the absolute conveyance, refuse to execute the defeazance, will not this Court relieve against the fraud?" Again, in another case(*o*), he expressly recognizes the same doctrine, and in the subsequent case of Joynes *v.* Statham (*p*), the Lord Chancellor observed, "Suppose an agreement for a mortgage drawn by the mortgagee, the mortgagor being a marksman, and the mortgagee omit to insert a covenant for redemption, and then brings a bill to foreclose, shall not the mortgagor be at liberty in this Court, upon reading evidence, to shew the omission?" So where(*q*) an absolute conveyance is made for a certain sum of money, and the person to whom it is made, instead of entering and receiving the profits, demands interest for his money, and has it paid him, this will be admitted to explain the nature of the conveyance; and if the conveyance be absolute, and a bill be filed to redeem, and the de-

(*n*) Walker *v.* Walker, 2 Atk. 99; Dixon *v.* Parker, 2 Ves. 225.

(*o*) Young *v.* Peachey, 2 Atk. 257.

(*p*) Joynes *v.* Statham, 3 Atk. 387.

(*q*) Maxwell *v.* Montacute, *supra*.

fendant swear it was an absolute purchase; nevertheless parol evidence will, it seems, be admissible to shew the contrary (*r*). And an indorsement on the deed of conveyance, signed by the mortgagor only, is evidence to shew the intent (*s*); as is also a note in writing signed by the parties (*t*); and in an instance where an absolute conveyance for 80*l.* was made, and on bill filed to redeem, the defendant by his answer insisted, that it was intended to be an absolute conveyance without proviso and condition for redemption, but admitted it was in trust after payment of the 80*l.* and interest, for the plaintiff's wife and children, but no such trust was declared by writing. The plaintiff insisted, that as the defendant had confessed he was not to have the estate absolutely, and had not proved the trust, he, the plaintiff, was entitled to redeem. The Court, however, decreed the trust for the benefit of the plaintiff's wife and children (*u*).

Nor will the Courts permit the mortgagee to clog the equity of redemption with any bye-agreement (*x*), so as to gain an undue advantage. Thus in a case, in which money was lent on mortgage at 6 per cent. and by a separate deed, the mortgagor covenanted to convey to the mortgagee, if he (the mortgagee) thought fit, ground-rents at twenty years' purchase, to the value of 16,000*l.* On bill filed to redeem,

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(*r*) Franklyn *v.* Fern, Barnard. 30. (*s*) Ibid.
(*t*) Clench *v.* Witherby, Finch's Rep. 376.
(*u*) Hampton *v.* Spencer, 2 Vern. 288.
(*x*) Jennings *v.* Ward and others, 2 Vern. 520.

on the usual terms of payment of principal, interest, and costs, the defendant insisted on the agreement; but the Master of the Rolls decreed according to the prayer of the bill.

And so careful is equity to protect the debtor against the oppression of his creditor, that it will not allow the mortgagee to enter into a contract with the mortgagor, *at the time of the loan*, for the absolute purchase of the lands for a specific sum, in case of default made in payment of the mortgage-money at the appointed time, justly considering it would throw open a wide door to oppression, and enable the creditor to drive an inequitable and hard bargain with the debtor, who is rarely prepared to discharge his debt at the specific time (*y*).

But we must be careful to distinguish between the last-mentioned rule, and a case with which it may be confounded, viz. an agreement by the mortgagor, in case of sale, to give the mortgagee a preference of pre-emption, which if claimed within a reasonable time will be enforced (*z*). And although at first view this may seem to be within the objection raised by equity, viz. that of giving the creditor a collateral advantage over and above his principal and interest, yet on closer inspection it will be found clear of the rule. The option of sale is still left with the mort-

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(*y*) Price *v.* Perrie, 2 Freem. 258. Willett *v.* Winnell, 1 Vern. 488; Bowen *v.* Edwards, 1 Rep. in Chan. 222.

(*z*) Orby *v.* Trigg, 2 Eq. Ca. Ab. 599, 24; 9 Mod. 2.

gagor; he may redeem or sell, nor is he tied down to price; all that is stipulated for is, that if he thinks fit to sell, he shall give the mortgagee the refusal. In Willett *v.* Winnell, and Bowen *v.* Edwards, the sale was compulsory, and the price stipulated.

The rule must be further distinguished from the cases, in which the Courts have considered the agreement not to amount to a mortgage, but to be a *conditional purchase*, and in which instances the vendor will, it seems, be kept to his contract. Of this class is the case of an agreement for the purchase of the equity of redemption entered into *bonâ fide* and subsequently to a mortgage which was made and concluded without reference to any such agreement, followed by a subsequent agreement between the parties, that the mortgagor might have the estate on payment of principal, interest and costs (*a*); and also the case of a release of the equity of redemption, with a collateral agreement to reconvey on repayment of the purchase-money (*b*). And in this class also is the case of Sabine *v.* Barrell, *infra*.

A further distinction respecting which the authorities do not seem to be very clear, has been also made between mortgages and *defeasible purchases* (as they are called) subject to repurchase within a limited time, where the interest is taken by way

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(*a*) Cotterell *v.* Purchase, Ca. Temp. Talbot, 61.

(*b*) Endsworth *v.* Griffiths, 15 Vin. Ab. 468, Pl. 8; 2 Eq. Ca. Ab. 595, Pl. 6; 5 B. P. C. 184; Bac. Ab. 5, 9.

of rent-charge; for it is said, that in the latter cases the stipulations made between the parties must be strictly adhered to, or the estate of the grantee will become absolute.

The cases on which this doctrine rests are Floyer *v.* Lavington (*c*), and Mellor *v.* Lees (*d*).

In the first of these cases, a man in consideration of 800*l.* *granted* to another a rent of 48*l.* in fee, with a condition, that if the grantor should at any time give notice of his intention to pay in the consideration-money by instalments of 100*l.* every six months, and should, pursuant to such notice, pay the said money and interest *at any time during his life*, the grant should be void. There was no covenant to pay the money, and the rate of interest was then 10*l.* per cent., being much above the amount of the annuity. The grantor was dead; the grantee had conveyed the rent-charge to a purchaser, and sixty years had elapsed. A bill was brought by the heir of the grantor to redeem, and it was dismissed. And in the second of these cases, a man mortgaged lands in fee to secure 200*l.* and the mortgagees demised the lands to the mortgagor for 5,000 years, at a yearly rent of 12*l.* for the first three years, and 10*l.* for the residue of the term, with a proviso, that if in the space of three years the 200*l.* was paid with interest, the premises should be re-

(*c*) 1 P. Williams, 268. (*d*) 2 Atk. 494.

conveyed. The money was charity-money directed to be laid out in land, and the rents applied for certain purposes. After forty-eight years, a bill was filed to redeem; a new trustee of the charity resisted on the ground that it was an absolute purchase, and the Master of the Rolls decreed accordingly. On appeal to Lord Chancellor Hardwicke, he said there was a difference between such an agreement as this relating to a rent-charge issuing out of land, and an agreement relating to the land itself. And so likewise the case of creating a rent-charge out of lands and mortgaging a rent-charge was of different considerations. Where, he asked, was the fraud in the present case? The land itself was not parted with; it was merely buying a rent-charge, and it was plainly the intention of the parties, that after the end of three years the interest should be changed into a rent-charge, and be irredeemable.

This point does not seem of late years to have come before the Courts, and it will be safer to consider these cases as decided on the special circumstances attending them, than establishing a general principle for the decision of other cases.

Some writers (*e*) have also considered the general rule, that the mortgagee shall not be allowed to enter into a contract with the mortgagor, at the time of the loan, for the absolute purchase of the land for

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(*e*) 5 Bac. Ab. 12; Powell on Mortgage, 4th Ed. 1 Vol. 173.

a specific sum, in case of default on payment of the mortgage-money at the appointed time, not to apply in case the payment of the money advanced and interest be limited to a particular period, and for this doctrine the case of Tasburgh *v.* Echlin and others(*f*) is advanced as an authority. But this case was determined on circumstances so special that it is scarcely an authority for any subsequent case, and is hardly applicable to the matter in question. The circumstances were briefly these:

John Tasburgh was possessed of the residue of a beneficial term of 116 years in lands in Ireland, under a grant from the crown, at a certain rent. Sir John Eustace was seised of the reversion by a subsequent grant. In May, 1681, Eustace, in consideration of 200*l.*, conveyed the reversion to a trustee for Tasburgh, with a proviso for redemption on payment of 200*l.* and interest within five years, and with a declaration that if the money was not paid in that time, the estate of the trustee should be absolute and indefeasible, and Eustace should be for ever debarred from all right and relief in equity, and Eustace thereby (in default of payment) released to the trustee all his right to redeem. There was no covenant for payment of the mortgage-money. Neither principal nor interest was paid within the five years, and Tasburgh having no remedy at law by reason of the security being reversionary, filed his bill in Chancery in Ireland in 1687, in the name of his

(*f*) Tasburgh *v.* Echlin and others, 2 B. P. C. 265.

trustee, for a foreclosure. Eustace having stood out all process of contempt to a sequestration, appeared by his clerk in May, 1688, and his answer was to be taken by commission in England, and it was ordered that if the same was not returned by the 22d of June following, the cause should be set down to be heard, and the bill taken *pro confesso*. A further time was afterwards given him, and no answer being put in, an order for foreclosure was made, unless principal, interest and costs were paid before the 11th of December, 1689. The money was not paid, and Eustace returned to Ireland and died without issue, having acquiesced for eighteen years under the decree; but the order for foreclosure was never made absolute. Tasburgh died in 1691, and Henry Tasburgh entered as his heir at law, and on the 24th of August, 1722, demised the premises to Macnamara for thirty-one years, at a yearly rent of 250*l*. In September, 1723, the co-heiresses of Eustace filed their bill in Ireland, suggesting surprise, fraud and imposition in obtaining the decree of foreclosure, and praying the same might be reversed, and it was decreed. From this there was an appeal, and the decree of reversal was reversed.

It appears difficult to conceive a case decided on grounds less favourable than the preceding, for establishing an exception so extensive as that contended for, to the general principle in question; an exception, too, which would go far to introduce the very evil against which equity has been so careful to guard; and it is conceived, that notwithstanding the

case of Tasburgh *v.* Echlin, the general principle remains unshaken(*g*).

The same beneficial principle which operates in favour of the mortgagor, will operate in favour of his creditors; as(*h*) where a man having made several mortgages of his land, the first mortgagee filed his bill of foreclosure against the mortgagor and the other creditors; a decree *nisi* was obtained, and, to save the estate, one of the creditors and defendants, with the consent of the other creditors, redeemed, upon an understanding between them that the other creditors should redeem him by a given day. The money was not paid, and after twenty years' possession and considerable sums laid out in improvements, redemption was decreed, and the defendant was allowed only necessary repairs and lasting improvements.

It has been already mentioned(*i*), that a mortgage cannot be a mortgage on one side only; it must be mutual(*k*); that is, if it be a mortgage with one party, it must be a mortgage with both. The reverse of this was formerly attempted to be established; viz. that it must be a mortgage with both or with neither, so that it was argued(*l*) none could come to redeem, if the mortgagee could not

(*g*) *Sed vide* Powel on Mortgages, 4 Ed. 1 Vol. 183.

(*h*) Exton *v.* Greaves, 1 Vern. 138.

(*i*) *Ante*, page 24.

(*k*) Howard *v.* Harris, *supra*.

(*l*) Coplestone *v.* Boxwell, 1 Ch. Ca. 1; White *v.* Ewer, 2 Vent. 340.

compel the payment of the mortgage-money; but the former is the true principle. The mutuality, however, need not run *quatuor pedibus;* the rule only requires that it shall not be competent to one party alone to consider it a mortgage. In other respects the rights of the parties may be different, for it is in every day's practice, that one party may not be able to foreclose at a time when the other may redeem, as is in the instance cited in Talbot *v.* Braddyl(*m*). "If I lend 100*l.* upon a mortgage, with a proviso to redeem on payment of 112*l.* at the end of two years, there one side cannot foreclose till the end of two years; but if the mortgagor come at the end of the first year and offer to pay the 112*l.* he shall be admitted to the redemption."

And upon this principle the case of Talbot *v.* Braddyl was decided. Certain lands, part in possession and part out on lease for lives, were, in the year 1657, in consideration of 320*l.*, demised to Braddyl for 99 years, at 5*s.* rent reserved, and possession was immediately delivered: there was a proviso, that on payment of 380*l.* in the year 1688, the estate should be redeemed. The land at the time of the mortgage was worth about 15*l.* a-year; the lives fell in, and it became worth 45*l.* a-year. The plaintiff filed his bill to redeem, and Lord Keeper North decreed accordingly, notwithstanding the time specified had not yet arrived, and ordered an account of profits *ab origine*(*n*). It must, however, be observed, that a mortgagor cannot pay off the mortgage debt at any

(*m*) 1 Vern. 395. (*n*) 1 Vern. 183.

other than the time stipulated, without giving six previous months' notice, according to the rule of equity hereafter mentioned.

The preceding authorities show with what jealousy equity has looked on every attempt made to counteract or oppose its interference in behalf of the mortgagor; but its object being to protect him at a time when his necessities may have placed him at the mercy of the mortgagee, *cessante causâ cessat etiam lex*, and therefore the general rule of equity before stated will admit of a very considerable exception in cases, in which there is evidence of intention in the nature of the transaction, that provision was intended to be made by the mortgagor for some branch of his family, or that the mortgage was intended by him in the nature of a family settlement. Thus(*o*) where a man mortgaged lands to his relation in fee, the right to redeem was confined to the mortgagor during his life, and he not having redeemed in his lifetime, his heir filed his bill to redeem, and it was decreed on the principle already stated, viz. that the right to redeem cannot be restricted to a given time; but it being in proof that the mortgagor had a kindness for the mortgagee and intended him the land, and that the claim of redemption was inserted only upon the account that the mortgagor (being a bachelor) might marry and have issue, and that his full intent was if he died without issue, the mort-

(*o*) Newcomb *v.* Bonham, *supra*.

gagee should have the estate without redemption, and that the mortgage-money was really the full value at the time of the mortgage, being a reversion on two lives, which had since fallen in, Lord Keeper North, upon a demurrer to a bill of review, was inclined to reverse the decree; and it was at length agreed the cause should be heard *de integro*, which was accordingly done before the Lord Keeper, when he dismissed the bill. The like doctrine governed a case(*p*) in which a man, on his marriage, surrendered his copyholds to the use of himself and wife, in special tail, with remainder to his wife in fee, upon condition that if he paid 50*l.* to his wife's daughter on a given day, the surrender should be void. The money was not paid. The husband died without issue; the wife sold the estate; and the heir of the husband filed his bill to redeem. The defendant pleaded a purchase for valuable consideration without notice. The Court held it to have been the intention of the husband to reserve the option of paying the money, or letting the settlement stand; and allowed the plea(*q*).

It is rather singular that the case of Jason *v.* Eyres(*r*) was not adjudged as coming within the exception we are now considering, for it should seem to have been directly within its principle. Sir Robert

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(*p*) King *v.* Bromley, 2 Eq. Ca. Ab. 595.

(*q*) *Et vide* Woolston *v.* Aston, Hard. 511; Hampton *v.* Spencer, *supra*; Jason *v.* Eyres, 2 Ch. Ca. 38.

(*r*) Jason *v.* Eyres, *supra*.

Jason being seised of lands subject to a mortgage, entered into a marriage contract, by which it was agreed that the wife's fortune and a certain sum to be advanced by Sir Robert should be paid in reduction of the mortgage, and that for securing the payment of the remainder at the expiration of eighteen months, with interest, in the mean time, half-yearly at six per cent., the lands should be demised to trustees for 500 years; subject to which the lands were to be settled to Sir Robert for life, remainder to his intended wife for life, remainder to trustees in fee, upon trust, if Sir Robert should pay the remainder of the mortgage-debt and interest within the appointed time, if he should so long live, or otherwise within three years from the date of the conveyance, if he should so long live, and procure the lease to be surrendered, then in trust for Sir Robert and his heirs; but in case of failure in payment, or if Sir Robert should die before payment and surrender of the term, then in trust for the wife in fee, not only to enable her to pay the debt and free her jointure thereof, but to the end that she might enjoy the inheritance *for the increase of her fortune*, according to an agreement between them. Sir Robert died, and cross bills were filed by the widow and her second husband to have the inheritance, and by the heir to redeem. And redemption was decreed on the principle before stated, that once a mortgage always a mortgage, and that Sir Robert might have redeemed, had he lived beyond the three years. It might have been fairly contended, that the right of the wife was maintain-

able on the ground of the transaction being intended by way of settlement or family provision (*s*).

A doubt has been raised (*t*), whether an absolute conveyance can be converted into a mortgage by agreement *subsequent*. A slight consideration of principles will, it should seem, satisfy us on this head.

Equity looks to the substance and not to the form of things; and therefore on the one hand it considers a purchaser, after an agreement for an absolute sale, the actual owner before conveyance; and on the other hand where the agreement is for a mortgage, it considers the mortgagor the actual owner after conveyance. Applying these principles to the point in question, as soon as the agreement for an absolute sale is executed, and the consideration paid, the vendor is in equity a stranger to the estate, and any subsequent transaction between him and the purchaser cannot, it should seem, have the effect of divesting the ownership from the purchaser, and revesting it in the original vendor, without the intermediate step of a repurchase by the vendor. There is no greater privity of estate subsisting between them than between any two indifferent persons, and

(*s*) In this case *parol* evidence was offered and read on both sides, which the Court took no notice of, but rejected. It will be observed, that in Newcomb *v.* Bonham, the ultimate decision was expressly founded on *parol* evidence of the mortgagor's intention, and at the present day such evidence would be clearly admissible; Richards *v.* Sims, Barnard. 90.

(*t*) Powell on Mortgages, 4th edit. 1 vol. 156.

no act has been done to shift the ownership back again. Then if the purchaser contract, on repayment of the consideration-money, with interest, to reconvey the estate, this can be of no more avail in equity than if A. should contract to sell the estate to B. on payment of a sum of money with interest. If the purchase-money is not paid, A. may rescind his contract.

Upon this principle was decided the case of Sabine *v.* Barrell (*u*), in which the Lord Keeper said he was satisfied it was not originally a mortgage, but an absolute purchase; and that he thought where there was a clause or proviso for repurchase, the time limited ought to be precisely observed; and it may be thought this was the true principle which decided the before-mentioned cases of Cotterell *v.* Purchase, and Endsworth *v.* Griffith; and in the case of Coplestone *v.* Boxwell (*x*) the point was strongly pressed by the counsel for the defendant, but the case was referred to arbitration.

An important consequence results from this distinction between a mortgage and a purchase with a proviso for repurchase, viz. that in the latter case if the party to whom the conveyance is first made dies seised, and after his death the option is declared by the other party to take the estate, the purchase-money may belong to the heir, and not, as it would if it had been a mortgage, to the execu-

(*u*) Sabine *v.* Barrell, 1 Vern. 268.

(*x*) Coplestone *v.* Boxwell, 1 Ch. Ca. 1; 3 Salk. 241.

tor. Thus in a case in which an estate had been conveyed by one Wareham to Sir Richard Grobham, and afterwards Sir Richard demised the lands to Wareham for seven years, at a rent of 230*l.*, with a proviso, that if Wareham or his heir should within seven years be desirous to repurchase, and signify the same to Sir Richard, his heirs or assigns, and pay him or them 3000*l.*, then he or they would assure the lands to Wareham. Subsequently to the decease of Sir Richard, Wareham made his election to repurchase, and the money was decreed to the heir of Sir Richard, in preference to his executors, on the ground that it was not the case of a mortgage, but a mere collateral agreement to repurchase (*y*).

It may be further remarked, that the circumstance of an agreement to reconvey, although entered into *at the time* of conveyance, is not sufficient to convert the transaction into a mortgage, if there be evidence to rebut the presumption (*z*), and further that an estate redeemable may be rendered irredeemable by evidence of title, as where (*a*) copyholds were surrendered by way of mortgage, and by a second surrender the mortgagor limited them to himself for life, remainder to his wife for life, remainder to the mortgagee in fee. And although the words "subject to the trusts of the former surrender" were added, yet the court refused redemption, and con-

(*y*) Thornborough *v.* Baker, reported in 3 Swanston, 631.

(*z*) Sabine *v.* Barrell, *supra.*

(*a*) Perry *v.* Marston, 2 B. C. C. 397.

sidered the words to mean, " subject to the preceding life estates."

If a renewable lease be assigned, by way of mortgage, an agreement between the landlord and the mortgagee releasing the right of renewal, without the concurrence of the mortgagor or his representatives, cannot be sustained (*b*).

It scarcely need be noticed, that the mortgagor cannot under his covenant for further assurance on default in payment, be called upon to release his equity of redemption, and that he can under such covenant be required to confirm the mortgage only (*c*).

(*b*) O'Reilley *v.* Fetherstone, 4 Bligh, N. S. 161.

(*c*) Atkins *v.* Uton, 1 Lord Raym. 36; Comb. 318.

CHAPTER IV.

OF THE NATURE OF AN EQUITY OF REDEMPTION, ITS RIGHTS AND INCIDENTS.

THE right or equity of redemption being thus established, it is necessary to consider the nature of that right, against whom it lies, and its incidents or qualities.

First, then, of the nature of an equity of redemption.

It has been already shewn, that by the common law, the legal ownership of the land on the execution of the deed of mortgage, is transferred to the mortgagee, subject to be divested on performance of the condition, and that a mere right of reentry on performance of condition remains in the mortgagor, of which advantage may be taken by him or his heirs alone, being neither alienable nor devisable. These doctrines were at first attempted to be applied in equity to the right to redeem after condition broken, without reference to the principles, on which that right was founded, and accordingly in Roscarrick *v.* Barton (*a*), heard in Chancery the 21st of February, 23 and 24 Car. II.,

(*a*) Roscarrick *v.* Barton, 1 Ch. C. 217.

an equity of redemption was said to be but a mere right; a right to a bill in equity, and not such an inheritance as could be entailed within the statute *de donis;* and even so late as in the case of Casborne *v.* Scarfe (*b*), heard before Lord Chancellor Hardwicke, in Hilary vacation, 1737, the like doctrine of the equity being a mere right was advanced and strongly pressed on the Court to rebut the claim of an husband as tenant by the curtesy. But equity adhering to the principle of the civil law, which considered the borrower the owner of the pledge until debarred by judicial sentence, and looking at the substance and not at the form of things (*c*), held the mortgagor, as in the civil law, the real owner of the land until decree of foreclosure, and possessed of it in his ancient and original right, and therefore Lord Hardwicke, in Casborne *v.* Scarfe (*d*), denied the argument, that the equity was but a right, and putting the question on sound principles, declared the equity to be *an estate* in the land, and the person entitled to it the real owner of the land, and the mortgage personal assets.

An equity of redemption then is, in equity, the ancient estate in the land without change of ownership.

Questions of great nicety formerly arose in reference to the persons on whom this equity of re-

(*b*) Casborne *v.* Scarfe, 1 Atk. 602.
(*c*) Francis's Maxims, Max. 13.
(*d*) *Supra.*

demption was binding, but which for the most part have now ceased to have any interest: Lord Hale described it to be, not merely a trust, but a title in equity, and to be *inherent* in the land, and binding on *all persons*, whether in the *post* or otherwise (*e*), and, although on the immediate establishment of the equity of redemption, ancient prejudices so far prevailed as to lead to a decision, that lands conveyed to a mortgagee in fee, became subject to his legal incumbrances, and to the dower of his wife (*f*), and therefore, in order to prevent the latter, it was usual to convey the lands to two persons in joint tenancy, yet this misconception was soon remedied, and the rights of the parties put upon the proper footing.

Notwithstanding, however, the strong opinion entertained by Lord Hale of the binding quality of this equity, great doubts once prevailed whether the redemption of a mortgage could be had against the king (*g*). And it was very recently decided (*h*) that a lord of a manor was not bound by the equity on an escheat, if notice of such equity did not appear on his court rolls, although in another case (*i*) it was held he was bound by the equity if on the rolls there was a *reference* to a deed giving notice of it, and that the mortgage money belonged to the personal representative of the mortgagee, and not to the lord.

(*e*) Pawlett *v.* The Attorney-General, Hardw. 465.

(*f*) Nash *v.* Preston, Cro. Car. 190; 1 Eq. Ca. Ab. 311; Co. Litt. 204, n. 1.

(*g*) Pawlett *v.* The Attorney-General, *supra*.

(*h*) Attorney-General *v.* The Duke of Leeds, 2 Mylne & Keen, 343.

(*i*) Weaver *v.* Maule, 2 Russel & Mylne, 97.

A recent statute(*k*) has been passed which, by preventing escheated or forfeited lands of trustees or mortgagees from vesting in the crown, or in the subject, has removed any difficulty which, within the scope of probability, can in future arise on this subject.

By that statute, after reciting that great inconvenience had been found to result to persons beneficially entitled to real or personal property, by the escheating or forfeiture thereof to his majesty, to corporations, to lords of manors, and others, in consequence of the death without heirs, or the conviction for treason or felony of a *trustee* (*l*) in whom, or in whose name the same was vested, and it was expedient the same should be remedied, it is enacted, that where any person seised of any land, upon any trust, *or by way of mortgage,* dies without an heir, it shall be lawful for the Court of Chancery to appoint a person to convey such land in like manner as is provided by the act of the 11th year of King George the Fourth, and the 1st year of King William the Fourth, intituled "An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give effect to their decrees and orders in certain cases," in case such trustee or *mortgagee* had left an heir, and that it was not known who was such heir, and that such conveyance shall be as effectual as if there was such heir.

(*k*) 4 & 5 Will. IV. cap. 23.

(*l*) The word "mortgagee" is omitted in the recital in the statute.

On this enactment in may be proper to remark, that although it refers to the preceding statutes, as having provided for the case of a mortgagee dying leaving an heir, but it was not known who was such heir, yet in point of fact that particular event was *casus omissus* in those former statutes, which only met the case of a *trustee* dying, leaving an heir, and it was not known who was such heir (*m*). But as the 4 & 5 Will. IV. refers to the case of the trustee, as well as to that of the mortgagee, the mistake in the reference may be considered as immaterial. It is however to be wished that the error in the former statutes should be speedily remedied.

The statute of the 4 & 5 Will. IV. also enacts that no land, chattels, or stock vested in any person upon any trust, *or by way of mortgage*, or any profits thereof, shall escheat or be forfeited to his Majesty, his heirs or successors, or to any corporation, lord of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall *remain* in such trustee or mortgagee, or survive to his co-trustee, or descend, or vest in his representative, as if no such attainder or conviction had taken place.

And that the several provisions of the act shall extend to every case of a trustee having some beneficial estate or interest in the same subject, or

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(*m*) Ex parte Goddard, 1 Mylne & Keen, 25; Ex parte Stanley, 5 Simons, 320; *et vide infra.*

some duty as trustee to perform, and also to every case of a trust arising or resulting by implication of law, or by construction of equity.

But that nothing in the act contained shall prevent the escheat or forfeiture of any land, chattels, or stock vested in any such trustee *or mortgagee*, so far as relates to any beneficial interest therein of any such trustee or mortgagee; but such land, chattels, or stock, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if the act had not passed.

The act then recites that it was expedient to relieve persons beneficially entitled to real or personal property which had then already escheated or become forfeited to his Majesty, to corporations, to lords of manors, or others, *by any of the means aforesaid*. And it enacts, that in all cases where before the passing of the act any person possessed of or entitled to any land, chattels, or stock, or any right to or interest in any land, chattels, or stock, as *a trustee* thereof, either in whole or in part, or jointly with some other *trustee or trustees*, shall have died without an heir, or shall have been convicted of any offence whereby the said land, chattels, or stock, or any of them, have escheated or been forfeited, or have become subject to any escheat or forfeiture, then and in every such case the said land, chattels, or stock, or the right thereto or the interest therein, which hath escheated or been forfeited, or become subject to escheat or forfeiture by reason thereof, shall be subject to the order, control, and disposition

of the Court of Chancery, for the use of the party beneficially interested therein, in such manner and subject in all respects to such rights and incidents and to such orders and regulations of the said Court under the provisions of the said act of the 11th of George the Fourth, and of the first year of his present Majesty, as if such person so dead without an heir, or so convicted as aforesaid, were out of the jurisdiction of, or not amenable to the process of the said Court, without having been so convicted; provided that nothing in this clause contained shall extend to any land, chattels, or stock vested in any person by virtue of any grant thereof made subsequently to the time when such escheat or forfeiture first occurred, or to any land, chattels, or stock which more than twenty years prior to the passing of the act shall have been actually vested in possession, or reduced into possession by the party entitled thereto, by virtue of any such escheat or forfeiture.

It will be observed that this latter clause is restricted to the case of *a trustee*, and therefore, according to the cases of Ex parte Goddard and Ex parte Stanley, the case of a mortgagee is excluded, and, consequently, as to the latter, the act is prospective only. This was probably a mistake, but these statutes, relating to the estates of trustees and mortgagees, are very loosely drawn.

The equity of redemption, as in the case of a mere trust, will not of course be binding on a bonâ fide purchaser for a valuable consideration, if he takes without notice.

Next as to the incidents and qualities of an equity of redemption.

It has been already mentioned that an equity of redemption is *an estate* in the land without change of ownership. It necessarily follows, that its line of devolution must in the course of descent be governed as the land itself would have been by the general law, or by the lex loci; and, therefore, if the land be of gavelkind tenure, the equity of redemption will be divisible in like manner; or if the tenure be borough-English, the youngest son will be entitled; and so of the like (*l*), and on the like principle (*m*), if a devised estate is mortgaged by the testator, the mortgage, whether in fee or for a term of years, if confined to the purpose of the security, is but a revocation *pro tanto*. A devise of the equity of redemption itself must be also valid (*n*) if attended with the like technicalities as the law requires for a devise of the land. A doubt has been raised (*o*) whether prior to the breach of the condition, when, as has been already explained, the mortgagor has a right of re-entry only, a valid devise of the land can be made; and the ground of objection is, that the benefit of a condition is not devisable. There seems *at law* to be sound reason for the objection; for a right of re-entry can scarcely be placed on the footing of a *possibility*, accompanied with an interest, as has been attempted by a preceding writer (*p*), and devisable as

(*l*) 2 Ves. 304.

(*m*) Thorne *v.* Thorne, 1 Vern. 182; Hall *v.* Dunch, 1 Vern. 392.

(*n*) Phillips *v.* Hele, 1 Rep. in Ch. 190. (*o*) 2 Ch. C. 8.

(*p*) See Powell on Mortgages, 4th edit. 348, who refers to Roe *v.* Jones, 1 H. Bl. 30.

such; but nevertheless if such a devise could not be maintained *at law*, which, it is apprehended, is the total amount of the question, it would be good in equity, whether the mortgagor should die before or after breach of the condition. It is not, however, the intention in this place to enter into the doctrine of the devise of lands in mortgage, but to reserve the consideration of it to a subsequent chapter.

Prior to the decision that an equity of redemption was *an estate* in the land, and so long as the notion prevailed, that it was but a *right*, the limitation of it by way of entail or in strict settlement, seemed out of the question, and it was considered, that such an entail, if it could subsist, would tend to a perpetuity. But when the equity was declared to be the ancient estate without change of ownership, it became, of course, subject to all the limitations to which other estates in equity were liable (*q*).

It was once received in equity, that an entail in a trust estate and remainders over might be barred by any mode of assurance whatever, as by bargain and sale, covenant to stand seised, feoffment, and even by will (*r*); and in accordance with this doctrine it is said to have been decided that tenant in tail of an equity of redemption might devise it for payment of debts (*s*), and it seems even to have been doubted, whether a common recovery could be suffered of an equitable entail, unless upon a consideration (*t*). But

(*q*) Hard. 469.
(*r*) 1 Vern. 14, note.
(*s*) Turner *v.* Gwinn, 1 Vern. 41, 99.
(*t*) Goodrick *v.* Brown, 1 Ch. Ca. 49.

on a question before Lord Chancellor Hardwicke (*u*), whether an equitable remainder on an estate tail was barred by a settlement and will, he decided with great clearness, that the remainder was not barred, and the law became settled, that an equitable entail and remainders were barrable by such mode of assurance only as would bar a legal entail and remainders. By the 3 & 4 Will. IV. c. 74, abolishing fines and recoveries, a power of disposition has been given to tenant in tail of freehold lands by simple deed, inrolled in Chancery. To the provisions of the statute, more particular reference will be made in other parts of this Treatise.

In consistency with the anomalous decision of equity, that there should be a tenancy by the curtesy, but not dower, of a trust estate, the like was decided of an equity of redemption.

The right to tenancy by the curtesy, was at first disputed on the notion already mentioned, that the equity was but *a right* of which a seisin could not be had by the wife, so as to give title to the husband; but Lord Hardwicke in deciding the equity to be an estate, decided also the right to the tenancy by the curtesy (*x*).

The chief arguments relied on (*y*) by the widow for right to dower of an equity of redemption, were, first, that dower was a right, founded on principles of morality and equity, and, secondly, that an equity

(*u*) Kirkham *v.* Smith, Amb. 518; and see Legat *v.* Sewell, 2 Vern. 552.

(*x*) Casborne *v.* Scarfe, *supra.*

(*y*) Dixon *v.* Saville, 1 B. C. C. 326.

of redemption was to be distinguished from a mere trust, the latter being the creature of the parties themselves, who, it might be supposed, had voluntarily relinquished the legal incidents and privileges it wanted; but that the former was the creature of the Court, founded on the principle, that the mortgage was nothing originally more than a pledge, and that the original ownership remained in the mortgagor, subject to the legal title of the mortgagee, so far as such legal title was requisite to the end of his security, and that accordingly the estate of the mortgagee was not treated by equity as any title beyond that extent, and that his beneficial interest, though the mortgage was in fee, was considered only as personal estate; but the Lords Commissioners considered the point so well settled, it would be wrong to discuss it much, and the bill was dismissed, but without costs, the defendants not praying them (*z*).

The statute of the 3 & 4 Will. IV., cap. 105, has prospectively removed this anomaly in cases of women married subsequently to the 31st of December, 1833, by enacting, that when a husband shall die beneficially entitled to any land for an interest, which shall not entitle his widow to dower out of the same at law, and such interest, whether equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy,) then his widow shall be entitled in equity to dower out of the same.

(*z*) *Et vide* Banks *v.* Sutton, 2 P. Wms. 700; Attorney-General *v.* Scott, Cases *temp.* Talbot, 138, and cases in note; D'Arcey *v.* Blake, 2 Sch. & Lefroy, 391.

It will be observed, that the statute embraces estates of which the husband shall be seised partly for a legal interest, and partly for an equitable interest. This has more immediate reference to the limitations formerly generally in use in bar of dower, which, being to the husband for life, with the remainder to a trustee during his life in trust for him, with remainder to himself in fee, were in fact partly legal and equitable. The words in the statute will of course apply to any similar case; as if the estate is limited to a trustee for the husband for a term of years or other limited interest with remainder to the husband in fee or in tail, or to the husband for a term of years or other limited interest with remainder to a trustee in fee, in trust for the husband in fee or in tail, or in any other manner which shall give the husband the sole beneficial profits of the land, as realty, for an estate amounting to an estate of inheritance in possession. The statute also gives to widows a right of dower in estates in respect of which their husbands may have been entitled to a right of entry or action, although they shall not have recovered possession, provided the dower be sued for and obtained within the period during which such right of entry or action might be enforced.

These benefits have, however, been dearly purchased by women, the statute having placed the right to dower absolutely within the disposal of the husband, by alienation or charge, or by simple declaration of intention by deed or will (*a*).

A devise also to the widow by her husband of any

(*a*) An involuntary disposition by bankruptcy appears to be hardly within the provisions of the statute; *sed quære.*

lands out of which she would be entitled to dower if not so devised, will be a general bar of dower. But a bequest to her of personal estate will not have that effect, unless (in both cases) a contrary intention is declared by the will.

Women married prior to the 1st of January, 1834, are not within the statute, either in respect of its disabilities or benefits.

Prior to the statute of frauds (*a*), trust estates, not being cognizable at common law, were not extendible on an elegit, statute or recognizance (*b*). By that statute it was enacted, that it should be lawful for every sheriff or other officer to whom any writ or precept should be directed, at the suit of any person or persons, of, for, or upon any judgment, statute or recognizance thereafter to be made or had, to do, make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents and hereditaments as any other person or persons were in any manner seised or possessed, or thereafter should be seised or possessed, *in trust* for him against whom execution was so sued, like as the sheriff or other officer might or ought to have done, if the said party, against whom execution thereafter should be so sued, had been seised of such lands, tenements, rectories, tithes, rents, or hereditaments of such estate as they be seised of in trust for him *at the time of such execution sued*, which lands, &c. should accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as should be

(*a*) 29 Car. II., cap. 3, sec. 10. (*b*) 1 Roll. Ab. 888, 6.

so seised or possessed, in trust for the person against whom such execution should be sued. And the statute further enacted, that if any *cestui que trust* thereafter should die, leaving a *trust in fee simple* to descend to his heir, such trust should be deemed and taken to be assets by descent, and the heir should be liable to and chargeable with the obligation of his ancestor, for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner as the trust descended.

Since the passing of this statute, trust estates of inheritance have become subject to an execution at law; but trusts of a chattel interest remain in the same plight as they did prior to the statute, and therefore it was held, that the sheriff was justified in an instance in which the debtor had no other property than an equitable interest in a term of years, in returning *nulla bona* to the writ of *fieri facias*, at the suit of a judgment creditor (*c*).

This latter decision confirmed the preceding decisions in equity, that an execution at law will not affect *the equity of redemption of a term* (*d*).

It is also now admitted, that the equity of redemption of an estate of inheritance is not extendible, although the precise point does not seem to have been

(*c*) Scott v. Scholey, 8 East, 466; *et vide* Metcalf v. Scholey, 2 New Rep. 461, S. P.

(*d*) Burdon v. Kennedy, 3 Atk. 738; Lyster v. Dolland, 1 Ves. jun. 431; 3 B. C. C. 480.

quite so directly decided. In Lyster *v.* Dolland (*e*), a mortgagee of a *chattel* interest obtained possession by an ejectment at law of the leasehold premises, and afterwards proceeded against the mortgagor under his bond, and obtained judgment, and took the mortgage premises in execution. The sheriff sold the whole interest in the term to a trustee for the mortgagee. On a bill filed to redeem, Lord Chancellor Thurlow seems at first to have thought the equity of redemption in a term might be taken in execution under the statute, and his chief difficulty, on first hearing the cause, arose from the sheriff having sold the whole interest in the term under the execution, and not merely the equity of redemption; but on the next day he observed, that on looking into the statute he did not think the case within it; he had thought the words of the statute had been much larger, and that the words "equitable interests" were contained in it, but found himself wrong, and he thereupon let the plaintiffs in to redeem. It does not clearly appear from the report in Vesey, whether Lord Thurlow's observations went to equities of redemption generally, or were confined to the equity of redemption of a term; but Brown, in his Report, says he was informed the Lord Chancellor decreed in favour of the plaintiffs, on the ground that an equity of redemption was not liable to be taken in execution under the 29 Car. II., c. 3, and his lordship desired that might be taken notice of as the ground of the judgment. However, according to the cases of Scott *v.* Scholey and Metcalf *v.* Scholey, the sheriff would not have been justified in the sale, even if it

(*e*) *Supra.*

had been a mere trust estate, and the case of Lyster *v.* Dolland may therefore be considered as proving too much. In Plunkett *v.* Penson (*f*), heard before Lord Chancellor Hardwicke, in which the principal question was, whether an equity of redemption of a mortgage in fee of a *trust estate* was legal or equitable assets, his lordship said, he should be glad to know if there was any instance where an *equity of redemption* had ever been held to be liable to the execution of a bond creditor in the lifetime of the mortgagor, to which the counsel answered, they could not recollect any instance where it had been so held. On the principal question, in that case, his lordship said, "I do agree, that if a mere trust estate descends upon an heir at law, it will be considered as legal and not as equitable assets, and this is founded upon the third clause of the statute, which gives a specialty creditor his remedy at law, by an action of debt against the heir of the obligor, but it has not made a mortgage in fee of a trust estate subject to the same thing. If there is a mortgage for a thousand years, and the reversion in fee left in the mortgagor, it will be legal assets, because the bond creditor might have judgment against the heir of the obligor, and a *cesset executio* till the reversion come into possession; but where it is a mortgage of the whole inheritance, I do not see what remedy a bond creditor can have to make it assets at law; and if the specialty creditor should bring an action against the heir, he may plead *riens per descent*. Therefore, if the plaintiff is under a necessity of coming here for relief, this Court will act according to its known rule

(*f*) 2 Atk. 290.

of doing equal justice to all creditors, without any distinction as to priority."

Now this was certainly deciding that an equity of redemption was not to be considered as a *mere trust estate by descent*, for, if the equity of redemption had been a trust by descent, the heir could not since the statute have pleaded *riens per descent;* and if it is not to be considered in the light of a trust estate, then it is not within the words of the third section of the statute, and consequently not extendible (*g*). In this doctrine the Courts and the Profession have acquiesced, and the case of Plunket *v.* Penson was recognized in Scott *v.* Scholey, and part of the words above quoted were cited by Mr. Justice Lawrence with approbation, and it may therefore be admitted as settled doctrine, that an equity of redemption of an estate of inheritance is not extendible under a judgment at law.

However, although the equity is not extendible by the sheriff, the judgment forms an equitable lien on the land, and the creditor may file his bill to redeem, as will be hereafter explained.

Assets in a Court of Equity are legal or equitable. They are considered equitable either in respect of the testator's intent, as in the case of a charge upon the real estate for payment of debts generally, or in respect of the interest of the party in the property being purely equitable, and not made legal assets by any statute (*h*). If they are of chattel interest and

(*g*) *Et vide* Lyster *v.* Dolland, 1 Ves. jun. 436, at the end of case.
(*h*) Fonbl. Treat. on Equity, 2 vol. 399.

legal, they will be administered by the personal representatives of the deceased in a due course of administration. If they are assets real, and legal, the heir or devisee will take, subject to the debts of his ancestor or testator. If assets, whether real or personal, are equitable, they will be applicable in satisfaction of all the creditors *pari passu*, excepting that judgment creditors having a general lien, and thus having a right to come in and redeem a subsisting mortgage, are also entitled to preference in the distribution of equitable assets, consisting of an equity of redemption of a mortgage in fee (*i*). But after a bill filed by creditors, the executor cannot by confessing judgment give preference (*k*), and the Court will, after a decree against the executor to account, restrain creditors from proceeding against him at law, and direct them to come in under the decree (*l*).

Before the statute of frauds, all trust estates were equitable assets. By that statute, as before remarked, *trust estates in fee simple* are rendered liable to an execution at law.

A trust estate of inheritance, therefore, became legal assets; and, by analogy, it was held that an equity of redemption was also legal assets (*m*), but

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(*i*) Sharpe *v.* the Earl of Scarborough, 4 Ves. jun. 538.

(*k*) Solley *v.* Gower, 2 Vern. 61.

(*l*) Potts *v.* Layton, Toller's Executors, 456.

(*m*) 2 Freem. Pl. 130. The reporter adds, "Come al moy fuit dit per Sir F. Winnington, il esteant de concilio en le case;" *et vide* 3 Leon. 32.

in Plunket *v.* Penson (*n*) Lord Hardwicke, as before remarked, determined them to be equitable, and the heir may, on an action against him by a specialty creditor, plead *riens per descent* (*o*).

If the mortgage is but for term of years, leaving a legal reversion in the mortgagor, the reversion in fee will be of course legal assets (*o*), for the specialty creditors might have judgment at law with a *cesset executio* until the reversion fell into possession, as before observed (*p*). The judgment at law will be only of assets *quando acciderint*, but the creditor may, by bill in equity, compel the heir to sell the reversion, even (as it seems) if it be expectant on an estate tail (*q*).

If the mortgage be in fee, and there be judgment creditors, although, as before noticed, they cannot extend the equity, they, nevertheless, have a general lien in equity upon it, and consequently the equity of redemption will, as to them, be deemed legal assets, and applicable accordingly (*r*).

An equity of redemption of a leasehold estate is equitable assets (*s*), notwithstanding the doubt thrown out in Sharpe *v.* the Earl of Scarborough.

(*n*) Plunket *v.* Penson, *supra*. *Et vide* Solley *v.* Gower, *supra*; Clay *v.* Willis, *infra*.

(*o*) *Supra*, page 57; *et vide* Placknet *v.* Kirk, 1 Vern. 411.

(*p*) *Supra*, page 57.

(*q*) *Vide* Tyndale *v.* Warre, 1 Jac. 212, and cases there cited.

(*r*) Sharpe *v.* Earl of Scarborough, *supra*.

(*s*) The creditors of Sir Charles Cox, 3 P. Wms. 342; Hartwell *v.* Chitters, Amb. 308; Clay *v.* Willis, 1 Barn. & Cress. 372.

It seems to have been formerly held (*s*), that if an equity of redemption was devised to *executors* for payment of debts, it became legal assets; for that such a devise shewed the testator's intention that it should be so applied. But this doctrine is now overruled (*t*), and an equity of redemption remains equitable assets, whether devised to trustees generally or to executors for payment of debts (*u*).

Whether estates are devised to trustees to sell for payment of debts, or descend on the heir, charged by the ancestor with the payment of debts, will make no difference in their being accounted equitable assets (*x*).

It has been already said, that a mortgage made subsequently to a devise is but a revocation *pro tanto* in equity. In like manner, the execution of a power by way of mortgage, whether in fee or for years, is but an appointment *pro tanto* (*y*), unless there be on

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(*s*) Girling *v.* Lee, 1 Vern. 63.

(*t*) See Lewin *v.* Okeley, 2 Atk. 50, and cases in note.

(*u*) Clay *v.* Willis, *supra*; Silk *v.* Prime, 1 B. C. C. 138; Barker *v.* May, 9 Barn. & Cress. 489.

(*x*) Bailey *v.* Ekins, 7 Ves. 319; Shiphard *v.* Lutwidge, 8 Ves. 26.

(*y*) Thorne *v.* Thorne, 1 Vern. 141; and Perkins *v.* Walter, *ibid.* 97. Note *.

* The marginal extract in this case mistakes the facts, for it is there stated to be an authority, that a mortgage, after a voluntary settlement, with power of revocation, and a will in confirmation of it, is a revocation *pro tanto* only; but it does not appear from the circumstances stated, that the voluntary settlement contained any such power, nor did it require it to give effect to the mortgage, the

the face of the instrument an indication of an ulterior intention, inconsistent with a future exercise of the power (*z*), and the right of redemption will remain in the persons entitled to the estate in default of appointment (*a*).

On the principle before stated, that the mortgagor remains the actual owner of the estate, it has been determined (*b*) that the mortgagor of an advowson has a right to nominate to the living on a vacancy, and to compel the mortgagee to present his nominee, even although there be an actual engagement between them, that the mortgagee shall, after default made, have the right to present.

In like manner an equity of redemption may itself

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settlement itself being void, under 27 Eliz., as against a *bonâ fide* purchaser, which a mortgagee *pro tanto* is. It contained a power for the tenant for life to appoint the estate for a thousand years at any rent; he accordingly appointed the estate to trustees, upon trust, by sale or mortgage, to raise certain sums for payment of debts, and to discharge a mortgage, and for other purposes, and in *this deed* reserved a power of revocation, and afterwards mortgaged the estate, having first, by his will, confirmed the voluntary settlement, and appointed other sums to be raised out of the term. It was contended, the subsequent mortgage revoked the will and the appointment to the trustees, *sed non allocatur*, "it might be a revocation *pro tanto*, but not otherwise."

(*z*) Fitzgerald *v.* Fauconberg, Fitzg. 207.

(*a*) Innes *v.* Jackson, 16 Ves. jun. 356, *et vide infra.*

(*b*) Jory *v.* Cox, Prec. Chan. 71; Amhurst *v.* Dawling, 2 Vern. 401; Galley *v.* Selby, Stra. 403; Mackenzie *v.* Robinson, 3 Atk. 559, which over-ruled Gardiner *v.* Griffith, 2 Pr. Wms. 403. *Et vide infra.*

become the subject of mortgage, and each equitable mortgagee shall have preference according to his priority in time, the maxim of equity being, *Qui prior est in tempore, potior est in jure* (*c*). Of the protection afforded by the statute law to the mortgagee of an equity of redemption, and by what means a subsequent mortgagee of the equity of redemption may obtain preference to a prior mortgagee of the equity, an explanation will be given in the subsequent chapters.

The equity of redemption being an estate in the land, it followed that the doctrine of *possessio fratris* would apply in exclusion of the half blood (*d*).

But the law in this respect is materially affected by the 3 & 4 Will. IV. c. 106 (*e*), which has enacted, that any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir. And the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be enabled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor, where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the

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(*c*) Fonb. Treat. Equ. vol. i. 319, and cases in note. And see also *Ex parte* Knott, 11 Ves. jun. 609.

(*d*) Casborne *v.* Scarfe, 1 Atk. 603. (*e*) Sec. 9.

father, and their issue and the brother of the half blood on the part of the mother shall inherit next after the mother.

Whether an equity of redemption is subject to escheat does not seem to have been precisely determined; but the reasoning of the Lord Keeper in Burgess *v.* Wheate (*e*), as well as the principles on which he determined that a mere trust estate was not so subject, fairly leads to the conclusion that an equity of redemption is not liable to escheat, for, as remarked by the Lord Keeper, it is a question of tenure and not of forfeiture, and the right to escheat arises *pro defectu tenentis;* so long as the lord has his tenant to perform his services, the land cannot revert in demesne, and the crown has no equity on which to sue a *subpœna.* How far the Court would interfere, in case the mortgagee in such case should also proceed on his bond or covenant to recover the debt from the personal representatives of the mortgagor, remains to be seen; but according to the opinion of the Master of the Rolls, in Burgess *v.* Wheate (*f*), the Court would, under such circumstances, direct the mortgagee to convey the estate to the executors. This, however, was merely an *obiter dictum,* and cannot be relied on; but it may be considered clear, equity would not allow the mortgagee to have both the money and the estate.

(*e*) Burgess *v.* Wheate, 1 Bl. Rep. 123; *et vide* Fawcett v. Lowther, 2 Ves. 304.

(*f*) 1 Blackst. Rep. 149.

An equity of redemption (except of copyholds) is subject to crown debts, and may be sold under an extent of the Court of Exchequer, pursuant to the 25 Geo. III. c. 35 (*g*).

Notice of motion for an order for sale should be given to the mortgagee before the motion can be made, and the Court will order a reference to ascertain what is due on the mortgage (*h*).

An equity of redemption is liable to forfeiture for treason, but not for felony (*i*).

(*g*) 13 Eliz. c. 4; Rex *v.* Delamotte, Forrest. R. Exch. 162.

(*h*) King *v.* Coomber, 1 Price, 207.

(*i*) Attorney-General *v.* Sands, Hardres, 488; Lovell's case, 1 Salk. 85; Attorney-General *v.* Crofts, 1 B. P. C. 222. *Et nota.*— By the 54 Geo. III. cap. 145, corruption of blood is in all cases saved except for treason, petit treason, and murder.

CHAPTER V.

OF STATUTES MERCHANT, STATUTES STAPLE, RECOGNIZANCES, AND ELEGIT.

BEFORE we proceed further, it is proper to inquire into the nature of certain compulsory modes by which lands may, by force of the statute law, be rendered a security for debt.

It has been already noticed, that the common law did not, as between subject and subject, allow the lands themselves to be taken in execution on a judgment for debt or damages; for if they might have been so taken, then a tenant might have been intruded on the feud against the lord's consent; and thus by a circuitous route, an alienation might have been effected against his will. The creditor therefore could only, by the common law writ of *fieri facias*, take the goods and chattels of his debtor, and by writ of *levari facias*, take the growing profits of the land; and even of these latter he might be deprived by subsequent alienation of the land itself. The crown indeed might at common law have taken the lands of its debtor, by force of its prerogative, and a creditor might, on judgment against the heir, on a specialty debt of the ancestor, have taken the land; for otherwise he would, as against the heir, have been remediless.

The inconvenience of this rigid system began to be soon felt by a growing commercial state, and the

statute of Acton Burnell (*a*) in its preamble notices that merchants who had lent their goods to divers persons were greatly impoverished, because there was no speedy law provided for them to have recovery of their debts at the day of payment assigned, and by reason thereof many merchants had withdrawn, to the damage as well of the merchants as of the whole realm. And it therefore provided a remedy hereafter noticed of a *statute merchant*, being a bond or obligation on record, taken before the mayor of the place, and entered on record, and sealed with the seal of the debtor and the king.

A much more extensive remedy was soon after provided for the creditor by the 13 Edward I. cap. 18, which enacted, that when a debt was recovered *or acknowledged* in the King's Court, or damages awarded, it should be in the election of the creditor to have a writ of *fieri facias* unto the sheriff, to levy the debt of the lands (*i. e.* the profits) and goods, or that the sheriff should deliver to the creditor all the chattels of the debtor, (saving only his oxen and beasts of his plough,) and the one-half of his land, until the debt was levied upon a reasonable price or extent; and if he were put out of that tenement he should recover by a writ of novel disseisin, and after, by a writ of redisseisin, if need should be. In consequence of this statute a writ was framed since called a writ of elegit, from the words of the entry on the roll, *Quod elegit sibi executionem fieri*

(*a*) Statute of Acton Burnell, 11 Edw. I.

de omnibus catallis et medietate terræ. On the suing out of this writ, the sheriff must impannel a jury, who are to inquire into all the goods and chattels of the debtor, and make an appraisement of the same, and the sheriff must deliver them to the creditor at the appraised price; and the jury are also to inquire as to his lands (not being copyhold, which are not liable to be extended under an elegit) (*b*), and appraise their value, and set out and deliver to the creditor a moiety of them by metes and bounds, at the extended value. But the sheriff need not deliver a moiety of *each* tenement (*c*); it is sufficient if it appear the lands extended are but a moiety in value of the whole. If the sheriff extends more than a moiety, and the fact appears on the return, it seems the execution is merely void (*d*).

This statute extending to the case of a debt *acknowledged* in the King's Court, a mode of security was suggested, which gave the creditor an immediate hold upon the land, and at the same time saved him the expense of actual process to obtain judgment. This was by a warrant of attorney, authorizing certain attornies to appear for the debtor, and confess the debt in a court of record, whereupon judgment might be forthwith entered up, and a

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(*b*) Heydon's case, 3 Co. 9; nor, according to Rolle, is a lease by licence, 1 Roll. Ab. 888, 3.

(*c*) Den *v.* Lord Abingdon, Doug. Rep. 473.

(*d*) Putten *v.* Purbeck, 2 Salk. 563. *Sed vide contra* Carthew, 453. *Et vide infra.*

writ of execution *instanter* sued out (*e*). Between a judgment so obtained and a judgment obtained in an actual action, Lord Kenyon, in Doe *v.* Carter, said he saw no difference (*f*), since the object of the former was merely to shorten the process and to lessen the expense of the proceeding.

When lands are extended under an elegit, they are delivered to the creditor to hold "*quousque debitum satisfactum fuerit*," that is, until the debt recovered, and stated damages are repaid, and no other damages or expenses, nor even interest are allowed (*g*); and as the annual value of the land extended is ascertained by the inquisition and extent, the time when the debt will be satisfied is certain, and the debtor may re-enter without a previous writ of *scire facias* (*h*). But as the lands are always extended much below the real value, and as the debtor cannot on a writ of *ad computandum* at law insist on the creditor's doing more than account for the extended value, he is

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(*e*) Holbird *v.* Anderson and another, 5 Term Rep. 235.—Note—In this case, the debtor had been sued to judgment by a creditor, who was entitled to sue out execution on the 8th of May, on which day the debtor voluntarily went to another creditor, and gave him a warrant of attorney to confess judgment against him, on which judgment was immediately entered up, and execution levied on the same day, two hours before the first creditor's execution reached the sheriff's office; and it was held the preference was not unlawful nor fraudulent within the meaning of the 13 Eliz. c. 5. *Sed vide infra* as to judgments obtained on warrants of attorney in cases of bankruptcy.

(*f*) Doe *v.* Carter, 8 Term Rep. 61.

(*g*) Fulwood's case, 4 Rep. 67; 2 Inst. 678.

(*h*) Burwell *v.* Harwell, Cro. Car. 598; Fulwood's case, *supra*.

driven for remedy into a court of equity, which acting on its principle, that he who seeks equity shall do equity, will compel him to pay interest on the debt, although it should exceed the penalty on the judgment (*i*).

The sheriff formerly delivered actual possession of the land extended. He now delivers legal possession only (*k*). Whether the plaintiff may enter by virtue of the elegit, or must obtain actual possession by ejectment, does not appear clearly decided, although the authorities preponderate in favour of the first proposition (*l*). If, however, there be a tenant in possession under a lease granted prior to the date of the judgment (*m*), the creditor cannot succeed in ejectment; for the legal title must prevail, even although he give the tenant notice that he does not mean to disturb his possession, but only to get into the receipt of the profits. He may, however, extend a moiety of the reversion and of the rent, and he will have the like remedies for the moiety of the rent as the debtor himself had. (*n*). The debtor cannot, as before observed, by writ *ad computandum* at law, compel the creditor to account for the profits beyond the extended value; yet, if by some casual profit, the cre-

(*i*) Godfrey *v.* Watson, 3 Atk. 517; Owen *v.* Griffith, Amb. 520.

(*k*) 2 Saund. 69, a.

(*l*) Rogers *v.* Pitcher, 6 Taunt. 202; Harris *v.* Booker, 4 Bingham, 98; Tidd's Practice, 1036, 9th edition; Taylor *v.* Cole, 3 Term Rep. 295; Bull. Nisi Prius, 104.

(*m*) Doe *v.* Wharton, 8 T. R. 2; Rogers *v.* Pitcher, *supra*.

(*n*) Campbell's case, 1 Roll. Ab. 894, Pl. 5; 2 Leon. 113; Bishop of Bristow's case, Moor, 36.

ditor is satisfied his debt (*p*), or if part has been levied, and the debtor in Court tender him the residue (*q*), he may have his writ of *scire facias ad rehabendum terram*, to ascertain the accidental profit, and for recovery of the land: but in this latter case the tender must be in court, and of the money actually due, and not an offer to come to an agreement: the debtor may also have a *scire facias*, if he has obtained an acquittance; but a *scire facias* will not lie on a general averment that the creditor has received his debt, which may have happened through his improvement of the land, of which the debtor can take no advantage (*r*). If a creditor has two judgments against one debtor (*s*), he may take both moieties in execution; but if one moiety be already taken in execution, a second judgment creditor can take but one-fourth (*t*), that is, a moiety of the remaining moiety, and so of the like.

Copyholds, as already remarked, are not liable to an extent (*u*); nor, it should seem, is an advowson in gross (*v*), nor glebe lands belonging to a parsonage or vicarage (*x*); but rent-charges (*y*), lands whereof a man is seised *jure uxoris* (*z*), lands in ancient demesne (*a*); and, in short, every other species of

(*p*) Bac. Ab. Ex. 707; 2 Inst. 396. (*q*) 2 Roll. Ab. 482.
(*r*) 2 Roll. Ab. 483; Bac. Ab. Execution, 708.
(*s*) Attorney-General *v.* Andrew, Hard. 23.
(*t*) Huyt *v.* Cogan, Cro. Eliz. 482. (*u*) *Supra*, 64.
(*v*) Gilb. Ex. 39; *sed vide* Robinson *v.* Tonge, 3 P. W. 401.
(*x*) Jenk. 207. (*y*) Mo. 32.
(*z*) Dalt. Sher. 136. (*a*) Cox *v.* Barnsley, Hob. 47, 48.

landed property, except as before-mentioned, seem liable to the extent; but if an estate tail be extended, the issue may avoid it, after death of tenant in tail, by assise or writ of *auditâ querelâ* (*c*), and if one of two joint tenants confess a judgment, and die before execution, it will not bind the survivor (*f*).

A judgment is a general lien which will bind lands whereof the debtor is possessed, not only at the time of entering up the judgment, but those also which he shall subsequently acquire, and no subsequent alienation, even to a purchaser without notice, will defeat it (*d*); but such a purchaser may protect himself against prior judgments, of which he had no notice when he purchased, by procuring the conveyance or assignment of a prior outstanding term or legal estate.

A term, in the consideration of law, being but one day, the consequence was, that a purchaser or mortgagee, although prior to the judgment creditor, was bound by the judgment, if the purchase or mortgage and judgment were within the same term; for the judgment would relate to the first day of the term (*e*).

To remedy this, the statute of frauds and perjuries (*f*) enacted, that the judge or officer signing the

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(*b*) Ashburnham *v.* Saint John, Cro. Jac. 85; Gilb. Exec. 391.

(*c*) 1 Inst. 184, b.; Abergavenny s case, 6 Rep. 78.

(*d*) 2 Inst. 395; 1 Roll. Ab. 892, Pl. 14 and 16; 2 P. Wms. 492.

(*e*) 2 Saund. 9.

(*f*) 29 Car. II. cap. 3, sect. 14.

judgment should set down the day of the month and year of his so doing upon the paper book, docket, or record, which he should sign, which date should be also entered on the margin of the roll of the record where the judgment was entered, and that *purchasers* (*g*) should be charged from such time only, and not from the first day of the term, whereof the judgment was entered. By subsequent statutes (*h*), judgments are required to be docketed, viz. those of Michaelmas and Hilary terms, before the last day of the ensuing terms, and those of Easter and Trinity terms, before the last day of Michaelmas term. And it is declared, that no judgment not so docketed, shall affect purchasers or mortgagees (*i*). A docketing after the time limited by the statute will, it seems, be of no avail against any subsequent purchaser or mortgagee, unless he has notice of the judgment, when he will be bound by it in equity, although it is not docketed according to the statute (*k*).

In Hodges *v.* Templar (*l*), Lord Holt said, " If one will enter judgment as of a term, he must actually enter it before the essoign day of the succeeding term, otherwise it shall only relate to the term of which he enters it; and, he adds, if judgment be signed in Hilary term, and in the subsequent vacation the defendant sells lands, and before the essoigns

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(*g*) 29 Car. II. cap. 3, sect. 15.

(*h*) 4 & 5 Will. and Mary, cap. 20; 7 & 8 Will. III. cap. 36.

(*i*) Forshall *v.* Coles, 7 Vin. Ab. 54.

(*k*) Davis *v.* Strathmore, 16 Ves. 419; Thomas *v.* Pledwell, 7 Vin. Ab. 53, *contra*; Forshall *v.* Coles, *supra*.

(*l*) *Supra*.

of Easter term the plaintiff enter his judgment, it shall affect the lands in the hands of the purchaser, and if one enter judgment in vacation, when indeed the party was dead, yet if he was living in the preceding term, the judgment is good by relation; so that it seems a purchaser might still be over-reached by a judgment signed prior to his purchase, &c., but entered subsequently to it. It is said, however, that no practical inconvenience results from this to purchasers, as it is the practice to index judgments as soon as they are *signed*(*m*).

By the general rules (*n*) made in Hilary term, 4 Will. IV. under the authority of the 3 & 4 Will. IV. cap. 42, sect. 1 (*o*), it is ordered, that all judgments, whether interlocutory or final, shall be entered of the day of the month and year, whether in term or vacation, *when signed*, and shall not have relation to any other day, provided it shall be lawful for the Court or a Judge to order a judgment to be entered *nunc pro tunc*.

But, notwithstanding this new regulation, a purchaser might, it is thought, be still over-reached by a judgment signed prior, and entered subsequently to his purchase, if it were not for the precaution of the immediate index. It would seem to be more safe that judgments should take effect from the day they are

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(*m*) *Vide* Sugden's Vendors and Purchasers, 684, 8th edit.; *et vide* Tidd's Pract. 939, 9th edit.; Mayor of Norwich *v.* Berry, 4 Burr. 2277.

(*n*) See 5 Barnewall & Adolphus.

(*o*) 3 & 4 Will. IV. cap. 42.

entered, and that the day of such entry should be entered on the margin of the roll, as directed by the 1 & 2 Will. IV. cap. 58, in respect of the rules and orders to be entered under that act (*p*).

As judgments now take effect from the day they are signed, whether in term or vacation, it is no longer necessary, in order that judgment may be entered up on a warrant of attorney, to show that the debtor was living in the preceding term. It will be sufficient to show he was living within a reasonable time preceding the application (*q*).

By the 1st of Will. IV. cap. 7 (*r*), the judge before whom any action is tried, may certify before the end of the sittings or assizes, that execution ought to issue forthwith, or on some day to be named in such certificate, and subject, or not, to any condition or qualification. And in such case a rule for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith, or afterwards, according to the terms in such certificate, in vacation or term; and the postea, with the certificate, is to be entered of record as of the day on which the judgment shall be signed, and be recorded as the judgment of the Court wherein the action shall be depending, although the court may not be sitting on the day of the signing thereof. In the 5th volume of Barnewall and Adolphus will be

(*p*) Section 7.
(*q*) Jordan *v.* Farr, 2 Adolphus & Ellis, 437.
(*r*) 1 Will. IV. cap. 7.

found an entry of a postea on a judgment signed in vacation (*s*).

Chattels personal and leaseholds, since the statute of frauds, are bound from the time of delivery of the writ of execution into the hands of the sheriff (*t*), and, as between different plaintiffs, the sheriff must give priority to the writ of *fieri facias* first delivered to him, from which time the goods are bound (*u*).

It has been already mentioned, that an equity of redemption is not extendible (*v*). If a judgment be entered up after contract for sale and actual payment of the purchase-money, but previously to the conveyance, the purchaser will, it seems, be relieved against it in equity (*x*). If a mortgagee in fee purchase, he will, of course, be protected from all judgments subsequently to his mortgage, of which he had not notice (*y*).

A difference of opinion formerly prevailed (*z*), whether in equity, judgments bound a subsequent purchaser or mortgagee *who had notice of them*, but who,

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(*s*) Engleheart *v.* Eyre, 5 Barnewall & Adolphus, 70.

(*t*) 29 Car. II., cap. 3, sect. 16.; Burdon *v.* Kennedy, *supra*, 739; Jeanes *v.* Wilkins, 1 Ves. 195.

(*u*) Hutchinson *v.* Johnson, 1 Term Rep. 729.

(*v*) *Ante*, page 55.

(*x*) Finch *v.* Earl of Winchelsea, 1 Pr. Wms. 277.

(*y*) Sugden's V. and P. 478, 8th edit.

(*z*) See Powell on Mortgages, 4th edit. 508; Sugden's V. and P. 476, 8th edit.

previously to execution sued out, obtained a conveyance from trustees, in whom the lands had been vested prior to the obtaining of the judgments. By the express words of the statute, which directs that execution may be delivered of all such lands as any other persons shall be seised of, in trust for the debtor, in the same manner as if he had been seised of such lands of such estate, as they shall be seised of in trust for him at the time of the *execution sued*, and by the authority of the case of Hunt *v.* Coles (*a*), it would seem clear, that *at law* the lands are not liable. But it was urged that they were liable *in equity* if the purchaser, &c. had *notice;* and in behalf of this opinion it was argued (*b*), the lands would have been so liable prior to the statute of frauds, and it could not be supposed the statute intended to conclude the equitable relief. In support of this opinion, the cases of equitable relief under the registry acts were referred to. On the other side, the argument was that as equity follows the law (*c*), no relief would be granted against the purchaser, through the medium of a Court of Equity.

The precise point has recently occurred, and it has been decided, that notice to the subsequent purchaser is binding, even although the judgment (so far as it affects lands in a registry county) is not registered (*d*).

(*a*) Hunt *v.* Coles, Com. 226 ; *et vide* Com. Dig. Title Execution, (C. 14.) and 2 Saund. 11.

(*b*) Sugden's V. and P. 480, 8th edit.

(*c*) Higgins *v.* The York Buildings Company, 2 Atk. 107.

(*d*) Tunstall v. Trappes, 3 Sim. 286.

If, however, the conveyance to the purchaser be in exercise of a power created by an instrument dated prior to the judgment, then, as the exercise of the power wholly displaces the estate in respect of which the judgment is obtained, the judgment will be defeated at law(*e*), and also in equity, even although with notice(*f*).

If a trust for sale is once well created, the existence of subsequent judgments against the grantor will not prejudice the title(*g*).

A Court of Equity will not oblige a creditor to wait until he is paid out of the rents, but will accelerate the payment by a sale of the moiety(*h*).

If the inquisition by the sheriff be void for any defect appearing on the face of it, the Court will, on suggestion thereof, or on a writ of *scire facias*, order the writ to be vacated, and award a new one and amerce the sheriff(*i*).

If the debtor be possessed of a term for years, the sheriff may either extend it, that is, deliver a moiety of it to the creditor, or he may sell the whole term to the creditor, as part of the personal estate of his

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(*e*) Doe *v.* Jones, 10 Barnewall & Cresswell, 459.

(*f*) Tunstall *v.* Trappes, *supra*; Eaton *v.* Sanxter, heard in March, 1834, before the V. C.

(*g*) Lodge *v.* Lyseley, 4 Simons, 70.

(*h*) Stileman *v.* Ashdown, 2 Atk. 610.

(*i*) 2 Saund. 69, *note*.

debtor, at a gross price, appraised and settled by the jury(*j*). The debtor may save the term by tender to the sheriff prior to its delivery to the creditor, or by tender in Court before actual delivery by the sheriff; but if no such tender is made, the property is altered by the delivery of the sheriff, and the creditor may dispose of it without being accountable for the profits(*k*). If, however, the judgment be afterwards reversed, the sale and delivery will be void, and a writ of restitution awarded. But if the term had been sold under a *fieri facias*, and the judgment had been reversed, the sale would have been valid(*l*).

If the sheriff legally take goods in execution, and the owner afterwards becomes bankrupt, and the sheriff, after the bankruptcy, sells at one time goods sufficient to satisfy that execution, and also an execution delivered to him after the bankruptcy, the assignees may maintain *trover* against the sheriff for such of the goods as were sold after he had raised money sufficient to satisfy the first execution (*m*).

After the sheriff has delivered the lands to the creditor under an elegit, the latter cannot have either a *fieri facias* or *capias ad satisfaciendum* (*n*). But if

(*j*) 2 Inst. 395; Fleetwood's case, 8 Rep. 171, a; Dalt. Sher. 137.

(*k*) Gilb. Ex. 34; 2 Saund. Rep. 68; Comyn *v.* Brandlyn, Mo. 873.

(*l*) Goodyere *v.* Ince, Cro. Jac. 246; Bac. Ab. Ex. 740.

(*m*) Stead and others, assignees of Moorhouse *v.* Gascoyne, 8 Taunton, 527.

(*n*) Tidd's Pract. 996, 9th edit.

the sheriff return *nihil* to the elegit, or if nothing be done on the writ, the creditor may sue out a *capias ad satisfaciendum* or *fieri facias*, or may have debt on the judgment (*o*). And after a *fieri facias*, the creditor may have either a *capias* or elegit (*p*). If the creditor be evicted out of the extended lands, he may have a *scire facias* out of the Court from which the first execution issued, on which a new writ may issue (*q*). And the remedy extends to his personal representatives (*r*). Or if the record is removed on error into another Court and affirmed there, he may also have a *scire facias* out of that Court. But to give him the benefit of the statute, he must be evicted from all the lands, and not from part only (*s*).

Although the creditor under the elegit holds the lands "*as his freehold*," yet he has a chattel interest only, which devolves on his personal representatives (*t*).

It is a general rule, that execution cannot be sued out after a year and a day, without a writ of *scire facias;* but if a writ has issued, and been returned and filed, it may be continued by entry on the roll of *vicecomes non misit breve.* It seems (*u*), the mere awarding of a writ of elegit on the roll within the year, will not warrant the entry of the con-

(*o*) Tidd's Pract. 1037, 9th edit.
(*p*) Ibid. 1019.
(*q*) 32 Hen. VIII. c. 5.
(*r*) Co. Litt. 290, a.
(*s*) Co. Litt. 289, b.; Fulwood's case, *supra*; Crawley *v.* Lidgeat, Cro. Jac. 338.
(*t*) 1 Inst. 42, a; 2 Inst. 396, a.
(*u*) Tidd's Pract. 1104, 9th edit.

tinuances. The debtor may by agreement waive the benefit of requiring a writ of *scire facias*, to revive the judgment, as is the usual practice on warrants of attorney; and if a writ of execution has been issued within the year, a different writ of execution may be awarded after the year, without a *scire facias* (*x*). If the executor or administrator of the creditor proceed on the judgment, they must sue out a *scire facias*, even within the year (*y*). The creditor may award on the roll several writs of elegit into several counties for the whole debt (*z*). The proper mode of discharging a judgment is by entering up satisfaction on the record (*a*), or the judgment may be released by deed, which, although it does not vacate the judgment, will be good cause, in case execution is sued out, on which to ground a writ of *auditâ querelâ*, to annul the execution (*b*); and it was held, that after a considerable lapse of time, the Courts would presume the judgment satisfied (*c*); and it seems the defendant might, on an old judgment, plead payment under the 4th of Anne, cap. 16, sect. 12 (*d*).

The 3 & 4 Will. IV., cap. 27 (*e*), has now enacted,

(*x*) Ares *v.* Hardress, 1 Stra. 100. (*y*) 2 Inst. 395.

(*z*) Dyer, 162, (b), Pl. 51; Earl of Worcester's case, Moor, 24, Pl. 83; Goodyere *v.* Ince, *supra*; Yelv. 179; 2 Saund. 68, a.

(*a*) For the mode of doing this, see Tidd's Pract. 1096.

(*b*) Bac. Ab. Ex. 707.

(*c*) Peake's Evidence, 25, note; Tidd's Pract.

(*d*) Kemys *v.* Ruscomb, 2 Atk. 45.

(*e*) 3 & 4 Will. IV. c. 27, s. 40.

that no action or suit shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged or chargeable out of any land at law or in equity, or any legacy, but within twenty years after a present right to receive the same shall have accrued to some person capable of giving a discharge for the same, unless in the mean time some part of the principal money, or some interest thereon, shall be paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent. And in such case no such action or suit shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given.

Recognizances are of two sorts; viz. recognizances by the common law, and recognizances by the statute law. Of the latter we shall speak presently. Recognizances by the common law are obligations acknowledged by the debtor before any of the judges in or out of term, and in any part of England, or before the Lord Chancellor or any other person for such purpose appointed by the king, or, by the custom of London, before the lord mayor and aldermen, or lord mayor singly, and perfected by enrolment in some court of record (*e*), and on which execution may be sued out, in like manner as on a judgment. If execution is not sued out within a year and a day

(*e*) Bacon's Ab. Execution, 687.

after the day assigned in the recognizance, a writ of *scire facias* must issue to revive the judgment (*f*); recognizances must, it seems, be enrolled within six months after being acknowledged (*g*), and they bind lands in the hands of a purchaser, from the time of enrolment (*h*).

The statute of Acton Burnell, as before mentioned (*i*), created the *statute merchant*. This statute was partial in its operation, and the sheriffs, it is said, misinterpreted its provisions, and sometimes, by malice and false interpretation, delayed its execution; the statute of the 13 Edw. I., stat. 3 (*k*), therefore, at once enforced and extended the remedy by enacting, that a merchant who would be sure of his debt, should cause his debtor to come before the mayor of London, or before some chief warden of a city, or of another good town where the king should appoint: and, that he should, before the mayor and chief warden or other sufficient men chosen and sworn thereto, when the mayor or chief warden could not attend, and before one of the clerks that the king should thereto assign, when both could not attend, *acknowledge the debt and the day of payment*, and the recognizance should be enrolled by one of the clerks, and the roll should be double, whereof one part should remain with the mayor or chief warden, and the other with the clerks that thereto should

(*f*) Bacon's Ab. Ex. 693.
(*g*) 2 Saund. 8.
(*h*) Ibid.
(*i*) *Supra*, page 67.
(*k*) 13 Edw. I., stat. 3.

be first named; and further, *one of the said clerks*, with his own hand, *should write an obligation*, to which writing *the seal of the debtor* should be put, *with the king's seal* provided for the same intent, which seal should be of two pieces, whereof the greater piece should remain in the custody of the mayor or chief warden, and the other piece in the keeping of the aforesaid clerk, and if the debtor did not pay at the day limited to him, then should the merchant come to the mayor and clerk with his obligation, and if it were found by the roll or writing, that the debt was acknowledged and the day of payment expired, the mayor or chief warden should cause the body of the debtor to be taken (if he were lay) whensoever he happened to come in their power, and should commit him to the prison of the town, there to remain until he agreed for the debt; and if the debtor was not in the power of the mayor or chief warden, then the mayor or chief warden should send the recognizance *into Chancery under the king's seal*, and the Chancellor should direct a writ unto the sheriff, in whose shire the debtor should be found, to *take his body* (if he were lay) *and safely keep him in prison* until he had agreed for the debt; and, within a quarter of a year after he was taken, his chattels should be delivered to him, so that by his own he might levy and pay the debt; and it should be lawful unto him, during the same quarter, to sell his lands and tenements for the discharge of his debts, and his sale should be good and effectual; and, if he did not agree within the quarter next after the quarter expired, *all the lands and goods of the*

debtor should be delivered unto the merchant by *a reasonable extent*, to hold them until such time as the debt was wholly levied, and *nevertheless the body should remain in prison*, as before said; and the merchant should have such seisin in the lands delivered to him, that he might have a writ of novel disseisin and redisseisin, *as of freehold*, to hold to him and his assigns until the debt was paid; and, as soon as the debt was levied, the body of the debtor should be delivered with his lands, and the sheriff should return the writ; and if the sheriff return that, the debtor could not be found, or that he was a clerk, then the merchant should have writs to all the sheriffs where he had lands, to deliver to him all the goods and lands of the debtor, at a reasonable extent, to hold unto him and his assigns in form aforesaid, and at last he might have a writ to take his body, if he were lay; and, after the lands were delivered to the merchant, the debtor might lawfully sell them, so that the merchant had no damage, and the *merchant should be always allowed for his damages, costs, labours, suits, delays, and expenses*, and if the debtor found sureties, they should be liable in like manner; and the merchant should have seisin of all the lands that were in the hands of the debtor the day of the recognizance made, in whose hands soever they came after, either by feoffment or otherwise; and that if the debtor or his sureties died, the creditor might take the lands, but *not the body of the heir*.

A statute merchant, then, is a bond of record under the hand and seal of the debtor, authenticated

by the king's seal, which renders it of so high a nature, that, on failure of payment on the day assigned, execution may be awarded, without any mesne process to summon the debtor, or the trouble or charges of bringing in proofs to convict him, and thus, it is presumed, it obtained the name of *a pocket judgment* (*l*).

The provisions of the act must be strictly attended to, for if the statute merchant varies from them in a material part, it will be void, and the party may be relieved in a writ of *auditâ querelâ* (*m*); but although void as a statute, it may be still good as an obligation, being under the seal of the debtor (*n*); but the omission of an immaterial circumstance will not vitiate it, such as the omission of the day of payment, for then it shall be paid presently (*o*), or if the inrolment, &c. be written by the servant of the clerk, and not by the clerk himself (*p*), or the like.

The next remedy for the creditor was the *statute staple* (*q*). It was deemed advisable that certain towns should be appointed at which the staple of wool, leather, fells and lead should be holden, for the purpose of exportation by foreign merchants, and for that purpose the statute of the 27 Edw. III. st. 2, was passed, called the "Statute of Staples," which made it felony for any English merchant to export

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(*l*) Bac. Ab. Execution, 689. (*m*) 2 Saund. 69 a, *note*.
(*n*) Hollingworth *v.* Ascue, Cro. Eliz. 355, 494.
(*o*) Sir William Jones, 52 Bridg. 19; Winch. 82.
(*p*) Winch. 83. (*q*) 27 Edw. III. st. 2.

the staple commodities of the realm; and, for the protection of the foreign merchant, it created the statute staple, that is, it authorized the *mayor of the staple* to take recognizances of debts made before him in *the presence* of the *constables* of the staple, or one of them, and *each staple* should have *a seal kept in the possession of the mayor under the seal of the constables*, and that *each obligation* made on such recognizances should be sealed *with the seal of the staple*, and the mayor might take the body of the debtor and commit him to prison, if found within the staple, until he made agreement for the debt and damages, and seize the goods of the debtor within the staple, and deliver them to the creditor on a true appraisement, or sell them and deliver the money to the creditor; and if the debtor was not within the staple, nor goods to the amount of the debt, the same should be certified into Chancery, under the seal of the staple, on which a writ should issue to *take the body of the debtor and his lands, tenements and goods*, and the writ should be returned with the value of the lands and goods, and due execution should be made from day to day, in like manner as in the case of a statute merchant.

A statute staple, then, is a bond of record acknowledged before the mayor of the staple in the presence of the constables of the staple, or one of them, and the only seal required for its validity is the seal of the staple, and therefore if the statute be void for any cause, it cannot, as in the case of a statute merchant, be proceeded on as a common

obligation (*r*), and, wanting the sanction of the seal of the king, the sheriff, after the extent, cannot deliver the lands to the conusee, but must seize them into the king's hands, and in order to obtain possession of them the conusee must sue out a writ of *liberate* (*s*), which is a writ out of Chancery, reciting the former writ, and commanding the sheriff to deliver to the conusee all the lands, tenements, and chattels by him taken into the king's hands, if the conusee will have them, by the extent and appraisement made thereof, until he be satisfied his debt (*t*).

The intent of the statute of 27 Edw. III. was to confine the remedy thereby given to transactions between merchant and merchant, concerning the merchandize of the same staple (*u*), but the remedy being found convenient, it was, by connivance, extended to cases not within the meaning of the law. To suppress this, and, at the same time, to give the creditor a security of a similar nature, the statute of the 23 Hen. VIII. c. 6, authorized the *recognizance in the nature of a statute staple.* It prohibited the improper use of the statute staple, properly so called, but enabled the *Chief Justice of the King's Bench or Common Pleas,* and, *in their absence,* out of term, the *Mayor of the Staple of Westminster and the Recorder of London jointly* to take recognizances, and it prescribed the form of the recognizance, and that

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(*r*) Bro. Stat. Merchant, 16; Mo. Pl. 1097; Ascue v. Hollingworth, *supra*; 2 Bac. Ab. 693.

(*s*) 2 Roll. Ab. 475. (*t*) 2 Saund. 70, c.

(*u*) *Vide* Preamble to Statute 23 Hen. VIII. c. 6.

it should be sealed *with the seal of the debtor and of the king*, and *of the judge or persons before whom it was taken*, and should be enrolled in two rolls by the clerk of the recognizances, and one of the rolls should be kept by the justices, &c. and the other by the clerk, and should, at the request of the creditor, be certified into Chancery under the seal of the clerk, and the creditor should have the like process and remedy as in the case of *a statute staple*.

A recognizance, then, within the act of the 23 Hen. VIII. is in effect the same as the statute staple under the 27 Edw. III. except that it is acknowledged before different persons, and being under the seal of the debtor, it may, as well as the statute merchant, be used as a common obligation (*x*).

The process on a statute merchant differs from that on the statute staple, and the recognizance in nature of a statute staple in some important particulars. For if the conusor cannot be found within the staple, nor his goods to the value of the debt, the first process, under the two latter securities, after the certificate under the seal into Chancery, is to take body, lands, and goods all in one writ, in which respect it is preferable to the statute merchant, under which, after it is certified into Chancery, the first process is a writ of *capias si laicus*, directed to the sheriff, commanding him to take the body of the defendant, if a layman, to satisfy the

(*x*) Saund. 70, b.; Bothomly v. Fairfax, 1 P. W. 335.

debt (*y*). If the sheriff return upon the writ, that the party is dead, or not found in his bailiwick, the writ issues to extend the land (*z*). If the conusor be a clergyman, he cannot be arrested under the statute merchant, but the sheriff is in the first instance commanded to levy the debt of his moveable goods and chattels, by writ of *levari facias* (*a*).

These securities also differ in respect of the place of the return; for the writ of execution on the statute merchant is returnable in either bench, but upon the statute staple, the writ is returnable into Chancery (*b*): and the 23 Hen. VIII. c. 6, which first brought in the recognizance in nature of a statute staple, referring in this to the same process and execution established by 27 Edw. III. st. 2, c. 9, on the staple, the law must be the same in both cases (*c*).

The writ of execution on a statute or recognizance, is a writ of extent or *extendi facias* against the body, lands, and goods of the debtor (*d*), under which the sheriff must impannel a jury to extend the lands, as upon an elegit (*e*).

The conusee has this advantage over the judgment creditor, viz. he may issue out execution *at any time*, without a *scire facias*, or if the conusee die,

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(*y*) Saund 70, c.
(*z*) Ibid.
(*a*) Ibid.
(*b*) 2 Bac. Ab. 692.
(*c*) Co. Litt. 290; 2 Bac. Ab. 692.
(*d*) Tidd's Pract. 1031, 6th edit.
(*e*) 19 Vin. Ab. 557.

his executor may sue out execution in like manner, and if the conusor be returned dead by the sheriff, the execution may, it seems, be taken out against his lands, without a *scire facias*, against his heir, or against the heir and terre tenants at the conusee's election (*f*); but, until actual entry, although after *liberate* returned, he has not an assignable interest (*g*), but only a possession in law, which he must perfect by entry, and a release by the conusee before execution of all his right and interest *in the land*, will not estop his subsequent execution (*h*), but, nevertheless, he may by proper words release *the execution* (*i*); legal possession of the land must, it seems, be obtained by ejectment (*k*).

Although the conusee may extend all the lands of the conusor, into whose hands soever they come (*l*), yet, so long as they remain in the possession of the conusor or his heirs, the conusee may, if he so think fit, extend a part only (*m*); but if the conusor has aliened the whole or part since the statute or recognizances, the case is altered; for if he has parted with the whole to different persons, and the conusee extend part only, the aggrieved party may compel

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(*f*) 2 Inst. 471; Bro. Statute Merchant, 16, 43, 50; Bac. Ab. Execution, 694; *Scire facias*, 108; 2 Saund. 72, note.

(*g*) Hanman *v.* Woodford, 4 Mod. 48; 2 Salk. 563; 3 Lev. 312; Barrow *v.* Gray, Cro. Eliz. 552.

(*h*) Barrow *v.* Gray, *supra*.

(*i*) Bac. Ab. Exec.; Hyde *v.* Morley, Cro. Eliz. 40.

(*k*) 1 Vent. 41, 42. *Sed vide supra*, page 66.

(*l*) Harbert's case, 3 Co. 12; (*m*) Bac. Ab. Exec. 698.

all the alienees to contribute, by writ of *auditâ querelâ* (*n*), which sets aside the execution, and restores the party to the mesne profits, and compels the conusee to sue execution of all the lands (*o*). If the conusor has aliened part only of his lands, and the conusee extend all or part of the land sold, the party aggrieved shall also in such case have his writ of *auditâ querelâ* (*p*); but if the conusee had, in such instance, extended the lands only which remained in the hands of the conusor or his heirs, no writ of *auditâ querelâ* would lie, for neither he nor his heir could have contribution against his alienees (*q*). But as between co-heirs it is but fair they should contribute, a writ of *auditâ querelâ* for contribution will therefore lie (*r*).

The lands taken under a statute or recognizance, will, as in the case of an elegit, descend on the personal representatives of the conusee as chattel interests (*s*), and they are to be holden until the conusee has received his debt, and costs of suit and reasonable expenses, which the Chancellor shall assess, and, therefore, although the time of the statute is expired, the conusor is put to his *scire facias* before he can regain possession of his lands (*t*), in which respect these securities differ from an elegit, as already mentioned (*u*).

(*n*) Bro. Stat. Mer. 49; 2 Inst. 396.
(*o*) Bac. Ab. Exec. 696. (*p*) 1 Roll. Ab. 311.
(*q*) Harbert's case, *supra*; 2 Roll. Ab. 472.
(*r*) Hob. 25; Co. Lit. 376. (*s*) 1 Inst. 42, a; 2 Inst. 396.
(*t*) 4 Co. 67; 2 Roll. Ab. 479. (*u*) *Supra*, p. 65.

Lands purchased subsequently to the acknowledgment of the statute or recognizance, will, as in the case of a judgment, be bound by the lien (*x*), and as the statute was created for the benefit of merchandize, an alien merchant may, under a statute, extend the lands and hold them against the king (*y*).

The statute may be discharged before execution by cancelling, or by a defeazance or release, after which, if the conusee proceed to take out judgment, the conusor may sue out his writ of *auditâ querelâ* to set aside the execution. The statute is also discharged, if the conusee purchase part of the land in execution (*z*).

In case of eviction, the conusee may have a writ *scire facias*, and a new writ of execution, and in case of omission or error in the inquisition, he may have a writ of re-extent (*a*).

After the debt and costs are satisfied, the proper discharge is the entry of satisfaction on the record.

Several statutes have been enacted for the regulation and enrolment of statutes and recognizances. The statute of the 27 Eliz. c. 4 (*b*), has declared that the whole tenor and contents of all statutes merchant and statutes staple shall, within six months

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(*x*) Bac. Ab. Exec. 698. (*y*) Bac. Ab. Aliens, 138.

(*z*) Ibid. Exec. 704, 705.

(*a*) 1 Inst. 290, 32 Henry VIII. c. 5; 8 Geo. I. c. 25, sect. 4; *vide infra.*

(*b*) 27 Eliz. c. 4, sects. 7 & 8.

after they are acknowledged, be entered in the office of the clerk of recognizances taken according to the 23 Henry VIII. c. 6, who shall enter the same in a book provided for that purpose, and kept by him; and if they are not brought within four months after they are acknowledged to the clerk for the purpose of being so entered, the statutes shall be void against subsequent purchasers for money or other good consideration. It will be observed, that this statute does not extend to recognizances in the nature of a statute staple.

By the statute of frauds(*c*) it is provided, "that the day of the month and year of the enrolment of recognizances shall be set down in the margin of the roll where the recognizances are enrolled, and that no recognizance shall bind any land, tenements or hereditaments in the hands of any purchaser, *bond fide* and for valuable consideration, but from the time of such enrolment." And by a subsequent statute(*d*) it is enacted, "that the clerk of the recognizances in the nature of a statute staple, or his deputy, shall yearly from thenceforth prepare and keep three parchment rolls, as usual, and shall, at the times of acknowledging of every such recognizance, fairly write or ingross, instead of the heads or contents thereof, on the said rolls, the full tenor *in hæc verba* of every such recognizance, and that one of the said rolls shall contain all the recognizances to be taken before the Chief Justice of the King's Bench for

(*c*) 29 Car. II. c. 3, sec. 18. (*d*) 8 Geo. I. cap. 25.

the time being, and one other of them shall contain all the recognizances to be taken before the Chief Justice of the Court of Common Pleas for the time being, and the other of them shall contain all the recognizances before the mayor of the staple at Westminster, and recorder of London, for the time being; and that, at the time of every such acknowledgment, the respective persons before whom such recognizances shall be taken, and also the party and parties acknowledging the same, shall also sign their respective names to the roll or inrolment of every recognizance so taken, under the inrolment thereof, as well as sign and seal the same recognizance; and that all the said three rolls so signed shall, at the end of every year, be fixed together, and be thereby made one roll as accustomed, and be and remain in the custody of the clerk of the recognizances, or his deputy, in his public office in London or Middlesex, who shall keep a docket to refer to the said roll or rolls, for the benefit of searches by purchasers and others (as used to be), to which docket also shall be added the day, month and year of every such acknowledgment; and that in case any loss or damage shall happen to any such recognizance, the same shall and may, from any of the said rolls so to be kept in the custody of the said clerk or his deputy, in order to have process thereon, be by him or them, by certificate under his or their seal, certified into Chancery, in like manner as recognizances by the said act of the 23 Henry VIII. are directed, and as if the said recognizance had not been lost or damaged; and that to such certificate and all other certificates of such recognizances shall be annexed a true transcript

of the entry of such recognizance, to be taken from the said roll or rolls in his or their custody; and further, that in case of any such loss or damage, a like certificate, with such transcript annexed as aforesaid, shall be made, and be left and remain with the clerk of the Petty Bag Office in Chancery, and shall be as good and effectual as if the said recognizance under seal had been left in the same office, as hath been used upon the issuing out of process in the same office; and that in order to prove such statutes and recognizances, in case of any loss or damage, a true copy or copies from the said roll or rolls, in the custody of the said clerk or his deputy, made and signed by the said clerk or his deputy, and duly proved, shall be deemed good evidence of such recognizances, and be of the same validity to all intents and purposes, as if the said original recognizances were produced under seal; and that in case it shall at any time or times before or after the filing or returning of any liberate or liberates, sued out on any such extent or extents, be made appear to the Court of Chancery that sufficient has not been extended and levied, or sufficiently extended and levied to satisfy such recognizance, or that any omission, error or mistake has happened in making, suing out, executing or returning any of the said writs, or any process thereupon, or should it happen that any lands, tenements or hereditaments should thereafter be evicted from any person or persons who shall have extended the same by virtue of any such writ or process as aforesaid, that then, and in every such case, the said Court of Chancery shall and may award one or more re-extent or re-extents for the

satisfying the same as aforesaid; and that writs of liberate or liberates may be sued out thereupon, any law or statute to the contrary thereof in any wise notwithstanding."

By the several registry acts(*e*), it is provided, that no judgment, statute or recognizance (other than such as shall be entered into in the name and upon the proper account of his Majesty) shall affect or bind any manors, lands, tenements or hereditaments in the counties of Middlesex and York, unless a memorandum of such judgment, statute or recognizance shall be entered at the register office, in manner therein directed. In Middlesex, judgments, &c., bind from the time they are memorialized. In the North Riding of York, any judgment registered within twenty days; and in the East and West Ridings, and in Kingston-upon-Hull, within thirty days after the day of acknowledgment, is available in like manner as if registered on the day it was acknowledged (*f*).

The process against the ecclesiastical profits of a beneficed clerk, is termed a *sequestration*. When a writ of execution is sued out against a beneficed clerk, if the sheriff return *nulla bona*, and that the defendant has no lay fee, a writ of *fieri* or *levari facias* issues to the bishop of the diocese wherein the benefice is, commanding him to levy the sum recovered of the ecclesiastical goods and chattels of the defendant.

(*e*) 5 Ann. c. 18; 6 Ann. c. 35; 7 Ann. c. 20; 8 Geo. II. c. 6.

(*f*) *Et vide* Sugden's V. and P. page 485, 8th edit.

This writ is in the nature of a common *fieri facias*, and the bishop may seize and sell the profits of the benefice. Upon this writ, the bishop or his officer makes out a sequestration directed to the churchwardens, or (upon a proper security) to persons of the plaintiff's own appointment, requiring them to sequester the tithes and other profits of the benefice, which sequestration is to be forthwith published by reading it in church during divine service, and afterwards at the church door, and fixing a copy thereon, for, until publication, it has no priority over other sequestrations. This writ is a continuing writ, and the plaintiff is entitled to the growing profits from time to time, though the writ has long been returnable; but if it be actually returned, the bishop's authority is at an end. The proper return to the bishop is *fieri* or *levari feci* (*g*).

It may be proper in this place to add a few words concerning debts due to the king.

Debts to the king are either of record or not of record.

Debts of record to the king are in the nature of a feudal charge, and bind the debtor's land in whose hands soever they come, from the time of his becoming in debt to the king (*h*). And the crown, by its prerogative, has preference in all cases in

(*g*) Tidd's Pract. 9th edit.
(*h*) 2 Roll. Ab. 156, (b) Pl. 1.

which the debt is prior on record to the judgment, statute or recognizance of the subject, even although the lands have been actually delivered to the subject under the elegit or extent (*i*). If the judgment, statute or recognizance of the subject be prior in date to the king's debt of record, yet, to give the subject priority, the lands must be actually delivered to him in satisfaction of his debt, for if the king's writ comes into the sheriff's hands whilst the lands are in the possession of the law, on the elegit or extent, and not actually delivered to the creditor, the alteration of property is not complete, and the king's debt shall be first satisfied (*k*).

By the common law, the king could only take by matter of record, and, therefore, although by force of the prerogative of the crown, it was an incontrovertible rule, that in all cases where the king's and subject's titles concurred, the king's title should be preferred (*l*); yet, on all bond and simple contract debts due to the king, before an extent could issue, it was necessary the debt should be found by inquisition, after which it became a debt of record. To remedy this delay, so far as respected bond debts, the 33 Hen. VIII. c. 39, sec. 50, enacted, that all obligations and specialties which should be made for any cause or causes touching or in any wise concerning the king's most royal majesty, or his heirs,

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(*i*) Bac. Ab. Execution, 735; 2 Saund. 70, (e); Gilb. Hist. Exch. 88.

(*k*) Gilb. Exch. 91.

(*l*) 16 East, 282.

or to his or their use, commodity, or behoof, should be made to his highness and his heirs, kings, in his or their name or names, by the words "to the lord the king," and to none other person or persons, to his use, and to be paid to his highness by these words "to be paid to the said lord the king, his heirs or executors," with other words used and accustomed in common obligations; and that all such obligations and specialties so to be made, should be good and effectual in the law to all purposes and intents, and shall be of the same nature, kind, quality, force and effect, to all intents and purposes, as the writings obligatory taken and acknowledged according to the *statute of the staple at Westminster*, had at any time theretofore been taken, used, exercised and executed against any lay person or persons. And the 53d section enacted, that all suits, process, judgments, decrees and executions thereafter to be taken, pursued or given for the king, in any of the king's Courts mentioned in that act, of or upon any of the same obligations, should be of the same or like strength, force, effect and intent in the law to all purposes, only against all and all manner of such person or persons as had been bound in such obligations or specialties, as well spiritual as temporal, and against their heirs, successors, executors and administrators, and every of them, and against none other, as writings obligatory taken and acknowledged according to the *statute of the staple at Westminster*, at any time before the making of that act had been used to be taken, exercised and executed against any lay person or persons; and by the 74th section it was further enacted, that if *any suit* should be

commenced or taken, or any process be awarded for the king for the recovery of any of his debts, then the same suit or process should be preferred before the suit of any person or persons; and that the king, his heirs and successors, should have first execution against any defendant or defendants of and for his said debts, before any other person or persons, *so always that the king's suit were taken and commenced, or process awarded for the said debt at the king's suit, before judgment given for the said other person or persons.*

By force of the 50th and 53d sections of this statute, the king became enabled to proceed to execution on a bond executed to him, without a previous inquisition, and thus far the prerogative of the crown was *enlarged.*

On the intent of the 74th section, a great difference of opinion has prevailed. It was admitted not to be confined to bond debts (*m*), and that it was restrictive on the old prerogative; but to what extent was the doubt. A question was also raised, whether it was to be held as extending to goods as well as lands. In an early case (*n*) it was considered that the ita quod, *so always,* made a condition precedent and a limitation, and it was decided, that a judgment and execution, *executed by elegit* before any suit or process commenced by the king, should be preferred to the extent of the king, issuing on a bond

(*m*) Cecil's case, 7 Rep. 18.

(*n*) Attorney-General *v.* Andrew, Hard. 23.

debt, bearing date before the subject's judgment, and assigned to the king before the subject's execution. It does not appear what would have been the decision of the Court if the elegit had not been executed. In Uppom *v.* Sumner (*o*), decided in the Common Pleas, after much consideration, the judges of that Court unanimously decided, that the crown's extent came too late, after the defendant's *goods* were seized, in execution on a judgment at the suit of a subject, *but before sale.* In Rorke *v.* Dayrell(*p*), the like point was unanimously decided by the judges of the King's Bench, although it was ably argued, that if the case of Uppom *v.* Sumner was law, the crown, so far from being in a better, was in a worse situation than the subject, which might be exemplified thus:—" It was clear the king was not bound by the statute of frauds, by which it was enacted, that no execution shall bind the property of the goods, but from the time of the delivery of the writ to the sheriff, and, therefore, with respect to the king, the common law still operated to bind the goods from the teste of the writ (*q*). Now if A. recover judgment against the king's debtor on the 1st of January, but do not deliver his writ of execution to the sheriff till the 4th, and B. also recover judgment against the same person on the 3d, and deliver his writ on the same day, and on the 2d an extent issue at the suit of the crown, according to the construction contended for, this absurdity would

(*o*) Uppom *v.* Sumner, 2 Black. Rep. 1251, 1294; 4 Term. Rep. 413. *Et vide* 2 Com. Dig. 538, 648.

(*p*) Rorke *v.* Dayrell, 4 T. R. 402. (*q*) Gilb. Exch. 90.

follow, that the king would not be preferred as against A., though he would as against B.; and yet it must be admitted, that B. is entitled to a preference against A."

The point afterwards came on to be argued in the Court of Exchequer (*r*), and was decided in favour of the crown. The Lord Chief Baron (Macdonald), in the course of his judgment, took an original view of the matter. His Lordship said, " his apprehension was, that when the cases of Uppom *v.* Sumner, and Rorke *v.* Dayrell were determined, it was not sufficiently considered how the law stood with respect to the prerogative of the crown, both in respect of the general preference which it claims to be entitled to for all its rights, and as to the particular prerogative in respect of execution for its debts. By the common law, the crown was entitled to *prior execution* for its debts; this does not mean preference as between two executions sued out, the one by the crown, the other by the subject; but the crown was to be first satisfied its debt, before the subject could *take out any execution at all.* The crown protected its debtor against all executions by the subject, till the crown's debt was paid. We have a writ of protection in the register, and Fitz. Nat. Brev. 28, B.; and notice is taken of this prerogative in Cr. Ly. and Madox; and this explains one of the cases cited in the King *v.* Cotton (*s*), where the king sent his writ out of Chancery to the justices of the C. B. com-

(*r*) Rex *v.* Allnutt, 16 East. 278.
(*s*) King v. Cotton, Parker, 123.

manding them to surcease execution in a suit between subject and subject, the defendant being his debtor, till the debt should be satisfied: which was considered as so much of course, that the plaintiff asked no more of the Court, than that the cause should be left on foot in Court by continuance on the roll, in order that when the king's debt should be satisfied, there should be an award of execution for him. Whether it may not be too critical to say, that there is a legal distinction between prior execution and preference in execution, I am not quite sure; the language of 33 Hen. VIII. is, that the king's suit and process shall be preferred before the suit of any person, and that he shall have first execution. It is not that his execution shall be preferred, but that he shall have first execution, that is, he shall have execution before the subject shall be permitted to have his execution, which seems to have a pretty plain reference to this prerogative, which went to restrain the subject from taking any execution at all, till the crown's debt was satisfied. This prerogative was carried so high formerly, that an executor of one indebted to the king could not take probate, till the king's debt was paid or secured to him. Instances are vouched by Madox and the records of this Court, of Licences, stating the prerogative, and stating that the king's debt had been in some manner compounded for or secured. At this day, in the case of an execution, the king's suit and process is preferred, and he is entitled to prior execution in respect of all his debts upon record. The *diem clausit extremum* issues without waiting for an executor or administrator; and when there is an

executor or administrator, in the administration of assets, it would be a *devastavit* in him, if he were to pay the debt of the subject before the crown's debt upon record. But it has been held, that since 33 Henry VIII. there is the single case of execution upon a judgment, which they say is to be preferred to the king's debt by force of the statute. This appears to me to go a great way to shew what prerogative of the crown it was to which the statute applies; that it was to the prerogative of having first execution in the sense in which I have explained the words, and not to any prerogative which goes to determine the preference between two executions, one of the crown and the other of the subject, *subsisting* at the same time. This latter prerogative will be found to depend upon another principle perfectly distinct from this, and far more general; determining a preference in favour of the crown in all cases, and touching all rights of what kind soever, where the crown's and the subject's right concur, and so come into competition. I take it to be an incontrovertible rule of law, that where the king's and the subject's title concur, the king's shall be preferred. The books are full of instances to that effect. A great number are cited in the Attorney-General *v.* Andrew, Hard. 24, and among these Stringfellow's case (*t*), which is the case of an execution; but there is a multitude of other cases which have nothing to do with executions. If 33 Hen. VIII. had meant to have taken away or abridged this prerogative, it can hardly be imagined, that it would

(*t*) Stringfellow's case, Dyer, 67.

have controlled the effect of it in the particular instance of an execution, and left it to operate in its full force in the multitude of other cases to which it applies. That in the case of two executions subsisting at the same time, the crown's and the subject's title do concur, and that this is a different case from the case of a first execution, which supposes that to exist before the other, appears to be manifest; each derives under his execution a title to be satisfied his debt out of the effects of his debtor. Both executions are in force at some one point of time before either is executed; the instant they thus concur, the king's prerogative to be preferred attaches. Stringfellow's case proves, that priority of teste and even part execution avail nothing; an imperfect and even barely inchoate title gives way to a title of the same nature in the crown whenever they are found to exist together. An execution executed by the subject alters the property, and there is then nothing left upon which the crown's execution can attach; in that case the crown's and the subject's title do not concur; but in the expressive language of Steel, C. B. in the Attorney-General *v.* Andrew, the subject's title is prior to the king's, and is executed. I observe that in the case of Rorke *v.* Dayrell, it seems to be assumed in a part of the argument, that as soon as the execution was begun to be executed, the property was altered, which to be sure would decide the question. I take that to be erroneous. The property is so far bound by delivery of the writ, that as between subject and subject the question of priority is determined; but as against the crown it is not bound at all; but I take it the property is in

no sense and to no purpose in this world altered, either by delivery of the writ, or by the actual taking possession of the goods."

This disputed question was subsequently argued in the Court of King's Bench, in a cause (*u*) in which the late Lord Chief Justice Tenterden was counsel, but which went off on a different point.

The question was again discussed in the case of Rex *v.* Sloper (*x*), and decided in favour of the crown. At length the precise point was submitted by the House of Lords to the Judges for their opinion in the case of Giles *v.* Groves, reported in Bingham's Reports and Bligh's Reports (*y*), on the following questions:—

First, "a common person brings his action against "another, and obtains judgment, issues a writ of "*fieri facias* upon that judgment and delivers the "writ to the sheriff, who, in execution thereof, seizes "the goods of the defendant. While the goods are "in the sheriff's hands, and before he has sold them, "a writ of extent in aid is issued against the same "defendant, as debtor of a debtor of the crown, tested "after the seizure under the *scire facias*, and is deli-"vered to the sheriff. Shall this writ of extent be "executed by the sheriff extending the same goods, "seizing them into the king's hands, and selling them "to satisfy the crown's debt, without regard to the

(*u*) Thurston *v.* Mills, 16 East, 254.

(*x*) Rex *v.* Sloper, 6 Price, 114.

(*y*) Giles *v.* Grover, 9 Bingham, 128, and 6 Bligh, N. S. 327.

" writ of *fieri facias* under which he had first seized " them ?"

Second, " All other things remaining the same, " does it make any difference, whether the writ of " extent was in chief or in aid ?"

The judges being divided in opinion, delivered their opinions *seriatim* at considerable length, and eight of them (including the Chief Justices of the King's Bench and Common Pleas) were in favour of the crown, and two in favour of the subject.

The law is, consequently, now settled, that the extent of the crown, whether in chief or in aid, will have preference to the prior *fi. fa.* of the subject, unless the goods have been actually sold (*z*).

By the 13 Eliz. cap. 4, it is enacted, that all the lands and hereditaments, which any accountant to the crown shall have within the time whilst he shall remain accountable, shall, for the payment and satisfaction unto the Queen's Majesty, her heirs and successors, of his arrears, at any time thereafter to be lawfully (according to the law of the realm) adjudged and determined upon his account, be liable to the payment thereof, and be put and had in execution for such arrears, in like and in as large and beneficial a manner, to all intents and purposes, as if he had *the day he first became accountant,* stood bound by writing obligatory, having the

(*z*) See also Grove *v.* Aldridge, 9 Bingham, 428.

effect of *a statute staple*, to her Majesty, her heirs or successors, for the true answering and payment of the same arrears. Consequently, the lands of an accountant to the crown are bound from the time the party enters into office (*a*); but the act does not extend to accountants whose receipt does not exceed 300*l.*

Upon an extent in chief against the crown's debtor, if he be an accountant within the 13 Eliz. the writ directs an inquiry to be made with reference to the period at which the lien attached, and at any time since. And the like, if the debt arise upon a bond put on the footing of a statute staple, within the 33 Henry VIII (*b*).

Although, generally speaking, the inrolment of a bargain and sale, under the 27 Henry VIII., c. 16, relates to the time of its execution, so as to avoid all mesne acts of the bargainor; yet, it was held, such relation did not take place on the bargain and sale by commissioners of bankruptcy of the bankrupt's real estate, and therefore the execution of the crown, if tested before the inrolment, found the property still vested in the bankrupt, and consequently extendible (*c*).

(*a*) The case of the Chancellor &c. of Oxford, 10 Rep. 55, 6; The Bishop of Bristow *v.* Coxhead, Mo. 257; Nicholls *v.* How, 2 Vern. 389.

(*b*) Manning's Exch. 536, 537.

(*c*) Perry *v.* Bowers, Sir T. Jones, 196; 1 Vent. 360; 2 Shower, 156; Elliott *v.* Danby, 12 Mod. 3; Doe *v.* Mitchell, 2 M. & S. 446; Manning's Exch. 540.

As the crown is not bound by the statute of frauds, which directs that chattels shall be bound from the delivery of the writ of execution into the hands of the sheriff, the property of the king's debtor is bound from the day of the teste, although the writ were not delivered to the sheriff, or even sued out till long afterwards (*d*). Nor would the assignment of the commissioners of bankruptcy, as against the king, have related to the time of the bankruptcy, as it would between subject and subject (*e*); but if the extent was tested on a day subsequently to the assignment, even to a provisional assignee, it would have come too late (*f*).

By the 1 & 2 Will. IV., cap. 56, all the personal estate of the bankrupt, and all the real estate to which he is absolutely entitled (except copyholds,) now vest in the assignees on their appointment, without either bargain and sale or assignment (*g*).

Extents *in aid*, which, in some cases, were productive of considerable grievance, have been restricted in their operation by a salutary enactment (*h*), by which the sum to be levied under

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(*d*) Manning's Exch. 554.

(*e*) Regina *v.* Arnold, 7 Vin. Ab. 104; Attorney-General *v.* Hanbury, in Scacc. 2 Show. 481; Attorney-General *v.* Capel, 2 Show. 480; Brassey *v.* Dawson, 2 Stra. 978; Manning's Exch. 544.

(*f*) Drury *v.* Man, 1 Atk. 95; *et vide* 14 Ves. 87.

(*g*) *Vide* 3 & 4 Will. IV., c. 74, as to bankrupt tenants in tail.

(*h*) 57 Geo. III. c. 117.

the extent in aid, is confined to the amount of debt actually due to the crown, if the debt due to the king's debtor exceeds the crown debt.

The baron's fiat is the true commencement of the king's suit (*i*).

(*i*) 2 Saund. 70, (f).

CHAPTER VI.

OF THE STATUTES OF FRAUDULENT DEVISES.

THE statute of the 3d & 4th of William and Mary, cap. 14, called the Statute of Fraudulent Devises, introduced a just principle for the relief of creditors, which has since been followed out to its full extent. By that statute, a right of action was given to the specialty creditor against the heir and devisee of his debtor *jointly*, in cases where no provision was made by the will for payment of debts.

The remedy was, however, held to be confined to cases in which action of debt lay, as of bond debts and other specialties for securing a sum certain, and not to extend to damages for breach of covenant, or of contracts under seal (*a*); nor did it provide for the case of a devisee and no heir, nor did it embrace simple contract creditors who, in case their fund was exhausted by the specialty creditors, were driven to their suit in equity to obtain a marshalling of assets.

The 47 of Geo. III., sec. 2, cap. 74, rendered the estates of deceased *traders* liable to their simple contract creditors.

The 1st of Will. IV., cap. 47, proposed to provide

(*a*) Wilson v. Knubly, 7 East, 128.

for the defects in the 3 & 4 of William and Mary, in respect of debts by covenant, and cases of a devisee and no heir, and to amend the provisions of the 47 Geo. III. It accordingly repealed both the former acts, and enacted, "That all wills and testamentary limitations, dispositions or appointments already made by persons in being, or thereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her or their decease, should be seised in fee simple, in possession, reversion or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, should be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators, and assigns, and every of them, with whom the person or persons making any such wills or testaments, limitations, dispositions or appointments, shall have entered into any bond, *covenant*, or other specialty binding his, her or their heirs,) to be fraudulent, and clearly, absolutely and utterly void, frustrate, and of none effect, any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding." And for the means that such creditors might be enabled to recover upon such bonds, *covenants* and other specialties, it was further enacted, "That in the cases beforementioned, every such creditor should and might have and maintain his, her, and their action and actions of debt or covenant upon the said bonds,

covenants and specialties, against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, *or the devisee or devisees of such first mentioned devisee or devisees* jointly, by virtue of that act; and such devisee and devisees should be liable and chargeable for a false plea, by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended."

The statute then provides, "That if in any case there should *not be any heir* at law, against whom, jointly with the devisee or devisees, a remedy was thereby given, in every such case every creditor to whom, by that act, relief was so given, should and might have and maintain his, her, and their action and actions of debt or covenant, as the case might be, against such devisee or devisees *solely*, and such devisee or devisees should be liable for false plea as aforesaid." Thus provision is now made for the case before alluded to, of there being a devisee and no heir to answer the demands of creditors (*a*).

The statute then repeats the provision made in the former acts in favour of limitations for just debts and childrens portions, by enacting, "That where there had been or should be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, tenements or hereditaments for the raising or paying of any real and just debt or debts, or any portion or portions, sum or sums of money,

(*a*) *Et vide* Jarman on Devises, 461.

for any child or children of any person, according to, or in pursuance of any marriage contract or agreement in writing, *bonâ fide* made before such marriage, the same and every of them should be in full force, and the same manors, messuages, lands, tenements and hereditaments should and might be enjoyed by every such person or persons, his, her, or their heirs, executors, administrators and assigns, for whom the said limitation, appointment, devise or disposition was made; and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators and assigns for such estate or interest as should be so limited or appointed, devised or disposed, until such debt or debts, portion or portions should be raised, paid and satisfied, any thing therein contained to the contrary thereof in any wise notwithstanding."

By the operation of this clause, devises for payment of debts are taken out of the statute, and creditors must come in as the will directs, even although the testator should give a preference to simple contract over specialty creditors (*a*), or should direct the debts to be paid out of the yearly rents (*b*), although if the provision made by the will is not sufficient for the purpose, the devise it seems will so far be deemed fraudulent (*c*): a mere charge of debts

(*a*) Miller v. Horton, Coop. 45.

(*b*) Lingard v. Earl Derby, 1 B. C. C. 311; Earl of Bath v. Earl of Bradford, 2 Ves. 577.

(*c*) Hughes v. Doulben, 2 B. C. C. 614.

will be as sufficient as a devise for payment of debts, to take the case out of the statute (*d*).

The statute next considers the case of a sale by the *heir* before action brought, and provides, "That in all cases where any heir at law should be liable to pay the debts *or perform the covenants* of his ancestors, in regard of any lands, tenements, or hereditaments descended to him, and should sell, alien, or make over the same before any action brought or process sued out against him, such heir at law should be answerable for such debt or debts, *or covenants,* in an action or actions of debt *or covenant* to the value of the same lands so by him sold, aliened or made over, in which cases all creditors should be preferred, as in actions against executors and administrators; and such execution should be taken out upon any judgment or judgments so obtained against such heir to the value of the same land, as if the same were his own proper debt or debts, saving that the lands, tenements, and hereditaments *bonâ fide* aliened before the action brought, should not be liable to such execution." And it further provides "That where any action of debt or covenant upon any specialty shall be brought against the heir, he may plead *riens per descent* at the time of the original writ brought or the bill filed against him, any thing therein contained to the contrary notwithstanding; and the plaintiff in such action may reply, that he had lands, tenements or hereditaments from his ancestors before the original writ brought or bill filed; and if upon the issue joined

(*d*) Bailey *v.* Ekins, 7 Ves. 316.

thereupon it should be found for the plaintiff, the jury should inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment should be given, and execution should be awarded as aforesaid: but if judgment should be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer, or *nihil dicit*, it should be for the debt and damage, without any writ to inquire of the lands, tenements, or hereditaments so descended." And further, "That all and every the devisee and devisees made liable by that act should be liable and chargeable in the same manner as the heir at law, by force of the act, notwithstanding the lands, tenements, and hereditaments to him or them devised, should be aliened before the action brought."

The statute then re-enacts the provisions of the 47 Geo. III. by providing, "That from and after the passing of the act, where any person being at the time of his death a trader, within the true intent and meaning of the laws relating to bankrupts, should die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, or other real estate, *which he should not by his last will have charged with, or devised subject to or for the payment of his debts*, and which would be assets for the payment of debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in courts of equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs at law, devisee or devisees of such debtor,

and the devisee or devisees of such first-mentioned devisee or devisees, should be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they are liable to at the suit of creditors by specialty, in which the heirs were bound; provided, that in the administration of assets by courts of equity, under and by virtue of that provision, all creditors by specialty, in which the heirs were bound, should be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs were not bound, should be paid any part of their demands."

The provisions of this statute were a great improvement of the law; but which still remained defective in respect of the claims of simple contract creditors on the real estates of their deceased debtors, not being traders.

To remedy this, the 3 & 4 Will. IV. c. 104, was passed, by which all the freehold and copyhold estates of a deceased debtor are made liable to the payment of simple contract as well as specialty debts. By that statute it is enacted, "That when any person shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold or copyhold, *which he shall not by his last will have charged with or devised subject to the payment of his debts*, the same shall be assets to be administered in courts of equity for the payment of the

just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of that act, liable to in respect of such freehold estates, at the suit of creditors by specialty, in which the heirs were bound: Provided, that in the administration of assets by courts of equity under and by virtue of that act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands."

Thus, although under the ancient feudal law the real estates of debtors could not by any process be taken in execution for any of the debts of their creditors, on the ground that otherwise persons might, by such circuitous mode, have been introduced into the feud without the lord's consent; and although the principle so established long maintained its ground, and yielded at first only to the claims of judgment and afterwards of specialty creditors; yet, at length, principles more just made their way to the notice of the legislature, and opened the door wide to the claims of every species of creditors over every species of estates.

BOOK THE SECOND.

OF THE DIFFERENT SUBJECTS AND MODES OF MORTGAGE, AND ALSO OF THE TRANSFER OF MORTGAGE.

CHAPTER I.

OF THE SUBJECTS OF MORTGAGE.

HAVING attempted to trace the progress of mortgages, from their origin at common law to their establishment with an equity of redemption, under the protection of the courts of equity; and having also treated of judgments, statutes and recognizances, it will next be proper to consider the subjects and modes of mortgage.

The consideration of the *subjects* of mortgage we may briefly dismiss; for it may be laid down as a general proposition, with few exceptions, that every species of property, real or personal, corporeal or incorporeal, moveable, or immoveable, in possession, remainder, expectancy, or even in action, is the subject of mortgage. Manors, lands and tenements, freehold, copyhold and leasehold; remainders or re-

versions, rents, franchises, advowsons, rectories impropriate, tithes, bills of lading, ships, freightage, articles of merchandize, bills of exchange, debts, government annuities, title deeds, and even possibilities, may, according to their several natures, be conveyed, transferred, delivered or assigned, by way of mortgage security.

The exceptions to the general rule appear to be —Pensions granted for supporting the grantee in the performance of future services, such as the pension granted by the 5th Ann. cap. 4, for the more honourable support of the dignities of the Duke of Marlborough (*a*) and his posterity, payable out of the revenue of the Post Office; the salaries of the judges, given for the support of the dignity of their office (*b*); annuities pro consilio impendendo (*c*); full pay and half pay of an officer (*d*); the commission of an officer (*e*); and (since the 57th Geo. III. cap. 99) church livings (*f*); and the future interest of a married woman, in chattels personal, in the event of her surviving her husband, and the latter dying prior to the chattel personal being reduced into possession (*g*); and also, as it seems, the life

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(*a*) Davis *v.* the Duke of Marlborough, 1 Swanst. 74.

(*b*) Ibid. arguendo. (*c*) 1 Dyer, 2 a, n.

(*d*) Barwick *v.* Reade, 1 Wm. Blackst. 627; Flarty *v.* Odlum, 3 Term Rep. 681; Lidderdale *v.* the Duke of Montrose and another, 4 Term Rep. 248; Stone *v.* Lidderdale, 3 Anstr. 533; M'Carthy *v.* Goold, 1 Ball & Beattie, 387.

(*e*) Collyer *v.* Fallon, 1 Turner & Russell, 459.

(*f*) *Vide infra*, Book II. c. 11. (*g*) *Vide infra*.

interest of a married woman in a personal fund beyond the duration of the coverture (*h*).

We shall in the subsequent chapters of this book, consider the modes by which the different species of property may become the subject of mortgage, and also of the transfer of mortgages generally, and of the stamps on mortgages and assignments of mortgage.

(*h*) Stiffe *v.* Everitt, 1; Mylne *v.* Craig, 37.

CHAPTER II.

OF MORTGAGES OF FREEHOLDS.

In its commencement, the form of the mortgage security was simple. The old *mortuum vadium* has been already described (*a*). The mortgage, which supplanted it, has been shewn (*b*) to have been a feoffment, with a condition contained in the same deed, or sometimes in a separate deed of defeasance (executed at the same time) to be void on payment of a given sum, at a given time. On performance of the condition, the mortgagor, as before shewn (*c*), was restored to his old estate, paramount all the charges and incumbrances of the feoffee.

The mortgage, by way of absolute conveyance, with the clause of redemption in a separate deed of defeasance, being liable to be made the means of fraud, was much discountenanced by the Courts. Lord Chancellor Talbot, in Cotterel *v.* Purchase (*d*), observes, "In the northern parts it is the custom in drawing mortgages to make an absolute deed, with a defeasance separate from it; but I think it a wrong way, and to me it will always appear with a face of fraud, for the defeasance may be lost, and then an absolute conveyance is set up. I would discourage

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(*a*) *Supra.* (*b*) *Supra.*
(*c*) *Supra.* (*d*) Cotterel *v.* Purchase, *supra.*

the practice as much as possible." And in a case (*e*) in which lands were conveyed by an absolute deed of conveyance, and there was a separate agreement between the parties, that on the creditor being reimbursed what he advanced, and 50*l.* over for improvements, he should reconvey. The mortgagor died, leaving an infant son, who, within one year after he came of age, but twelve years after the transaction, filed his bill to redeem. Lord Chancellor Hardwicke said, " the not inserting the clause in the deed was an imposition on the mortgagor, but the reason was, that he was in distress, and therefore turned it into the shape of a purchase, but still he meant it as a security. Wherever the Court finds such a clause as this, it adheres to it strictly, to prevent the equity of redemption from being entangled to the prejudice of the mortgagor," and he decreed a redemption with costs against the mortgagee. But the great objection to this form of mortgage was, that the estate might be conveyed to a *bonâ fide* purchaser without notice; in which case the right to redeem would be wholly defeated, and the mortgagor be left to his remedy against the mortgagee for the fraud. In consequence of the discouragement it received, this mode of mortgage has become almost obsolete.

In some instances, the mortgage used to be effected by a demise and redemise, that is, the mortgagor demised the lands to the mortgagee for a long

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(*e*) Baker *v.* Wind, 1 Ves. 160.

term of years, at a pepper-corn rent, and then the mortgagee redemised them at a pecuniary rent, which covered the interest of the money lent, and there was a condition in the original demise, that on payment of the mortgage debt and interest by a given day, the original term should be at an and; upon which the derivative term would also cease. This mode of mortgage is also nearly obsolete; but if an estate be in hand, and there is a wish to obtain a power of distress for payment of the interest of the mortgage debt, an underlease might be still advantageously resorted to. It would, however, it is apprehended, require the duty to be paid as on a *bonâ fide* lease, and instead of an underlease, a practice in some cases prevails of conveying the lands to a trustee in fee, with a proviso authorizing him to distrain on the lands in the mortgagor's possession, in case the interest shall be in arrear for a given time, with a further declaration, appointing the trustee the receiver during the time the lands shall be in lease. Or the mortgagor may give a power of attorney to confess judgment in ejectment, in case the interest shall be in arrear (*f*), with a covenant to appoint such person a receiver as the mortgagee shall name, in case the lands shall be let.

Mortgages of freeholds, in modern practice, are either in fee or for such other interest as the mortgagor has in the lands, or by demise for a long term

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(*f*) For a precedent of a Power of Attorney of this sort, see Appendix, No. I.

of years, attended with a condition in the same deed, that if the principal and interest be paid within a given time, the lands shall be reconveyed; or the deeds of mortgage shall be void; or the term shall cease and determine (*g*). It has been already said (*h*), that if the former be the wording of the proviso, and the money be actually paid within the limited time, a reconveyance will nevertheless be necessary; but if the latter be the form, then, on payment of the money within the period mentioned in the condition, the estate of the mortgagee will *ipso facto* determine. If the mortgage be by term of years, a covenant is usually inserted on the part of the mortgagor, that after default made, he or his heirs will at his own costs do all lawful acts for confirming the term, or, if required, for conveying the reversion in fee to such persons as the mortgagee, his executors, administrators or assigns shall direct; for otherwise the mortgagee would on foreclosure obtain a chattel interest only, and not the fee. The benefit resulting from the mortgage being in the first instance for a term of years, and not in fee, is, that the security and debt devolve together; but if the mortgage be in fee, the land will descend to the heir as a trustee for the executor, and the debt vest in the executor, which, in case of the infancy or absence of the heir, creates inconvenience, and in a recent case in Ireland (*i*), Lord Redesdale said, he remembered a case in which

(*g*) For a Precedent of Mortgage, see App. No. II.

(*h*) *Supra.*

(*i*) Schoole and Wife v. Sall, 1 Scho. & Lef. 177.

the Court restrained the executor of the mortgagee from proceeding at law to compel payment of the debt on the bond, because the concurrence of the heir of the mortgagee in a reconveyance could not be obtained, and the money was ordered into Court until the executor could find the heir.

By a series of legislative omissions, the case of the heir of a *mortgagee* not being known has not been yet provided for. The statutes of the 6 Geo. IV. and 1 Will. IV. have authorized the Court of Chancery, on petition, to appoint some person to convey the legal estate in cases where the heir of a *trustee* cannot be found; and it has been already noticed, that by the cases of Ex parte Goddard (*k*) and Ex parte Stanley (*l*), it is decided that those statutes do not reach the case of the heir of a *mortgagee* not being known. The 4 & 5 Will. IV. (*m*) has provided for the case of there being *no heir* of a trustee *or mortgagee;* but the framers of that act, not being aware of the decisions in Ex parte Goddard and Ex parte Stanley, have not remedied the defect in the former acts of the heir of a mortgagee not being known, unless it should be thought that the legislature, by referring to the former acts in the latter statute as applying to the case of the heir of a mortgagee, has declared such to be the true meaning of those enactments.

(*k*) 6 Geo. IV. c. 16, and 1 Will. IV. c. 60.
(*l*) *Supra.* (*m*) 4 & 5 Will. IV. c. 23.

In a bill now before parliament it is intended to provide, that the executors or administrators of a mortgagee in fee may convey the legal estate, which will be a great accommodation in practice.

A mode of mortgage has been suggested in cases where two persons are advancing money at the same time on one estate, and preference is not wished to be given to either, and each is desirous of having a lien on the whole estate, and yet of avoiding the intervention of a mutual trustee, viz. limiting one moiety of the estate to one mortgagee for a long term of years, with remainder to the other mortgagee in fee, and the other moiety *vice versâ*. Thus each mortgagee is first mortgagee for a long term of years of one moiety, and second mortgagee in fee of the other moiety. Several conditions for redemption are inserted (*n*), with several covenants for title with each mortgagee.

(*n*) For a precedent of these conditions in mortgage, see Appendix, No. III.

CHAPTER III.

OF MORTGAGES OF COPYHOLDS.

MORTGAGES of copyholds, on account of the peculiar nature of the tenure, retain in general their primitive form. They usually consist of a conditional surrender in the manor court by the mortgagor to the mortgagee and his heirs. By the condition, the surrender is made void, on payment by the mortgagor, &c. of principal and interest to the mortgagee, &c. on a given day; the condition is entered on the rolls, and immediately follows the surrender. The condition may, however, be contained in a separate deed of defeasance, of even date with the surrender; but as remarked by Mr. Watkins (*a*), this mode should never be resorted to when it can be avoided; for the defeasance may be lost, and then, as the surrender is absolute on the rolls, the proof of the condition may be difficult, and besides the title to the lands should always appear on the records of the manor; and, therefore, even if a separate deed of defeasance be executed, it should be always entered on the rolls.

Another important reason against having an absolute surrender, with a separate deed of defeasance,

(*a*) Watkins's Copyholds, vol. i. page 116.

formerly existed, viz. that if the mortgagee died without an heir, the lord of the manor might enter for the escheat, inasmuch as he had no notice of the condition on his court rolls (*b*). In the case of the Attorney-General *v.* Duke of Leeds, an absolute surrender had been made by Benjamin Clarkson to John Crosse, on which Crosse was admitted. The surrender was, in fact, to secure 700*l.* and interest, but of which no mention was made on the court rolls. Crosse, by his will, gave his personal estate to charitable uses, which, as to the mortgage-money, was within the mortmain acts, and void, and the crown claimed to be entitled. Crosse did not dispose of the copyhold by his will, and being illegitimate, died without an heir, on which the Duke of Leeds, as lord of the manor, entered, claiming it as an escheat, and granted it to the widow and administratrix of Clarkson. A suit was instituted by way of information and bill by the Attorney-General and the executor of Crosse against the Duke of Leeds and administratrix and customary heir of Clarkson, praying that the administratrix and heir might be decreed to pay the mortgage-money, and that the duke might be declared a trustee for the crown. The information and bill were dismissed without costs.

But if the lord has notice of the condition for redemption, or of any trusts, although only referred to as subsisting in a separate deed, he will be bound; and if the trusts are by way of mortgage security,

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(*b*) Attorney-General *v.* Duke of Leeds, 2 Mylne & Keen, 343.

the mortgagor will be entitled to re-admittance on payment of the debt (*c*).

The legal rights of the lord claiming by way of escheat in default of heirs have however now been placed under the control of the Court of Chancery, for the benefit of the parties beneficially entitled by the 4 & 5 Will. IV., cap. 23, as before noticed (*d*).

If a copyhold is devised, charged with a sum of money applicable for charitable purposes, and the testator leaves no customary heir, or next of kin, the crown will be entitled to the sum charged by force of its prerogative, whether the charge is to be considered in the nature of real or personal estate (*e*).

On performance of the condition, by payment of the money, the surrender is at an end, and the surrenderor is in possession *in statu quo*, without any readmission or fine (*f*).

As well in the case of a conditional as of an absolute surrender, the surrenderor remains tenant to the lord until the admission of the surrenderee, so much so, that, prior to the 55 Geo. III., cap. 192, the mortgagor could not, after the conditional surrender, and before the admission of the surrenderee, devise the copyholds without a previous surrender to

(*c*) Weaver *v.* Maule, 2 Russ. & Mylne, 97.

(*d*) *Supra.*

(*e*) Attorney-General *v.* Henchman, 2 Sim. & Stuart, 498.

(*f*) Simonds *v.* Lawnd, Cro. Eliz. 239.

the use of his will (*g*). If the surrenderee is admitted, and the condition is broken by the nonpayment of the money, his estate is absolute; and when the mortgage is paid off, a readmission and fine will be necessary, and the mortgagor will thereupon gain a new estate, and the descent be altered, so that if the lands had originally descended to him *ex parte materná*, they will afterwards descend as if he had taken by purchase (*h*).

Unless there is a special custom in the manor, by which the lord may compel a surrenderee to come in and be admitted, he cannot, it should seem, compel the mortgagee to be admitted, even after condition broken (*i*); but if there is such a custom in the manor, it seems he may compel him, and a Court of Equity will not give relief (*j*).

If the conditional surrenderee has not been admitted, the practice is, on payment of the money, for the mortgagee to give a warrant to the steward to vacate the surrender, and thereupon the surrender is at an end (*k*).

(*g*) Doe v. Wroot, 5 East, 130; Kennebel v. Scrafton, 8 Ves. Jun. 30.

(*h*) Benson v. Scott, 12 Mod. 49; Hannam v. Morgan, 7 T. R. 103.

(*i*) Basspool v. Long, 1 Roll. Ab. 568; Cro. Eliz. 879; 1 Show. 30, 83; King v. Dilliston, 1 Salk. 386; Carth. 41; Prec. in Ch. 573.

(*j*) Tredway v. Fotherley, 2 Vern. 367.

(*k*) Mr. Watkins in his treatise on copyholds, (page 184, vol. i. 2d edit.) says, in case the money is paid *within* the time prescribed

After the conditional surrenderee has been admitted, he becomes tenant to the lord, and the surrenderor may, before condition broken, release to him the benefit of the condition (*l*), and, after condition broken, he may release him to the equity of redemption; and no fine will in either case be necessary, for the mortgagee is already in possession, and on his admittance a fine has been already paid (*m*).

After condition broken, and before admittance, the mortgagee may file his bill to foreclose (*n*).

The equity of redemption may be of course mortgaged without surrender, and will pass by deed, being an equitable interest only; but if undisposed of, it will descend to the customary heir of the surrenderor, as the legal estate would have done (*o*).

A tenant in tail of an equity of redemption may bar the entail and remainders over, by deed enrolled in the manor, or by actual surrender as prescribed by 3 & 4 Will. IV. cap. 74.

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by the condition, the surrenderee acknowledges the repayment, and authorizes the steward to vacate the surrender; he afterwards adds, this formal mode is not necessary, for on payment of the money within the prescribed time, the surrender is *ipso facto* void. It is suggested, this mode of vacating the surrender is more usually practised in cases in which the money is *not* paid within the time, on which it becomes necessary to authorize the steward to vacate the surrender, than in the instance put by Mr. Watkins. See Burgaine *v.* Spurling, Cro. Car. 283.

(*l*) Hull *v.* Sharbrook, Cro. Jac. 36; Kite *v.* Queinton, 4 Co. 25.

(*m*) Kite *v.* Queinton, *supra*.

(*n*) Sutton *v.* Stone, 2 Atk. 101.

(*o*) Fawcett *v.* Lowther, 2 Ves. 304.

As the mortgagor remains tenant to the lord until the admittance of the mortgagee, the copyhold will on his death descend on his customary heir (*p*), and a heriot will become due (*q*).

A surrenderee not being tenant until admittance, cannot in the mean time pass the lands by surrender (*r*), although he may make an equitable transfer of them. He may also devise the lands and they will pass in equity (*s*), but the devisee will not be entitled to admission as legal tenant, for a legal devise of copyholds cannot be made before admittance (*t*), and therefore, although the devisee is admitted, the surrenderor or his heir will still remain tenant to the lord. But equity will consider the legal tenant to be a trustee for the devisee. The proper course to be pursued probably would be for the heir of the surrenderee to be admitted, and to make a surrender to the devisee. In the case of Doe *v.* Vernon (*u*), it was held that the devisee (who had been admitted) of a devisee, who had died without admittance, could not maintain ejectment as the legal tenant.

So long as the transaction between the mortgagor and mortgagee rests in covenant, if the mortgagee assign his equitable interest by deed, and the mort-

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(*p*) Frosel *v.* Welsh, Cro. Jac. 403.
(*q*) 2 Watkin's Copyholds, 158, 2d edit.
(*r*) Doe *v.* Tofield, 11 East, 246.
(*s*) Davie *v.* Beversham, 3 Ch. Rep. 2.
(*t*) Doe *v.* Tofield, *supra.* (*u*) 7 East, 8.

gagor surrender to the assignee, he may compel the lord by mandamus to admit him without a double fine (*x*). The reader will observe that Mr. Watkins, in his treatise on copyholds (*y*), refers to this case, as an authority, that if a *surrenderee* before admittance assign by deed, the lord must admit the assignee without a double fine; but it will be seen the case applies to an assignment by a covenantee only, and not by a surrenderee.

If the mortgagor dies before the admittance of the mortgagee and a heriot is paid, and the mortgagee afterwards dies, and his heir claims to be admitted, Mr. Watkins (*z*) makes a query, whether, inasmuch as the admittance of the surrenderee or his heir always relates to the time of the surrender, so as to avoid all intermediate rights and interests contrary to the surrender, such as the free-bench of the surrenderor's widow and the like (*a*), a heriot will not on such admittance become due, as if the surrenderee had died seised; and if so, whether the lord ought not to return the first heriot. Arguing from principle, it would seem that such would be the law, for after the admittance of the heir of the surrenderee, it would be difficult to contend that, *fictione juris*, the surrenderee died seised, so as to avoid the widow's free bench, &c. but not so as to give the lord a right to his heriot, and the law

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

(*y*) Watkins on Copyholds, vol. i. 161, 2d edit.

(*z*) Ibid. vol. ii. 158, 2d edit.

(*a*) Benson *v.* Scott, 1 Salk. 185; Vaughan *v.* Atkins, 5 Burr. 2785.

would scarcely permit the lord to hold both. But the case has not been decided.

From this doctrine of relation the surrenderee may in ejectment after admittance, lay his demise in the interim between the admittance and surrender; and recover mesne profits from the time of the surrender (*b*).

The mortgagor may in the mean time, and until the admittance of the mortgagee, make a second surrender, which will be good if the first surrender is not perfected by admittance (*c*).

Since the passing of the 55 of Geo. III., cap. 192, surrenders of copyholds to the use of the will are no longer necessary. But prior to that statute a surrender made by the mortgagee to the use of his will before admittance, was void, and would not have been made good by a subsequent admittance (*d*).

A general devise of real estate will, since the statute, pass copyholds, although there are freeholds to satisfy the words of the will (*e*), if the will was made subsequent to the statute, but not if the will was made prior to the statute, although the death of the testator was subsequent to it (*f*).

(*b*) Holdfast *v.* Clapham, *supra*; Roe *v.* Hicks, 2 Wils. 15.
(*c*) Burgaine *v.* Spurling, 1 Term Rep. 601.
(*d*) Doe *v.* Tofield, *supra.*
(*e*) Doe *v.* Ludlam, 7 Bingham, 275.
(*f*) Doe *v.* Bird and another, 5 Barnewall & Adolphus, 695.

If the surrender is made out of Court, it is sometimes permitted to be vacated for want of a proper presentment, and a new surrender is taken (*g*).

In some instances the mortgage consists merely of the surrender and condition entered on the rolls; but more frequently there is a previous covenant to surrender, containing covenants for the title, and for payment of the money, which otherwise the mortgagee does not obtain.

(*g*) Fawcett v. Lowther, *supra*.

CHAPTER IV.

OF MORTGAGES OF LEASEHOLDS.

WHEN leaseholds are made a mortgage security it is usual, in order to avoid liability of the rent and covenants in the original lease, to take an underlease at a pepper-corn rent, reserving the last day, or a few days of the original term, and the mortgagor covenants to pay the rent and perform the covenants in the original lease. This precaution of an underlease should never be neglected, if the rent be heavy or the covenants burthensome; for otherwise, the mortgagee, whether he takes possession or not, will become liable to all the covenants which run with the land (*a*).

There is indeed a well-known decision opposed to the position, that he will be liable if he does *not* take possession, viz. the case of Eaton and Jaques (*b*), which was tried before Mr. Justice Buller, at the sittings for Middlesex, in Trinity Term, 1780, when the precise point appears for the first time to have been agitated in a Court *of law*, and on which a case was reserved for the opinion of the Court of King's Bench.

It had been considered to be clear law by Lord

(*a*) Traherne *v.* Sadleir *et al.* 5 B. P. C. 179.

(*b*) Eaton *v.* Jaques, Doug. 438.

Chief Justice Holt (*c*), that on an *absolute assignment*, the estate vested in the assignee before entry; for which reason his Lordship seemed to think the ancient method of pleading, "*virtute cujus*" the assignee entered and *was possessed*, was now disused; and *in equity* it had been received as undoubted law, that the same doctrine applied to a conditional assignment by way of mortgage. Thus in a case (*d*) where a lease had been granted with covenants to repair, and the lease had been assigned by way of mortgage, and the mortgagee had never entered; the houses being greatly out of repair, the lessor filed his bill against the assignee to compel him to discover whether the lease was not assigned to him, and for specific performance of the covenants. The Court said, it was the mortgagee's folly to take an assignment of the whole term, *and thereby subject himself to the covenants;* but as he was only a mortgagee not in possession, the Court would not assist the plaintiff to charge the defendant, or compel him to perform the covenants, but would leave him to his remedy at law. And in another case in equity (*e*), where a lease had been assigned by way of mortgage; but the mortgagee had never entered: the lessor recovered in an action at law against the mortgagee for rent; whereupon the mortgagee filed her bill for relief, but it was dismissed, *she being ill advised to take an assignment of the whole term:* so that, in both the preceding cases, it was taken for granted the

(*c*) Cook v. Harris, 1 Lord Raym. 367.

(*d*) Sparkes v. Smith, 2 Vern. 276.

(*e*) Pilkinton v. Shaller, 2 Vern. 374.

mortgagee was liable, although not in possession, and, in the last case, the lessor, as before stated, had actually recovered against the assignee in an action at law for the rent.

The Court of King's Bench, however, seemed to consider these cases of little weight, and decided that the mortgagee was not liable to be sued on the covenants, as he had not taken possession. The reasons given by Lord Mansfield for his judgment, shew to what an extent that able judge was inclined to carry into a Court of common law the principles of the civil law. He said, "to do justice between men, it is necessary to understand things as they really are, and to construe instruments according to the intention of the parties. Can we (he asked) shut our eyes and say it was an absolute conveyance? It was a mere security; it was not an assignment of *all* the mortgagor's estate, right, title, &c." In this Willes and Ashurst, justices, coincided. But Mr. Justice Buller went further; after stating that Lord Holt was mistaken as to the form of pleading, for he had looked into the precedents, and they always allege *virtute cujus* the assignee entered and *was possessed*, he added, he did not agree that, *even if the assignment was absolute*, the action would lie without possession, and further added, "there is no instance."

This judgment seems to have produced the case of Walker *v.* Reeves (*f*), which was heard in the

(*f*) Walker v. Reeves, Doug. 445.

King's Bench, in Michaelmas Term, the 22 Geo. III. and which was, in fact, the case of a mortgage security, although in the pleadings before the Court it appeared to be an absolute assignment. The question there was, whether an assignee of a lease, who had, before the rent became due, assigned the lease to one Biggs, who had never entered, was liable for the rent which had accrued due *since* the assignment. The defendant pleaded the assignment. The plaintiff replied that Biggs had not taken possession, and relied on Eaton *v.* Jaques. The counsel for the defendant insisted that the case of Eaton *v.* Jaques turned on the fact of its being a mortgage security, and urged, that none of the reasoning in that case was applicable to an absolute assignment. In this the Court coincided, and Lord Mansfield, in giving judgment, said, "By the assignment, the title and possessory right passed, and the assignee became possessed in law, and this case is by no means like Eaton *v.* Jaques, which, being a mortgage, was not an assignment for this purpose; it was a mere security." The reporter adds, that "if the plaintiff, instead of replying that Biggs did not take possession, had traversed by his replication the allegation of the plea, that the defendant had assigned *all* his estate, &c. and upon issue joined, it had appeared on the trial, that the assignment contained a proviso of redemption, it should seem he would have been entitled to a verdict on the authority of Eaton *v.* Jaques." Walker *v.* Reeves, therefore, put the judgment in Eaton *v.* Jaques on the true ground on which that decision was made, viz. that it was a mortgage security, and totally overruled the doubt thrown out

by Mr. Justice Buller, whether, on an absolute assignment, the estate vested in the assignee before entry.

The doctrine laid down in Eaton *v.* Jaques was again recognized in a case in the Court of King's Bench (*g*), and in a subsequent case in the Common Pleas (*h*). In the former of which cases the Court determined that a mortgagee of a ship, of which he was out of possession, could not be considered the owner so as to maintain an action at law for the freight; and in the latter case the Court decided, that a mortgagee so placed was not answerable for the goods furnished for the use of the ship. This former case was heard before three of the Judges who decided Eaton *v.* Jaques, namely, Mansfield, Ashurst, and Buller; and the latter case before two of the Judges of the Common Pleas, namely, Heath and Wilson, the Chief Justice Loughborough and Mr. Justice Gould being absent.

Succeeding Judges, however, seem to have been little inclined to acquiesce in the authority of Eaton *v.* Jaques. More especially the learned Judge who immediately followed Lord Chief Justice Mansfield in the Court of King's Bench, and who was peculiarly well qualified, from his profound knowledge of the Common Law of England, to correct the equitable innovations of his predecessor, expressed his dislike

(*g*) Chinnery *v.* Blackburne, 1 H. Blackstone, 117, note.
(*h*) Jackson *v.* Vernon, ibid.

of the doctrine. In the case of Westerdell *v.* Dale (*i*), which was argued in the Court of King's Bench in Trinity Term, 1797, Lord Kenyon said, " As to the cases respecting a mortgagee, whether in or out of possession, he is the legal owner, and must be so considered in a Court of Law, notwithstanding his title is subject to equitable interests. It is said in one of the cases, that a mortgagee is only liable when in possession, and that what proves this point is, that in charging the mortgagee it is necessary to state in pleading that he entered and was possessed; but with great deference to the learned Judge who gave that reason, I doubt it; I consider those as formal words."

The precise point afterwards arose in an action tried before his Lordship in Trinity Term, 39 Geo. III., the particulars of which are stated in Woodfall's Landlord and Tenant (*k*). The original lessee of a term brought an action against a sub-assignee, to whom it had been assigned by way of mortgage, for the recovery of ground-rent paid by the original lessee in respect of the lease during the interest of the defendant as mortgagee.

In this instance Lord Kenyon is stated to have said, " the defendant is liable as assignee; his liability is not limited to his possession; but as long as

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(*i*) Westerdell *v.* Dale, 7 Term Rep. 312.

(*k*) Stone *v.* Evans, Woodfall's Landlord and Tenant, 113, second edit.; *et vide* Turner *v.* Richardson, 7 East, 340, note.

he had the legal estates, so long he continued liable to the covenants in the lease; if he wished to avoid that liability, he should have taken an underlease. As to the case of Eaton *v.* Jaques, he would overrule it without the least reluctance." And a verdict was given accordingly.

A more recent case occurred (*l*), which may also be considered to be opposed in principle to the case of Eaton *v.* Jaques, although the Court in deciding it professed neither to impugn nor confirm that decision. In that case it appeared that one Denton had granted to the corporation of Carlisle, and their successors, so much of the river Caldew running through his lands, as would be sufficient for working certain mills, and had covenanted for himself, his heirs and assigns, against the obstruction of the water. He afterwards mortgaged the lands to one Wilson in fee, who never entered. After this Denton died, having devised the lands to the defendants, against whom an action was brought by the corporation for breach of covenant, as assignee of all the estate and interest of Denton in the lands. The Court said, that whether a mortgagee before entry was liable or not, it was quite clear the devisees of an equitable estate (which was the only character that could be ascribed to the defendants on the record) were not so; and judgment was given for the defendants.

Now it would seem to follow, as almost an inevi-

(*l*) Mayor of Carlisle and others *v.* Blamire, 8 East, 487.

table consequence, that, if the devisee of an equity of redemption of a mortgaged estate, into which the mortgagee has never entered, has in the eye of a Court of law only an equitable estate, not recognizable at common law, the mortgagee himself must at common law be considered the person liable to covenants, for otherwise the covenantee is without remedy as against the holder of the land.

To these cases may perhaps be added, the authority of the opinion of Lord Chancellor Thurlow, who within a few years after the decision in Eaton *v.* Jaques, decided a case in equity (*m*), in which, from the wording of his judgment, his lordship does not seem to have at all acquiesced in the doctrine laid down in Eaton *v.* Jaques. A lease had been granted with covenants for rebuilding, &c. This lease had been deposited by the lessee with a creditor to secure a debt. The executors of the lessor filed their bill against the depositary for a specific performance of the covenants to rebuild. The defendant in his answer admitted he was liable to the other covenants, but denied, he was bound to rebuild. The Lord Chancellor said, "it was no matter whether the defendant took the lease as a pledge or as a purchase; he could not take the estate and refuse the burthen; it was nothing to the lessor." And after refusing the prayer for specific performance, he decreed the defendant should execute an assignment to enable the plaintiff to

(*m*) Lucas *v.* Comerford, 1 Ves. Jun. 235.

bring an action at law. Lord Chancellor Thurlow therefore apparently could not have doubted, the mortgagee was liable to an action on the covenants before entry.

In a recent case (*n*), the question was again argued in Serjeants' Inn Hall before ten of the judges, and the authority of Eaton *v.* Jaques *expressly overruled.* It is therefore now clear, both on principle and sound authority, notwithstanding the case of Eaton *v.* Jaques, that if a mortgagee accepts an assignment of all the remaining interest in the term, he will be liable to the payment of the rent, and performance of the covenants in the original lease, so long as he shall be the legal owner of the lease, although he shall not take actual possession of the premises.

The reader will remark, that in the aforegoing cases of Sparkes *v.* Smith, and Pilkington *v.* Shaller (*o*), a Court of Equity would not, on the one hand, assist the lessor on bill filed by him against the mortgagee for a discovery of the deed of assignment to him, and for a specific performance of the covenants, but left the lessor to his remedy at law; so neither would it, on the other hand, after the lessor had obtained judgment against the mortgagee at law, for the arrears of rent, give the mortgagee relief, although he had never been in possession; but in the case of Lucas *v.* Comerford (*p*), the Court so far assisted the

(*n*) Williams *v.* Bosanquet, 1 Broderip & Bingham, 238.
(*o*) *Supra.* (*p*) *Supra.*

lessor as to decree the depositary of a lease to execute an assignment to enable the lessor to bring his action against him at law.

It is decided, that if the mortgagee of a leasehold estate obtain a renewal of the lease, although there subsisted only a tenant right, the renewed lease will be held subject to the like equity as subsisted in the old lease, and will be redeemable accordingly (*q*); the mortgagee however, is not bound to renew, and in case he does, will be entitled to his costs in effecting the renewal, with interest (*r*).

When *a renewable lease* is made the subject of mortgage, a covenant should be introduced on the part of the mortgagor, for concurring at his own expense in all lawful acts for obtaining a renewal, for otherwise the mortgagee cannot compel him to do so (*s*). And there should be added an agreement (*t*), that, if he refuses, it shall be lawful for the mortgagee to renew and to charge the estate with the costs and interest.

A mortgage of a leasehold messuage will comprise the good-will of the business carried on there, so that if the house and good-will are put up to sale,

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(*q*) Holt *v.* Holt, 1 Ch. Ca. 190; Rakestraw *v.* Brewer, Select Ca. in Ch. 55; Lee *v.* Vernon, 5 B. P. C. 10.

(*r*) Lacon *v.* Mertins, 3 Atk. 4; Godfrey *v.* Watson, ibid. 518; Manlove *v.* Bale, 2 Vern. 84.

(*s*) Lacon *v.* Mertins, *supra*.

(*t*) For a precedent of such Covenant, see Appendix, No. 4.

the mortgagee will be entitled to have the whole produce of the sale applied towards satisfaction of his debt (*u*).

If an equitable mortgagee of a leasehold apply for a sale in a case of bankruptcy, the Court will not order the parties to indemnify the assignees against breach of covenants, but will give the assignees time to consider whether they will accept or reject the lease (*x*). And if the assignees do not come to a decision within a reasonable time the Court will make the usual order, giving the assignees the option to conduct the sale if they choose (*y*).

It has been already remarked, that a release by the mortgagee of the right of renewal, will not be binding on the mortgagor or his representative claiming a right to redeem (*z*).

(*u*) Chissum r. Dewes, 5 Russell, 29.
(*x*) Ex parte Fletcher, 1 Dea. & Chit. 318.
(*y*) Ibid. 356. (*z*) *Supra*, page 41.

CHAPTER V.

OF MORTGAGES WITH POWER OF SALE.

It is now usual in practice to give the mortgagee a power of sale over the estate in case default is made in payment of the mortgage-money beyond a time limited. The modes of accomplishing this are various. In some instances, the estate is limited to the use of the mortgagee for a term of years, with the usual proviso for redemption, and subject thereto, to the use of trustees in fee upon trust to sell. In other instances it is limited at once to trustees in fee, in trust to sell if the money is not paid at a given day; and the proviso for redemption is also inserted. In other instances, it is limited to the mortgagee in fee, upon trust to sell if the money is not paid as in the preceding instance; and, in other instances, it is limited to the mortgagee in fee, with the usual proviso for redemption, attended with a declaration, that if default is made in payment at the given time, it shall be lawful for the mortgagee, his heirs or assigns, after notice in writing requiring payment, to sell, &c. To which it may be proper to add a proviso that such power of sale shall not prejudice his right of foreclosure; and that the assigns of the mortgagee, their heirs or assigns shall have the like powers as if they had been parties to the deed.

Either mode is valid and effectual, but the latter

is most to be recommended; for, on breach of the proviso, it bestows on the mortgagee an absolute estate; and at the end of a further time gives him a power of sale; and leaves open to him the option, in the mean time, of filing his bill to foreclose.

Doubts were formerly entertained of the validity of an exercise of these powers of sale, without the concurrence of the mortgagor, or the sanction of a Court of Equity (*a*), but they were groundless; a slight consideration will shew they are not within any of the mischiefs intended to be guarded against by the Courts of Equity, for they give nothing to the creditor beyond his principal, interest, and costs; they bestow on him no collateral or ulterior advantage; and they only enable him with promptitude to obtain payment of his mortgage debt.

The case of Croft *v.* Powell (*b*) was considered as raising considerable grounds for doubt (*c*); but so far from it, it will, on consideration, be seen to be rather an authority in favour of these powers. That case was as follows. In 1703, Rouse conveyed lands to Baldwin in fee, with a defeasance by way of mortgage, and it was agreed, that if the money was not paid by the appointed time, it should be lawful for Baldwin and his heirs to mortgage or *sell* the lands *free from redemption;* and out of the money raised by such mortgage or sale, retain the mortgage-money

(*a*) Powell on Mortgages, 1 vol. 14, 4th edit.
(*b*) Croft *v.* Powell, Comyn's Rep. 603.
(*c*) Powell on Mortgages, 1 vol. 14, 4th edit.

and interest, and be accountable for the overplus to Rouse and his heirs. Default was made in payment, and the lands were afterwards charged by Rouse with further sums of money to other persons. In the year 1716, Baldwin agreed to sell the lands to Gab. Powell for 4300*l.* and to warrant the same to him and his heirs, *except as thereinafter excepted, in which exception was contained the mortgage defeazance;* and accordingly by lease and release of the 25th and 26th of March, 1716, Baldwin conveyed the lands to Powell in fee, and in the conveyance *the defeasance* was mentioned and *excepted,* and Baldwin covenanted that 4400*l.* was due to him on the mortgage. It further appeared that Rouse and wife had levied a fine of the premises to Baldwin, and that Baldwin had for some time before the sale been in possession, and had presented to a benefice belonging to the estate which had become vacant, and that Rouse was privy to the agreement for sale to Powell. It also appeared, that in 1719 Powell had filed his bill in the Exchequer against Rouse and wife, praying to be quieted in possession, or that, *if* the estate was redeemable, Rouse might be decreed to redeem, or be foreclosed, on which Rouse filed his cross-bill to redeem, and Powell, in his answer to the cross-bill, insisted that the fine was levied by way of confirmation to Baldwin, who thereupon took upon himself to be absolute owner, and that the defeasance was noticed at Baldwin's request; but Powell admitted, that fearing he might be accountable to Rouse for the overplus, beyond what was due to Baldwin, he made Baldwin covenant that 4400*l.* was due, and he afterwards, on taking advice, retained 1300*l.* as an

indemnity, and he offered to pay the 1300*l.*; and submitted that Rouse or Baldwin should redeem. It does not seem that any further proceedings took place until 1729, when a bill for redemption was filed by a second mortgagee, and the daughter and heir of Rouse, and Powell insisted he had an absolute estate, not redeemable under the power of sale, and cited Bonham *v.* Newcomb (*d*), (which was clearly not in point, and the decision on which is, in the argument in Croft *v.* Powell, placed on the wrong ground;) and insisted on the effect of the fine, and on Rouse's consent to the sale, and on more than twenty years' possession since the mortgage to Baldwin; and that the exception of the defeasance, and the covenant by Baldwin that 4400*l.* was due, was a prudent caution, since Baldwin might possibly be accountable for the overplus, if he had sold for more than was due to him. It was on the other hand argued, and so decided, that the estate was redeemable at any time while in the hands of Baldwin; *that though Baldwin had a power, on nonpayment of the money within the year, to mortgage or sell in order to raise the money lent, and to be accountable for the overplus, it was not then to be considered what he might have done, but what he had done, and it was manifest it was not Baldwin's intention to give Powell an absolute and indefeasible estate, for it was not conveyed to him absolutely, and free from the equity of redemption.* Besides, the bill filed by Powell in 1719, shewed he was conscious he had a redeemable estate, as also his re-

(*d*) *Supra.*

taining the 1300*l.* as an indemnity; that Baldwin presenting to the benefice would not help the case, for he had the legal estate, and had *at law* a right to present, and it did not appear but he might have presented on the nomination of Rouse; and that as to the fine it only confirmed the estate *in statu quo*. And lastly, that the length of time was in that case of little weight, for that although Lord Nottingham did look upon the statute of limitations as a proper rule to determine the time of redemption, yet that had in many cases been varied from, and no certain rule in point of time had been fixed upon; and in the principal case the conveyance to Powell was in 1716, and he preferred his bill in 1719, and the bill by the present plaintiff was in 1729, so that twenty years had not elapsed; and redemption was decreed.

Now it is manifest that so far was the aforegoing case from raising considerable doubt of the validity of the powers for sale in question, that, on the contrary, *in express terms it admits their validity*, and the real question in Croft *v.* Powell was, whether it was a sale or a transfer; and it was manifestly the latter. The arguments drawn from the fine levied to Baldwin and his presentation to the benefice were untenable; and the exception of the defeazance, Baldwin's covenant for the amount of the mortgagee's debt, the reservation of the 1300*l.* and the bill filed by Powell, were unanswerable objections to the plea of its being an absolute purchase.

Consequently, had these powers for sale stood on no better authority than the case of Croft *v.*

Powell, it may be thought there was little hazard in a reliance on them. They have since received express judicial decisions in their favour; the first is the case of Clay *v.* Sharpe (*e*). Wardell assigned leasehold premises to Day in trust for Sharpe, subject to redemption on retransfer of 2000*l.* stock, and it was agreed that if default was made in the retransfer, it should be lawful for Day to sell, and out of the purchase-monies reimburse himself his costs, and repurchase the 2000*l.* stock, and that he should pay the overplus to Wardell, *and Wardell covenanted to concur in the sale.* But it was provided that his concurrence should not be necessary to perfect the title, being intended only as a further satisfaction to the purchaser. Default being made in payment of the mortgage-monies, Day, by Sharpe's directions, put up the mortgage premises for sale, and Clay became the purchaser. Clay's attorney prepared the assignment, and made Day, Sharpe, and Wardell parties. Wardell refused to execute, on which Clay filed his bill for specific performance against the three parties. Wardell in his answer alleged, that he resisted the sale, as having been made without his consent, and at an under-value. He afterwards became bankrupt, and a supplementary bill was filed by Clay against his assignees. On hearing the cause the Chancellor dismissed the plaintiff's bills as against Wardell and his assignees *with costs,* and decreed

(*e*) Clay v. Sharpe, 18 Ves. 346, note; Sugden's V. and P. Appendix 14, 8th edit.

that the agreement entered into by the plaintiff with Day and Sharpe for purchase of the premises should be carried into execution, and on the plaintiff's paying to Sharpe and Day, the residue of the purchase-money, they should execute an assignment to the plaintiff, and that Sharpe and Day should pay the plaintiff's costs, so far as the bills were not dismissed.

The second is the case of Corder *v.* Morgan (*f*), in which the circumstances were almost precisely the same as in Clay *v.* Sharpe, at least so far as respected the language of the power of sale, and the bankruptcy of the mortgagor; but there was this difference between the cases, that in Clay *v.* Sharpe the purchaser was the plaintiff, and in Corder *v.* Morgan, he was the defendant, and the mortgagee the plaintiff. The defendant in the latter case submitted that the plaintiff was bound to procure the concurrence of the mortgagor and his assignees in the conveyance (*g*). The Master of the Rolls said, his opinion was, that the clause in the mortgage deed empowering the plaintiff to sell, whereby the mortgagor undertook to join in the conveyance, was

(*f*) Corder *v.* Morgan, 18 Ves. Jun. 344.

(*g*) The defendant in this case seems to have relied on one of the arguments used in Croft *v.* Powell, (*supra*,) viz. "that it was inconceivable, if Powell had expected an absolute estate, that he would not have insisted on Rouse joining in the conveyance,"—and on an opinion expressed by Lord Kenyon, in the King *v.* The Inhabitants of Edington, 1 East, 288, that a Court of Equity would controul the exercise of a power of sale given to the mortgagee.

a mere contract between the mortgagor and mortgagee, to the benefit of which, the defendant as a purchaser was not entitled; and there was nothing in the nature of the contract between the plaintiff and his mortgagor which prevented the latter giving, and the former exercising such a power of sale as that upon which the present question arose. He therefore decreed specific performance, but he did did not think it a case for costs, as the case of Clay *v.* Sharpe was not in print.

These decisions have established the validity of these powers for sale; they also shew that the concurrence of the mortgagor cannot be required by *a purchaser*, although there be an express covenant on his part to join in the sale, and that a bill filed by *a purchaser* to compel the mortgagor to concur in the conveyance will be dismissed with costs; it may be also concluded from the case of Corder *v.* Morgan, that if a purchaser shall hereafter refuse to complete his sale by reason of the mortgagor not concurring in it, and a bill is filed against him by the mortgagee for specific performance, it will be decreed against him *with costs*.

If the power of sale be vested in a trustee, the Court will, it seems, grant an injunction against proceeding to a sale, if reasonable notice of the intended sale is not given to the mortgagor, the trustee being bound to attend to the interests of both parties (*h*). And if the trust for sale be confined to the

(*h*) Anon. 6 Madd. 10.

trustee *and his heir*, a sale by his assign will not be authorized (*i*).

If the surplus produce of the sale be directed to be paid to the executors or administrators of the mortgagor, and the sale is made in his lifetime, it will be personal estate; but if not made until after his death, it will be real estate, and belong to the heir (*k*).

(*i*) Bradford *v.* Belfield, 2 Sim. 264.
(*k*) Wright *v.* Rose, 2 Sim. & Stu. 323.

CHAPTER VI.

OF MORTGAGES UNDER TRUST TERMS, TO RAISE PORTIONS AND MAINTENANCE.

In all well drawn modern settlements and wills, where portions are intended to be provided, care is taken to express the time when the portions shall *vest*, the time when they shall be *payable*, and (if they are charged on real estate) the rate of interest they shall carry from the time they become *payable* until they are raised, with provisoes that the trustees may after the deaths of the tenants for life, or in their lifetime if they shall direct, raise any part of the portions for the advancement of the children, and shall after the deaths of the tenants for life, and until the portions are payable, raise certain sums for maintenance, not exceeding the amount of interest on the principal of the portion, and that the trustees shall not mortgage or sell until some one of the portions becomes payable. By these precautionary provisions, the questions which formerly so much perplexed the Courts in respect to the raising and payment of portions and maintenance rarely occur. But as the points may still arise under settlements and wills unskilfully penned, it will be proper to give the decided cases on this matter our consideration.

The doctrine to which we are about to advert was established on the principle of *convenience*, which is

not always the safest ground on which to rest judicial decisions; and it is singular that in the instance now under our consideration, the doctrine which was originally grounded on convenience, contrary, in some instances to the literal interpretation of the trust, was ultimately found in its application so extremely inconvenient and even ruinous to the estate, that later judges, although feeling themselves bound by the earlier decisions, have nevertheless taken advantage of apparently very trifling circumstances to free themselves from the difficulty.

The doctrine in question seems to be laid down with sufficient accuracy by Lord Chancellor Cowper, in Corbet *v.* Maidwell (*a*), that is, "first, that though a term is limited in remainder to commence after the death of the father, yet if the trust is to raise a portion *payable* at eighteen or day of marriage, without doubt the daughter shall not wait the death of her father, but at the age of eighteen or marriage may compel a sale of the term; secondly, so it is if the trust of a term for raising daughters' portions be limited to take effect, in case the father dies without issue male by his wife, and the wife die without issue male leaving a daughter; in such case the term is saleable in the life of the father."

The first of these propositions is supported by the case of Heyter *v.* Jones (*b*), which was decreed by the Lords Commissioners, the 14th November, 10

(*a*) Corbet v. Maidwell, 1 Salk. 159.

(*b*) Heyter v. Jones, 3 Rep. in Cha. 106.

Will. III., and afterwards affirmed by their Lordships, upon a rehearing, and ultimately affirmed on appeal to the House of Lords. Lands were limited to father and mother for their lives, and afterwards in trust that the trustees, after the decease of the parents, should out of the rents and profits, or by fines, raise 4000*l.* for the portions of younger children to be *paid* at twenty-one, unless the next heir should within one year after the said portions became payable, pay or secure the same. The father died leaving issue a son and several younger children. One of the daughters attained twenty-one in her mother's lifetime; and it was decreed that she was entitled to her portion with interest from the time she attained twenty-one (*c*).

(*c*) This case is reported in Equity Ca. Ab., vol. 1. 337, under the name of Hellier *v.* Jones, and it is there stated that the estate was limited to the father and mother for their lives, with remainder to their first and other sons in tail male, *with remainder* to trustees for 200 years upon trust *after the death of the father and mother,* out of the rents and profits to raise 4000*l.* for portions for younger children at their age of twenty-one years, unless the person in remainder should raise and pay the same; and that the term was ordered to be sold and the portions raised in the lifetime of the father and mother. If this be an accurate account of the limitations, the Court must have transposed the term of years and placed it prior to the limitation to the sons, which in fact seems to have been the intent, from the circumstance of the raising of the portions not being made to depend on the contingency of a failure of issue male; so that the Court must have read the limitations as if they had run thus:—to the father and mother for their lives, with remainder to trustees for 200 years upon trust, to raise portions for younger children, payable at twenty-one, with remainder to first and other sons in tail male. The case, however, is very loosely stated, both in Equity Ca. Ab. and in the Reports in Chancery.

The second of these propositions seems to have received judicial sanction for the first time in the case of Greaves *v.* Mattison (*d*), which was decided in a case at Common Law (*e*). An estate was settled on A. for life, with remainder to his sons successively in tail male, remainder to trustees for forty years, upon trust *if A. should die without issue male of his body begotten on his wife,* then out of the rents and profits of the lands, or by demising, letting or setting the same, to raise portions for daughters, that is, if but one, 5000*l.*, and if two or more 6000*l.*, to be equally divided between them, and to be *paid* them respectively at twenty-one or *marriage,* with benefit of survivorship and with provision for maintenance in the meantime. The wife of A. died, leaving two daughters and no son; one of the daughters died an infant; the surviving daughter married in the father's lifetime, and the question was, what portion she should have; and it was resolved by three of the judges, Pemberton, Dolben and Raymond, first, that the interest and right to the portions was *vested* in the daughters by the death of their mother without issue male, and should not wait the death of the father; secondly, that the trustees, after the death of the mother and in the life of the father, might have sold their interest in the term (although it could not take effect as to the possession of the lands to them or their vendee during the father's life) for

(*d*) Greaves *v.* Mattison, Sir T. Jones, 201.

(*e*) This question arose on an action of trespass, for taking away the plaintiff's daughter.

raising the maintenance or payment of the portion, if any daughter should in the lifetime of the father attain to the age of twenty-one, or be married; and in their opinion the intent of the words should be taken to be, that after the death of the mother, the daughters should be provided with maintenance and portions certainly, and not wait the death of their father, who perhaps might marry another wife, (as here the father had done,) and would not have such a respect for the daughters of the deceased wife as he ought, or he might live so long that the daughters would not have their portions to keep them in any competent time; and, thirdly, that the interest of the portions being vested in the daughters by the mother's death, the two daughters by the express words of the deed ought to have 6000*l.* between them, and by as express words, by the death of one of them, the survivor was entitled to the whole 6000*l.* To this decision, Jones, Justice, did not assent, but gave his opinion that the right to the portions did not vest in the lifetime of the father, and that the 6000*l.* was not intended to be raised unless there were two daughters living at the father's death; and, secondly, though he agreed the term might be sold in the father's lifetime, yet he thought that it was not intended by the parties that such a sale should be made; for the first intention was that the money should be raised out of the rents, issues and profits, which could not be done by the trustees during the father's life; and the execution of the trust as to demising, letting or setting seemed to be intended only when they should have power to take the rents, issues and profits; and as to the argument of the

possibility of neglect by the father, and therefore the care of that was put in the hands of the trustees, he thought if such had been intended, an express power ought to have been given for such purpose, for the law would never suppose that the father, against the obligation of nature, would neglect to make a competent provision for his daughters, and, therefore would not make a construction to compel him to it of words expressing no such thing and against the proper sense of them. And he added, that another (*i. e.* different) construction would be too great an encouragement to disobedience in the daughters, and to ruin themselves by mean marriages: he therefore thought the surviving daughter entitled to 5000*l.* only.

The arguments of the Court in this case have been rather diffusely stated, as the case forms the foundation of this branch of the doctrine in question, and the arguments advanced *pro et contra* were, with no great variation or addition, followed in the greater part of the subsequent cases.

There is also a case in Vernon's Reports, heard before the Lord Keeper, in Hilary Term, 1703, which is generally considered as a strong authority for the same doctrine (*f*). But the reference made by the editor of the last edition to the register's book, shews that this case was attended with such considerable evidence of intention that the portions should be raised in the lifetime of the surviving parent, that it can hardly be considered as an au-

(*f*) Gerrard *v.* Gerrard, 2 Vern. 458.

thority for the general doctrine we are referring to. The principal points in that case were;—lands were settled on Sir Charles Gerrard for life, remainder to his wife for her jointure, remainder to the first and other sons of the marriage in tail; but if Sir Charles should die without issue male, having one or more daughters, then to trustees for 500 years, in trust, by the rents and profits or by mortgage, to raise 5000*l.*, if but one daughter, to be *paid* at twenty-one or marriage, which should first happen next after the decease of Sir Charles and wife, *or within six months after either of those days or times* (i. e. *twenty-one or marriage*), so as such daughter did not marry before eighteen without the consent of one of her *parents*, or grand parents, if any of them should be living; provided that if *Sir Charles*, or any other person entitled to the inheritance, paid or secured the portion to such daughter *at the time aforesaid*, the term should be surrendered. Sir Charles died without issue male, leaving one daughter, who attained twenty-one in her mother's lifetime; and the question being whether the portion should be raised in the mother's life-time, it was decreed accordingly, with interest from the filing of the bill.

It will be observed, that in this case it was provided at the time of the settlement, that if *the father* paid the portion on the marriage, the term should cease. It might be, therefore, considered to be the intention of the parties that the portions should be then payable, or at least it was a fair inference, united with the previous provision for the payment within

six months after twenty-one or marriage with the consent of one of the *parents*.

The case of Staniforth *v.* Staniforth, heard in the same term before the Master of the Rolls, was however directly in point (*g*). In that case lands were limited to the father for life, remainder to the wife for life, and the heirs male of their bodies begotten; and if it should happen there should be no issue male of the marriage, and one or more daughter or daughters, then to trustees for 500 years, from the decease of the survivor, upon trust by sale or mortgage to raise portions; but no time was appointed for payment of them, nor was there any provision for maintenance. There was no issue male of the marriage, and the father died leaving only one daughter. On bill filed by the daughter, the Master of the Rolls declared, that by the consequence of the father's death without issue male, leaving a daughter, the term arose, though not to take effect in point of profits until after the death of the mother, and that the portion *vested* in the daughter in the lifetime of the mother; and that no time being appointed for the payment of portions, nor any maintenance in the mean time, she was entitled to a reasonable maintenance, not exceeding the interest of her portion, from the death of her father, or at least from such time as the portion might have been raised by a sale; and he accordingly decreed the portion to be raised by a sale, with a reasonable maintenance in the mean time.

(*g*) Staniforth v. Staniforth, 2 Vern. 460.

Thus far the doctrine laid down in Greaves *v.* Mattison seems to have proceeded without interruption; but it was discovered that the prejudicial consequences extended much beyond what was contemplated even by Jones, in his objections to the decision in Greaves *v.* Mattison. For if the portions were ordered to be raised by *sale* of the reversionary term, it was evident that the interests of the remainder-man or reversioner might, in case the property was not of great value, be totally sacrificed to the raising of the portions, and even if the property was considerable, still the injury done to the estate might be to a very serious extent. If the portions were ordered to be raised by *mortgage* of the reversionary term, then the estate of the tenant for life must be encroached upon to satisfy the accruing interest of the mortgage, contrary to the intent, and, in many cases, the express wording of the settlement, or the only alternative was that the interest should run in arrear; and as in such latter case the mortgagee might file his bill in equity, and by procuring rests to be taken, convert interest into principal, it was clear that if the tenant for life lived many years, the interest might double or even treble the principal, and by such means prove the total ruin of the estate.

Evils so serious as these led at length to a decided disapprobation of the rule laid down in the preceding cases, and judges became anxious to discover circumstances which would justify them in departing from it. Thus, if a particular time is appointed for the raising of the portions, such as "*after*

the commencement of the term" (*h*) or the like, that circumstance has been held to *imply a negative*, that the portions should not be raised at any other time. It has been also held, that the circumstance of the maintenance being directed to be raised out of the rents and profits after the term has fallen *into possession* (*i*), is sufficient to shew that the portion shall not be raised before that period, on the ground that the maintenance must precede the portion, and that it would be absurd to raise the portion first and the maintenance afterwards. The circumstance also of the settlement providing that the children should out of the premises receive a yearly sum for maintenance, and that the residue of the rents should *in the mean time*, until the portions became payable, be received by the persons entitled to *the reversion* immediately expectant on the term, has been thought a sufficient indication of the intention to take the case out of the general rule (*k*).

Lord Hardwicke went so far (*l*) as to say, that the Court would lay hold of very small grounds to prevent the raising of the portions in the life of the father and mother; but Lord Talbot (*m*) thought it rather depended on the particular penning of the trust, and agreed with Lord Cowper, that if all the

(*h*) Butler *v.* Duncombe, *infra*.
(*i*) Brome *v.* Berkeley, *infra*.
(*k*) Stephens *v.* Dethick, *infra*.
(*l*) Stanley *v.* Stanley, 1 Atk. 549.
(*m*) Hebblethwaite *v.* Cartwright, Forrest, 31.

contingencies had happened, the portions must be raised. Lord Chancellor Eldon (*n*) has expressed his disapprobation of what fell from Lord Hardwicke, and has given his opinion that the proper rule is that which is stated by Lord Talbot, and that he did not think the Court ought *to be eager* to lay hold of circumstances, but should hold an equal mind while construing the instrument; the latter observation was made by his lordship in answer to a remark of Lord Alvanley in Clinton *v.* Lord Seymour (*o*), viz. that the Court was expressly *eager* to lay hold of circumstances to shew it was not the intention of the parties that the portions should be raised out of the reversionary term. Lord Chancellor Eldon said, "the rule upon the whole depends upon this, whether it was the intention of the parties to the instrument, attending to the whole of it, that the portion should or should not be raised in this manner; taking it *primâ facie* to be the intention upon the general rule, if there is nothing more than a limitation of the parent for life, with a term to raise portions at the age of twenty-one or marriage, and the interests are vested, and the contingencies have happened, at which the portions are to be paid, the interest is payable and the portions must be raised in the only manner in which they can be raised, that is, by mortgage or sale of the reversionary term."

The following leading cases, which are chiefly

(*n*) Codrington *v.* Lord Foley, 6 Ves. jun. 380.

(*o*) Clinton *v.* Seymour, 4 Ves. jun. 440.

noticed in the order in which they occurred, will explain the circumstances under which the Courts thought themselves either bound by the rule or enabled to evade it.

The first instance in which a stand was made against the rule was by Lord Chancellor Cowper in the before mentioned case of Corbett *v.* Maidwell.

In that case (*p*), after a limitation to the father for life, an estate was limited to trustees for 500 years, upon trust, if the father should die without issue male by his then intended wife, and there should be one or more daughters of their two bodies, who should be *unmarried or not provided for at the time of his death,* such daughter, if but one, should have 2000*l.*, and 30*l. per annum issuing out of the profits* till the portions should become due; the portion to be *payable* at eighteen or day of marriage, and the trustees to raise it by sale or mortgage, or perception of profits. There was one child of the marriage, a daughter, who married the plaintiff, and after the mother's death the plaintiff and wife filed their bill to have the portion raised in the father's lifetime. The Lord Chancellor dismissed the bill, on the ground that all the contingencies had not happened, namely, that the child who could claim the portion must be a daughter *unmarried or unprovided for at the father's death;* and as to the 30*l.* maintenance, it must be

(*p*) Corbett v. Maidwell, Trinity Term, 9 Ann. 1 Salk. 158; 3 Rep. in Cha. 101.

intended in case the father should die without issue male, leaving a daughter under eighteen or not married; because otherwise this absurdity must follow, that the daughter must be paid maintenance money in the lifetime of the father, out of the profits of a term which was not to commence till after his death.

In the case of Savile *v.* Savile (*q*), which was heard before Lord Chancellor Parker, in Trinity Term, 1718, the principle laid down in Greaves *v.* Mattison was again in some degree acted upon; there an estate had been limited to the father for life, with remainder, to the intent that the widow might receive a jointure rent-charge for life, and subject thereto, to trustees for ninety-nine years, determinable on her death, in trust for securing the jointure, and thus charged, to the sons of the marriage in tail, with remainder to trustees for the term of 500 years, upon trust, in default of issue male, to raise portions for daughters, *payable* at sixteen or marriage: the father died without issue male, and his lordship decided that the term of 500 years took place in equity from the death of the father, and that the portions should be raised accordingly.

In this latter case, however, as the term of ninety-nine years was limited for a particular purpose only, and extended only to *part* of the profits, the general doctrine was not strongly brought into question.

(*q*) Savile v. Savile, 1 Pr. Wms. 456.

In a subsequent case his lordship concurred with Lord Chancellor Cowper in expressing his disapprobation of the general rule (*r*). An estate was limited, in pursuance of articles, to the mother for life (the father being then dead, leaving issue only one child, a daughter,) with remainder to trustees for 500 years, upon trust, *from and after the commencement of the term,* by the rents and profits, or by demise, sale or mortgage, to raise 3000*l.* for the daughter's portion, *payable* at twenty-one or marriage; the Lord Chancellor held the words '*from the commencement of the term*' to signify commencement *in possession,* which *implied a negative* that it should not be raised before; and that although the portion was directed to be paid at twenty-one or marriage, yet it was a rule in law and equity to construe the whole deed so that every clause should have its effect, and he decreed that the portion in this case was vested, but should not carry interest till the term should commence, *for all interest was in default of payment.*

The case of Sandys *v.* Sandys was heard before Lord Macclesfield, in Trinity Term, 1721 (*s*), in which the estate was limited (subject to preceding life estates in the husband and wife, and to a limitation to the issue male of the marriage,) to trustees for 500 years, upon trust by sale or mortgage, or out of the rents and profits, to raise portions to be *paid* at twenty-one or marriage. One of the daughters (after

(*r*) Butler *v.* Duncombe, 1 Pr. Wms. 448.
(*s*) Sandys *v.* Sandys, 1 Pr. Wms. 707.

her mother's death without issue male) having married, filed her bill in her father's lifetime to have her portion raised. The Lord Chancellor, after remarking that the selling or mortgaging reversions seemed a great hardship, being in effect to ruin a family for the raising the daughters' portions, and therefore he would not go one step further than precedents should force—at length, *animo reluctante*, decreed the portion to be raised with interest from the marriage.

But his lordship soon afterwards took occasion to shew how adverse he was to the general doctrine, and how willing to escape from it on any reasonable ground (*t*). An estate was limited to the husband and wife successively for life, with remainder to the sons of the marriage in tail male, with remainder to trustees for a term of years, to commence on failure of issue male of the marriage, upon trust by the rents and profits, or by sale or mortgage, to raise portions for daughters, to be *paid* at the age of eighteen or marriage, or within as short a time after as *conveniently might be;* and for the maintenance of such daughters, and until their portions should be raised, a yearly sum was to be paid for maintenance, payable half-yearly at Michaelmas and Lady day, and the first payment to be made on such of the said feasts as should happen *next after the death of the father*, it being the intent of the parties that no such yearly maintenance should be paid during the father's life;

(*t*) Reresby *v.* Newland, 2 Pr. Wms. 94.

with a proviso, that if the father should die without any daughter *living at his decease*, the term should be void; and power was reserved to the father, with the consent of the trustees, to revoke all the uses. The mother died, leaving one child, a daughter, who married the plaintiff, and with her husband filed her bill for raising the portion in her father's lifetime. The Lord Chancellor held the portion could not be *conveniently* raised in the father's lifetime; for by selling the reversion, the family might be inconvenienced to that degree as to ruin the estate; besides there was a proviso in the settlement, making the portion contingent during the father's lifetime, namely, if the father died without any daughter living at his decease, the portion was not to be raised; and the father had a power of revocation with the consent of the trustees, which suspended and prevented the portions from being payable; and he decreed the portion could not be raised during the father's life.

The case of Brome *v.* Berkeley, which was heard before Lord Chancellor King, with the assistance of the Master of the Rolls, is particularly worthy of attention (*u*): The estate was limited to father and mother for life, and to their sons in tail male, with remainder to trustees in fee, upon trust, if there should be no son of the marriage, or being such, if all should die under twenty-one without issue, then out of the rents and profits, or by sale or leasing, or otherwise, to raise portions for the daughters of the

(*u*) Brome *v.* Berkeley, 2 Pr. Wms. 484.

marriage, payable at twenty-one or marriage; and also to raise a certain yearly sum, by half-yearly payments, for their maintenance and education; the *first payment* of the maintenance money to be made at such of the half-yearly feasts as should happen next after the said estate so limited to the trustees should take effect *in possession*. There was one child of the marriage, a daughter, who, after the death of her father, having attained twenty-one, filed her bill in her mother's lifetime against the trustees for raising the portion with interest from the time the same became payable. The Master of the Rolls, after admitting that if a reversionary term or estate be limited to trustees to raise portions at a certain time, when that time comes the portion must be raised, unless in the declaration of the trust of the term the intention of the parties appears to the contrary, said, that in the principal case such intention was plain, for in that case *the maintenance* for the daughter was not to be paid until the trust estate came *into possession*, and the payment of maintenance must be intended to *precede* the payment of the portion; the maintenance must determine when the portion becomes payable: In this opinion the Lord Chancellor coincided, adding, that it was absurd to say the portions should be raised first, and the maintenance money paid afterwards. The bill was accordingly dismissed, and the decree affirmed in the House of Lords.

In a subsequent case (*x*), Lord Chancellor King

(*x*) Goodal *v.* Rivers, Moseley, Rep. 395.

considered himself bound by the general rule. In that case the estate was limited to Sir George Rivers for life, with remainder to Dame Dorothy his wife for her jointure, with remainder to the first and other sons of the marriage in tail male, with remainder to trustees for 500 years, upon trust, in default of issue male of the marriage, out of the rents and profits after the commencement of the term, or by demising, selling, mortgaging or otherwise disposing of the premises, when and in such manner as the trustees should think fit, to levy and raise the sums after mentioned, for the portions and maintenance of daughters, if one only should attain the age of nineteen or marry, 4000*l.*; if two, 5000*l.*; if three or more, 6000*l.*; to be equally divided between them, with certain yearly sums for their maintenance and education from the death of Sir George *or* Dame Dorothy, which should first happen, till such portions should be paid, and the portions to be *paid* to the daughters at twenty-one or marriage or as soon after as they could be raised, and the said yearly sums for maintenance to be paid from the death of Sir George *or* Dame Dorothy, which should first happen, till the portions became payable, with a provision, that if Sir George survived his wife, and sufficiently maintained his daughters to the approbation of the trustees until they attained the age of fourteen, no maintenance should be raised until that time, and with a proviso, that the power given to the trustees of selling or mortgaging should not prejudice the life estate of the wife, which latter proviso the Solicitor General afterwards in his argument observed arose from abundant caution. Dame Dorothy died in the

lifetime of Sir George, leaving issue two sons and several daughters. The two sons afterwards died without issue: at the time of the death of the surviving son, all the daughters had attained to the age of nineteen. The daughters after this filed their bill against their father and the trustees to have their portions raised by sale of the term, with interest from the death of their last surviving brother. It was argued by the Attorney and Solicitor-General for the plaintiffs, that this case was distinguished from that of Brome and Berkeley, inasmuch as in the present case the maintenance was to be raised after the death of either father or mother, until the daughters attained nineteen or marriage, and therefore was not within the objection made in the former case, namely, that the portions would precede the maintenance; nor was it within the case of Butler *v.* Duncombe, because in that case the words "*after the commencement of the term*" introduced the declaration of the trust, but in the present case "*the failure of issue male*" introduced the trust. In this the Lord Chancellor coincided, and he held that the words, "*when and in such manner,*" (which it had been urged for the defendant gave a great latitude to the trustees, and left the convenience of time to them,) only signifying that the estate should be sold either together or in parcels, as the trustees should think fit; and he decreed that the portions should be raised with interest from the death of the surviving brother by sale of the reversion.

In Hebblethwaite *v.* Cartwright (*y*) Lord Chan-

(*y*) Hebblethwaite v. Cartwright, For. 30, Easter term, 1734.

cellor Talbot placed the doctrine entirely on the ground of *apparent intention* and on the particular penning of the trust: which ground has been since strongly approved of by Lord Chancellor Eldon, as before remarked. In that case an estate was limited to A. for life, remainder to his first and other sons by B. his wife, in tail male, remainder to trustees for 1000 years, upon trust, if there should be no issue male of the marriage who should live to attain twenty-one or be married and have issue, then out of the rents and profits, *or* by sale or mortgage, to raise portions for daughters, to be divided between them at twenty-one or marriage, and a yearly sum for maintenance in the meantime; with a proviso, that if the father or the remainder-man should advance them in marriage with portions equivalent, or there should be no daughter who should attain twenty-one or be married, then the term to cease. The wife died without issue male, leaving three daughters. One question made in the cause was, whether under the trusts of the term the portions were to be raised in their father's lifetime; and in support of the negative, it was ingeniously urged that the option given to the trustees of raising the portions out of the rents and profits, *or* by sale or mortgage, required that the death of the father should precede the raising of the portions. But the Lord Chancellor held, that since they had both powers, they might use that which best suited the interest of the daughters; nor did he conceive the proviso respecting advancement any evidence of intention to postpone the raising of the portions; and he decreed the portions to be raised, with interest

from the mother's death, at which time they first vested.

The case of Stanley *v.* Stanley, heard before Lord Chancellor Hardwicke (*z*), is very briefly reported, and the grounds of the decision are not mentioned. But it seems that his Lordship, after stating the general rule, decided against the claim of the daughters to have their portions raised in the lifetime of their parent.

In Hall *v.* Carter (*a*), heard before Lord Hardwicke in July, 1742, the Lord Chancellor maintained the general doctrine. In that case an estate stood limited (subject to the widow's jointure) to trustees for 100 years, upon trust out of the rents or profits, or by mortgage, to raise portions for daughters at eighteen or marriage, and to pay to every daughter 6*l.* for maintenance. The like argument was used in this case as in Hebblethwaite *v.* Cartwright, viz. that the option vested in the trustees of raising the portions either out of the rents and profits *or* by mortgage, evinced the intention that they should not exercise their election until the term came into *possession;* and it was also contended, that the raising of maintenances out of the rents and profits brought it within the case of Brome *v.* Berkeley. As to the first objection, viz. the right of election, the Lord Chancellor held they should not be allowed to post-

(*z*) Stanley *v.* Stanley, 1 Atk. 548.
(*a*) Hall *v.* Carter, 2 Atk. 355.

pone the raising of the portions in order to make their election; and as to the second objection, he distinguished the case of Brome *v.* Berkeley, by observing that in the latter case the daughters were not to have maintenance until the term came into possession, while in the principal case the maintenance was *a subsisting charge*, the arrears of which must be paid when the estate came into possession. And he decreed accordingly, and that the portions should carry interest from the time they became due.

In a subsequent case (*b*), however, Lord Hardwicke thought himself justified in departing from the general rule. An estate was settled upon parents for life, and to their sons in tail male, with remainder to trustees for a term of years to raise portions for daughters, to be paid at twenty-one or marriage; and the daughters out of the premises to have such yearly maintenance as should be suitable to their degree and quality, and the residues of such yearly rents, above such yearly maintenance, *in the meantime*, till the portions became payable, to be received by such persons as should be entitled to the reversion immediately expectant on the determination of the term. The Lord Chancellor applied the case of Brome *v.* Berkeley to the principal case, and dismissed the bill.

Notwithstanding the doctrine laid down in Brome

(*b*) Stevens *v.* Dethick, 3 Atk. 39.

v. Berkeley, that the *maintenance* must determine when the portions shall become payable, Lord Hardwicke, in Lyon *v.* Chandos (*c*), determined, that the payment of maintenance could not operate to postpone the raising of the portions in the face of a clear and express declaration. And therefore in that case, although the maintenance was directed not to be raised, until *after the death of the Duke of Chandos*, yet as the raising of the portions was expressly declared to be "at twenty-one or marriage, the Marquis of Carnarvon being dead," he refused to admit the implication arising from the time of the commencement of the maintenance against the absolute and clear declaration of the time for payment of the portions, and directed them to be raised with interest from the death of the Marquis. And although the Master of the Rolls, in Clinton *v.* Seymour (*d*), is reported to have considered the order for payment of interest from the death of the Marquis singular, as the maintenance could not be raised until the death of the Duke; yet it is apprehended the decree was in consistency with the preceding decisions, which *directed* interest to be raised from the time the portion became payable, without reference to the raising of maintenance.

The case of Churchman *v.* Harvey, heard before Lords Commissioners Willes and Wilmot (*e*), was the same in effect as Butler *v.* Duncombe, the lan-

(*c*) Lyon *v.* Chandos, 3 Atk. 416.
(*d*) Clinton *v.* Seymour, 4 Ves. jun. 464.
(*e*) Churchman *v.* Harvey, Amb. 335.

guage of the trust being that the trustees should at any time from and after the *commencement of the term in possession* raise the portions; and was decided in like manner.

In Smith *v.* Evans, heard before Lord Chancellor Northington in Michaelmas term 1766 (*f*), the estate was settled to the father and mother and their issue male in strict settlement, with remainder to trustees for a term of years, upon trust, if the father should die without issue male and leaving one or more daughters living at his death, then to raise portions by leasing, assigning or mortgaging. The father died without issue male, leaving his widow and two daughters, who filed their bill to have their portions raised in their mother's lifetime. It is singular that his Lordship in giving judgment should incline to favour the general rule before alluded to, and to disapprove of the reasons which induced the Court to make the decisions which are exceptions to it, saying that the inconvenience of a younger child starving for want of his portion was as great as the injuring of the estate of the eldest son by raising the portion out of the reversion; and it being urged that by leasing was meant at rack rent, and therefore the case resembled the case of Brome *v.* Berkeley, he declared he could not understand it in that sense, and would not construe it so unless he was compelled; it meant leasing upon fine, and he decreed

(*f*) Smith *v.* Evans, Amb. 633.

the portion to be raised with interest from the filing of the bill.

The case of Conway *v.* Conway was heard before Lord Chancellor Thurlow (*g*), and is an extraordinary judgment. It has been shewn that by the preceding cases the general rule is, that the portions when they are *vested*, and are directed to be *paid* at a given time, shall be raiseable out of a reversionary term, unless an intention is shewn that the payment shall be postponed until the term comes into possession; and that the evidence of such an intention is an exception to the rule. But in Conway *v.* Conway, the Lord Chancellor is made exactly to reverse the rule, and to say that when a man gives portions charged on a term to arise on the death of a party, it shews that they are not to be paid till after the death of the party; and that though they are directed to be paid upon attaining twenty-one or marriage, yet it can only be when the term shall come into existence; but that such an intention could not be raised against express declaration.

In Codrington *v.* Lord Foley (*h*) Lord Eldon, after noticing this reported judgment of Lord Thurlow, said, that upon looking at his own brief in that cause, and to other cases, he was satisfied Lord Thurlow never did express himself in the words there attributed to him; and he adds, that doctrine is di-

(*g*) Conway *v.* Conway, 3 B. C. C. 267.
(*h*) Codrington *v.* Lord Foley, *supra*.

rectly contrary to that of Lord Cowper, Lord Hardwicke, and what all the cases, whether proceeding upon sufficient circumstances denoting intention or not, do in effect say, that there must be some circumstances in the will or settlement denoting the intention to take the case out of the general rule, which is, that the portions shall be raised at the days or times limited, unless the will or settlement contain circumstances indicating an intention that they are not to be raised at those days or times.

The case of Codrington *v.* Lord Foley remains to be noticed, which was heard before Lord Eldon (*i*), and which was briefly as follows:—Lord Foley, by his will, devised certain estates to trustees for ninety-nine years, with remainder to Thomas, afterwards Lord Foley, for life, remainder to trustees during his life to preserve contingent remainders, remainder to other trustees for 100 years, for raising a jointure for any wife of Thomas Lord Foley, with remainder to other trustees for 1000 years upon trust, to raise 30,000*l.* for portions for younger children, as Thomas Lord Foley should appoint; and in default of appointment, to be equally divided between them if more than one, share and share alike, with remainders over; and he devised other estates to trustees for 101 years; and subject thereto to uses in favour of his second son Edward, and his issue; and he declared the trusts of the term of 99 years, and 101 years, to be, that the trustees should, out of the

(*i*) Codrington v. Lord Foley, *supra*.

rents and by the sale of timber, allow for the use of his sons Thomas and Edward, any sum not exceeding 6000*l.* a year, until such of their debts as were then provided for, and should be due at his decease, should be discharged; and in the next place, to discharge a mortgage and certain other debts of his two sons, and after the decease of his sons and payment of the debts, &c. to attend the inheritance. Thomas Lord Foley died in 1793, leaving one son and one daughter, who, in 1796, married Christopher Codrington, Esq. The bill was filed by Mr. and Mrs. Codrington and their infant children, against Lord Foley then an infant, and the then trustees of the term of 1000 years, praying an account of principal and interest, and that the same might be raised; it was objected that the trusts of the term of 99 years remained to be performed; and a cross bill was filed which prayed that the trusts of the terms of 99 years and 101 years should be satisfied before those of the term of 1000 years should be executed. The Lord Chancellor after stating, as before mentioned, that the rule depends upon this, whether the parties to the instrument, attending to the whole of it, intended that the portions should or should not be raised, distinguished the principal case from all the preceding cases, viz. that this was not attempted to be *raised with any prejudice to the life estate of the parent* (*k*), and he decreed that the plaintiff was en-

(*k*) It would not seem from the preceding cases, that the raising of the portion by mortgage or sale of the reversionary term prejudiced the life estate of the parent; the prejudice was in fact to the estate of the remainder-man, by the accumulation of interest upon

titled to have the portion raised with interest at 4*l. per cent.* from the marriage to the filing of the bill, and interest at 5*l. per cent.* from the filing of the bill, but gave no costs.

Having thus gone through the leading cases on this head, it remains to be noticed, that if, as is usual in modern settlements, the trusts are by sale or mortgage to raise the portions after the parent's death, or in his lifetime, if he shall so direct; and if the parent is willing that the portion shall be raised by mortgage *in his lifetime;* or if the term has fallen into possession; the usual mode of raising the portion is, that the child shall assign to the mortgagee his share of the sums to be raised, and give the mortgagee a power of attorney to receive it. Then the tenant for life, if the term is reversionary, makes a demise of a proportional part of the estate to the mortgagee for 99 years, if the tenant for life shall so long live, upon trust to permit the tenant for life to receive the rents until default is made in payment of the interest, and then to receive the rents and retain the interest. The trustees of the term assign a proportional part of the premises comprised in the term to the mortgagee, and there is

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interest. In Hall *v.* Carter, *supra*, Lord Hardwicke is reported to have said, that in more modern cases, the Court has thought it very hard in the lifetime of the father to encumber his estate with raising daughters' portions; but he immediately afterwards remarks, that the estate of the *jointress* could not be affected by the mortgage of a reversionary term. These observations would tend to infer that a distinction has been taken between the cases of the father being tenant for life and any other person. But the author has not been able to discover an authority for it.

introduced a proviso for redemption by the tenant for life, or persons in remainder, on payment of the portion and costs, &c. The tenant for life, or (if the term is in possession) the remainder-man (if he will concur) covenants for the payment of the money and for the title.

Where an annual sum is directed to be raised for *maintenance*, and there is an existing life estate, and it is not clearly expressed that the maintenance is not to commence until after the determination of that estate, the question of intention arises as in the case of the portion itself. If it is ascertained to be the intention that the maintenance shall commence notwithstanding the life estate, but the payment of it is clearly confined to be out of *annual profits*, it must from necessity either encroach on the life estate, or run in arrear; the former can never be considered the intention, as the term is reversionary to the estate; the maintenance must therefore run in arrear, and when the trust term falls into possession all the arrears must be paid (*l*). If the trusts for raising the portion and maintenance are extended to *sale or mortgage*, it was for some time considered doubtful whether the Court would raise the *maintenance* by way of mortgage, for it is manifest there is some difficulty in accomplishing it, inasmuch as the maintenance is a running sum becoming due quarterly or half-yearly; and in Pierpoint *v.* Lord Cheyney (*m*), Lord Chancellor Parker said he had

(*l*) Ravenhill *v.* Dansey, 2 P. Wms. 179.
(*m*) 1 P. Wms. 483.

not been enabled to find a single precedent for mortgaging a reversion for maintenance; but in the subsequent case of Ravenhill *v.* Dansey (*n*), Lord Chancellor Macclesfield considered it clear, that when the child had no other maintenance, it had been decreed to be raised by mortgage of the reversionary interest of a term; and in a recent case (*o*) the Master of the Rolls admitted the maintenance might, if necessary, be raised by sale or mortgage (*o*).

In a case heard before Lord Alvanley (*p*), an estate was limited to the use of the Duke of Newcastle for life, with the remainder to trustees for 1000 years, with remainder to the Earl of Lincoln for life; and the trusts of the term of 1000 years were by mortgage or sale, or out of the rents and profits, to raise 15,000*l.* for an only daughter of the Earl, payable at such time as he should appoint; and in default of appointment, to be a vested interest at twenty-one or marriage, but not to be *payable till after the death of the survivor of the Duke and Earl*, and to carry interest at 4*l. per cent.* from the death of the survivor, and there was a proviso that no sale or mortgage should be made until some one of the portions became payable, and upon further trust, *after the death of the Earl*, to raise by all or any of the ways and means aforesaid, for the maintenance of the younger children until their portions should be payable, such

(*n*) *Ubi supra.*

(*o*) Lyddon *v.* Lyddon, 14 Ves. jun. 558.

(*p*) Lady Clinton *v.* Lord Robert Seymour, 4 Ves. jun. 440.

yearly sums not exceeding the interest of the portions, as the Earl should appoint; and in default of such appointment, then such yearly sums as would be equivalent to the interest by quarterly payments, and the *first payment* to be made on such of the usual feast days as should happen next *after the death of the Earl,* and the surplus of the rents and profits to be paid to the person for the time being entitled to the *reversion or remainder* expectant on the determination of the term. The Earl of Lincoln died in 1788, leaving only one younger child, a daughter, and without executing any appointment of a yearly sum for maintenance. The Duke, after the death of the Earl, paid the Countess Dowager of Lincoln the yearly sum of 400*l.* for the maintenance of the child. The Duke died in 1794. Lady Catherine Clinton, the daughter, on attaining twenty-one in 1797, prayed an account of interest *from the death of her father the Earl.* On the other side it was contended that no interest accrued due until the death of the *Duke.* The Master of the Rolls, in giving judgment, said, that taking the words of the maintenance clause by themselves, he should have no hesitation in saying, that the daughter was entitled to maintenance from the death of her father during the life of her grandfather, but that it was now perfectly settled, that the Court would lay hold of any words from which it could be fairly inferred it was not the intention to charge the reversionary term in that manner, and the question then was, whether the succeeding words, upon which he chiefly relied, did not amount to demonstration, that it could not be the intention that on the quarter-day after the death of the Earl, and

each subsequent quarter-day, the plaintiff might come and insist upon having her maintenance raised by sale or mortgage; and after noticing that the maintenance could not have affected the Duke's estate for life, and must have been raised, if at all, out of the reversionary term to arise after his death, and that by express words the power of raising money by sale or mortgage could not be used till one of the portions became payable, he declared that the clause directing that after the maintenance should be raised and paid, the surplus of the rents and profits should, until the portions became payable, be received by the persons for the time being entitled to the premises in reversion or remainder expectant on the determination of the term, appeared demonstration, that the maintenance should be raised out of the *annual profits*, and not by sale or mortgage, and which could not be during the life of the Duke, for the Duke was not a person entitled to the reversion or remainder expectant upon the determination of the term; and he accordingly decreed that the plaintiff was not entitled to interest until the death of the grandfather.

It is important to ascertain under what circumstances the words *rents and profits* will authorize a mortgage, or will be restricted to *annual* rents. By a liberal construction, it has been held, that as the words "rents and profits" in a devise would carry the fee (*q*), so the words "profits of land," when not re-

(*q*) Allan v. Backhouse, 2 Ves. & Bea. 74.

stricted to annual profits, and especially when applied towards the raising of portions or debts, were to be considered as signifying any profits the lands would yield, whether by sale or mortgage or otherwise (*r*). But, according to a more modern doctrine, it seems the *natural* meaning of raising a portion by rents and profits is by the *yearly* profits (*s*), and the cases which have extended it further are *exceptions* out of the general rule in which the context has afforded a different construction (*t*). Thus where a time certain is prefixed for the payment of portions, and it is evident the annual profits will not raise the money within that time, the Court has directed a mortgage (*u*). So also in a case where the trust of a term was out of the rents and profits to raise 8000*l.* for daughters' portions, to be paid them *as soon as conveniently could be*, two points were made:—first, whether the 8000*l.* could be raised by sale or mortgage? and secondly, whether it should carry interest, and from what time? and it was considered, that as the daughters were of age at the time of the father's death, it would be *convenient* to raise the portions forthwith; and it was decreed, that the portions

(*r*) Lingon *v.* Foley, 2 Ch. Ca. 205; Backhouse *v.* Middleton, 1 Ch. Ca. 173; Gibson *v.* Rogers, Amb. 93; Treat. on Eq. vol. i. 446.

(*s*) Ivy *v.* Gilbert, *infra.*

(*t*) 2 P. Wms. 19; Allan *v.* Backhouse, *supra.*

(*u*) Backhouse *v.* Middleton, *supra; et vide* Heycock *v.* Heycock, 1 Vern. 256; Berry *v.* Askham, 2 Vern. 26; Warburton *v.* Warburton, 2 Vern. 420; Okeden *v.* Okeden, 1 Atk. 552; Green *v.* Belcher, 1 Atk. 505; Shrewsbury *v.* Shrewsbury, 1 Ves. jun, 234; and see 2 Ves. jun. 481, note; and Allan *v.* Backhouse, *supra.*

should be raised by sale or mortgage, and that the 8000*l.* should carry interest from the death of their father (*x*). But equity would not have raised the portions by mortgage if the children had been of tender years at the death of the father (*y*), and in such case the portions would have become due, when the rents would have raised them and would have carried no interest (*z*). As soon as the portions could have been raised by the rents, the land would have borne its burthen and have been discharged (*a*).

If the trust be to raise portions out of rents and profits, and no time is appointed for payment, and the child dies under twenty-one, and unmarried, before it is raised, the portion will in such case be raised out of the annual rents, for the Court will not, it seems, direct a mortgage (*b*).

The several cases already cited shew that the words "rents and profits" when *added or prefixed to more general words* (*as sale or mortgage*) *by way of alternative,* will not restrict the meaning of the more general words (*c*). But if there be a *clear intention,*

(*x*) Trafford *v.* Ashton, 1 P. Wms. 416; *Et vide* Stanhope *v.* Thacker, Prec. Chan. 435.

(*y*) Evelyn *v.* Evelyn, *infra.*

(*z*) Ivy *v.* Gilbert, *infra.* (*a*) Ibid.

(*b*) Earl of Rivers *v.* Earl of Derby, 2 Vern. 72, *et vide* 2 P. Wms. 672.

(*c*) Greaves *v.* Mattison, Gerrard *v.* Gerrard, Sandys *v.* Sandys, Goodall *v.* Rivers, Hebblethwaite *v.* Cartwright, Hall *v.* Carter, *supra.*

shewn that the trust shall be confined to annual rents, the Courts will not in any case order a sale (*d*).

There are also cases in the books which shew that the words "rents and profits" will be restricted to annual rents, when followed or attended by other words which imply that the *money shall not be raised in any other way*, or *when the words "rents and profits" are placed in opposition to the more general words "sale or mortgage."* Of the latter position the beforementioned case of Corbett *v.* Maidwell (*e*) is an instance where the *maintenance* was directed to be issuing out of the *profits;* and the portion itself to be raised by sale or mortgage or perception of rents and profits. Of the former position, the case of Ivy *v.* Gilbert (*f*) is a strong instance. Roger Pomeroy settled lands to the use of himself for life, with remainder, as to part, to the use of his wife for life, with remainder to his first and other sons in tail male, with remainder to trustees for 120 years, upon trust "out of the rents and profits, as well by leases for one, two, or three lives, or any number of years determinable thereon, or for twenty-one years absolutely at the old rent, to raise 1500*l.* for daughters' portions," with remainder to Roger Pomeroy in fee. There was one only child, a daughter, who married Humphrey Gilbert, the defendant's father. Roger Pomeroy having no issue male, limited the reversion to trustees for ten years, upon trust, if Gilbert and wife should release

(*d*) Small *v.* Wing, 5 B. P. C. 66, 2d edit.

(*e*) Corbett *v.* Maidwell, *supra.*

(*f*) Ivy *v.* Gilbert, Prec. Chan. 583; 2 P. Wms. 13.

the 1500*l.* portion then to raise 1900*l.*, and lay out 1500*l.* (part thereof) in the purchase of land for the benefit of Gilbert and wife, and to pay the residue to Gilbert; and subject to the term of ten years, to the use of his nephew Hugh Pomeroy for life, with remainder to his first and other sons in tail male, with remainder to John Gilbert (the defendant) for life, with remainder over. On the death of Roger Pomeroy in 1708, Hugh Pomeroy entered, but the portion of Mrs. Gilbert was unpaid. In 1712, the plaintiff's father advanced the 1500*l.* on a mortgage of the term of 120 years, in which Gilbert and wife (who had taken out administration to the surviving trustee of the term of 120 years,) and Hugh Pomeroy, the tenant for life, concurred. In 1758, Hugh Pomeroy died without issue male, and appointed Daniel Pomeroy his executor. On the death of Hugh Pomeroy John Gilbert entered. The plaintiff filed his bill of foreclosure. And it was argued that the words "as well by leasing, &c." were additional and not restrictive, for the testator could not have intended the portion should be raised out of the annual profits, which would have starved the remainder-man. The Lord Chancellor said, where a trust of a term for raising portions for daughters does direct a particular method for raising them, it implies a negative that they shall not be raised in any other way, and when the trust of the term, as in the present case, is to raise the portion by leasing for one, two, or three lives, or for any term of years determinable thereon, or for twenty-one years absolutely, it shall not be raised in any other way; and even by leasing, it could not be raised but by

making such leases, upon which the old rent was reserved. He afterwards observed, there was no time appointed for the raising of this portion, and therefore the portion was due when the profits could raise it, and it carried no interest; but when the 1500*l.* was or might have been raised by the profits, then it became due, and the land was discharged as having borne its burthen (*g*). And he declared that the profits received by Hugh Pomeroy were as if received by Ivy, because of the clause in the mortgage deed, that it should be lawful for Hugh Pomeroy to take the profits without account until default of payment, so that he was the tenant at will to the mortgagee; and therefore the mortgage was not pursuant to the trust, and so much of the profits as had been received must go towards the payment and sinking of the portion. But there having been a power of leasing, and the intention having been to charge the land as far as might be, he directed the master to see how far the land might have been charged by leasing, and whether any lives were vacant, and he reserved the consideration how far the estate should be chargeable thereby, and ordered the representative of Hugh Pomeroy to pay the mortgage monies and interest as far as the assets would extend. This decree was afterwards affirmed in the House of Lords (*h*).

In Evelyn *v.* Evelyn (*i*), the like doctrine as in

(*g*) *Et vide* Evelyn *v.* Evelyn, *infra*.

(*h*) 2 B. P. C. 468.

(*i*) Evelyn *v.* Evelyn, 2 P. Wms. 659.

Ivy *v.* Gilbert was recognized. In that case, a man having power by deed to make any lease or leases for years sans waste, for the raising of daughters' portions, *so that such lease or leases should cease and determine upon the raising of such portions, and costs and charges for raising the same;* appointed the lands to trustees for a term of years, to raise 8000*l.* as soon as conveniently might be after his decease; but without any provision for maintenance, or mention of any express time when the portions should be payable. He died leaving a widow who had a jointure on part of the premises, and three infant daughters, the eldest of whom was not eight years of age. It was considered that the clause "So that, &c." shewed an intention that the portions should be raised out of the annual profits, and the children being of tender years, the Court refused to raise the portion by sale or mortgage, but directed the 8000*l.* to be raised out of the rents and profits without interest, the profits to be accounted for from the father's death. From this decree there was an appeal, and the matter was compromised.

In Mills *v.* Bank (*k*), the words of the trusts were "by rents, issues and profits, or by making leases for one, two, or three lives, or for any number of years determinable on one, two, or three lives, reserving the ancient rent, or by granting copyholds on fines" to raise 10,000*l.* to be paid to daughters at eighteen or marriage, and to sons at twenty-one, or

(*k*) Mills *v.* Bank, 3 P. Wms. 1.

as soon after as the same could be raised out of the premises aforesaid. It was urged that these affirmatives implied a negative, according to the general doctrine, that affirmative statutes imply a negative; in this the Lord Chancellor coincided, and said he approved the resolution in Butler *v.* Duncomb (*l*), that all trusts of terms directing the method of raising of money imply a negative, viz. that the money shall be raised by the method prescribed, and not otherwise. From the circumstances stated in this case, it appears there were two daughters who became entitled to the 10,000*l.*, one of whom married Sir George Rook, and the other married Mr. Ash, and that in the year 1706, Lord Chancellor Cowper had decreed the portion to be raised *by sale* of the trust term, and that 5000*l.*, being part of the trust estate of the infant son of Sir George Rook, had been advanced by the executor of Sir George Rook to Mr. Ash, on mortgage of the term, which was approved by a master, and the money was laid out in pursuance of a decree in another cause touching an account of the estate of Sir George Rook. But the case of Ivy *v.* Gilbert being afterwards decided by Lord Chancellor Macclesfield as before mentioned, this cause was re-heard before his lordship, who, after admitting he should not have made the decree, said, it was optional in the Court on a re-hearing to do any thing thereon; and that when the money had been lent under a decree, and with the approbation of a master, for the Court to make another decree setting aside this security, would be to make the

(*l*) *Supra.*

Court fight against itself and act inconsistently, which rendered it more proper to apply to a superior Court, and if the defendant would have the opinion of the Court for setting aside the securities, it seemed necessary for him to file an original bill; but he gave the defendant time to advise with his counsel what course he would pursue in so extraordinary a case. On the 11th of June, 1725, a petition was presented to have back the deposit, the parties having amicably ended the matter.

It may not be improper, in this place, to recal to our recollection the general rules on the vesting and payment of portions.

If a time certain is appointed for the payment of a portion, charged on land by deed or will, and the child dies before the time for payment arrives, the portion will sink for the benefit of the estate (*m*), unless a time for its vesting be expressly provided. To this rule, however, there are exceptions, when the payment of the portion is deferred from the circumstances, not of the person, but of the fund.

If no time certain is appointed for the payment of the portion, and the child dies before it is raised, it will nevertheless vest and be payable (*n*). But to this rule exceptions are to be found in cases in which the children have died at a very early age.

(*m*) Smith *v.* Smith, 2 Vern. 93.

(*n*) Earl Rivers *v.* Earl of Derby, *supra*.

As soon as all the events have happened, and the portion has become payable, it may be raised by sale or mortgage, unless the raising of it be contrary to the trusts of the settlement, as in some of the instances already mentioned, or unless the raising of it be restricted to annual profits, as before also mentioned.

Although all the events have happened, and the portions have become payable, yet if the trust be to raise the portion out of the rents and profits, and the children be of tender years, the Court will not direct a sale or mortgage, but will order the rents to be applied as they arise (*o*).

That the like course will, it seems, be pursued, if the legatee dies under twenty-one, and unmarried, before the portion is raised (*p*).

That, in case the portion is to be raised out of annual rents the portion will carry no interest; for the portion will not be due until the rents would have raised the portion; and as soon as it would have raised it, the land will have borne its burthen, and be discharged (*q*).

And lastly—That if the trust be expressly restricted to annual profits, the Court will in no case order a sale (*r*).

(*o*) Evelyn *v.* Evelyn, *supra.*

(*p*) Earl Rivers *v.* Earl of Derby, *supra.*

(*q*) Ivy *v.* Gilbert, *supra.*

(*r*) Small *v.* Wing, *supra.*

CHAPTER VII.

OF MORTGAGES BY EXECUTORS, BY TRUSTEES FOR SALE AND FOR PAYMENT OF DEBTS, AND UNDER POWERS OF CHARGING.

Both at law and in equity the whole personal estate of the testator vests in the executor, who, from the duties of his office and the nature of his trusts, must necessarily have an absolute power over it (*a*), whether specifically bequeathed (*b*), or limited in trust (*c*), or not. The executor's first duty is to provide for payment of debts; and if the general undisposed of property or the fund expressly provided by the testator, is not sufficient for such purpose, the property specifically bequeathed or given in trust must be resorted to. Nor can a testator, by any testamentary disposition of his personal estate, frustrate or delay the claims of his creditors (*d*). We accordingly find the adjudged cases and text books, when speaking of the powers vested in the executors, using strong expressions: and we also find the judges shewing great reluctance to fetter the executors in the exercise of their functions. Notwithstanding this

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(*a*) *Vide* Nugent *v.* Gifford, 1 Atk. 463; M'Leod *v.* Drummond, 17 Ves. jun. 161.

(*b*) Ewer *v.* Corbet, 2 P. Wms. 149; Burting *v.* Stonard, Ibid. 150; Langley *v.* Earl of Oxford, Amb. 17; Andrew *v.* Wrigley, 4 B. C. C. 125.

(*c*) *Vide* M'Leod *v.* Drummond, *supra.*

(*d*) Andrew *v.* Wrigley, *supra.*

great discretionary authority, numerous cases are to be found in the books, arising from the circumstances attending the disposition by executors of their testator's assets; and on some of the points a considerable difference of opinion has existed.

The power of the executors to dispose of a specific legacy seems to have been formerly questioned, and even in a modern valuable treatise (*e*) the point is put rather doubtfully. An early case (*f*) was considered as militating against this power; but it has been since observed (*g*), that was not in fact the case of a specific bequest, it being a charge on a particular part of the assets, and there was supposed to be strong circumstances of fraud in the conduct of the parties. Succeeding cases (*h*) have established this power of disposition by the executors beyond question (*i*)

(*e*) Sugden on Vendors and Purchasers, 550, 8th edition.

(*f*) Humble *v.* Bill, 2 Vern. 444.

(*g*) 17 Ves. jun. 160; 3 Atk. 241.

(*h*) Ewer *v.* Corbet; Burting *v.* Stonard; Langley *v.* Earl of Oxford, *supra*.

(*i*) Sir Edward Sugden, in his Treatise on Vendors and Purchasers, has raised a doubt whether it is safe to take an assignment of a specific legacy from the executor without the concurrence of the specific legatee, lest the executor should have assented to the bequest, and he cites Thomlinson *v.* Smith, Finch, 378. It is submitted this was a case of gross fraud, and is but a slender authority. In that case, a man bequeathed a leasehold estate to his wife for life, remainder to A. for ten years, remainder to his children. The widow took out administration with the will annexed, and assented to the bequest, and enjoyed the property during her life. After her death, the defendant in the suit, (who had

As the executor may absolutely dispose of the testator's assets for the general purposes of the will, there seems no good reason why in the exercise of a sound discretion, and presuming the language of the will does not peremptorily require an absolute sale, the executor may not raise the money required by a partial sale or mortgage of the assets. Accordingly the proposition is broadly laid down by Lord Hard-

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become the owner of the inheritance) purchased of A. his interest in the leasehold. After the expiration of the ten years, the children exhibited a bill for an account, and prayed the remainder of the term might be decreed to them. The defendant set up an assignment by the widow as administratrix, in consideration of 150*l.*, the better to enable her to pay the debts of the testator, and insisted, that, as the plaintiffs charged that the administratrix assented to the bequest, they had their remedy at law notwithstanding the assignment, and ought not to have relief in equity. But the Court being satisfied that the testator left assets to pay his debts, and that the administratrix did assent to the said legacies, decreed to the plaintiffs the residue of the term. It is submitted that in this case the enjoyment of the leasehold by the administratrix for life, and the subsequent purchase of A.'s interest, were in direct contradiction to the alleged assignment by the administratrix; and it is conceived that if a purchaser or mortgagee shall *bonâ fide* deal with an executor, within a reasonable time after the testator's death, and obtain possession of the muniments of title, a specific legatee would never be permitted, at law or in equity, to set up the executor's assent against the sale or mortgage, for, by sale and delivery, the title of the purchaser or mortgagee is complete. *Vide* Scott *v.* Tyler, Dickens, 725, and 17 Ves. jun. 166. In a bill before parliament it is proposed to enact, that the assent of an executor or administrator shall not vest in any legatee the legal title to any personal estate other than such chattels as may pass by delivery; but that such title shall remain vested in the executor or administrator until he shall have executed an assignment or release in writing of such personal estate.

wicke in Mead *v.* Lord Orrery(*k*), and yet more broadly and expressly by Lord Thurlow in Scott *v.* Tyler (*l*), and has been since recognized by Lord Eldon in M'Leod *v.* Drummond (*m*). Lord Loughborough, indeed, is reported to have said, a mortgage is not a natural way of raising money, and that it may lead to an inquiry as to the circumstances of the testator's estate (*n*); but this observation, it is conceived, must be considered as applying to transactions attended with circumstances exciting suspicion of fraud.

The mortgage may be either of legal or equitable assets (*o*), or of mere *choses in action* (*p*), and may be by actual assignment, or by deposit (*q*); and a dealing with one of many executors will be valid, for each is competent (*r*). The deed of mortgage need not state that the money is wanted for the purposes of the will, for in order to vitiate the security, it must be shewn the money was *not* for the payment of debts (*s*). Nor is the mortgagee bound to see to its application (*t*), although Lord Kenyon has expressed an opinion that a trust might be so framed as to call on a purchaser from an executor to see to the

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(*k*) Mead *v.* Lord Orrery, 3 Atk. 239.

(*l*) Scott *v.* Tyler, Dickens, 724.

(*m*) M'Leod *v.* Drummond, 17 Ves. jun. 154.

(*n*) Andrew *v.* Wrigley, 4 B. C. C. 138.

(*o*) Nugent *v.* Gifford, 1 Atk. 463; *et vide* 17 Ves. jun. 167.

(*p*) Scott *v.* Tyler, *supra*.

(*q*) Ibid. (*r*) Ibid.

(*s*) Bonney *v.* Ridgard, 4 B. C. C. 138, cited.

(*t*) Scott *v.* Tyler, *supra*; *et vide* Elliot *v.* Merryman, Barnard. 78.

application of the money (*u*); but this observation must also, it is conceived, be supposed to apply to a sale made under very peculiar circumstances, and not for the purpose of the payment of debts generally.

Fraud or covin, however, will vitiate any transaction, and turn it to a mere colour. If one concerts with an executor, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or *in any other manner* contrary to the duty of the office of executor, such concert will involve the seeming purchaser or pawnee, and make him liable to the full value (*x*).

It was indeed held by Lord Mansfield (*y*), that such was the power of an executor, that although it was apparent on the face of the transaction that he was about to apply the assets to a purpose foreign to the will, yet a person with that knowledge was justified in dealing with him upon the supposition that all the debts were paid, or that the testator's estate was or might be indebted to the executor to that amount: and in a recent case (*z*), under peculiar circumstances, the latter supposition was allowed to be urged on behalf of depositaries of bonds, to whom they had been pledged by executors for securing advances to themselves in another capa-

(*u*) Bonney *v.* Ridgard, 4 B. C. C. 130, cited.

(*x*) Scott *v.* Tyler, *supra.*

(*y*) Whale *v.* Booth, 4 Term Rep. 625, note.

(*z*) M'Leod *v.* Drummond, *supra.*

city. Lord Mansfield accordingly held, that where a creditor under a writ of *fi. fa.* took in execution *bona propria* and *bona testatoris* vested in his debtor, *knowing them to be such*, the execution was valid on the ground that the executors joined in the bill of sale, which his lordship considered tantamount to a conveyance (*a*). This doctrine, to the full extent laid down by Lord Mansfield, Lord Chancellor Eldon expressed himself not prepared to follow (*b*). And in a case subsequent to Whale *v.* Booth, Lord Kenyon, and Ashhurst and Grose, Justices, against Buller, Justice, decided that *bona testatoris* could not be taken in execution under a *fi. fa.* in satisfaction of the executor's private debt (*c*).

In two leading cases also in Equity (*d*), Lord Hardwicke supported assignments of the testator's assets, made by the executor in satisfaction of his own debt or for his private purposes. But it is to be observed, that in both these cases a considerable time had elapsed since the death of the testator, and in the first instance the executor was also sole residuary legatee, (the bill being filed by the testator's daughters as *creditors* under a marriage settlement); and in the second instance, three executors concurred in the assignment of a mortgage as a collateral security for one of them in an appointment of receiver, who

(*a*) Whale *v.* Booth, *supra.*

(*b*) M'Leod *v.* Drummond, *supra.*

(*c*) Farr *v.* Newman, 4 Term Rep. 621; *et vide* what is said of this case by Lord Eldon in M'Leod *v.* Drummond, *supra.*

(*d*) Nugent *v.* Gifford, *supra*; Mead *v.* Lord Orrery, *supra.*

was also one of five residuary legatees, and to whom the deed stated the mortgage to belong. In this latter instance, the bill was filed by the other residuary legatees, being the first instance, it seems, in which *residuary* legatees had attempted to follow the assets into the hands of a purchaser, the former instances having been confined to creditors and specific legatees. These two cases depended on particular circumstances (*e*); the broad principles contained in Mead *v.* Lord Orrery were afterwards disapproved by Lord Kenyon in Bonney *v.* Ridgard (*f*); and in a prior case (*g*) relief had been actually granted to a creditor against a purchaser of part of the testator's assets from an executor, the purchaser having allowed the executor's private debt out of the purchase-money, and having express notice that the creditor's debt was unpaid, than which, Lord Alvanley remarks, there cannot be a stronger instance of devastavit (*h*). In a modern case (*i*) relief was granted to a *pecuniary* legatee against bankers, with whom part of the assets had been deposited, to secure a private debt of the executor, within a month after the death of his testatrix, attended with circumstances of gross negligence in the bankers, but unaccompanied by fraud; which decision is in accordance with the known opinion of Lord Chancellor Thurlow on the second

(*e*) *Vide* Tanet *v.* Ivie, 2 Ves. 470.

(*f*) Bonney *v.* Ridgard, 2 B. C. C. 433; 4 B. C. C. 130; 7 Ves. jun. 167, cited.

(*g*) Crane *v.* Drake, 2 Vern. 616.

(*h*) Andrew *v.* Wrigley, 4 B. C. C. 137.

(*i*) Hill *v.* Simpson, 7 Ves. jun. 152.

point in the case of Scott *v.* Tyler (*k*); in which latter case, however, the circumstances were stronger than in Hill *v.* Simpson, for in Scott *v.* Tyler the bonds were specifically bequeathed, and were handed over to the bankers to secure a debt *already due* from the executor, and not for advances *then made*, which, according to the opinion of the Master of the Rolls in M'Leod *v.* Drummond (*l*), is a material circumstance; and the bankers had also previous knowledge of the property.

In the case of M'Leod *v.* Drummond (*m*) relief was refused on a bill filed by two co-executors in Scotland, who had never acted, but had permitted the other two executors in England to manage the property for a great length of time. The acting executors, many years after the testator's death, pledged some bonds belonging to him with their bankers, to secure advances made to them as army agents, representing that an account was kept between *them and the estate*, to which they were, or frequently might be, in advance. The Master of the Rolls dismissed the bill, and on appeal to the Lord Chancellor, the decree was affirmed under the peculiar circumstances of the case.

Relief will also be refused if there has been great delay on the part of the legatees in making claim, even although they have but a contingent or expectant right, for such an interest will entitle them to know

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(*k*) *Supra.* (*l*) 14 Ves. jun. 353.

(*m*) M'Leod *v.* Drummond, 14 Ves. jun. 353; *et vide* 17 Ves. jun. 170.

what debts the testator owed, and what part of his estate has been applied to the payment of them (*n*).

The result of the cases seems to be, that if a purchaser or mortgagee advance money to an executor, (even though the executor be also residuary legatee,) for purposes which he knows to be foreign to the will, or if he takes as a security for the executor's private debt part of the testator's assets, he does it at his own risk, and is liable to a suit for relief on bill filed either by a creditor, or by a pecuniary, specific, or residuary legatee, if such legatee pursue his remedy within a reasonable time. If the executor is also specific legatee, a mortgage from him of the specific legacy in satisfaction of his private debt will be safe, unless it can be shewn the creditor knew there were debts unpaid (*o*).

It is material also to observe, that if a particular fund is pointed out by the will for the payment of debts, it may become necessary for a mortgagee to inquire if that fund has been exhausted.

Estates are sometimes vested in trustees upon trust for *sale* without any express power to mortgage. A mortgage is a partial sale, and therefore a trust for sale will, generally speaking, include a mortgage (*p*)*;

(*n*) Andrew v. Wrigley, 4 B. C. C. 136.

(*o*) Taylor v. Hawkins, 8 Ves. jun. 209.

(*p*) 3 P. Will. 9.

* In corroboration of this doctrine, it has been suggested, that if a trustee for sale becomes also the purchaser, relief in equity is given to the *cestuis-que* trust on their paying to the trustee the money advanced with interest, thereby treating the transaction as a mortgage under the power for sale.

and it must depend upon the nature of the trust, if it be not authorized by it. If the object of the trust is for a definite purpose, such as to raise a certain sum of money for debts, portions, or the like, without an ulterior intention of effecting an entire conversion into personalty by an absolute sale, there seems no objection to the money being in every case, where practicable, raised by mortgage. Questions of this sort must depend on the peculiar circumstances of the trust, and the intention of the parties as shewn on the instrument.

If there be a trust to raise money by sale or mortgage, and the trustees raise the money by mortgage, it is doubtful whether they can afterwards exercise their trusts for sale for the purpose of discharging the mortgage; for the money being once raised, the trustees are *functi officio*, the purposes of their trust being completed. It is clear the mortgagee cannot *compel* them to sell, even if they have the power (*q*).

If a man has a power of charging an estate with a sum of money, he may also charge it with interest (*r*); nor will equity interfere to diminish or reduce the rate of interest charged (*s*). An unlimited power to charge will in equity authorize a disposition of the estate itself in trust for sale (*t*); but a particular

(*q*) Palk *v.* Lord Clinton, 12 Ves. jun. 48.

(*r*) Killmurry *v.* Geery, 2 Salk. 538; Boycot *v.* Cotton, 1 Atk. 556; Evelyn *v.* Evelyn, 2 P. Wms. 591; Hall *v.* Carter, 3 Atk. 359; Lewis *v.* Freke, 2 Ves. jun. 507.

(*s*) Lewis *v.* Freke, *supra*.

(*t*) Long *v.* Long, 5 Ves. jun. 445.

power of charging will not authorize a limitation of the fee to secure the money, and the appointment will be void (*u*). Equity would, however, most probably, in the latter case, relieve, as in the case of a defective execution (*x*).

The converse of the doctrine laid down in Long *v.* Long is good; for a power to appoint the fee will authorize a charge, which equity will carry into effect by a sale (*y*). And it will also authorize an appointment to trustees in trust for sale (*z*).

In a modern case a power to charge with a sum of money was held to authorize the grant of a rent charge until the principal and interest were paid (*a*).

If there be a devise in trust, by mortgage or sale, to raise money for payment of debts, the trustees may proceed to raise the money without the sanction of a decree of a Court of Equity; for decrees of equity do not give rights, but are only an execution of the trust or power already subsisting (*b*). A devise for payment of debts takes the case out of the statutes

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(*u*) Jenkins *v.* Keymis, 1 Lev. 150, 237; Hard. 395; 1 Ch. Ca. 103.

(*x*) See Sugden on Powers, 5th edit. 455.

(*y*) Roberts *v.* Dixall, 2 Eq. Ca. Ab. 668; *et vide* Palmer *v.* Wheeler, 2 Ball & Beatty, 18.

(*z*) Kenworthy *v.* Bate, 6 Ves. jun. 793; and see 1 Ves. & Bea. 78.

(*a*) Blake *v.* Marnell, 2 Ball & Beatty, 35.

(*b*) Earl of Bath *v.* Earl of Bradford, 2 Ves. 587.

against fraudulent devises (*c*); so that the bond and simple contract creditors can only come in *under the will* (*d*), and they are therefore put on an equal footing in equity, and are to be paid *pari passu* (*e*); for the specialty creditors cannot pursue the estate as legal assets, which, if it were within the statutes, they might do (*f*). On the same principle it has been held, that the creditors must comply with the terms of the will; and, therefore, if the debts are directed to be paid out of the annual rents, there can be no sale or mortgage (*g*). In Cook *v.* Parsons (*h*) Lord Nottingham thought the words "To set and farm let, and out of the rents (without saying profits) pay his debts," were not sufficient whereon to ground a sale; and Lord Hardwicke refused a sale where the words were, "by perception of rents and profits, or by leasing or mortgaging the same to raise and pay the sums and legacies mentioned in the will" (*i*); he added, if it had been a trust of the rents and profits, it might have been sold. But his lordship did not recollect any case which would authorize a sale where there were other limiting words following

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(*c*) 3 William & Mary, c. 14; 6 & 7 Will. III. c. 14; 4 Ann, c. 5 (Ireland); 47 Geo. III. c. 74, repealed by 1 Will. IV. c. 47; *et vide supra*, chap. FRAUDULENT DEVISES.

(*d*) Howse *v.* Chapman, 4 Ves. jun. 550.

(*e*) Conyngham *v.* Conyngham, 1 Ves. 523.

(*f*) Fonb. Treat. on Equ. vol. i. 448, note (*o*).

(*g*) Lingard *v.* Earl of Derby, 1 B. C. C. 311.

(*h*) Cook *v.* Parsons, Pre. Chan. 184; *et vide* Sir John Talbot *v.* Duke of Shrewsbury, Gilb. Rep. Eq. 89.

(*i*) Ridout *v.* Earl of Plymouth, 2 Atk. 105.

rents and profits. In Baines *v.* Dixon (*k*), estates were devised to trustees and their heirs upon trust for payment of the testator's funeral expenses, debts, and legacies, as far as his personal estate should be deficient, and for raising maintenance, &c. for his children; and to convey to his eldest son, at twenty-three; and he directed the legacies to be paid after his debts were satisfied, as the rents should *advance* the same. Lord Hardwicke, on appeal, directed the debts to be raised by sale, and the legacies to be paid out of the annual profits.

But in order to take a devise of real estate for payment of debts out of the statutes against fraudulent devises, it seems necessary it should *effectually* provide for the purpose (*l*).

A general charge of debts by deed or will on real estate, will not give interest on simple contract debts not carrying interest (*m*); nor will the single circumstance of the debt being liquidated in the Master's Office give interest; nor will any delay entitle the

(*k*) Baines *v.* Dixon, 1 Ves. 41.

(*l*) Hughes *v.* Doulben, 2 B. C. C. 614; *et vide* Fonb. Treat on Equ. vol. i. 448, note (*o*). Bailey *v.* Ekins, 7 Ves. jun. 323; *et vide supra*, p. 115.

(*m*) Barwell *v.* Parker, 2 Ves. 364; Earl of Bath *v.* Earl of Bradford, ib. 588; Shirley *v.* Ferrers, 1 B. C. C. 41; Creuze *v.* Hunter, 2 Ves. jun. 157; *vide contra* Carr *v.* Lady Burlington, 1 P. Wms. 229; Maxwell *v.* Wettenhall, 2 P. Wms. 26. But the devise will carry interest, if the charge be of the simple contract debts of a third person, Shirt *v.* Westby, 16 Ves. jun. 393.

simple contract creditor to interest, if the delay arise out of or is the natural consequence of the jurisdiction of the Court, or might have been prevented by the party (*o*). On a cause coming on for further directions, the Court may give interest (*p*). After liquidation, any one creditor may prosecute the decree (*q*). "And the trust or charge, whether for simple contract or specialty debts (for as to the trust both are on a footing, though there be no term created for that purpose), gives to a Court of Equity, incidentally, authority to make a mortgage or sale, because the estate, by virtue of such devise, becomes a trust, and such Court having jurisdiction to liquidate it, after liquidation can give interest on the debt.

"Then the debt, being a gross sum with the interest, becomes an incumbrance, and a mortgage may be made to pay it off; and in such case, the creditors, if not paid, can have no relief but by application to a Court of Equity, because they can have no action against the heir (for want of assets descended), or against him and the devisee (because the case is out of the statute), and then when all or any of the creditors join in, or bring a bill for satisfaction of their debts, and to have a performance of the trust by sale or mortgage, from the moment the mortgage is made, that also, it is clear, carries interest.

(*o*) Creuze *v.* Hunter, *supra*, and see note at the end of the case.
(*p*) Ibid. (*q*) Ibid.

"And as the Court of Chancery will, upon bills brought by creditors, decree money to be raised by mortgage or sale, so they will support trustees who mortgage without such decree first had, *if it be fairly done,* for the trustees need not wait for a decree of the Court, which, if it were necessary, would oblige every person to come there, but they may do it without, and this is plain, if we consider the nature of a decree of that Court, for such decree does not (as already stated)(*r*) create or give a right, but only enforces an execution of a trust and power before subsisting.

"And in allowing interest in such cases, Equity acts by analogy to the proceedings, where creditors are left to their legal remedy, for if a bond creditor bring an action against the heir at law, or against him and the devisee jointly, and (since the statute of fraudulent devises) if the heir, in case of descent, or heir and devisee joining in case of a devise, come in and confess real assets, (which in justice they ought to do,) in that case judgment goes against them for the debt to be levied out of the estate; but because it cannot be known how much the value of the land descended or devised is, *per annum,* there issues a writ of inquiry to the sheriff, and the judgment proceeds, that the sheriff shall deliver the lands to the plaintiff, *donec debitum prædictum levaverit;* then the sheriff makes an inquiry in nature of an extent, fixes the extended value, which is always

(*r*) *Supra,* page 209.

much below the real value of the lands, and delivers them to the plaintiff according to that value. The remedy that the heir and devisee have, is by *scire facias* to have an account and the lands delivered back. But a Court of law will do that only according to the extended value by the sheriff; therefore the heir and devisee must come to a Court of Equity to have it extended according to the real value, and to have it back afterwards. But the Court will insert terms, namely, upon paying interest, for a Court of Equity will not extend its powers to assist the heir at law or devisee, but according to equity, by making him answer satisfaction, and do justice (*s*)."

Lord Eldon remarked, that a mere charge is a declaration of intention, on which a Court of Equity will fasten, and by virtue of which they will draw out of the mass going to the heir, or to others, that quantum of interest which will be sufficient for the debts (*t*).

It is decided that executors or trustees shall not, after a decree to account, lend money on mortgage, without an application to the Court (*u*); and it has been said, *arguendo*, that a trust to lay out money "on good security," will not authorize a loan on mortgage (*x*). If the mortgage is contrary to the

(*s*) *Vide* Earl of Bath *v.* Earl of Bradford, 2 Ves. 589; and Powell on Mortgages, vol. i. 88, 4th edit.

(*t*) Bailey *v.* Ekins, 7 Ves. jun. 323.

(*u*) Widdowson *v.* Duck, 2 Mer. 494.

(*x*) Ibid. *Sed quære.*

trust, or in disobedience of an order to the contrary, the executors or trustees will be responsible for the loss; but otherwise the mortgage will be a fund in their hands, which they will be ordered to pay into Court (*y*).

If a mortgagor pay off a mortgage, having notice it is trust money, he is bound in equity to see to its application, unless he is expressly or impliedly exempted from that obligation; and even if he is so exempted, still a difficulty occurs, from the necessity of producing the settlement or will creating the trust, to prove the fact, and of engrafting the proof on the title, to satisfy an assignee of the mortgage, as well as future purchasers. To obviate this latter inconvenience, the better practice is for the mortgagor to execute a mortgage to the executors or trustees, without putting notice of the trust on the mortgage, and then for the executors or trustees to execute a separate declaration of their trust. To meet the former, it is advisable not to give the *mortgagor* notice of the fact of the money being in trust.

There is a further rule in equity, *viz.* that if two or more persons advance their own monies on mortgage, whether in equal proportions or not, and the mortgage is limited to them so as to create a joint-tenancy at law, nevertheless in equity they shall be considered as tenants in common, and there shall be no survivorship between them. The consequence is,

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(*y*) Widdowson *v.* Duck, 2 Mer. 494.

that if a mortgage is made to two or more persons, without notice of the trust on the face of the deed, so that they appear to have made advances of their proper monies; and if one of them die before the mortgage-money is paid off, the concurrence of the executor or administrator of the deceased mortgagee becomes necessary in the discharge. This inconvenience has given rise to a proviso now frequently inserted in such instruments, *viz.* that if one of the mortgagees shall die before the money is paid off, the receipt of the surviving mortgagee or his executors, administrators or assigns, shall be a good and sufficient discharge to the mortgagor, his heirs, executors, administrators and assigns, although and notwithstanding the executor or administrator of the deceased mortgagee shall not concur therein, any rule of equity to the contrary thereof in any wise notwithstanding.

CHAPTER VIII.

OF EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS.

THE statute of the 29 Car. II. cap. 3, commonly called the statute of frauds and perjuries, enacts (*a*), that no "action shall be brought upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Notwithstanding this statute, it is now decided, that if the title deeds of an estate are (without even verbal communication) deposited by a debtor in the hands of his creditor, or of some third person on his behalf, such deposit is *of itself evidence of an agreement executed for a mortgage of the estate* (*b*), of which agreement the creditor may avail himself as of an *agreement in writing* for that purpose, for he may file his bill for the completion of the security by a legal conveyance from his debtor, who will not be allowed to plead the statute of frauds; or if the debtor become bankrupt, the creditor may present the usual petition for payment of his debt by sale of the estate, and to be allowed to prove the deficiency, if any under the commission.

(*a*) 29 Car. II. c. 3, s. 4.

(*b*) *Ex parte* Wright, 19 Ves. jun. 258.

An equitable mortgage by deposit of title deeds will be recognized even in a Court of Law, as in a case (*c*) where an action of assumpsit was brought by the assignees of a bankrupt (who was the legal owner of a moiety of an estate in a register county) to recover from the party entitled to the other half of the estate, but who had received the whole of the rents, a moiety of such rents. On the trial it appeared that the defendant had lent the bankrupt a sum of money to complete his part of the purchase, and it was agreed between them, that the title deeds should be deposited as a security. The defendant subsequently took an assignment of the moiety of the bankrupt in the estate, but the assignment was not registered. The assignment from the commissioners to the assignees was duly registered, and therefore had preference to the unregistered deed (*d*). The assignees claimed to be entitled to recover, *at law*, one moiety of the rents received by the equitable mortgagee, but on the trial of the cause were nonsuited. And on argument in the King's Bench, the Court held the verdict to be right, on the ground that the equitable mortgagee might have retained the rents against the bankrupt if he had been solvent, and they might therefore be retained against his assignees; and the Court held the registry not to apply to an equitable mortgage where there was no deed to be registered.

But, however, in a case of trover (*e*) for the reco-

(*c*) Sumpter and others *v.* Cooper, 2 Barn. & Adol. 223.

(*d*) See Doe *v.* Alsop, 5 Barn. & A. 142.

(*e*) Harrington *v.* Price, 3 Barn. & Adol. 170.

very of the title deeds by the owner of the estate, the claim of a depositee of the title deeds was not admitted. In that case a party had sold the estate, but refused to deliver up the deeds, on a pretence which was groundless. The purchaser sold to a third party, who brought action of trover for the deeds, and in 1824 obtained judgment. In September 1825, the original vendor deposited the deeds with the defendants, and absconded. In 1827, the judgment was docketed against the vendor. The purchaser then discovering the deeds to be in the possession of the defendants, brought trover against them, and relied on the case of Hooper *v.* Ramsbottom (*f*), which decided that the right to the estate carries with it the right to the title deeds, notwithstanding their being pawned by the vendor subsequently to the execution of his deed of conveyance to a party without notice. On the part of the defendants, the neglect of the purchaser was urged in not securing the title deeds, and the case of Head *v.* Egerton (*g*) was cited, in which it was decided that a second mortgagee obtaining possession of the title deeds, without notice of the prior mortgage, could not be compelled to give them up to the first mortgagee without payment of his debt. But the Court held there was a difference between the case of a purchaser and a mortgagee, as in the latter case the mortgagor generally retains possession of the estate, and therefore his retaining the title deeds is a circumstance more likely to mislead, and the postea was entered for the plaintiff.

(*f*) 6 Taunton, 12.
(*g*) 3 P. Wms. 280.

Previously to the establishment of the doctrine of equitable mortgage by deposit of title deeds, it was held that the mere possession of the title deeds of an estate gave the holder no interest in the estate itself, except collaterally, as in the instance put by Lord Eldon (*h*), that is, if the owner of the lands could not part with the estate without the deeds, he should not have them without paying the debt due from him to the holder, so that the possession of the deeds gave no direct interest in the estate, but gave to the creditor an interest arising out of the power of embarrassing the property in the sale (*i*). And it was considered, that to give the creditor a charge on the land without an agreement in writing, would be in direct contravention to the statute of frauds. Lord Eldon, indeed, is reported to have used expressions denoting his opinion, that the judicial decisions establishing this doctrine approach to a virtual repeal of the statute, for he is reported to have said, when pressed to a further extension of the doctrine, that the statute must not be *repealed* by him farther than it had been hitherto *repealed* by his predecessors, to whose authority he submitted (*k*); language which must be construed as denoting his lordship's strong disapprobation of that which he admitted must be considered as settled law (*l*). How far its existence in deterioration of the public revenue, by di-

(*h*) *Ex parte* Whitbread, 19 Ves. jun. 211; *et vide ex parte* Kensington, 2 Ves. & Bea. 83.

(*i*) Vide Head *v.* Egerton, 3 P. Wms. 279.

(*k*) *Ex parte* Whitbread, *supra.*

(*l*) *Ex parte* Kensington, *supra.*

minishing the amount of stamp duties, is of sufficient importance to attract the notice of the legislature, remains to be seen. Lord Eldon repeatedly expressed his surprise that the doctrine was ever admitted, and a determination has been shewn not to extend it beyond its present limits (*m*).

The first decision in favour of this doctrine was made by Lord Chancellor Thurlow in the case of Russell *v.* Russell, first heard before Lords Commissioners Loughborough and Ashhurst in Easter Term, 1783 (*n*). In that case a bill was filed by a depositary of a lease for securing a debt owing by one who had since become bankrupt, and praying a sale. It was objected by the defendants that the plaintiff's claim was against the statute of frauds and perjuries. The Lords Commissioners considered that this was a contract executed, and that it was open to explanation upon what terms the lease was delivered; an issue was accordingly directed at law to try whether the lease was deposited as a security for the sum advanced; which, upon trial, the jury found. On a further hearing (on the equity reserved) Lord Chancellor Thurlow ordered the lease to be sold, and the plaintiff to be paid his money. This case was followed by those of Featherstone *v.* Fenwick, and Harford *v.* Carpenter, both heard before Lord Thurlow, in which the same principle was acted upon (*o*).

(*m*) *Ex parte* Hooper, 1 Mer. 7.

(*n*) Russell *v.* Russell, 1 Bro. C. C. 269.

(*o*) Featherstone *v.* Fenwick, Harford *v.* Carpenter, 1 Bro. C. C. 269, note.

These decisions are the foundation of the doctrine of equitable mortgage by deposit of title deeds, a species of security which, however much it has excited the disapprobation of succeeding judges (*p*), has now become of daily practice.

If the general registry which was lately under consideration had been established, this mode of security must have been annihilated.

It was the opinion of the late Sir William Grant, that the deposit must be made with the view and intent of an immediate security, and not *diverso intuitu;* and in a case heard before him in December, 1806, he expressly decided accordingly (*q*). The facts were: Messrs. Wilkinsons (father and son) were indebted to Norris in a considerable sum, partly on his own account, and partly as factor for a foreign house. Wilkinson the father, being possessed of landed estate, his son by his direction delivered the title-deeds into the hands of Thompson (the solicitor of Norris). After this Wilkinson the father died, having by his will devised his real estate to trustees upon trust to sell and pay debts. Norris afterwards filed his bill, alleging the delivery of the title deeds to Thompson to have been by way of deposit for security of the debt. A considerable difference of testimony existed be-

(*p*) *Ex parte* Haigh, 11 Ves. jun. 403; Norris *v.* Wilkinson, 12 Ves. jun. 192; *Ex parte* Whitbread, *supra; Ex parte* Hooper, *supra.*

(*q*) Norris *v.* Wilkinson, 12 Ves. jun. 192.

tween Thompson and Wilkinson, jun. relative to the transaction; but the facts admitted by Thompson were, that the deeds were delivered to him for the purpose of enabling him *to prepare* a mortgage security, and which was accordingly prepared; but that the execution of it was prevented by the illness and subsequent death of Wilkinson, sen. Wilkinson, jun. distinctly swore in his answer, that the deeds were delivered as *instructions* for preparing a security, and not as a security in the first instance, and Thompson could not recollect Wilkinson, jun. saying in terms, that he and his father did agree to the deposit of the deeds *as a security*. By the bill the plaintiff insisted he had a specific lien on the land: the defendant contended, he must come in as a creditor under the decree for payment of debts. The Master of the Rolls, after expressing his want of approbation of the doctrine established by the cases of Russell and Russell, Featherstone and Fenwick, and Harford and Carpenter, said, "I am of opinion this is not a case of deposit of deeds. It is clear, these deeds were not delivered by way of deposit in the sense in which that word has been used in the cases, *i. e.* as a present and immediate security, but were delivered only for the purpose of enabling the attorney to draw the mortgage, which it is alleged Wilkinson, sen. had agreed to give. Passing by all the objections made to Thompson's testimony, and all consideration of the particulars in which it is contradicted by the deposition of Wilkinson, jun. and taking it exactly as it stands, it does in every part of it prove what I have stated in respect to the purpose for which the deeds were put into his hands.

Now in all the cases that have been referred to, the deeds were delivered *by way of deposit.* Such deposit was indeed held to imply an obligation to execute a legal conveyance whenever it should be required; but the primary intention was to execute *an immediate pledge,* with an implied engagement to do all that might be necessary to render the pledge effectual for its purpose. But here there was no intention to put the deeds into pledge; that was not the thing which the parties had in contemplation." And in support of his decision he cited a case heard before Lord Hardwicke (*r*), in which a man having delivered his title deeds to an attorney for the purpose of a mortgage being prepared, died before it was completed, and the creditor attempted to establish a claim on the land as equitable mortgagee, but the point was given up. In a case before Lord Eldon (*s*), the Chancellor decided that where leaseholds had been assigned by way of mortgage for securing 400*l.*, the mortgagee could not tack a simple contract debt on a parol agreement, because the contract, under which he held, was a contract for conveyance only, and not for deposit.

The doctrine in these cases appears, however, to be contrary to a case which was not reported at the time when Norris *v.* Wilkinson was decided (*t*), and to be also in opposition to a decision in bankruptcy

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(*r*) Brizick *v.* Manners, 9 Mod. 284.
(*s*) *Ex parte* Hooper, 1 Mer. 7.
(*t*) Edge *v.* Worthington, 1 Cox, 231.

made by Lord Eldon himself(*u*). And in a yet more recent case it was decided by Lord Gifford, Master of the Rolls, that an agreement to give a mortgage and the delivery of the title deeds for the purpose of having the agreement carried into effect, constituted an equitable mortgage(*x*).

The deposit will create an equitable mortgage for the debt then due, although there be not one word spoken at the time (*y*). But if the deposit is made for the purpose of gaining credit, it will not cover monies previously advanced and then due (*z*).

The deposit may be a security as well for debts actually due, as also for future advances, if made out by evidence or oath uncontradicted. Of this, a doubt seems to have been entertained by the Master of the Rolls in Norris *v.* Wilkinson: but in a subsequent case heard before Lord Chancellor Eldon (*a*), where Knight deposited title deeds with Langston and Co. as a security for their advances on the account of Joshua and Edward Knight; and Langston and Co. advanced several sums between the 14th of June, when the deeds were deposited, and the 20th of June, on which day a memorandum was signed by Knight, stating that the deeds were deposited as a security for the several advances; on the same day

(*u*) *Ex parte* Bruce, 1 Rose, 374.

(*x*) Hockley *v.* Bantock, 1 Russel, 141.

(*y*) *Ex parte* Mountfort, 14 Ves. jun. 606; *Ex parte* Langston, 17 Ves. jun. 230; *Ex parte* Kensington, 2 Ves. & Bea. 83.

(*z*) Mountfort *v.* Scott, 1 Turner & Russell, 274.

(*a*) *Ex parte* Langston, *supra*; and see *Ex parte* Mountfort, *supra*.

an act of bankruptcy was committed by Knight, on which a commission issued on the 23d. The Lord Chancellor decided that the memorandum, containing nothing inconsistent with the claim of Langston and Co., could not prejudice them, but was a ratification of the prior agreement, and that the petitioners were entitled to hold the deeds as a security for their debt (*b*).

The deposit may be made either to the creditor himself or to some third person over whom the depositor has no control. But it will not be effectual if made to the wife of the depositor, nor *à fortiori* if permitted to be retained by the debtor, even if he should deliver a memorandum to that effect into the hands of the creditor (*c*). Nor will the equitable deposit in the hands of one person be extended to an advance made by another person, unless the party holding the deeds is a mere trustee and has made no advance (*d*).

Although there be an unstamped agreement between the parties, which is inadmissible as evidence, yet other parol evidence may be adduced to establish the equitable mortgage (*e*).

(*b*) *Vide Ex parte* Hooper, *supra*, where Lord Chancellor Eldon said he was dissatisfied with the principle on which he acted in the above case, of extending the original doctrine so as to make the deposit a security for future advances, and that at all events the doctrine was not to be further enlarged.

(*c*) *Ex parte* Coming, 9 Ves. jun. 115.

(*d*) *Ex parte* Whitbread, 19 Ves. jun. 212.

(*e*) Hien v. Mill, 13 Ves. jun. 114.

An equitable mortgage by deposit of title deeds will have preference over a subsequent purchaser or mortgagee of the legal estate *with notice*. And notice will be implied from the nature of the transaction, as if the subsequent purchaser or mortgagee was informed the creditor was in possession of the title deeds, and neglected to make inquiry for what purpose he held them, which is *crassa negligentia* (*f*).

If a *bonâ fide* deposit be made, and the debtor afterwards and in immediate contemplation of bankruptcy, execute a conveyance of the legal estate to the creditor in completion of the mortgage, it is a good legal title and will be protected by the equitable title previously obtained (*g*).

When the deposit is made for a particular purpose, that purpose may be enlarged by a subsequent agreement without an actual re-delivery; as when deeds are deposited to secure advances by a banking firm, the deposit may be extended to secure advances made by the bank after a change of partners (*h*).

In order to constitute the equitable mortgage by deposit, there must, it seems, be a delivery of *all the title deeds* (*i*). In *Ex parte* Wetherell, the question

(*f*) Hiern *v.* Mill, 13 Ves. jun. 114.
(*g*) *Per* Lord Eldon in Hiern *v.* Mill, *supra*.
(*h*) *Ex parte* Kensington, 2 Ves. & Bea. 79.
(*i*) *Ex parte* Pearse, 1 Buck. 525.

was, what was the effect of the delivery of the title deeds to one moiety only of the estate, the title deeds of the other moiety being retained by the debtor, and passing into the possession of his assignees, the mortgagees having understood that the deeds delivered to them related to the entirety. The Lord Chancellor thought that under the circumstances of that case, there was sufficient *evidence in writing* (and on which he grounded his decision) that there should be a mortgage of the entirety, and consequently he did not determine, to use his own words, " Whether that would not be taken to be a sufficient deposit, which could be taken upon looking at the instruments to amount to evidence, that the estate was meant to be a security."

An equitable lien on copyholds will be created by a deposit of a copy of court roll (*k*)

It should seem that if there be a written instrument stating the terms on which a deposit is made, an inference contrary to it, founded on affidavit alone, will not be admitted. Such at least appears to be the principle on which the case of *Ex parte* Combe was decided (*l*). The case is not very accurately reported, but it should seem the facts were as follow:—Meux and Co. were creditors of Morgan, who for their security had executed a warrant of attorney to confess judgment, and had deposited the

(*k*) *Ex parte* Warner, 19 Ves. 202; 1 Rose, 286.

(*l*) *Ex parte* Combe, 17 Ves. 369; *et vide Ex parte* Kensington, *supra*.

lease of his house with them. In January, 1810, Meux and Co. entered up judgment and levied execution for 1560*l.* 6*s.* 5*d.* Morgan applied to Combe and Co. to lend him money to satisfy Meux and Co. and to supply him with beer, which they agreed to do; and Morgan on the 20th of Jan. 1810, executed to them a warrant of attorney, with a defeazance stating that Combe and Co. had that day lent him 1250*l.* and *that he had deposited* with them the lease of the house as a collateral security for the 1250*l.* and further advances not exceeding 1500*l.* On the same day Combe and Co. paid off Meux's debt, and satisfied the law charges and sheriffs' poundage, amounting in the whole to 1252*l.* and thereupon Meux and Co. delivered to them the lease. On the 14th of August following, Combe and Co. entered up judgment against Morgan, and levied execution for 1420*l.* 14*s.* But a commission of bankrupt issuing against him on that day, they withdrew their execution, and proved part of their debt for beer delivered as a debt under the commission, and presented a petition praying a sale of the leasehold premises for payment of the residue of their debt; and they contended that having paid off Meux and Co. they were entitled to stand in their place. An important fact is omitted in the report, viz. the time when the act of bankruptcy took place; but it must be presumed to have occurred previously to the 20th of January, 1810, for otherwise there seems no good reason why Combe and Co. might not have rested on the strength of the deposit made to themselves. The Lord Chancellor, however, dismissed the petition on the ground

that the petitioners were bound by the recital in the defeasance, viz. *that Morgan had deposited the deeds.*

If the creditor by his bill, or in case of his debtor's bankruptcy, by his petition and affidavit, insist that the deposit was made as a security for future advances, as well as for the debt then due, and the debtor by his answer to the bill, or by affidavit in bankruptcy, deny the fact, the Court will direct an inquiry to be made by the Master or the Commissioners, in respect of what debt the deposit was made (*m*).

If the title deeds of the house engaged in trade are deposited to secure a debt, and the premises are sold together with the *good-will* of the business, the equitable mortgagee will be entitled to the whole of the purchase money (*n*).

The Court will, on bill filed by the party holding the deeds, order a sale (*o*).

The equitable depositor will, as in the common case of mortgage security, have six months given to him to redeem (*p*).

If there is written evidence attending the deposit of the title deeds, the mortgagee will be entitled to

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(*m*) *Ex parte* Mountfort, *supra.*

(*n*) Chissum *v.* Dewes, 5 Russel, 29.

(*o*) Pain *v.* Smith, 2 Mylne & Keen, 417.

(*p*) Parker *v.* Housefield, ibid. 419.

the costs of his petition for a sale; but otherwise not (*q*); and if there is a deposit of freeholds and leaseholds with written evidence only quoad one set of deeds, an order for sale will be obtained subject to the payment of costs by the mortgagor (*r*).

On a review of the decided cases establishing this mode of mortgage security, it is perhaps to be regretted, that the old law was not adhered to, and the principle on which the statute of frauds was founded more respected. For although equity, by declaring the deposit itself to be evidence of an agreement executed, has contrived to evade the strict and literal wording of the statute, yet it is manifest that the door has been in some degree opened to fraud and perjury; nor does a creditor seem to deserve much favour who will not be at the trouble of a few lines in writing (*s*) if he is desirous to have a charge on his debtor's estate. If the debtor denies that the deposit was intended to cover future advances, as in *Ex parte* Mountfort(*t*), or if he insist that the deeds were not delivered by way of deposit, but with a different intent, resort must, in many cases, be had to parol evidence; and, as remarked by Lord Eldon (*u*), "the mischief of all these cases is, that the Court is deciding upon parol evidence with regard to an interest in land within the statute of frauds."

(*q*) *Ex parte* Brightens, 1 Swanst. 3; *Ex parte* Trew, 3 Madd. 372; *et vide* Anon. 2 Madd. 281; *Ex parte* Sykes, 1 Buck. 349.

(*r*) *Ex parte* Robinson, 1 Dea. & Ch. 119.

(*s*) *Ex parte* Whitbread, *supra*.

(*t*) *Supra*.

(*u*) *Ex parte* Mountfort, *supra*.

CHAPTER IX.

OF WELCH MORTGAGES.

WELCH mortgages, as already remarked (*a*), closely resemble the ancient *mortuum vadium* described by Glanville, *viz.* a conveyance of an estate redeemable *at any time* on payment of the principal, with an understanding that the profits in the mean time shall be received by the mortgagee without account in satisfaction of interest (*b*). And this was also formerly a common mode of mortgage in Ireland (*c*). No covenant for payment of the debt on the part of the mortgagor is inserted in the mortgage deed (*d*), and the mortgagee has no remedy to compel redemption or foreclosure in equity (*e*)*. If the amount of rents and profits be excessive, the Court will on bill filed by the mortgagor decree an account, notwithstanding the agreement that the profits shall be retained in lieu of interest (*f*); and probably in the present day the Court would in every instance decree an account against the mortgagee of the rents and profits, whether the value was excessive or not.

(*a*) *Supra*, page 9.

(*b*) *Vide* Talbot *v.* Braddyl, 1 Vern. 395.

(*c*) Hartpool *v.* Walsh, 5 B. P. C. 275.

(*d*) Lawley *v.* Hooper, 3 Atk. 280; King *v.* King, 3 P. Wms. 361.

(*e*) Howell *v.* Price, Prec. Ch. 423.

* *Quære.*—Whether the mortgagee might not maintain an action of debt on the loan, for every mortgage implies a debt. See King *v.* King, *supra*; *sed vide contra*, Howell *v.* Price, *supra*.

(*f*) Fulthorpe *v.* Forster, 1 Vern. 477.

In some instances the estate is conveyed to the mortgagee and his heirs, until out of the rents and profits he shall have received principal and interest, which is *in the nature of a Welch mortgage*, and was compared by Lord Hardwicke (*g*) to a tenancy by *elegit*, so that as soon as the principal and interest were satisfied the estate ceased, and the mortgagor might maintain ejectment, unless the mortgagee had remained in possession twenty years after the debt was satisfied, at which time the statute of limitations would have begun to run; and which circumstance would also bar the mortgagor of any equity of redemption (*h*). And his lordship said the mortgagor had the same right as the conusor under the *elegit* had, to come into a Court of Equity for an account of the rents and profits; nor would the Court relieve the mortgagee from his own contract and agreement of being subject to a perpetual account (*i*). In a similar case, time was held no bar to redemption, although by the mortgagor's own shewing upwards of sixty years had elapsed (*k*) since the mortgagee took possession.

In Hartpool *v.* Walsh (*l*), a bill to redeem a mortgage in the nature of a Welch mortgage was dismissed in the Irish Chancery, and on appeal to the English House of Lords the judgment was affirmed; but in that particular case a second mortgage had

(*g*) Yates *v.* Hambly, 2 Atk. 362.
(*h*) *Et Vide* 3 & 4 Will. IV. c. 27, s. 28.
(*i*) Yeates *v.* Hambly, *supra*.
(*k*) Orde *v.* Heming, 1 Vern. 418.
(*l*) Hartpool *v.* Walsh, *supra*.

been made to the same party, by which the mortgagor had agreed to repay the whole debt at any time *after eighteen months' notice;* and it was admitted the notice had long since been given, which reduced it to the case of a common mortgage.

In a case (*m*) heard before Lord Eldon, the doctrine of a mortgage in the nature of a Welch mortgage was fully recognized by the Court. The question came on incidentally on a motion, that one of the defendants, who was the executor of the executor of the attorney of the original mortgagee, should leave with his clerk in Court certain drafts or copies of deeds, letters, and papers, which he had by his answer admitted to be in his possession. The circumstances of the case, it appeared, were these:—Edward Charlton (under whom the plaintiffs claimed) being indebted by judgment to one Rooke in several sums of money, did, by agreement dated the 18th of April, 1747, agree to deliver up possession of the lands to the attorney of Rooke to hold to Rooke as his freehold, until he should have levied and received the amount of his debt. In 1752 Rooke assigned all the premises and the remainder of his debt to Reed (under whom the defendant Reed claimed, and who was also a judgment creditor of Charlton) and appointed Reed his attorney. Reed entered, and was possessed until his death in 1754, when Christopher Reed (who was residuary devisee, executor and residuary legatee of Reed) entered and was possessed until his death in 1778, on which the trustees and exe-

(*m*) Fenwick *v.* Reed, 1 Mer. 114.

cutors of his will entered and were possessed until 1783, when the defendant Reed entered and had been ever since in possession. Charlton died in 1767 intestate, leaving William Charlton his heir at law, who died in 1797, having devised his real estates to the plaintiff Fenwick in trust to sell. In the year 1800, Fenwick filed his bill for an account and to be let into possession, and alleged at the time Reed first took possession it was agreed between him and Charlton that Reed should retain possession, until not only the debt due to Rooke, but also the debt due to Reed, should be paid; that the whole of those debts had been fully paid; that the defendant Reed had kept accounts as mortgagee; that with respect to the objections which might arise from length of time, Charlton could not have had possession until all the debts were paid; that in 1781 a considerable part of the debts remained undischarged; and that since 1783, when the defendant Reed took possession, he had given out, that part of the debts remained unsatisfied. Reed in his answer denied the circumstances from which it was attempted to be inferred that he had treated the transaction as a mortgage, and insisted that from the length of time a release of the freehold ought to be presumed. He denied his belief of any agreement between his aucestor and Charlton, and alleged that he entered merely as creditor, having a right to redeem against Rooke. He admitted the assignment of 1752 to be in his possession, but said he had no knowledge of the agreement of 1747, except from the recitals in the assignment. The bill was amended in 1801 and 1803, and answers put in, to which no exceptions were taken. In 1807 the plaintiffs moved to file

exceptions *nunc pro tunc*, which was refused with costs. In the same year the bill was again amended, and an answer put in in 1808; from which time no further proceedings appeared until the present motion in 1816. The Lord Chancellor observed, the transaction appeared to be in the nature of a Welch mortgage, and that time would be no bar to redemption, unless it were proved that the party had held over for the space of twenty years after the debt was fully paid and satisfied; that if the assignment to Reed was only until Rooke's debt was paid, it was impossible to say the bar might not be set up in the present case, and in a future stage of the cause it might be just to determine accordingly. But on this point the answer left it doubtful, not only whether Reed took possession under an agreement to pay himself his own debt in addition to Rooke's, but if it did so, whether the amount of both the debts had even yet been satisfied by the perception of rents and profits. The Lord Chancellor then remarked, that if the present was not a case in which length of time alone would operate as a bar to redemption, the question still remained whether there were circumstances to raise the presumption of a release. The weight of long continuance of possession as a ground for such presumption, he observed, must depend most materially on the nature of that possession. And here again, there was no certainty in the case as it then stood, whether the possession by Reed, after Rooke's debt was paid, was originally adverse; or whether, at first holding by virtue of a distinct agreement with the Charltons, his possession became adverse at some period subsequent to his entering under that agreement. In the latter case, he added,

it would be much more difficult to raise the presumption contended for: these were undoubtedly points fit for future inquiry.

At the Autumn assizes for 1821 an ejectment was brought, by the direction of the Vice Chancellor, on the demise of Fenwick *v.* Reed. The question submitted to the jury was, whether a conveyance from Edward or William Charlton could be presumed? The defendant was prohibited from setting up as a defence, that the debts due or assigned to Reed were paid twenty years ago, or that the same were still unpaid. On the trial, the jury, under the direction of the judge, found a verdict for the plaintiff. On the 9th November, 1821, Serjeant Hullock moved the Court of King's Bench for a new trial, on the ground of misdirection, which was refused (*n*).

Although by the 28th section of 3 & 4 Will. IV. cap. 27, as subsequently noticed (*o*), the right of redemption by a mortgagor is lost at the end of twenty years next after the mortgagee takes possession, unless there has been some intermediate acknowledgment of right, yet it is conceived that this enactment cannot apply to the case of Welch mortgages (in which the original stipulation is, that the mortgagee shall hold and receive the rents until his debt is satisfied) unless twenty years shall have elapsed from the period when, by the receipt of the rents, the mortgage debt and interest might have been paid.

(*n*) 5 Barn. & Ald. 233. (*o*) *Vide infra.*

CHAPTER X.

OF MORTGAGES BY TENANTS IN TAIL, AND BY DEFECTIVE CONVEYANCE.

INSTANCES have occurred in which from the circumstance of the title-deeds being in the custody of a tenant for life in possession, who has refused to permit them to be inspected, or from other circumstances, a mortgage security has been taken from a person as tenant in fee, who, on further inquiry, or on subsequent inspection of the title-deeds, after the estate has fallen into possession, has proved to be tenant in tail only. In this case, if the mortgage be by demise, the mortgagee obtains a term of years determinable by entry of the issue, and if in fee, he obtains a base fee, determinable in like manner (*a*). It was indeed formerly held (*b*) that the estate of the grantee was void on the death of the tenant in tail and not voidable only, but this was overruled by Lord Holt, in Machell *v.* Clarke (*c*).

If, prior to the 3 & 4 Will. IV. cap. 74, the tenant in tail, subsequently to the mortgage and even without reference to it, levied a fine or suffered a common recovery, he would have let in the mortgage, although he declared the use of the fine or recovery to a subsequent mortgagee or purchaser without notice (*d*). If the first mortgage was in fee,

(*a*) Machell *v.* Clarke, 2 Ld. Raym. 778.

(*b*) Tooke *v.* Glasscock, 1 Saund. 260. (*c*) *Supra.*

(*d*) Poph. 5, 6; Stapilton *v.* Stapilton, 1 Atk. 8; Tourle *v.* Rand 2 B. C. C. 653; Doe *v.* Whichelo, 8 Term Rep. 214.

a subsequent legal common recovery would not have been valid without the concurrence of the mortgagee or his heirs, for the want of a good tenant of the freehold (*e*). But, on the principle of there being no degrees of estates in equity, it was decided that if *equitable* tenant in tail made a mortgage, he might suffer a recovery without the concurrence of the mortgagee (*f*).

By the recent statute of the 3 & 4 Will. IV. cap. 74, fines and common recoveries, since the 31st of December, 1833, are abolished, and entails in freehold estates have become barrable by deed of disposition inrolled in Chancery, and entails in legal copyhold estates are barrable by surrender, and in equitable copyhold estates by surrender or by deed inrolled in the Manor Court. By this statute a new legal term has been created by the substitution of a *protector*, whose consent is required in the place of the concurrence of the freeholder for life in the old assurance by common recovery, but with very considerable modifications of the law, for the purpose of more readily ascertaining the proper person to give such consent, and extending the office of protector, as well to persons having an estate of freehold, as to persons having a prior estate for years, determinable on a life or lives, and to persons who have parted with their estate, and to persons having no estate whatever, but specially appointed for the purpose.

(*e*) *Vide* Watkins on Conveyancing, 7th edition.

(*f*) Nouaille *v.* Greenwood, 1 Turner & Russell, 26.

It is intended by the statute to exclude from the office of protector all persons being bare trustees, (unless taking under a settlement executed prior to the 31st of December, 1833,) and women taking in respect of dower, and all persons intitled in respect of any estate taken by them as heirs, executors, administrators or assigns, and to vest it in the person taking the first beneficial estate for a term determinable on a life or lives, or any greater estate prior to the estate tail under the same settlement or will, whether by force of the actual limitations or by resulting use or trust; and to continue the office in such person, notwithstanding alienation, but not in his representatives, and also to vest it in any person specially appointed for the purpose. The statute contains a provision in respect of settlements prior to the first of January, 1834, in which cases the concurrence of the same person as protector is required, as would have been a necessary party prior to the statute, in making the tenant to the præcipe; and in such cases the concurrence of the *mortgagee* will be still necessary if the estate tail intended to be barred is legal.

The 21st section of the statute provides that the disposition by tenant in tail, by way of mortgage, or for any other limited purpose, shall, to the extent of the estate created, be an absolute bar in equity as well as at law, to all persons as against whom such disposition is by the act authorized to be made, notwithstanding any intention to the contrary *expressed or implied* in the deed by which the disposition may be effected, provided, that if the estate created by such disposition shall be only an estate

pur autre vie, or for years absolute or determinable, or if an interest, charge, lien or incumbrance shall be created, without a term of years absolute or determinable, or any greater estate, for securing or raising the same, such disposition shall, in equity, be a bar only so far as may be necessary to give full effect to the mortgage, or to such interest, lien, charge or incumbrance, notwithstanding any intention to the contrary *expressed or implied* in the deed by which the disposition may be effected.

The practical effect of this clause appears to be, that in case tenant in tail creates a charge on the estate by way of demise for a term of years, or *pur autre vie,* or by way of mere charge without any actual estate, the issue in tail and remainder-men will be entitled, subject to the charge or incumbrance so created, notwithstanding any intention declared in the deed to the contrary, as, for example, the insertion of a proviso, making the estate redeemable by the mortgagor or *his heirs.* But if tenant in tail creates any interest by way of mortgage, exceeding his own life estate, and which in all probability will be in fee, the issue in tail and remainder-men will be bound by it both at law and in equity, although the estate be made redeemable by the mortgagor or *the heirs of his body,* or other the persons who would have been entitled under the old limitations, in case the same had not been barred; so that it would seem to be the intention of the framers of the act in such latter case to require *a new set of limitations by way of resettlement,* unless the sole intent of the instrument be to let in the mortgage.

The clause is rather obscurely worded, and its provisions appear somewhat arbitrary.

If the mortgage is in fee, and it is intended to re-settle the estate to the old uses, the limitations must *not* be introduced into the proviso for redemption, and it may be *prudent* to make the new settlement by a distinct deed, although it is presumed the statute does not prevent a re-settlement by the deed of mortgage, if the object is effected by a distinct set of limitations.

If the mortgage be for a term of years, it is presumed the statute does not prohibit the introduction of further limitations of express uses.

In respect of estates voidable through the defective assurance of tenant in tail, the 38th section of the act has mainly followed the common law, by enacting that a voidable estate created in favour of a purchaser (or mortgagee) for a valuable consideration, shall (so far as a subsequent assurance by the tenant in tail can operate under the provisions of the act) be confirmed by such assurance. But the statute has altered the common law, by introducing an exception in favour of a purchaser not having express notice of the first assurance, and consequently such purchaser, although he may have notice by *implication* of the defective assurance, yet, if he has not express notice, will not be bound by it.

The mortgagee may by bill in equity *compel* the

mortgagor tenant in tail, to perfect the title, but the Court will not point out *what title* the mortgagor shall make; it will decree him to make such title to the mortgagee as he is capable of doing (*g*).

It must be always borne in mind that the issue in tail claiming *per formam doni* will not be bound by their ancestor's contract (*h*).

Prior to the 3 & 4 Will. IV. cap. 74, a question was entertained in the case of a tenant in tail *becoming a bankrupt* after creating the mortgage and before perfecting the assurance. By the statute 21 James I. c. 19, s. 12, the commissioners of bankrupts were authorized "by deed enrolled to grant, bargain, sell and convey all manors, &c. whereof any bankrupt was or should be seised of any estate tail, in possession, reversion or remainder to any person or persons *for the benefit of the creditors of such bankrupt*, and it was declared that such grants and sales should be good in law against such bankrupts, the issues of their bodies, and against every person claiming any estate, right, title, or interest under such bankrupts, after such time as such persons should become bankrupt, and against every person whatsoever, whom such bankrupts by common recovery or otherwise might cut off, or bar from any remainder, reversion, rent, profit, title or possibility, in, to or out of any of the said manors, &c."

(*g*) Sutton *v.* Stone, 2 Atk. 101.
(*h*) Stapilton *v.* Stapilton, *supra*.

It was questioned whether the bargain and sale of the commissioners would have the like effect, as the fine or common recovery of the tenant in tail, if levied or suffered before he became bankrupt, would have had, in letting in the mortgage incumbrance. A variety of cases have decided, that generally speaking, the assignees of a bankrupt stand in the place of the bankrupt himself (*i*), and it would seem to follow, that as the mortgagor, notwithstanding the defect of the assurance, could not have made entry on the premises to defeat the mortgage, the assignees claiming under him must have been equally estopped both at law and in equity from disputing the assurance; and that as the bargain and sale would operate as a common recovery, if the mortgagor was tenant in tail in possession, and as a fine, if he was tenant in tail in remainder, and therefore would, in the first instance, bar the issue and the remainders over, and in the second instance, bar the issue, the mortgage title must, to the extent of the bargain and sale in barring the issue and remainders, have been ratified and confirmed.

The contrary was however decided in a case heard at law before Lord C. J. Lee, and Justices Wright, Foster and Denison (*k*): the question arose on an action of ejectment brought by the assignees of

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(*i*) Mitford *v.* Mitford, 9 Ves. jun. 100, *et vide* 2 Vern. 429, cases in note; Co. Bank. L., 325; 2 Salk. 449, note.

(*k*) Beck *v.* Welsh, 1 Wils. 276.

bankrupt tenant in tail, who was then dead, but who, prior to his bankruptcy, had mortgaged the lands to the defendant for 500 years. The Court, after admitting that if the tenant in tail had suffered a recovery, he would have let in the mortgage, held, "that the statute of 21 James I. c. 19, s. 12, was made for the benefit of creditors who had no specific lien upon the lands of a bankrupt, and not for any particular creditors, who relied upon the title they accepted; that tenant in tail without suffering a recovery could only affect the estate *for his own life*, and he being now dead *the mortgagee's title was at an end;* and the statute never intended to put the prior incumbrancers on an estate tail in better case than they would have been if the statute had never been made. It would be very strange to say that this statute, which was most plainly made for the general benefit of all the creditors, should have an effect quite contradictory thereto, viz. to make good a defective title to a particular creditor. It was impossible the legislature could ever intend any such thing; so without saying any more, though this were a new case, yet the Court were all clear of opinion that judgment must be for the plaintiff."

It may be remarked, that in this case the Court seem to have proceeded on the law laid down in Tooke *v.* Glasscock, rather than in that of Machell *v.* Clarke, and to have considered the term of 500 years to have *ipso facto* ceased on the death of the tenant in tail, rather than as voidable by entry. It is indeed impossible to reconcile the judgment in

Beck *v.* Welsh, in favour of the plaintiffs in ejectment, with the law in Machell *v.* Clarke; for if the mortgage term was voidable only and not void, on what principle could *the assignees* make entry in derogation of the act of the person in whose place they stood? Is it not probable, that had the Court in Beck *v.* Welsh, put that construction on the act of tenant in tail, which, since the case of Machell *v.* Clarke, has generally been considered to be the right construction, viz. that his assurance was not avoided by his death, but voidable only, the decision would have been in favour of the defendant?

The 3 & 4 Will. IV., cap. 74, s. 62, would seem to have put an end to all future doubts on this subject, by enacting that a voidable estate created by tenant in tail in favour of a purchaser for a valuable consideration, shall be confirmed by the *disposition of the commissioners,* (so far as the assurance can operate under the provisions of the act,) unless such disposition shall be made to a purchaser for a valuable consideration without express notice. And by the act the commissioners are directed to convey to purchasers the estates of bankrupt tenants in tail(*l*), and the assignees are authorized *ad interim* to receive rents and enforce covenants (*m*).

The reader need not be reminded that by the 1 & 2 Will. IV. (*n*) the bargain and sale of the commissioners in bankruptcy has been dispensed with, except

(*l*) Sections 57, 58, 59. (*m*) Section 67.
(*n*) 1 & 2 Will. IV. c. 56, s. 56.

in cases of copyholds (*o*) and the estates of tenants in tail.

It had been decided prior to the statute of the 3 & 4 Will. IV. that relief might in equity be had against the assignees of bankrupt tenant in tail in the case of a defective assurance, if there was in the mortgage-deed *a covenant for further assurance.* In a case heard before Lord Northington (*p*), it appeared that tenant in tail had executed a trust-deed for the benefit of his creditors, and therein had *covenanted* to convey to the trustees for sale his remainder in tail expectant on the decease of his mother in divers estates; and had covenanted generally for further assurance. A commission of bankrupt was afterwards issued against the tenant in tail by one of the creditors, parties to the trust-deed, and he and another were chosen assignees, to whom the usual bargain and sale was executed by the commissioners; the assignees filed their bill to set aside the trust-deed; the Court directed the parties to try their rights at law; and the trustees obtained a verdict: after this the tenant for life died, and the trustees filed their bill against the assignees to have the estate delivered to them. Both causes came on together, when Lord Northington confirmed the trust-deed, and directed the assignees to join in conveying all their estate and interest in the lands to the trustees, or as they should appoint, his lordship being of opinion that *as the estate was bound by a specific covenant for further*

(*o*) See 6 Geo. IV. c. 16, s. 68.

(*p*) Edwards v. Applebee, 2 B. C. C. 652, note.

assurance from the bankrupt, the trustees were become entitled to that interest which on the bankruptcy, and the operation of the law thereon, was then vested in the assignees; and he dismissed the bill filed by the assignees with costs.

It may be observed, that in the last-mentioned case there was only a covenant on the part of the tenant in tail to convey, and not an actual conveyance. In Tourle *v.* Rand (*q*), there was an actual conveyance by tenant in tail in remainder, expectant on his mother's death, to the mortgagee, with a covenant for further assurance. The mortgagor afterwards became bankrupt, without levying a fine or suffering a recovery. The question agitated in that case was, whether the mortgagee, not having the title deeds, should be postponed to a subsequent mortgagee, to whom they had been delivered after the estate fell into possession. The Chancellor determined he should not, for he could not have compelled the tenant for life to give up the deeds. The counsel for the assignees then contended, on the authority of Beck *v.* Welsh, that the mortgage would be good only during the life of the tenant in tail; to this Lord Chancellor Thurlow replied, "that point does not arise, yet if tenant in tail mortgage and afterwards suffer a recovery, it will make good the former title; *the covenant for further assurance* might be taken hold on as a plank."

The precise point was subsequently heard before Lord Thurlow (*r*). Tenant in tail mortgaged to the

(*q*) Tourle *v.* Rand, *supra*.

(*r*) Pie *v.* Daubuz and another, 3 Bro. C. C. 595.

plaintiff *in fee*, with covenant for further assurance; the mortgagor became bankrupt; a bill was filed by the mortgagee against the assignees, alleging that the plaintiff had discovered, since the bankruptcy, that the mortgagor was only tenant in tail, *and that the fee simple was vested by the bargain and sale in the defendants;* and he insisted that by virtue of the covenant he was entitled to call on the assignees to make further assurance of the premises to him. The assignees, in their answer, submitted to act as the Court should direct. The counsel for the mortgagee cited Taylor *v.* Wheeler and Edwards *v.* Applebee; the assignees relied on Beck *v.* Welsh. The Solicitor General in reply urged, that the equity arose from the bankrupt's having agreed that the land should be charged, which agreement would bind the land in equity, and that the plaintiff might call upon the assignees to make good the title by further assurance, just as the bankrupt ought to have done. The Lord Chancellor, after saying that the cases appeared to be directly contradictory, and that the argument of the Court in Beck *v.* Welsh did not appear to him satisfactory, and that he should have agreed with Lord Northington in a different construction of the statute, conceiving its object only to be saving the expense of a recovery, and that this effect would be to let in the incumbrance and to convey not only all that the bankrupt had conveyed but more, and therefore if the case of Beck *v.* Welsh had not been cited, he should have adopted Lord Northington's construction, ultimately decreed that the defendants should redeem the mortgage or stand foreclosed, and execute a proper conveyance of the premises to the plaintiff and his heirs. It is presumed that since

the passing of the statute, the mortgagee having a covenant for further assurance, may, if necessary, *compel* the assignees to redeem or to cause the mortgage to be perfected by the disposition of the Commissioner in bankruptcy.

If a mortgage or sale be made by a defective conveyance, such as a feoffment without livery, a bargain and sale without enrolment, or the like, equity will give the mortgagee or purchaser relief against the mortgagor, or, in case of his bankruptcy, against his assignees; for (as remarked by Lord Eldon in Mestaer *v.* Gillespie) (*s*), the very instrument being only inchoate and not complete to pass the property, is in equity *evidence of an agreement* to convey, and the conscience is bound to make further assurance, that obligation arising from the payment of the money. An instance of this is to be found in the case of Taylor *v.* Wheeler (*t*), in which a surrender of copyholds by way of mortgage having become void for want of presentment in due time, relief was decreed for the mortgagee against the assignees of the mortgagor who had become bankrupt, and who, Lord Cowper observed, "was plainly bound in equity by the defective conveyance, *et come moy semble* he became a trustee for the mortgagee."

The like relief will also, it is said (*u*), lie for a defective purchaser or mortgagee against subsequent

(*s*) 11 Ves. jun. 625.
(*t*) Taylor *v.* Wheeler, 2 Salk. 449.
(*u*) *Vidé* 5 Bac. Ab. 43, *et infra*.

judgment creditors, who, having only *a general lien* on the land, did not *originally* rely on the land for their security, and therefore have not equal equity to have the land applied for payment of their debts. The ruling case cited for this doctrine is that of Burgh *v.* Francis (*x*), which was however decided under peculiar circumstances. Henry Francis, in consideration of 400*l.* by feoffment, on the 17th of July, 1665, mortgaged to Henry Burgh in fee, *but no livery was made thereon;* and he covenanted for himself and his heirs, that he was lawfully seised in fee of the premises, and for quiet enjoyment free from incumbrances against himself and his heirs, and all persons claiming under him, with covenant for further assurance. Francis, in 1670, made his will, and thereof appointed Henry Francis, his son, executor. Afterwards Robert Burgh died, and the plaintiff, Eleanor, proved his will. The defendant, Henry Francis, confessed judgments on bonds entered into by his father, viz. several as heir and one as executor to his father. One of these judgments was obtained by Heyman, a plaintiff in an action brought in Hilary Term, 1670, for 400*l.*; and all the other judgments were entered about the same time. This cause came to be heard by Sir Heneage Finch, Lord Keeper, assisted by Judge Wyld, who declared that the Court was fully satisfied that the plaintiff ought to be relieved, and that the said judgments ought not to encumber the premises till the mortgage money was fully paid, wherein the Court did not

(*x*) Burgh *v.* Francis, 5 Bac. Ab. 41; Finch's Rep. 28; Nelson's Rep. 183.

ground its judgment upon the manner of obtaining the judgments all in a term and most of them together, nor on the special way whereby the heir charged the lands by pleading *riens per descent*, nor on the propriety of the teste of the subpœnas before the teste of the originals on which the judgments were grounded, but upon the true nature of the case: the Court declared that the debt due by the mortgage did originally charge the lands, which the bonds did not till they were reduced to judgments; and it ought not to be in the heir's power, by confessing judgments, to charge the lands in prejudice of that equity, and the rather because of the covenant for further assurance; and though the mortgage was defective in law for want of livery, yet equity, which supplied that defect, charged the lands; and though the creditors had no notice, yet they shall be bound in this case, because they are put in no worse condition than they ought to be, *viz.* to be postponed to the mortgage. Therefore, it was decreed that the defendant Henry should convey to the plaintiff, or her assigns in fee, in manner as a Master should direct, but redeemable on the payment of the said 400*l.* due on the former defective mortgage, and the premises to be held quietly against the plaintiffs, and all claiming under them since the date of the mortgage; and he who had the equity of redemption might in convenient time bring a bill to redeem; and in default thereof the plaintiffs might bring one to foreclose, and a perpetual injunction was also awarded to quiet the plaintiffs and their assigns in possession against all the defendants and the afore-

said incumbrancers, and to stay all proceedings at law.

To this case in Bacon's Abridgment (*y*) the following reason is subjoined.

"From this case, which hath been a governing case in the Courts of Equity, they have stated the difference before-mentioned, for these *bond creditors* did not originally pitch upon the land as a pledge and security for their money; and when they came afterwards and reduced their securities into judgments to affect the lands, yet since they affect it in the hands of the heir, who was subject to this equity, and obliged in conscience to supply the defect in the execution of the deed, they can only stand in his place, and therefore must be subject to the defective security. But otherwise it had been if there had been a subsequent mortgage duly executed, and without notice of the former; because the lands being then originally pledged for the money, and the mortgagee having the legal title, the defective securities that could not prevail at law should not overturn in equity a security that was equally upon valuable consideration. But *the bonds* in the former case did not originally take hold of the land at all; and when they were reduced to a judgment they only took hold of the land together with other things; and therefore equity doth not look on them as such charges on the land as are to take hold so imme-

(*y*) Vol. v. p. 42.

diately on it, that a prior defective security is not to be relieved and set up against them, especially since such incumbrancers did not take the land as an original security, but came in afterwards under the person who was obliged in conscience to supply that defect; for the difference between the two cases turns upon this, that in the case of a second valid mortgage we must in all manner of justice suppose that the mortgagee would not have lent if the land had not been offered to secure his money; and therefore when he hath the title at law it is no equity to overturn it, or to postpone him to a defective security. But in the case of *the bonds* the obligees lent their money upon the personal security, and not on the credit of lands, and therefore when they come to affect the lands they must stand in the place of the person that had made himself liable in a Court of Equity to answer and make good the defective security."*

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* It may perhaps be fairly doubted whether the case of Bugh *v.* Francis can be considered an authority for the general doctrine, that equity will in every case postpone a subsequent judgment creditor to a prior defective mortgagee. And it is submitted, there are forcible arguments to the contrary of such a doctrine; for in the first place, as observed by Mr. Fonblanque, (Vol. I. Treatise on Equity, 38,) the general rule is, that a Court of Equity will not interpose in prejudice of a defendant having a legal interest for a valuable consideration, and without notice of the plaintiff's equity. And, secondly, as the defect arises from the neglect of the mortgagee himself, he would not appear entitled to much favour in equity, to the prejudice of a more prudent creditor. The point, however, must be left to the reader's judgment.

From Lord Nottingham's notes it appears that the judgments were obtained after the service of the subpœna in equity, although before the return of it, and he decreed that the heir should execute a conveyance to the mortgagee, who should hold the redemption discharged of the judgments; "Wherein," says his lordship, "I did not rely upon the legal notice of *lis pendens*, but held the heir in this case to be a trustee of the land descended, which was charged with the equity of the mortgage, but could not be encumbered by the heir, for a purchaser without notice of a trust may be free, but an encumbrance is not like a sale (*z*)." The latter part of Lord Nottingham's remark must, it is submitted, be confined to an encumbrance by way of judgment.

Mr. Powell, in his Treatise on Mortgages (*a*) seems to have considered, that even if the second mortgagee have *notice* of the prior defective mortgage he must prevail against the first mortgagee, because, he says, the legal title was *ab initio* in the second mortgagee, and equity will not interfere to wrest it from him where both are equally upon a valuable consideration; and he considers the next mentioned case to have been decided upon this ground, for, he says, unless the subsequent purchaser for a valuable consideration, in that case, could have been charged with fraud, by reason of notice, there appears to be no pretence upon which the prior purchaser for valuable consideration like-

(*z*) 3 Swanst. 536, note.

(*a*) Page 538, 4th edit.; *et vide* 1 Eq. Ca. Ab. 320, S. P.

wise, but whose title was defective, could apply for relief, because, as between two purchasers upon the like considerations, that which has the complete title in law must prevail.

In this view of the case, however, Mr. Powell was certainly mistaken, for a mere statement of the circumstances will show that the securities of both parties were not only equally for a valuable consideration, but they had also *equal equity*, which would not have been the case had the second mortgagee taken *with notice* of the first encumbrance, and in fact it is expressly stated that he had *not* notice. The circumstances were (*b*), Richard Wiseman, son and heir apparent of Sir Richard Wiseman, intermarried with Winefred Barrington, entitled to a portion of 4000*l.*, and brought his bill against the trustees of his wife; whereupon a decree was had to pay to him the fortune of his wife, upon making a competent settlement, and upon failure thereof the fortune to be invested in lands with the approbation of the master. But upon the Master's report that no competent settlement could be made by Richard the son, it was by choice of parties invested in lands of Sir Richard the father of equal value, part of which lands happened to be eight acres of copyhold, which in the settlement were limited and declared, apart from the freehold, to be to the use of the issue of the marriage in common form, and afterwards in fee to the son, *with a covenant* from Sir Richard to surrender the copyhold. The wife died without issue, and the son, for

(*b*) Oxwick v. Plumer, 5 Bac. Ab. 43.

a valuable consideration, mortgaged both copyhold and freehold together to Oxwick and others, plaintiffs, but without any surrender. The son died, and the lands descended to Elizabeth, his sister and heir at law. The mortgagees foreclosed Elizabeth by a decree of the Court, and entered and took possession; to whom, being in possession, Elizabeth released and confirmed the estate in fee. Sir Richard, the father, being out of possession of the premises from the time of the settlement, which was made thirteen years past, surrendered the copyhold land to defendant Plumer for a valuable consideration. Plumer was admitted, and brought his ejectment; and the mortgagees brought their bills to be relieved. The Master of the Rolls, on solemn argument, dismissed their bills with costs; and held that the Court would not supply the defect of a surrender against a person that came in by title upon surrender of the same premises. The case coming on to be reheard before Lord Cowper, he was of the same opinion; and he took this difference, that when there are two persons that *have equal equity*, those that have the legal title shall prevail, because there is no equity to take from such persons the title that they have gained at law; as where A., B. and C. are three mortgagees, and C. purchases in the mortgage of A. to secure his own money *bonâ fide* lent, equity will never take from him the legal interest he hath gained (*c*). But if the contending parties in equity *have not equal equity, then those that have the greatest*

(*c*) *Sed vide infra.*

equity shall prevail against the legal title, as if a creditor takes hold of the land by a feoffment in mortgage without livery, equity will supply the defective conveyance against a subsequent judgment creditor, because the judgment creditor not relying on the land for his security, he hath not equal equity to have it applied for the payment of his debt as he that took it in mortgage(*d*). But in the principal case, where Plumer had equally lent money, and taken hold of the estate by a mortgage made with a legal surrender, so that the legal interest was in him, the covenant to surrender (though prior) could not be set up against him *who had no notice of it,* but Oxwick must pursue his remedy at law for the breach of the covenant.

And indeed a case which is afterwards animadverted upon by Mr. Powell, though on a different subject, was decided against a subsequent purchaser, on the ground of notice of the prior defective mortgage(*e*). In that case it appeared that a surrender of copyholds had been made by way of mortgage, which had become void for want of presentment. Afterwards Blincowe (one of the defendants) agreed with the mortgagor for the purchase of the copyholds, and took a surrender in the name of Moore (another of the defendants) who afterwards agreed to become the purchaser, and paid the purchase-money without notice of the mortgage,

(*d*) *Vide supra,* page 254, note.

(*e*) Jennings *v.* Moore and others, 2 Vern. 609.

and was admitted. On a bill filed by the executor of the mortgagee, Moore pleaded he was a purchaser for a valuable consideration without notice; but it was proved that Blincowe had notice of the mortgage, and it was adjudged that although Moore had not notice of the mortgage, nor employed Blincowe originally as his agent, yet his subsequent approval of the contract made Blincowe his agent *ab origine* so as to affect him with notice, and he was decreed to pay the 400*l.* and interest, or to surrender to the plaintiff. In this case, the principle contended for is clearly recognized, although the propriety of its application may be doubted.

The result of the cases seems to be, that if tenant in tail, prior to the 3 & 4 Will. IV. cap. 74, made a mortgage security without fine or recovery, and afterwards levied a fine or suffered a common recovery, he let in the assurance.

That since the passing of the statute the subsequent disposition by tenant in tail or by commissioners in bankruptcy will (so far as the instrument can take effect under the provisions of the statute) operate to confirm a prior defective assurance, unless such second assurance be made to a purchaser for a valuable consideration not having express notice.

That if tenant in tail shall have made a defective mortgage, he may be compelled by bill in equity to perfect the assurance.

That if, prior to the 3 & 4 Will. IV. cap. 74, tenant in tail became bankrupt before perfecting the mortgage security, and there was a covenant for further assurance in the mortgage deed, equity would hold the assignees bound to make good the defective security, and decree them to redeem or be foreclosed, and to convey to the mortgagee; and it is presumed, that since the statute the mortgagee has a similar equity.

That in the instance of a defective assurance made by tenant in fee or other person having an absolute interest, the assignees will be bound to make good the security with or without a covenant for further assurance, on the general equity between the parties.

It is said that creditors, having a subsequent valid security, but amounting only to a general lien on the estate (such as a judgment) will be bound by the prior defective conveyance, as their security did not *originally* affect the lands; as will also a subsequent mortgagee, who has obtained an actual valid assurance, but *with notice* of the prior defective mortgage.

It was doubtful, prior to the 3 & 4 Will. IV. cap. 74, whether equity would (as against the assignees) relieve a mortgagee who had taken a defective assurance from a tenant in tail without a covenant for further assurance; but, as before observed, the disposition by the commissioners will, in all cases, perfect the assurance since the statute, except as against a purchaser not having express notice.

Lastly, a subsequent mortgagee *without notice* hav-

ing a perfect title, will have preference both at law and in equity to the defective assurance, whether taken from a tenant in fee or tenant in tail, or any other person.

It is hardly necessary to repeat, that a defective assurance made by tenant in tail will not bind his issue inheritable under the entail at law or in equity, whether there be a covenant for further assurance or not (*f*).

(*f*) Stapilton v. Stapilton, 1 Atk. 9; Fox v. Crane, 2 Vern. 306; Saville's case cited in Attorney-General v. Day, 1 Ves. 224, and in Hinton v. Hinton, 2 Ves. 632; Hayward v. Stillingfleet, 1 Atk. 423.

CHAPTER XI.

OF MORTGAGE OF TOLLS.

THERE are some peculiarities requiring attention in the Law of Mortgage of Turnpike Tolls.

By the general turnpike act it is provided, that it shall be lawful for the trustees or commissioners of any turnpike road to borrow and take up at interest, on the credit of the tolls arising on such road, such sum or sums of money as they shall from time to time respectively think proper, and to demise and mortgage the tolls on such road, or *any part* or parts thereof, and *the turnpikes and toll-houses* for collecting the same, (the costs and charges of which mortgages shall be paid out of the tolls,) as a security to any person or persons, or their trustees, who shall advance such sum or sums of money, which mortgages shall be in the words or to the effect following, (that is to say)

" By virtue of an act passed in the year of the " reign of , intituled (here set forth the title of " the act); We, whose hands and seals are hereunto " subscribed and set, being of the trustees " (or commissioners) for putting into execution an act " passed in the year of the reign of , in-

(a) 3 Geo. IV. c. 126, sec. 81.

" tituled (here set forth the title of the act under " which the trustees or commissioners borrowing the " money and granting the mortgage shall act), in con- " sideration of the sum of sterling, advanced " and paid by A. B., of , to the treasurer of " the said trustees (or commissioners), do hereby " grant and assign unto the said A. B., and his exe- " cutors, administrators and assigns, *such proportion* " of the tolls arising and to arise on the said turn- " pike road, *and the toll gates and toll houses* erected " or to be erected for collecting the same, *as the said* " *sum of doth or shall bear to the whole sum* " *now or hereafter to become due and owing on the* " *security thereof.* To have, hold, receive, and take " the said proportion of the said tolls, toll-gates, toll- " houses and premises, with the appurtenances, unto " the said A. B., and his executors, administrators, " and assigns, for and during the residue of the term " for which the said tolls are granted by the said " last-mentioned act, unless the said sum of , " with interest, after the rate of £ per cent. per " annum shall be sooner repaid and satisfied. Given " under our hands this day of ."

And copies of all such mortgages are to be entered in a book to be kept for that purpose by the clerk or treasurer to the said trustees or commissioners, for which entry such clerk is to be paid the sum of 5*s.*, and no more, out of the tolls payable on such roads, and which said book may, at all seasonable times, be perused and inspected without fee or reward; and it shall be lawful for all persons respectively, to whom any mortgage shall be made as aforesaid, or

who shall be from time to time entitled to the money thereby secured, to assign or transfer his, her, or their right, title and interest in and to such mortgage, and the principal money and interest thereby secured, to any other person or persons whomsoever, which assignment or transfer may be made in the following words, or words to the like effect, to be indorsed on such mortgage security, or to be underwritten or thereunto annexed, and signed in the presence of and attested by one or more credible witness or witnesses, (that is to say):

"I, A. B., (or, I, C. D., assignee, executor, or administrator of A. B., as the case may happen,) do "hereby assign and transfer this mortgage security, "with all my right and title to the principal money "thereby secured, and all interest due and hereafter "to grow due upon the same, unto E. F., his or her "executors, administrators and assigns. Dated this day of 18 .

Witness, G. H. (Signed) A. B. or C. D."

Which transfer shall be produced and notified to the clerk or treasurer of the said trustees or commissioners, within two calendar months next after the day of the date thereof, who shall enter the same in the said book, for which entry the said clerk or treasurer is to be paid the sum of five shillings, and no more, and such transfer shall then entitle such assignee, his executors, administrators and assigns, to the full benefit of such mortgage security, and every such assignee may, in like manner, assign or transfer the same, and so *toties quoties*; and it shall

not be in the power of any person or persons (except the person or persons to whom the same shall be transferred, his, her, or their respective executors or administrators) to release, discharge or make void the original mortgage security, or the monies due thereon, or any part thereof; and all persons to whom any such mortgage or transfer shall be made as aforesaid, shall, *in proportion* to the sum or sums of money thereby secured, be creditors on the tolls by such act granted, and on the said toll-gates and toll-houses, in equal degree one with another, or in such order as shall be agreed upon and stipulated by the said trustees or commissioners at the time of the advance of their respective shares.

And, that if any person (*b*) shall agree to advance any sum to be employed in the making or repairing of any turnpike road, or highway intended to be made turnpike, and shall subscribe his name to any writing for that purpose, every such person shall be liable to pay every such sum so subscribed, according to the purport of such writing, and in default of payment thereof, within twenty-one days after the same shall become payable according to the purport of such writing, and shall be demanded by the person to whom the same is made payable by such writing, or if no person be named therein for that purpose, by the treasurer of such turnpike or intended turnpike road, it shall be lawful for every such treasurer or other person to sue for and recover the same in any of his majesty's courts of record,

(*b*) Sec. 82.

by action of debt or on the case, or by bill, suit or information, wherein no essoign, protection or wager of law, nor more than one imparlance, shall be allowed.

And that every mortgagee (*c*) that hath taken or been in possession, or shall take or be in possession of any toll-gate or bar set up or erected on any turnpike road, or of any lands or tenements, the rents whereof are appropriated to the repairs of any part of the turnpike road, shall, within twenty-one days after he shall have received notice in writing from the trustees or commissioners of such turnpike road, render an exact account in writing to such trustees or commissioners, or to such person as they shall appoint, of all monies received by such mortgagee, or by any other person or persons for his use and benefit, or by his authority, at such toll-gate or bar, or otherwise, and what he hath expended in keeping or repairing the same; and in case he shall neglect to render such account when required as aforesaid, he shall forfeit and pay to the said trustees or commissioners, for every refusal, neglect or omission, the sum of 50*l.*, to be applied to the use of the road on which such toll-gate or bar shall be erected.

And that (*d*) if any such mortgagee shall keep possession of any toll-gate or bar, by himself, or by any other person or persons on his behalf, and receive the tolls or duties thereat, or of any such rents and

(*c*) Sec. 47. (*d*) Sec. 48.

profits as aforesaid, after such mortgagee shall have received the full sum or sums of money due on his respective mortgage, and the interest thereof with costs, such mortgagee shall forfeit and pay, as a penalty, to the trustees or commissioners, double the sum or sums of money he shall have received over and above the sum of money due as aforesaid, with treble costs of suit, to be recovered by the treasurer or clerk to such trustees or commissioners, by action of debt, bill, plaint or information, in any of his Majesty's Courts of Record, which, when recovered, shall be applied to the use of the respective road on which such toll-gate or bar shall be placed, or such rents appropriated.

And that (*e*) if any mortgagee of any tolls, toll-gate, bars, chains, toll-houses and buildings on any turnpike road, shall seek to obtain the possession of the said toll-gates, bars, chains, toll-houses and buildings, in order to pay himself the principal money and interest, or any part thereof, due to him, it shall be competent for him, as lessor of the plaintiff, and upon his demise only, and without uniting in such demise the other mortgagees of the said tolls and premises, to obtain such possession; but such person who shall obtain the possession thereof shall not apply the tolls which may consequently be received by him, to his own exclusive use and benefit, but to and for the use and benefit of *all the mortgagees* of the same premises, *pari passu*, and *in proportion to the several sums which may be due to them as such mortgagees.*

(*e*) Sec. 49.

The effect of this statute appears to be, to vest in the mortgagees *pro tempore* of the tolls of any turnpike, without distinction as to the order of the dates of their respective securities, the entire legal estate in the tolls, toll-houses and gates, subject to open and let in any other mortgagees to equal rights, and to enable any one of the mortgagees, without the concurrence of the rest, to obtain possession of the toll-houses and receive the tolls, and thereout to retain his own just proportion, and to pay the remainder among his co-mortgagees, according to their respective proportions, but without any preference or priority.

In a case which occurred prior to the passing of this general act (*f*), it was decided, that under an authority contained in a local act to mortgage the tolls *without any mention of the toll-houses or gates*, the latter could not be mortgaged, although it was evident the possession of them was necessary to the receipt of the tolls, and it was also decided, that as the trustees were acting officially, and for the public benefit, they were not estopped (although parties to the deed) from insisting that they had no power to make such a demise. It may be remarked, that in this case the mortgage was made of the entirety of the tolls, and not of a proportion of them, although the act declared there should be no priority between the mortgagees. Mr. Justice Ashhurst, in giving judgment, observed, that the act expressly gave the trustees power to mortgage the tolls, but the reason why

(*f*) Fairtitle v. Gilbert and others, 2 Term Rep. 169.

it did not give them a further power was, because no creditor was to have preference. Now, if any creditor had a power to enter and take possession of the toll-gates he would gain a priority, which the act had denied." On this Lord Eldon, when Chief Justice of the Common Pleas, took occasion, in the case of Doe on demise of Banks *v.* Booth (*g*), to remark, that the reason why the creditor, in the case of Fairtitle *v.* Gilbert, would have gained a preference was, that the mortgage was of the whole of the tolls and not of a proportion of them, for he denied he would have had priority, if the mortgage had been of a proportion of the tolls, although the act had authorized a demise of the toll-houses, inasmuch as the mortgagee in possession might have been a bailiff or trustee for the others of their respective shares; and therefore in the principal case he decided that a mortgagee of a *proportion* of the tolls might maintain ejectment for the *toll-houses*, the local act then under consideration having authorized a demise of them. In this case it was contended, that the legislature could not have intended that any one of the mortgagees should take possession of the toll-houses and gates and receive all the tolls, but that the trustees were to act for all the parties, and, like other public officers, might be punished for any misapplication of the money entrusted to them, as the mortgagees might recover their proportion of the money, when collected, in an action for money had and received. To this mode of reasoning Lord Eldon

(*g*) 2 Bos. & Pull. 223.

replied, that there was a great difference between a demise of tolls and of toll-houses—the former only gave a personal interest in respect of which an action for money had and received might be maintained; the latter gave an interest in land which was within the statute of mortmain, and that the money advanced by the mortgagee would be very ill secured if his only remedy was either an application to the vindictive power of the King's Bench or a suit in Chancery, in which all the other thirty-five mortgagees must be made parties; and with respect to the action for money had and received, it would be a sufficient defence for the trustees to show, that they had distributed all the money received according to the provisions of the act.

It will be seen that the view taken by Lord Eldon has been adopted by the legislature in the general act, and that the 49th section of that act is a legislative expression of that decision.

In a case decided (*h*) since the passing of the general act, the doctrine laid down in Doe *v.* Booth, was carried out to an extent which was considered doubtful by one of the judges who heard the cause. It appeared that by a local act, certain tolls were granted, subject to the payment of tolls borrowed on the credit of former tolls, and to be borrowed on the tolls granted by that act, without preference, among the creditors, in respect of priority of mortgage.

(*h*) Doe *v.* Lediard, 4 Barn. & Adol. 137.

Under this act, mortgages to the amount of 17,000*l.* were granted, secured on grants of proportion of the tolls, and by a demise of the toll-houses, in the form prescribed by the general act.

After this an act was passed for making a branch road to communicate with the former, and by which it was declared that the former act should be as valid and effectual for carrying this act into execution as if re-enacted therein, and tolls were granted on the branch road to be applied like the former tolls, and to be liable to all the debts on those tolls; and it was provided, that all monies then due on the credit of the said tolls, and also all such monies as might thereafter be borrowed for making the several branches of road to be made by virtue of the former act, with interest, "*should have and be entitled to a preference and priority of charge and payment*," to and before any sums of money to be advanced by any person on the credit of the tolls to be granted by either of the acts for making the new branch road thereby authorized to be made. The trustees under the two acts borrowed 2700*l.* on security of a proportion of the tolls under the acts, and of the toll-houses, following the form of the general act.

A question then arose on the meaning of the words in the latter act, "priority of charge," and on an ejectment brought by a mortgagee under the latter act, for recovery of possession of the toll-houses, it was contended that the entire legal estate was in the *first set* of mortgagees, and that the second had only an equity of redemption, and consequently could not

recover at law. But a majority of the Court of King's Bench, including the Lord Chief Justice, decided that the word *charge* related only to the application of the toll money, and not to the legal estate, which became vested in all the mortgagees, and consequently that one of the second set might, under the 49th section of the general act, recover possession of the toll-houses and gates, and receive the tolls, subject to an account with the other mortgagees for such portion of the tolls as they were entitled to in respect of their advances.

CHAPTER XII.

OF MORTGAGES OF ADVOWSONS, CHURCH LIVINGS, RECTORIES IMPROPRIATE, AND TITHES.

An advowson is by no means an eligible subject for mortgage, for it produces no profit. It has been already mentioned (*a*) that on the living becoming vacant, the mortgagor has a right to nominate, and may compel the mortgagee to present his nominee although there be an express agreement between them to the contrary (*b*), and this doctrine applies whether the advowson be appendant or in gross (*c*).

As the mortgagee cannot present on an avoidance, it has been recommended that he should file his bill in equity for a sale (*d*). But even under the direction of a Court of Equity, a sale of an advowson cannot be made while vacant, so as to carry the next turn to present, contrary to the decided cases in matters of simony.

If the mortgagee presents, and his clerk is inducted, the mortgagor may file his bill to compel resignation, but the bill must be filed within six

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(*a*) *Supra*, and the cases there cited.
(*b*) Mackenzie *v.* Robinson, 3 Atk. 558.
(*c*) Ibid. *supra*. (*d*) Ibid. *supra*.

months from the death of the last incumbent, or it will be dismissed (*e*). A mortgage of an advowson should always include a power of sale and be made in fee.

The 13th of Eliz. cap. 20, enacted, that no lease of any benefice with cure, should endure longer than while the lessor should be resident and serving the cure of such benefice, without absence above eighty days in any one year, &c. "and that all chargings of such benefice with cure thereafter, with any pension or with any profit out of the same, to be yielded and taken thereafter to be made, other than rents to be received upon leases thereafter to be made, according to the meaning of that Act, should be *utterly void*." By the 3 Car. I., cap. 4, sec. 2, this Act was made perpetual.

In a case in the King's Bench (*f*), it appeared that an annuity had been granted out of a rectory, with a demise for a term of years to a trustee for securing it, and with a covenant and warrant of attorney to confess judgment as collateral securities. The judgment had been entered up, and a *fi. fa. de bonis ecclesiasticis*, and a *capias ad satisfaciendum*, obtained. On a rule to shew cause, why the grantor should not be discharged out of execution, and the deed and warrant of attorney and judgment vacated, and the *fi. fa.* set aside, it was argued for the grantee that

(*e*) Gardiner v. Griffith, 2 P. Wms. 404.

(*f*) Mouys v. Leake and another, 8 Term Rep. 411.

allowing the grant to be void within the statute, the covenant and warrant of attorney were good. On the other hand it was urged, that the grant was void by the common law, the canon law, and the statute law, and that if the grant was void, the covenant and warrant of attorney, being collateral securities for the same annuity, were void also. Lord Kenyon, in delivering the judgment of the Court, said, that he was not prepared to say, that the statute of the 13 Eliz. cap. 20, might not extend to that case, but he denied the consequence, that therefore the present rule must be made absolute; for even admitting that every thing that was done by the defendant to charge or affect the living was absolutely void, still the defendant's argument was not true in its extent: for if it were so, what was to become of all the process *de bonis ecclesiasticis?* The transaction was not *malum in se;* and a deed which was intended to operate one way, might operate another way, *ut res magis valeat quàm pereat,* if honesty required it; then why might not the deed have effect as a personal security against the grantor, containing as it did a covenant to pay the annuity? His lordship said, he would not, however, give any judicial opinion, whether or not the deed was void by the statute of Elizabeth, *which certainly contained some very strong expressions.*

It appears remarkable, that the objection taken to the annuity, in the case of Mouys *v.* Leake, viz. that the charge was *ipso facto* void under the statute, does not seem to have been urged in some preceding

cases relating to the same subject. Thus, in a case before Lord Mansfield (*g*), a creditor was in possession under a sequestration; an annuity creditor brought ejectment upon a prior demise of the rectory for securing the annuity; the judgment creditor pleaded, that the demise was avoided by eighty days' non-residence of the rector, and judgment was given accordingly; but it does not appear, that either the court or the bar considered the grant to be absolutely void *independently* of the non-residence; the like observation applies to a case in Ambler (*h*), in which a mortgagee of a rector's stipend, settled by Act of Parliament in lieu of tithes, and collected by an assessment on the inhabitants, and assigned by the rector to the mortgagee, was preferred to subsequent judgment creditors who had obtained sequestration.

By the 43 Geo. III. cap. 84, the 13 Eliz. cap. 20, and 3 Car. I. cap. 4, sec. 2, were wholly repealed.—The 57 Geo. III. cap. 99, repealed the 43 Geo. III. cap. 84, and also repealed part of the 13 Eliz. cap. 20, but did not repeal in terms the clause relating to the charging of livings, and therefore it was suggested, in the former edition of this work, that if that clause was to be considered an independent clause, and operating in the mode contended for in Mouys *v.* Leake, a question might still arise, whether by the

(*g*) Doe *v.* Mears, Cowp. 129.

(*h*) Errington *v.* Howard, Amb. 485, *et vide* Doe *v.* Barber, 2 Term Rep. 749; Brown *v.* Rose, 6 Taunt. 125; Arbuckle *v.* Cowtan, 3 Bos. & Pull. 321.

repeal of the 43 Geo. III. cap. 84, and only a partial repeal of the 13 Eliz. cap. 20, not extending to the charging clause in that act, the prohibition against the encumbering of church livings had not revived, except by way of sequestration. And that to avoid the consequences of this construction, a charge upon a benefice should always be attended by a warrant of attorney to confess judgment and sequestrate the living.

The point of law before referred to has since repeatedly come before the Courts for consideration and decision, and several important cases have occurred upon it.

It is now decided that *a charge* on a church living, if made subsequently to the 57 Geo. III. cap. 99, is void (*i*); but not so if made in the intermediate period between the passing of the 43 Geo. III. cap. 84, and the 57 Geo. III. (*k*), although a term created in the living *prior* to the 57 Geo. III., be assigned *subsequently* to that statute, to secure a sum advanced to redeem the annuity (*l*), and if in a deed of charge made in the intermediate period, there is a covenant to charge any living subsequently acquired, and an exchange is made prior to the revival of the 13 Eliz., the charge on the newly-acquired living will be valid, although the new grant is dated subsequently to the

(*i*) Shaw v. Pritchard, 10 Barn. & Cress. 241.
(*k*) Doe v. Somerville, 6 Barn. & Cress. 126.
(*l*) Doe v. Gully, 9 Barn. & Cress. 344.

57 Geo. III. (*m*). It is also decided that a charge on a church living which cannot, since the 57 Geo. III. be created per directum, cannot be created per indirectum. And therefore that a warrant of attorney reciting the annuity deed and that the warrant is executed *to the intent* that a sequestration may be obtained by the annuitant *and continued during the continuance of the annuity for better securing the same*, is void, as showing an intent indirectly to create a charge on the living (*n*). But if nothing appears on the instrument necessarily leading to the conclusion, that such was *the intent*, the warrant of attorney will be valid, although the *consequence may be*, that the profit of the living will probably be taken in execution. Thus, in a case (*o*) in which three annuities had been granted by a clergyman charged on his rectory, and secured by a demise of the rectory to a trustee, and by the covenants of the rector, and, as collateral securities, by three warrants of attorney, with defeazances in the common form to confess judgment at the suit of the plaintiff. Judgments were entered on the warrants of attorney, and sequestration obtained. An attempt was made to set aside the warrants of attorney, on the ground that they were a charge on the living; and it was urged

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(*m*) Metcalf *v.* The Archbishop of Canterbury, 6 Simons, 224.

(*n*) Flight *v.* Salter, 1 Barn. & Adol. 673; Newland *v.* Watkin, 9 Bingh. 113; Saltmarshe *v.* Hewett; and Skrine *v.* Hewett, 1 Adol. & Ell. 812.

(*o*) Gibbons *v.* Hooper, 2 Barn. & Adol. 734; *et vide* Newland *v.* Watkins, *supra*; Faircloth *v.* Gurney, 9 Bingh. 622.

that the case fell within *Flight* v. *Salter*, and that several instruments executed at the same time must be treated as one, and therefore whatever affected the validity of one, affected the validity of all. But it was observed by Lord Tenterden that one security might be good, and another bad. And Mr. Justice Parke asked, " supposing a bond had been given for payment of the annuity, would it have been a good plea to an action on such bond, that it was given to secure an annuity by means of a sequestration ?" And the same judge afterwards remarked, that the deeds contained covenants for payment of the annuity, independent of the charge on the benefice. The Court then decided that the warrants of attorney were valid. On the same principle was decided a subsequent case (*p*), in which it appeared that a deed contained a grant of an annuity charged on a benefice, and secured by a demise to a trustee, with power to receive the tithes, &c., and the deed declared that a bond and warrant of attorney *already prepared*, and bearing even date therewith, and the judgment to be entered up thereon, should be further securities, and the creditors might forthwith after judgment sue out execution, and do all necessary acts for obtaining a sequestration, and as often as the annuity might be in arrear, the sequestration might be put in force. The bond recited the agreement for the annuity and the deed of grant, and was declared to be for securing the annuity; the warrant of attorney authorized judgment on a bond of even date,

(*p*) Colebrook *v.* Layton, 4 Barn. & Adol. 579.

and was defeazanced on payment of an annuity of the same amount, and payable on the same days as that mentioned in the bond. It was held, the reference to the bond was not sufficient to incorporate the terms of the annuity deed with the warrant, so as to make it a charge on the benefice, and therefore the warrant of attorney was valid, although an affidavit was made that it was given *with the intent* to charge the living.

In three cases the Courts have confined the sequestration to the arrears due, but have upheld the warrant of attorney and judgment. In the first of these cases(*q*), the warrant of attorney (which was to confess judgment for 3000*l*.) recited the grant of the annuity charged on the rectory, and declared the judgment to be in trust to secure the annuity, but no execution was to issue until the annuity was in arrear, and in case it should be in arrear for fourteen days after demand made, then execution might issue *for three thousand pounds* to be applied in payment of arrears and costs, and the surplus to be *invested in consols* upon trust to pay the annuity. The annuity being in arrears for fourteen days after demand, a sequestration issued, under which the tithes and property of the living were taken by the sequestrator to an amount greatly exceeding the arrears and costs. The arrears being fully satisfied, the Court ordered the execution to be

(*q*) Kirlew v. Butts, 2 Barn. & Adol. 736 (note).

set aside, but not the warrant of attorney or judgment. In this case, it will be observed, the warrant of attorney did not evince an intent to *charge the living* by way of sequestration, but that execution should issue generally when the annuity was in arrear, and therefore did not fall within Flight *v.* Salter.

In the other case (*r*), the warrant of attorney gave direct power to issue a sequestration, from time to time, as arrears fell due. The Court confined the sequestration to arrears due when it issued, but refused to set aside the warrant of attorney. The distinction between this case and Flight *v.* Salter is, that the latter authorized an immediate sequestration, which was to continue so long as the annuities continued, whilst in the former, the sequestration was only to secure arrears actually due, and was not to be a continuing charge.

In the remaining case (*s*) the warrant of attorney was in the common form to confess judgment for 3200*l.*, and in the annuity deed the grantor stipulated that if the annuity was in arrear, the grantee might levy the whole sum. The Court directed the writ of sequestration to continue in force only until the arrears were paid.

It has been decided that a judgment entered up

(*r*) Moore *v.* Ramsden, 3 Barn. & Adol. 917 (note).
(*s*) Britten *v.* Wait, 3 Barn. & Adol. 915.

on a warrant of attorney for securing an annuity charged on a living in the North Riding of Yorkshire (supposing the same to be in other respects maintainable) need not be registered under the 8th Geo. II. cap. 6, by reason that though it may be enforced by sequestration, yet the benefice is not affected by *the judgment;* and that if a judgment creditor under a sequestration receives more than the sum for which judgment was entered up, the Court will order satisfaction to be entered up on the judgment roll, as of the date on which a subsequent judgment was entered up, and will direct the sums received by the first judgment creditor since that time, to be handed over to the second judgment creditor, but not any of the sums received prior to the signing of the second judgment (*t*).

Rectories impropriate and tithes in lay hands are subject to the like mode of mortgage as any other species of real estate.

The law relating to rectories impropriate and tithes has lately received great emendations by acts of parliament passed for limiting the periods for making claim to such species of property; prior to such statutes, the rule prevailed, *nullum tempus occurrit ecclesiæ,* so that it was in all cases of claim to impropriate tithes necessary to shew by what means

(*t*) Cottle *v.* Warrington, 5 Barn. & Adol. 447.

the tithes came into lay hands; and in cases of claim of exemption from tithes, to shew the origin of such claim. It is sufficient in this treatise to refer to the statutes in question (*x*).

(*x*) See 2 & 3 Will. IV. c. 100, and 4 & 5 Will. IV. c. 83, as to moduses and compositions real; 3 & 4 Will. IV. c. 27, as to impropriate tithes.

CHAPTER XIII.

OF MORTGAGES OF THE EQUITY OF REDEMPTION.

THE nature of an equity of redemption, its rights and incidents have been already explained (*a*).

It has been shewn, that although at first it was contended that an equity of redemption was a mere *right*, yet that equity adhering to the principles of the civil law, which considered the borrower the owner of the pledge until debarred by judicial sentence, and looking at the substance and not at the form of things, held the mortgagor, as in the civil law, the real owner of the land until decree of foreclosure, and possessed of it in his ancient and original right, and consequently that the equity of redemption was *an estate* in the land, and the person entitled to it the real owner of the land, and the mortgage personal assets.

An equity of redemption therefore, as already explained (*b*), being the ancient estate in the land, may be itself the subject of mortgage *toties quoties*, until equity debars the mortgagor of his equitable estate.

(*a*) *Vide* Book I. c. 4.
(*b*) *Supra*, 42.

As between mere equitable incumbrancers, it is a maxim in equity—*qui prior est tempore, potior est jure* (*c*). On this principle, each mortgagee of the equity of redemption has preference according to his priority in time (*d*).

But, as remarked by Mr. Fonblanque (*e*), this rule is applicable to *mere equities*, for there is another important principle that must be borne in mind, viz. that where equities are equal, the law must prevail (*f*), of which more will be hereafter said in its proper place in the chapter on the equitable doctrine of tacking. Equity, therefore, will not deprive a *bonâ fide* mortgagee of an advantage obtained by him *at law* by a conveyance of the legal estate, or an assignment of a prior judgment or statute (*g*), provided he did not obtain the conveyance of the legal estate after a decree to account, and provided at the time of advancing his money he had not notice of the mesne encumbrance, although he should afterwards obtain notice of the charge, prior to obtaining his legal protection (*h*). In the case, however, of a vendee advancing his money on a contract for sale, notice of a prior equitable charge before the conveyance will, it is said, bind him (*i*).

(*c*) *Supra.*

(*d*) Brace *v.* Duchess of Marlborough, 2 P. Wms. 491.

(*e*) *Vide* 1 Fonb. 320.

(*f*) Francis' 14th Maxim.

(*g*) *Vide* Brace *v.* Duchess of Marlborough, *supra.*

(*h*) See Wortley *v.* Birkhead, 2 Ves. 573.

(*i*) *Vide* Wigg *v.* Wigg, 1 Atk. 382, and 3 P. Wms. 306, note.

The consequence of the before-mentioned rule in equity, viz. that where equities are equal, the law must prevail, is, that a mortgagee of the equity of redemption may be postponed to a subsequent mortgagee, who having advanced his money without notice, afterwards (although then with notice) obtains possession of the legal estate. From this results a disadvantage and even danger in taking a mortgage of an equity of redemption, against which it is difficult to guard. An idea was indeed thrown out by Lord Eldon in Mackreth *v.* Symmons, which, if established as law, would afford great protection to the first equitable mortgagee, viz. that notice given to a first mortgagee shall affect the third mortgagee, who having advanced his money without notice of a second mortgage shall afterwards pay off the first mortgage. If this be law then a mortgagee of the equity of redemption may protect himself by express notice given to the first mortgagee, which notice will effectually prevent a third mortgagee from availing himself of a transfer made to him of the legal estate (*k*). It will be shewn in a subsequent chapter that notice to the trustees of an assignment of chattels personal will give priority and preference (*l*).

Another disadvantage attending a mortgage of an equity of redemption is, that the first mortgagee may, previously to the second mortgage, or even subsequently to it, if without notice, make further ad-

(*k*) *Vide infra*, chapter "NOTICE" *et quære.*
(*l*) *Vide infra.*

vances to the mortgagor, all of which (as also judgment or statute debts) (*m*), he will, as hereafter explained, be entitled to tack to his original mortgage in preference to the subsequent mortgagee. To guard against this mischief, it is incumbent on a person lending money on an equity of redemption first to make inquiry of the prior mortgagee into the amount of his demand, and secondly to give him express notice of the proposed mortgage. And it will be advisable, *if practicable, i. e.* if the first mortgagee will permit, to put notice of the second mortgage on the principal title deed, such as the conveyance to the mortgagor or the like, for otherwise the mortgagor might redeem the first mortgage and convey the legal estate to a stranger without notice, who would thus gain a preference to the prior equitable mortgagee.

Another disadvantage attending a mortgage of an equity of redemption is, that if the mortgagor shall afterwards redeem and take a conveyance to himself, he will, it may be thought, let in his widow's right to dower, and even his judgment and statute creditors, in preference to the equitable mortgagee (*n*).

A further disadvantage is, that the mortgagee has no legal remedy, so far as respects the estate, for enforcing payment of principal or interest, but is driven for relief to his suit in equity.

(*m*) Brace *v.* Duchess of Marlborough, *supra.*

(*n*) *Sed quære et vide supra.*

Another disadvantage, against which no prudence can guard, is, that the mortgagor may secretly have executed prior mortgages of the equity. For so gross a fraud the legislature has enacted his right of redemption shall be utterly lost. The 4 & 5 Will. III, cap. 16, after reciting that great frauds and deceits are too often practised by necessitous and evil disposed persons in borrowing money, and giving judgments, statutes, and recognizances privately, for securing the repayment of the said money, and the same persons do afterwards borrow money upon security of their lands of other persons, and do not acquaint the latter lender thereof with the same, whereby such late lender is very often in danger to lose his whole money, or forced to pay off the debts secured by the said judgments, statutes, and recognizances, before they can have any benefit of the said mortgages; and that divers persons do many times mortgage their lands more than once without giving notice of their first mortgage, whereby lenders of money upon second or after mortgages do often lose their money and are put to great charges in suit and otherwise, enacts, "That if any person shall borrow any money, or for any other valuable consideration for the payment thereof, voluntarily give, acknowledge, permit, or suffer to be entered against him or them one or more judgment or judgments, statute or statutes, recognizance or recognizances to any person or persons, creditor or creditors, and if the said borrower or borrowers, debtor or debtors, shall afterwards take up or borrow any other sum or sums of money of any other person or persons, or for other valuable consideration, become indebted to such per-

son or persons, and for securing the repayment and discharge thereof shall mortgage his, her or their lands or tenements, or any part thereof, to the said second or other lender or lenders of the said money, creditor or creditors, or to any other person or persons in trust for or to the use of such second or other lender or lenders, creditor or creditors, and shall not give notice to the said mortgagee or mortgagees of the said judgment or judgments, statute or statutes, recognizance or recognizances, in writing, under his, her, or their hand or hands, before the execution of the said mortgage or mortgages, unless such mortgagor or mortgagors, his, her, or their heirs, upon notice to him, her or them given by the mortgagee or mortgagees of the said lands and tenements, his, her, or their heirs, executors, administrators, or assigns, in writing under his, her, or their hands and seals, attested by two or more sufficient witnesses, of any such former judgment or judgments, statute or statutes, recognizance or recognizances, shall, within six months, pay off and discharge the said judgment or judgments, statute or statutes, recognizance or recognizances, and all interest and charges due thereupon, and cause or procure the same to be vacated or discharged by record, that then the mortgagor or mortgagors of the said lands and tenements, his, her, or their heirs, executors, administrators, or assigns shall have no benefit or remedy against the said mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, or any of them, in equity or elsewhere, for redemption of the said lands and tenements, or any part thereof, but the said mortgagee and mortgagees, his, her, or their heirs,

executors, administrators, and assigns, shall and may hold and enjoy the said lands and tenements for such estate and term therein as were or was granted and settled to the said mortgagee or mortgagees against the said mortgagor or mortgagors, and all person and persons lawfully claiming from, by, or under him, her, or them, freed from equity of redemption, and as fully to all intents and purposes whatsoever as if the same had been purchased absolutely, and without any power or liberty of redemption:" And further, "that if any person shall mortgage any lands or tenements to any person or persons for security of money lent or otherwise accrued, or become due, or for other valuable considerations, and if the said mortgagor or mortgagors shall again mortgage *the same lands or tenements or any part thereof* to any other person or persons for valuable consideration (the said former mortgage being in force and not discharged), and shall not discover to the said second or other mortgagee or mortgagees or some or one of them the former mortgage or mortgages in writing under his, her, or their hands, that then and in those cases also, the said mortgagor or mortgagors, his, her, or their heirs, executors, administrators, or assigns, shall have no relief or equity of redemption against the said second or after mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, upon the said after mortgage or mortgages, but that such mortgagee or mortgagees, his, her, or their heirs, executors, administrators, and assigns, shall and may hold and enjoy such more than once mortgaged lands and tenements for such estate and term therein as were or was granted and conveyed by the said mort-

gagor or mortgagors, against him, her, or them, his, her, or their heirs, executors, or administrators respectively, freed from equity of redemption, and as fully to all intents and purposes as if the same had been an absolute purchase, and without any power or liberty of redemption."

But it provides that, "if it shall so happen that there be more than one mortgage at the same time made by any person or persons to any person or persons *of the same lands and tenements*, the several late or under mortgagees his, her, or their heirs, executors, administrators or assigns shall have power to redeem any former mortgage or mortgages upon payment of the principal debt, interest and costs of suit to the prior mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns. And also, that nothing in the act contained shall be construed to bar any widow of any mortgagor of lands or tenements from her dower and right in or to the said lands, who did not legally join with her husband in such mortgage, or otherwise lawfully bar or exclude herself from such her dower or right.

It will be seen that the language of the statute is confined to a second mortgage *of the same lands*, and that the legislature does not appear to have contemplated that other estates might be also comprised in the second mortgage. To such cases, it has been held, the statute, being penal, does not apply (*o*), unless the

(*o*) Stafford v. Selby, 2 Vern. 589; Eq. Ca. Ab. 320, Pl. 5.

property joined with the equity of redemption is so inconsiderable that its introduction into the mortgage was palpably fraudulent, and for the mere purpose of affording a pretext for the evasion of the statute. The case of Stafford *v.* Selby also determined, that to comply with the directions of the statute the mortgagor must give the second mortgagee notice in writing under his hand of all the prior incumbrances; and that an assignee of the second mortgage, as well as a subsequent mortgagee redeeming the second mortgage, has the benefit of the statute. But that to entitle a second mortgagee to the advantage of the statute, he must come into court with clean hands and free from fraud.

The latter part of the statute, saving the rights of widows not concurring in the mortgage, will be inoperative in respect of women married subsequently to the 1st of January 1834, by reason that the 3 & 4 Will. IV. cap. 105, will render the dispositions by the husband binding on his wife without her concurrence.

The reader will, of course, not confound a legal reversion expectant on a mortgage term with an equity of redemption. It has been already explained (*p*), that the former is legal, and the latter equitable, assets. A mortgage in fee, therefore, after a mortgage for a term of years, will of course take precedence of mere equitable incumbrances. But

(*p*) *Supra*, 57.

even to a mortgage of such a nature, without some degree of precaution, a degree of hazard attaches, for the first mortgagee may continue to make advances to the mortgagor after the date of the mortgage in fee, either on his original security, or on judgment or statute security (*q*); all of which he will be entitled to tack, unless he had notice of the second mortgage; and even a subsequent mortgagee of the mere equity of redemption might obtain an advantage over the mortgagee of the legal reversion, by procuring an assignment of the first mortgage, to which he might tack his equitable charge if he had not notice of the intervening mortgage at the time of advancing his money. To guard against the first of these dangers, it is proper for the mortgagee of the legal reversion to make the like inquiries of the mortgagee of the term, and to give him the like notice as above mentioned in the case of a mortgage of the equity of redemption. And against the second danger, he would be in part likewise protected by the notice to the first mortgagee, if the principle suggested by Lord Eldon in Mackreth *v.* Symmons be law.

The Court cannot *compel* a second mortgagee who does not claim under a fiat in bankruptcy, but rests on his security, to concur in a sale obtained by a prior mortgagee under the general order of the 8th of March, 1794 (*r*).

If the Court decide in the first instance on the

(*q*) Brace *v.* the Duchess of Marlborough, *supra*.
(*r*) *Ex parte* Jackson, 5 Ves. 357.

validity of the claim of the mortgagee, the decision is conclusive on the commissioner in bankruptcy (*s*).

It is also here proper to remark that, although it has been decided (*t*) that an equitable mortgage is not within the general order of the 8th of March, 1794 (*u*), for sale of the mortgage premises on application by the mortgagee to the commissioners of bankrupt; yet it must be understood, that the decision in question does not apply to an actual mortgage either of a trust estate, or of an equity of redemption, but to that class of cases in which the mortgage arises from the inference of equity, such as an equitable mortgage by deposit of title deeds and the like; or in other words, that it does not apply to a mortgage of the equity, but to an equitable mortgage.

By the statute of the 1 & 2 Will. IV. cap. 56 (*x*), a Court of Bankruptcy was established, consisting of a chief judge and three puisne judges and six commissioners, to constitute a Court of Law and Equity, and to have (together with every judge and commissioner thereof) the rights and privileges of a Court of Record. And the judges, or any three of them, are constituted a Court of Review, to have superintendence and control in all matters of bankruptcy, with power to determine all such matters in bankruptcy as, by petition or otherwise, had there-

(*s*) *Ex parte* Jennings, 2 Swanst. 360.
(*t*) *Ex parte* Payler, 16 Ves. jun. 434.
(*u*) See Appendix, No. VI.
(*x*) Amended by 2 & 3 Will. IV. c. 114.

tofore been usually brought before the Lord Chancellor, whether such matters may have arisen in the Court of Bankruptcy or otherwise, except as therein afterwards provided; but subject to appeal to the Lord Chancellor on a special case to be approved and certified by one of the judges.

In lieu of a Commission of Bankruptcy, a fiat is directed to issue, and persons are to be appointed official assignees, one of whom is to be assignee of each bankrupt's estate, together with the assignee or assignees to be appointed by the creditors, and all the personal estate, and rents and proceeds of sale of real estate, are to be received by the official assignee, and by him transferred or paid into the Bank of England to the credit of the Accountant-General of the Court of Chancery, and until the assignees are chosen by the creditors, the official assignee is for all purposes to be sole assignee. But such official assignee is in no respect to interfere with the creditors' assignees in the appointment or removal of the solicitor, or in directing the time or manner of effecting any sales of the bankrupt's estate.

The act also provides, that instead of the old mode of assignment and bargain and sale, the personal estate of the bankrupt, and all such estate as by the 6 Geo. IV. c. 16, was directed to be conveyed by the commissioners to the assignees, (thereby excluding copyholds and the estates of tenants in tail,) shall vest in the assignees *virtute officii*, and that in register counties the certificate of the appointment of the assignees shall be registered, which

shall have the like effect as a registry of an actual conveyance would have had; but no purchaser, without notice of the bankruptcy, duly registering his deed, is to be affected by such bankruptcy, unless the certificate is registered, so far as regards the United Kingdom, within two months from the date of the appointment, and, as regards all other places, within twelve months from such date.

Various rules and regulations have been promulgated by this new Court. But no alteration appears to have been made in the general order of March, 1794, under which sales may be still made on application to the Commissioner.

If the mortgagee applies to the Court for leave to bid, the Court will direct the Commissioner to take the account and proceed to a sale in the manner directed by the general order, with leave for the mortgagee to bid, but the Court has decided that it is not *imperative* on a mortgagee (although it may be prudent) to apply for such leave (*y*). And if he bid without leave, and afterwards apply to the Court for an order of confirmation, the Court will, under special circumstances, grant an order *nunc pro tunc* (*z*). But, if a mortgagee applies for leave to bid, he must come before the Court in the character of a mere mortgagee, and waive any power of sale vested in him (*a*), and must, it seems, pay the costs of the

(*y*) *Ex parte* Ashley, 3 Dea. & Chit. 510; 1 Mont. & Ayr. 82.
(*z*) *Ex parte* Pedder, *ibid.* 622; 1 Mont. & Ayr. 327.
(*a*) *Ex parte* Davis, *ibid.* 504; 1 Mont. & Ayr. 89.

petition (*b*). If the same solicitor is concerned for the assignees and mortgagees, a separate solicitor should be appointed to conduct the sale (*c*). If the assignee himself become the purchaser, being also a mortgagee, the property will be ordered to be resold, subject to his claim as mortgagee (*d*). In questions respecting the existence of equitable mortgages, as by deposit of deeds and the like, the Court will not in future refer the question to the Commissioner, but will themselves decide the point (*e*).

A mortgagee becoming the purchaser will not be exempted from paying down the deposit (*f*).

The sale is exempt from the auction duty, whether made by direction of the assignees, with the concurrence of trustees appointed to sell the estates for the discharge of incumbrances, or with the consent of the mortgagees (*g*).

(*b*) *Ex parte* Williams, 1 Dea. & Chit. 489; 1 Mont. 514.
(*c*) *Ex parte* Rolfe, 1 Dea. & Chit. 77.
(*d*) *Ex parte* Turvill, 3 Dea. & Chit. 346.
(*e*) *Ex parte* Smith, 1 Dea. & Chit. 441.
(*f*) *Ex parte* Tatham, 1 Mont. & Ayr. 335.
(*g*) Attorney-General *v.* Winstanley, 5 Bligh, N. S. 130.

CHAPTER XIV.

OF EQUITABLE LIEN ON LANDED ESTATE.

If a vendor convey his estate to the vendee without receiving payment of any or having received part only of the purchase money, although the consideration is upon the face of the instrument expressed to be paid, and by a receipt indorsed on the deed acknowledged to be received (*a*), in equity the vendee becomes a trustee for the vendor for the amount of the money unpaid (*b*), and the vendor has, *by an implied contract* between him and the vendee, *an equitable lien* on the estate for the amount of the money (*c*). In like manner, if a vendee advance all or any part of the money to the vendor, and the contract is broken off, an implied contract arises, by which the vendee has a lien on the land (*d*). And

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(*a*) See Mackreth *v.* Symmons, 15 Ves. jun. 337; Coppin *v.* Coppin, 2 P. Wms. 291; but the receipt is conclusive at law, unless merely fraudulent; Rowntree *v.* Jacob, 2 Taunt. 141; *et vide* Lampson *v.* Corke, 5 Barn. & Ald. 606; Winter *v.* Lord Anson, 1 Sim. & Stu. 444.

(*b*) Pollexfen *v.* Moore, 3 Atk. 272; Blackburn *v.* Gregson, 1 B. C. C. 424.

(*c*) Blackburn *v.* Gregson, 1 B. C. C. 420; Mackreth *v.* Symmons, 15 Ves. jun. 349; Cowell *v.* Simpson, 16 Ves. jun. 279; Smith *v.* Hibbard, 2 Dick. 740; Harrison *v.* Southcote, 2 Ves. 389; Chapman *v.* Tanner, 1 Vern. 267.

(*d*) See Burgess *v.* Wheate, 1 Black. 150; Lacon *v.* Mertins, 3 Atk. 4.

the lien will, in either case, bind the lands in the hands of the party himself and his heirs, and also of volunteers, and *bonâ fide* purchasers *with notice* claiming under him (*e*). But this implied contract may be rebutted by clear and irresistible evidence shewing the intention of the parties, that the estate shall not be a security for the money (*f*). The questions in the books relating to equitable liens on real estate have principally turned on this point.

In the older cases (*g*) it seems to have been considered that the taking of any security, although merely personal, such as a bond, promissory note, or the like, was proof of the intention of the parties, that the lien should not subsist, and even so late as in the case of Nairn *v.* Prowse (*h*), the Master of the Rolls considered the point as still open. The contrary however is now determined, and it is settled that a mere personal security, whether a bond (*i*), bill of exchange (*k*), promissory note (*l*), or the like,

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(*e*) Mackreth *v.* Symmons, 15 Ves. jun. 337; Walker *v.* Preswick, 2 Ves. 622; Elliot *v.* Edwards, 3 Bos. & Pull. 183; Gibbons *v.* Baddall, 2 Eq. Ca. 682.

(*f*) 15 Ves. jun. 341.

(*g*) Fawell *v.* Heelis, Amb. 724; 1 B. C. C. 422, note; 2 Dick. 425; Bond *v.* Kent, 2 Vern. 281; 1 Fonb. 153.

(*h*) 6 Ves. jun. 752.

(*i*) Hearn *v.* Botelers, Cary's Rep. Cha. 25; *et nota* Winter *v.* Lord Anson, 1 Sim. & Stu. 445, deciding contra, was reversed by the Lord Chancellor on appeal in Winter *v.* Anson, 3 Russ. 488.

(*k*) Hughes *v.* Kearney, 1 Sch. & Lef. 136; Grant *v.* Mills, 2 Ves. & Bea. 309; *Ex parte* Peate, 1 Madd. 346.

(*l*) Gibbons *v.* Baddall, *supra*.

without more (*m*), will not of itself be sufficient to remove the equitable lien; nor is there any distinction on the point between freeholds and copyholds, the equitable lien equally affecting each species of property (*n*).

The difficulty is in ascertaining what act is sufficient for such purpose short of an express agreement. Lord Eldon, in Mackreth *v.* Symmons (*o*), observed, "the more modern authorities upon this subject have brought it to this inconvenient state: that the question is not a dry question upon the fact, whether a security was taken, but it depends upon the circumstances of each case, whether the Court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken." In Nairn *v.* Prowse (*p*) the vendee transferred long annuities, with an agreement that if the price did not rise within two years, so that the stock might be sold for 2200*l.*, the vendee would make good the deficiency. The stock sold for less than 2200*l.*; the vendor claimed a lien for the difference; but the Master of the Rolls thought this transaction a sufficient evidence of intention that the lien should not subsist. Of this decision, Lord Eldon, in Mackreth *v.* Symmons, hardly seemed to approve, considering that a vendor might be inclined to give a vendee a

(*m*) Mackreth v. Symmons, *supra*.
(*n*) Winter v. Lord Anson, 3 Russ. 492.
(*o*) 15 Ves. jun. 350.
(*p*) 6 Ves. jun. 752.

chance of the benefit of the rise without parting with the equitable lien (*q*).

A mortgage of other lands for the whole or part of the purchase money (*r*), or a mortgage of the purchased estate for part of the purchase money, permitting the rest to remain on personal security (*s*), has also been thought sufficient for the purpose of discharging the equitable lien on the purchased estate in the first instance wholly, and in the second instance to the amount of the money remaining on the personal security. But the former, Lord Eldon did not seem to hold quite conclusive (*t*), notwithstanding the opinion of the Master of the Rolls in Nairn *v.* Prowse, that it could be hardly thought it was intended the party should have a double mortgage. The latter may certainly be admitted to carry almost irresistible evidence of intention that the money on the personal security should not form a lien on the estate.

Sir Edward Sugden, in his Treatise on Vendors and Purchasers (*u*), appears still to think, that the doctrine of equitable lien extends to the case of an estate sold in consideration of an annuity secured by bond or covenant; and cites, as an authority, the case of Tardiff *v.* Scrughan (*x*), heard before Lord Camden, in which a father conveyed his estate to his two daughters as joint tenants in fee in consideration of

(*q*) 15 Ves. jun. 349.
(*s*) Bond v. Kent, 2 Vern. 281.
(*u*) Page 66, vol. ii. 9th edit.
(*r*) Nairn v. Prowse, *supra.*
(*t*) 5 Ves. jun. 341.
(*x*) 1 B. C. C. 423.

an annuity secured by their joint bond; one daughter conveyed her moiety to her husband for life, and it was decreed the husband should keep down a moiety of the annuity. But Lord Eldon, in Mackreth *v.* Symmons (*y*) disapproved the doctrine, and decided in opposition to it.

And in the more recent case of Clarke *v.* Royle (*z*), the Court expressed an opinion that Lord Eldon, in Mackreth *v.* Symmons, had expressly overruled the decision in Tardiff *v.* Scrughan. In Clarke *v.* Royle, however, the Court, instead of deciding the case in opposition to Tardiff *v.* Scrughan, endeavoured to distinguish the case before the Court from that of Tardiff *v.* Scrughan, on the ground that in the latter case simply a bond was given for the annuity, whilst in Clarke *v.* Royle, the deed of conveyance recited the agreement to convey on covenants being entered into by the purchaser for payment of an annuity, and a contingent sum of money, which covenants were, in the deed of conveyance, stated as forming such consideration, and were contained in the purchase deed. Under such circumstances, and considering the case of Winter *v.* Anson an authority, the Court decided the annuity and contingent sum were not charges on the estate. It will be remembered, that Winter *v.* Lord Anson was afterwards reversed, and therefore the case of Clarke *v.* Royle cannot be relied on as an authority.

A question is also raised by Sir Edward Sugden,

(*y*) 15 Ves. jun. 352. (*z*) 3 Sim. 502.

viz. whether the equity extends to affect third persons, as to give the vendor a preference to a subsequent equitable mortgagee with deposit of title deeds without notice (*a*). He considers the case of Stanhope *v.* Earl Verney (*b*) to be analogous, in which Lord Northington held, that a declaration of trust of a term in favour of a person, was tantamount to an actual assignment, unless a subsequent incumbrancer, *bonâ fide* and without notice, procured an assignment; and that the custody of the deeds respecting the term, with a declaration of the trust of it in favour of a second incumbrancer, was equivalent to an actual assignment of it, and, therefore, gave him an advantage over the first incumbrancer, which equity would not take from him. Upon the authority of this case, he seems to think an equitable mortgage, by deposit of title deeds, to a person *bonâ fide*, and without notice, will give him a preferable equity, and will overreach the vendor's equitable lien on the estate for any part of the money.

Without entering into the question of the soundness of the doctrine in the case of Stanhope *v.* Earl Verney (*c*), it may be thought that the case of Mackreth *v.* Symmons did in effect determine, that an equitable mortgagee without notice had not such right to preference; for in that case, the plaintiff had been as *vendor*, the defendant was a subsequent *mortgagee*, to whom a conveyance had been made by the

(*a*) Page 76, vol. ii. 9th edit.
(*b*) Butler's Note, 1 Co. Litt. 290, b.
(*c*) Vide *Ex parte* Knott, 11 Ves. jun. 618.

assignees of the vendee, under a decree of the Court, without prejudice to the vendor's claims, of which, however, the defendant had not notice at the time of the contract for the mortgage: the defendant afterwards foreclosed, but without making the plaintiff a party to his bill. It proved that the legal estate was outstanding in a third person, so that all the incumbrances were equitable. Lord Eldon, after noticing that fact, observed, "then between equities the rule '*Qui prior est tempore potior est jure*' applies; and gave judgment for the plaintiff, thus making no difference between this and any other species of equitable mortgage. Sir Edward Sugden, in a note to his last edition, says, that Symmons had not the title deeds; that fact cannot, with certainty, be collected from the case; it was not urged in favour of the *vendor* that *he* had retained the deeds, which would have been a decisive fact in his favour; nor is it stated that the trustee, Coutts, (in whom the legal estate was vested,) had the title deeds. But if Symmons had not the title deeds, the case is certainly not an authority in direct opposition to the opinion expressed by Sir Edward Sugden.

Another matter of considerable importance (*d*) was alluded to in Mackreth *v.* Symmons, viz. whether the Court would, in the event of the death of the vendee, marshal the assets in favour of third persons, so as in case of necessity to throw the lien on the purchased estate. Sir Edward Sugden has

(*d*) Vide 1 P. Wms. 680, note.

given this matter his consideration (*f*), and seems to think that a third person could not require the purchased estate and the personal estate of the vendee to be marshalled.

The general rule of equity is, that, if a person has two funds to which he may resort, he shall not disappoint another person, who can only resort to one of the funds (*g*). If, therefore, Sir Edw. Sugden's conception was correct, the present would be *an exception* to this benevolent and wise rule of equity. The distinction, however, does not appear to be sound.

The principal authority for this exception to the general rule is, the language used by Lord Hardwicke in giving judgment in the case of Pollexfen *v.* Moore (*h*), viz. that this equity did not apply to third persons, and that if a vendor should exhaust the personal assets of the vendee, a legatee under the will of the vendee would not be entitled to stand in his place. The circumstances in this case were:—the vendee had died without paying all the purchase-money, and devised the estate to Kemp, whom he made executor, and also (subject to some legacies) residuary legatee. Kemp wasted the personal assets and died leaving Boyle Kemp his heir at law. The vendor filed his bill for payment of the residue of the purchase-money, and one of the legatees under the vendee's will filed a cross bill, praying that if the

(*f*) Page 67, vol. ii. 9th edit.—Vendors.
(*g*) Aldrich *v.* Cooper, 8 Ves. jun. 382.
(*h*) 3 Atk. 372.

purchase-money was paid out of the personal estate, she might stand in the vendor's place as to his lien on the land. Lord Hardwicke, after stating as before mentioned, that the equity did not apply to third persons, and that if the vendor should exhaust the personal assets of the vendee and of Kemp, the legatee would not be entitled to stand in his place and to come upon the purchased estate; added, but he also thought the heir should not avail himself of his father's injustice, and, therefore, he would direct the vendor to take his satisfaction out of the purchased estate.

The decree in Pollexfen *v.* Moore, is, however, considered to have been, and certainly was, at variance with the judgment; for it ordered that the purchase-money and interest should in the first place be paid out of the *personal* estate of the vendee, but if it should appear that the vendee did not leave assets sufficient to pay the residue of the purchase-money and all his other debts, legacies, and funeral expenses; or if the personal estate of the vendee was not sufficient by reason that the assets of Kemp were not sufficient to answer such part thereof as came to his hands, then such deficiency, so far as the personal estate of the vendee should be applied in payment of the purchase-money, should be made good out of the purchased estate; and a competent part thereof was to be sold accordingly.

This decree certainly went to marshalling the assets, but it seems that the vendor had not parted

with the title deeds, which Sir Edward Sugden considers to have been the ground for the decree, on the principle that he had an equitable mortgage on the estate. With this explanation, Sir Edward Sugden thinks the case of Pollexfen *v.* Moore establishes an important distinction, viz. that where the vendor has an equitable mortgage on the estate, or in the case of fraud, the purchased estate and the personal estate will be marshalled in favour of simple contract creditors and legatees.

The case of Coppin *v.* Coppin (*i*), is also considered an authority in support of this doctrine. In that case, it appeared that a younger brother had purchased an estate of his elder brother, and died before payment of all the purchase money. By his will, he charged the estate with heavy legacies, but it was attested by two witnesses only; his brother was his heir at law, and also executor. Lord Chancellor King held, that the elder brother had an equitable lien on the estate, which he was entitled to discharge out of the personal assets, and that the legatees under the will could not stand in his place with respect to the equitable lien.

It may be remarked, that this case was attended by peculiar circumstances, for the elder brother had a double right to retain the remaining purchase-money out of the personal assets,—first, as vendor—and, secondly, as heir. It must, however, be admitted,

(*i*) Sel. Cha. Ca. 28; 2 P. Wms. 291.

that, in principle, it appears a considerable authority in favour of the exception contended for by Sir Edward Sugden in this instance to the general rule of marshalling.

Sir Edward Sugden also urges, that it seems to have been thought in Coppin *v.* Coppin, and apparently, he says, with some reason, that extending the vendor's lien to third persons would be breaking in upon the statute of frauds. And he argues thus: —"the general rule as to marshalling applies to cases, where the person resorting to the personal estate has an actual charge or lien on the real estate, but in this case, if equity first deems the purchaser a trustee for the vendor, as to so much of the estate as will satisfy the purchase-money unpaid, and then permits a disappointed legatee to stand in the place of the vendor, it is creating a charge on the land in direct opposition to the statute of frauds." Now it is submitted in reply to this reasoning, that the inroad on the statute of frauds would not in fact be greater in the case here put, than in the case of an equitable lien by possession of title deeds, on which ground Sir Edward Sugden attempts to reconcile the judgment and decree in Pollexfen *v.* Moore. For, in fact, in the latter case the mortgage is raised on the presumption of equity, and then the legatee is let in to stand in the mortgagee's place. The cases are nearly parallel, or, at all events, are equally within the mischief intended to be prevented by the statute of frauds.

Notwithstanding the cases of Coppin *v.* Coppin

and Pollexfen *v.* Moore, we find the distinction in question by no means approved by two of the most able judges who have sat in equity. For Sir William Grant, when Master of the Rolls, declared he could not distinguish it from the common case of marshalling (*j*); and Lord Chancellor Eldon, in an earlier case (*k*), shewed the inclination of his opinion to be in favour of the legatee, and in a more recent case (*l*) he expressed that opinion in very clear and forcible language. He first remarked, "that the case of Coppin *v.* Coppin required a good deal of consideration. If the estate had been in a third person, the general doctrine as to a person having two funds to resort to might be thought to have an immediate application; and the express terms of the decree in Pollexfen *v.* Moore might be found very inconsistent with it." He afterwards observed, "that if the meaning of Lord Hardwicke's remarks in Pollexfen *v.* Moore, viz. that the equity would not extend to a third person, was that he would follow the case of Coppin *v.* Coppin, and that if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there was great difficulty in applying the principle, as it would then be in the power of the vendor to administer the assets as he pleased; having a lien upon the real estate, to exhaust the personal assets and disappoint all the creditors, who, if he had resorted to his lien, would have been satisfied; and

(*j*) Trimmer *v.* Baynes, 9 Ves. jun. 209.

(*k*) Austen *v.* Halsey, 6 Ves. jun. 475, *et vide* 2 P. Wms. 295, note.

(*l*) Mackreth *v.* Symmons, *supra*.

in that respect, with reference to the principle, the case was anomalous." It is now decided (*m*) that, so far at least as *creditors* are concerned, the general rule of equity will prevail, and the Court will marshal the assets, and it may be thought such will also be the decision in respect of pecuniary legatees, whenever the case shall call for a decision, and that this species of equitable mortgage will not be distinguished from the rest in so important a point as that which we have been discussing.

It must be recollected that this doctrine of equitable lien does not apply to personal estate, for as soon as the vendee has possession, actual or constructive, the lien is gone (*n*), and after the delivery of part, there can be no stoppage *in transitu* of the remainder (*o*); but of this more will be said hereafter.

(*m*) Selby *v.* Selby, 4 Russ. 341.

(*n*) See 15 Ves. jun. 344.

(*o*) *Ex parte* Gwynne, 12 Ves. jun. 383; Crawshay *v.* Eades, 1 Barn. & Cress. 181.

CHAPTER XV.

OF MORTGAGES OF CHATTELS PERSONAL.

It will be necessary to premise a few general observations on mortgages of chattels personal.

On the assignment of a chattel personal, whether the interest be present or future, vested or contingent, notice should be forthwith given to the trustees in whom it is vested, it being now decided that if a party takes an assignment of a chattel personal, and does not give notice of it to the trustees, a subsequent assignee, giving such notice, will gain preference (*a*). If a policy of life assurance is assigned, notice of such assignment must be given to the office in which the insurance is effected, to take it out of the reach of the bankrupt laws (*b*); but very slight notification is sufficient for the purpose (*c*). If a bond is the subject of assignment, not only should the instrument itself be given up to the assignee, but notice of such assignment should be given to the debtor to prevent his payment of the bond debt to the original obligee, which, in default of such notice, would be valid and discharge the security (*d*).

(*a*) Dearle *v.* Hall, Loveridge *v.* Cooper, 3 Rus. 1; Wright *v.* Lord Dorchester, 1 Russ. 9, n.

(*b*) Williams *v.* Thorpe, 2 Simons, 257.

(*c*) *Ex parte* Straight, 2 Dea. & Chit. 314, *et vide infra.*

(*d*) Ryall *v.* Rowles, 1 Ves. sen. 367; 2 Atk. 177.

The 13th of Eliz. cap. 5, has enacted that "all and every feoffinent, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods, chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise; and all and every bond, suit, judgment, and execution, at any time had or made *to or for any intent or purpose to delay, hinder, or defraud creditors or others* of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, or reliefs, shall be deemed and taken (only as against such person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covinous, or fraudulent devises and practices as is aforesaid, are, shall, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of none effect." And a penalty is inflicted of one year's value of the lands, and the whole value of the goods, on parties and privies to the transaction who shall defend the same, or alien or assign the lands or goods to him or them conveyed or assured, and imprisonment for one half year (*e*). But it is provided (*f*), that the act

(*e*) 3d sec. *Nota.* Although in the latter part of this section, the word '*bond*' only is used, yet it must be taken to extend to foeffments, judgments, &c., as mentioned in the other parts of the clause, 4 East, 15.

(*f*) 6th sec.

shall not extend to any estate or interest in lands, goods, or chattels, had, made, conveyed, or assured, which estate or interest shall be *upon good consideration and bonâ fide* lawfully conveyed or assured to any person or persons, *not having at the time of such conveyance or assurance any manner of notice or knowledge* of such covin, fraud, or collusion as aforesaid.

On this statute, Lord Ellenborough has remarked(*g*), it is not every feoffment, judgment, &c. which will have the effect of delaying or hindering creditors of their debts, &c, that is therefore fraudulent within the statute; for such is the effect *pro tanto* of every assignment that can be made by one who has creditors. Every assignment of a man's property, however honest and good the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. But the feoffment, judgment, &c. must be devised of malice, fraud, and the like, to bring it within the statute.

The retention of the possession by the debtor of chattels personal, after assignment, is however *primâ facie* proof of fraud. This was decided by Twyne's case (*h*), heard in the 44th year of the reign of Queen Elizabeth. The circumstances were: Pierce was indebted to Twyne in 400*l.*, and to C. in 200*l.* C. brought action of debt; and pending the action,

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(*g*) Meux *qui tam* v. Howell, 4 East, 13.
(*h*) Twyne's case, 3 Rep. 480.

Pierce, who was possessed of goods and chattels of the value of 300*l.*, made a general assignment to Twyne, *but continued in possession*, and used them as his proper goods. C. obtained judgment, and had a *fi. fa.*; on which the sheriff proceeded to levy and was resisted by Twyne and others. And it was resolved that the gift had signs and marks of fraud, and that there was an implied trust between the parties, and that although there was a good consideration for the assignment, yet it was not *bonâ fide* within the meaning of the proviso, but the deed was fraudulent and void. Lord Coke, in his report of this case, adds, "And therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also, let it be made in a public manner and before the neighbours, and not in private, for secrecy is a mark of fraud. 2. Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3. Immediately after the gift, take the possession of them, for continuance of the possession in the donor is a sign of trust, and that which is between the donor and donee, called a trust *per nomen speciosum*, is in truth as to all the creditors a fraud, for they are hereby defeated and defrauded of their true and just debts (*i*)."

But although possession of goods and chattels after sale or mortgage is *primâ facie* a mark of fraud, within the statute of the 13th Eliz. yet it is but

(*i*) *Et vide* Edwards *v.* Harben, 2 Term Rep. 587; Bamford *v.* Baron, *ibid.* note.

presumptive evidence, which may be rebutted by evidence written, or, as it seems, parol (*k*), on the part of the vendee or mortgagee shewing the possession was consistent with the nature of the transaction.

As, if actual delivery be from circumstances impossible, *lex neminem cogit ad impossibilia*, as in the case of an assignment of a ship at sea (*l*), or in a foreign port (*m*), or of goods at sea (*n*), or goods in transitu (*o*), when the delivery of the muniments of title, attended as to ships with such formalities as the statute law requires, will be sufficient, of which more hereafter; and also in the case of choses in action, as bond debts in which an assignment of the debt and delivery of the bond will be also sufficient (*p*).

Or, where actual delivery has been made as nearly as may be, such as where goods are bulky and are in a warehouse and the key of the warehouse is delivered (*q*).

Or, where delivery is refused notwithstanding the agreement to the contrary (*r*).

(*k*) Cole *v.* Davis, 1 L. Raym. 724; Meggott *v.* Mills, *ibid.* 286.

(*l*) Atkinson *v.* Mayling, 2 Term Rep. 462.

(*m*) *Ex parte* Batson, 3 B. C. 362.

(*n*) Brown *v.* Heathcote, 1 Atk. 160; *et vide* 1 Ves. 362.

(*o*) Flynn *v.* Mathews, 1 Atk. 185.

(*p*) 1 Ves. 367.

(*q*) West *v.* Skip, 1 Ves. 244; *ibid.* 362; Smith *v.* Smith, Stra. 955.

(*r*) 1 Ves. 244.

Or, where the possession is consistent with the deed of assignment (*s*), as in the case of goods *bonâ fide* settled on marriage, or in the cases presumed by Mr. Powell (*t*), *viz.* of an assignment to a creditor without his privity, or an assignment to secure a future contingent debt, or under apprehension of legal process; or where from the very nature of the transaction a delivery could not be contemplated, such as (*u*) where a supercargo of a ship bound to the East Indies, shipped goods, and made a bill of sale of them and of their profits to one Royston by way of mortgage. The voyage was made and the supercargo sold the goods, and bought others, and made several barters and exchanges. He afterwards died at sea, and in a question between the mortgagee and a judgment creditor, the Lord Chancellor held the assignment valid, for though sold to Royston they were entrusted to the supercargo to negotiate and sell them for Royston's advantage, and the possession was not for the purpose of giving a false credit.

Or, as in the case of land being mortgaged with a mill standing on it, not affixed to the freehold, in which instance the possession of the mill by the mortgagor, although a mere chattel, is held to be consistent with the deed (*x*).

(*s*) Cadogan *v.* Kennett, Cowp. 432; Haslington *v.* Gill, cited in 2 Term Rep. 597; *et vide* 3 Barn. & Ad. 502, note, and the cases there cited.

(*t*) Powell on Mortgage, 4th edit. 50, 51.

(*u*) Bucknell *v.* Roysson, Pre. Cha. 289.

(*x*) Steward *v.* Lombe, 1 Brod. & Bing. 506; Rufford *v.* Bishop, 5 Russell, 354.

And, it has been also held that if the assignment be on a *condition* to be performed by the vendee, the vendor's continuance in possession does not avoid it, because by the terms of the conveyance, the vendee is not to have possession until he has performed the condition (*y*).

The result of all the cases seems to be, that possession of goods and chattels after an assignment of them does not of itself constitute fraud as against creditors, but is only *primâ facie* evidence of it, capable, like any other evidence of a similar kind, of being rebutted or explained.

In the 21st year of King James the First (*z*), a further enactment was made for the benefit of creditors, which applied to cases of bankruptcy, but was much more powerful in its effects than the preceding statute of Elizabeth, inasmuch as the saving clause for the protection of sales and mortgages made for a valuable consideration, and *bonâ fide*, was not inserted. By that statute, after reciting that it often fell out that many persons before they became bankrupts, did convey their goods to other men upon good consideration, yet still kept the same, and were reputed the owners thereof, and disposed of the same as their own, it was enacted, that "if any person or persons

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(*y*) Edwards *v.* Harben, 2 Term Rep. 596; Martindale *v.* Booth, 3 Barn. & Ad. 498.

(*z*) 21 Jac. I. cap. 19, sections 10 and 11. *Et nota*, the recital to the eleventh section is, by the misprinting of the statute, added to the tenth section.

should become bankrupt, and at such time as they should so become bankrupt should, by the consent and permission of the *true owner and proprietary*, have in their *possession, order, or disposition*, any goods or chattels, *whereof they should be reputed owners*, and take upon them the sale, alteration, or disposition as owners, that in every such case the commissioners, or the greater part of them, should have power to sell and dispose the same to and for the benefit of the creditors which should seek relief by the said commission, as fully as any other part of the estate of the said bankrupt."

This statute is now repealed by an act passed in the 6th year of the reign of King George the Fourth(*a*), but as several important questions arose on the construction of the former act, the decisions on which will have a direct bearing on the construction to be put on the more recent enactment, it will be proper in this place to give them consideration; at the same time noticing the variations made by the 6 Geo. IV.

It was questioned whether the generality of the enacting clause of the 21st James, was not restrained by the recital to goods which were *originally* the bankrupt's (*b*). But it was determined unanimously by the judges of the King's Bench (*c*), that the statute extended to the goods of *third persons* in the trader's possession *to sell as his own*, but not to

(*a*) Cap. 16.

(*b*) *Vide* L'Apostre *v.* L'Plaisterer, cited 1 P. Wms. 318, *et vide* 3 P. Wms. 185; 1 Ves. 365, 371.

(*c*) Mace *v.* Cadell, Cowp. 232; *et vide* Copeman *v.* Gallant, 1 P. Wms. 314; Horn *v.* Baker, 9 East, 215.

goods confided to him as a mere factor or goldsmith. In the 6th George the recital is omitted.

Another question was, whether *conditional sales* were within the purview of the 21st James, the words of the statute being, if any person, &c. shall become bankrupt, and at such time as he shall so become bankrupt shall, by consent of the *true owner*, have possession, &c. It was contended a mortgagee was not the true owner; but it was adjudged that the words *true owner*, were put in contradiction to false or seeming owner, and therefore mortgages were within the act(*d*). In the 6 Geo. IV. the language is somewhat altered, but without affecting its original meaning, the words in the latter act being, "if any bankrupt, at the time he becomes bankrupt, shall by the consent and permission of the true owner thereof, &c."

Another point debated on the former act was, whether the words *goods and chattels* in the act comprehended *choses in action;* and it was held they did(*e*). In the 6th Geo. IV. the words goods and chattels remain unaltered; and therefore, in order to divest from the mortgagor the ownership of outstanding debts, he must have done every thing that is equivalent to a delivery of chattels personal, *i. e.* of moveable goods, *viz.* assignment, delivery of the security,

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(*d*) Ryal *v.* Rowles, 1 Ves. 349; 1 Atk. 165.

(*e*) Ryal *v.* Rowles, *supra*; Jones *v.* Gibbons, 9 Ves. jun. 410; *Ex parte* Ruffin, 6 Ves. jun. 182; *et vide ex parte* Kensington, 2 V. & B. 79, which decided, that a trust estate *in stock* was not within the statute, and passed by mere assignment, not being capable of actual delivery.

and notice to the debtor (*f*), but debts due *on mortgage* are not within the statute, although collaterally secured by covenant or bond (*g*).

In the case of Ryal *v.* Rowles (*h*) it was held, that if a moiety of stock in trade be mortgaged by one partner to another, and they both continue the apparent owners, this is not a sufficient possession to give a specific lien against general creditors; and that if an undivided share of stock in trade be assigned to a stranger, it is necessary the mortgagee should be admitted into the business to render the security valid.

Where goods lying with a wharfinger in the name of A. had been purchased by B., who permitted them for several months after to remain at the wharfinger's in the name of A., during which time A. disposed of a part; but on notice of his insolvency, B. carried the order to the wharfinger for the delivery of the goods, and had the goods transferred into his own name nine days after A. had become bankrupt; it was held, there was a complete transfer before the bankruptcy (*i*).

(*f*) Jones *v.* Gibbons, *supra*. (*g*) *Ibid.*

(*h*) *Supra, sed nota*, that partners are seised *per my et per tout*, and each must be allowed against the other every thing he has advanced or brought in *as a partnership transaction*, and to charge the other in the amount with what that other has not brought in or has taken out more than he ought, and nothing is to be considered as his share but his proportion of the residue on the balance of accounts; West *v.* Skip, 1 Ves. 242.

(*i*) Jones *v.* Dwyer, 1 Rose, 339.

But where goods were taken in execution, and assigned by the sheriff and debtor to the creditor, who put his initials on every article and demised them to the debtor at a certain rent, who remained in possession to the time of his bankruptcy, it was held, the debtor was the *reputed owner*, there not being a notorious change of ownership (*k*).

The effect of these statutes is, that although a mortgage of chattels personal made *bonâ fide* and for a valuable consideration, but the possession of which is retained by the assignor, will be valid against creditors, under the 13 of Eliz. if it can be shewn the possession is consistent with the nature of the transaction, so that the presumption of fraud raised by the possession is rebutted; yet it may be void under the statutes of bankruptcy, as against the assignees of a bankrupt trader, who continues the *reputed owner* (*l*), unless it can be shewn that possession has been given as far as circumstances would permit, and therefore although in the before-mentioned cases of Cadogan *v.* Kennett and Bucknal *v.* Royston the assignments were valid within the 13 of Eliz., yet they would, it is conceived, have been void within

(*k*) Lingard *v.* Messiter, 1 Barn. & Cress. 308.

(*l*) As to what will amount to a reputed ownership, see the several cases of Walker *v.* Burnell, Dougl. 317; Bryson *v.* Wylie, cited in note, 1 Bos. & Pul. 83; Gordon *v.* The East India Company, 7 Term Rep. 228; Lingham *v.* Biggs, 1 Bos. & Pull. 82; Collins *v.* Forbes, 3 Term Rep. 316; Darby *v.* Smith, 8 Term Rep. 82; Horn *v.* Baker, *supra*; Steward *v.* Lombe, 1 Brod. & Bingh. 506; Storer *v* Hunter, 3 B. & Cress. 368; Clark *v.* Crownshaw, 3 B. & Ad. 804; Rufford *v.* Bishop, 5 Russ. 346; and Amos on Fixtures, 193.

the bankrupt laws (*m*). But in the before-mentioned cases of the delivery of the key of the warehouse, the delivery of the muniments of ships or goods at sea, and of the bond on assignment of a bond debt, the assignments would have been valid under both statutes. The possession of goods by a *factor* is not within the bankrupt laws (*n*), nor is the possession by the debtor after assignment of chattels real (*o*), nor of articles of machinery if, by the custom of the country, they are let with the mill (*p*), nor of fixtures annexed to the freehold (*q*); but the possession after assignment of fixtures severed from the freehold is within the statute (*r*).

(*m*) *Vide* Pre. Cha. 288. (*n*) Ryal *v.* Rowles, *supra.*

(*o*) *Ibid. et vide* Co. Bank. Law, 6th edit, 359; Jones *v.* Gibbons, *supra;* Stephens *v.* Stephens, 1 Ves. 352; Bourn *v.* Dodson, 1 Atk. 154.

(*p*) Rufford *v.* Bishop, *supra.* To show more clearly than could be done by general words, the species of articles which were adjudged not to be within the order and disposition of the bankrupt, the following items were selected by the reporters as a specimen from the first part of the schedule:—iron chest in office; grates in mansion house; weighing machine and clock; floor-plates and boshes; grinding-stone with cast iron ring, shaft or axis, and wrought iron work in clay-mill; wood-turning lathe with cast iron wheels, shafts, carriages, head stocks, rests and popits; wrought-iron and steel spindles, &c.; cast iron spur wheels and bevel wheels; and cast and wrought iron shafts and spindles, and carriages with long trains of solid and pipe shafts communicating motion from the forge lathe wheels to the wood lathe; pair of large shears and bed in puddlers forge; hollow force to filtering forge enclosed in cast-iron plates in wheels; hoop-mill engine, thirty-nine-inch cylinders extra bed plate; street mill engine, thirty-eight-inch cylinder.

(*q*) Ryal *v.* Rowles, *supra; Ex parte* Quincy, 1 Atk. 474; Horn *v.* Baker, *supra.*

(*r*) Ryal *v.* Rowles, *supra;* Horn *v.* Baker, *supra.*

Much discussion has arisen on the subject of assignments by husband and wife of choses in action belonging to the wife. The law is at length settled that an assignment by the husband, or by him and his wife jointly, of choses in action of the latter in expectancy or contingency, will not be binding on the wife, in case the husband die in her life time and before the fund has fallen into possession (*s*); and in consistency with the decided cases, it has been held by the present Lord Chancellor, that husband and wife cannot effectually dispose of a life interest of the wife in a fund not settled to her separate use, beyond the duration of the coverture (*t*). And if the wife is entitled to stock in possession under a will, and the executors, by direction of the husband, transfer it to trustees to the separate use of the wife, and the husband afterwards becomes bankrupt, such transfer will not, in favour of the assignees, be held a reduction into possession by the husband (*u*).

This rule of equity does not, it should seem, apply to a chattel real (*x*), nor to a chose in action to which there is an immediate right, but in such latter case the wife has an equity to a settlement out of it.

Neither does it apply to a fund belonging to a married woman standing in the name of the accountant-

(*s*) Honner *v.* Morton, 3 Russ. 65; Hornsby v. Lee, 2 Madd. 16; Purdew v. Jackson, 1 Russ. 1.

(*t*) Stiffe v. Everitt, 1 Mylne & Craig, 37.

(*u*) Ryland *v.* Smith, *ibid.* 58.

(*x*) Purdew v. Jackson, *supra.*

general of the Court of Chancery, which may be pledged by the husband alone (*u*).

It was formerly held, that although a *factor* might make a *bonâ fide sale* of the goods entrusted to his charge, yet he could not *pledge* them; or at least if he did, the mortgagee would hold subject to the like claims as when the goods were in the factor's possession, although the mortgage was made without notice of the fact (*x*).

The law on this subject is now materially altered.

By the 4 Geo. IV. cap. 83, which recites that the law as it formerly stood relating to the deposit or pledge of goods afforded great facility to fraud, it was enacted (*y*), that it should be lawful for any person to take any goods, or bills of lading for the delivery thereof, in deposit or pledge from the consignee thereof, but such persons should acquire no further right, title, and interest than was possessed therein and might have been enforced by such consignee at the time of the pledge.

This statute was altered and amended by the 6 Geo. IV. cap. 94 (*z*), which extended the authority of the factor or consignee to pledge any goods of

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(*u*) Sansum *v.* Driver, 3 Russ. 91.

(*x*) Paterson *v.* Tash, 2 Str. 1178; Daubigny *v.* Duval, 5 T. R. 604; Newsome *v.* Thornton and another, 6 East, 17; De Bouchout *v.* Goldsmid, 5 Ves. jun. 211.

(*y*) Section 2. (*z*) Sections 3 & 5.

which he had the bill of lading or warrant, or order for delivery, to any amount to any person *not having notice of his being a factor*; but with a proviso that such deposit, if made for an antecedent debt of the factor, should not extend beyond the amount of his interest in the goods, nor should any such deposit extend beyond such interest *if the party had notice.*

By the sixth section of the 6 Geo. IV. it is enacted, that nothing therein contained shall be deemed, construed or taken to deprive or prevent the true owner or owners, or proprietor or proprietors of such goods, wares, or merchandize, from demanding and recovering the same from his, her, or their factor or factors, agent or agents, before the same shall have been so sold, deposited or pledged, or *from the assignee or assignees of* such factor or factors, agent or agents, in the event of his, her, or their bankruptcy, nor to prevent such owner or owners, proprietor or proprietors from demanding or recovering of and from any person or persons, body or bodies politic or corporate, the price or sum agreed to be paid for the purchase of such goods, wares or merchandize, subject to any right of set-off on the part of such person or persons, body or bodies politic or corporate, against such factor or factors, agent or agents, nor to prevent such owner or owners, proprietor or proprietors from demanding or recovering of and from such person or persons, body or bodies politic or corporate, such goods, wares, or merchandize *so deposited or pledged,* upon repayment of the money, or on restoration of the negotiable instrument or instruments so advanced or given on the security of such goods,

wares, or merchandize as aforesaid, by such person or persons, body or bodies politic or corporate, to such factor or factors, agent or agents, and upon payment of such further sum of money, or on restoration of such other negotiable instrument or instruments (if any), as may have been advanced or given by such factor, or factors, agent or agents, to such owner or owners, proprietor or proprietors, or on payment of a sum of money equal to the amount of such instrument or instruments, nor to prevent the said owner or owners, proprietor or proprietors, from recovering of and from such person or persons, body or bodies politic or corporate, any balance or sum of money remaining in his, her, or their hands, as the produce of the sale of such goods, wares or merchandize, after deducting thereout the amount of the money or negotiable instrument or instruments so advanced or given upon the security thereof as aforesaid, provided that in case of the bankruptcy of any such factor or agent, the owner or owners, proprietor or proprietors of the goods, wares, and merchandize so pledged and redeemed as aforesaid, shall be held to have discharged *pro tanto* the debt due by him, her, or them to the estate of such bankrupt (*a*).

(*a*) As to mortgages of bills of lading, prior to the statute, see Evans v. Martlett, 1 Lord Raymond, 271; 3 Salk. 290; Lempriere v. Pasley, 2 T. R. 485; Wright v. Campbell, 4 Burr. 2047; Snee v. Prescott, 1 Atk. 245; Lickbarrow v. Mason and others, 2 T. R. 674; Savignac v. Cuff, *ibid.* 678.

CHAPTER XVI.

MORTGAGES OF SHIPS AND FREIGHT.

No species of mortgage security requires greater circumspection than that we are about to consider. In almost every other instance of the transfer of property, a defect in the assurance is remediable in equity, on proof of the equitable contract between the parties, as already noticed. But so strict are the provisions of the statute law regulating the change of this nature of property as almost to oust the jurisdiction of equity.

Recent statutes have made considerable alterations in this branch of the law; but to arrive at a clear understanding of the subject, it is necessary to advert, not only to the statutes now repealed, but also to the cases decided in reference to them.

The 7th & 8th William III., cap. 22 (*a*), enacted, that no ship or vessel should be deemed a British built vessel qualified to trade to or from *the plantations* until registered on the oath of one or more of the owners, before the collector or comptroller of the port to which the ship or vessel should belong; and

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(*a*) 7 and 8 Will. III. c. 22, is repealed by the 4 Geo. IV. c. 41, so far as relates to the registering of ships or vessels.

that in case there should be any alteration of property in the same port by the sale of one or more shares in any ship after registering thereof, such sale should always be acknowledged by indorsement on the certificate of the register.

This act it was considered did not preclude a mere parol agreement or contract for sale; and it applied only to ships trading to and from *the plantations*.

By the act of the 26 Geo. III. cap. 60 (*b*), the provisions of the 7th and 8th William III. cap. 22, were extended to *all* British built ships of fifteen tons or upwards; a form of certificate of registry was prescribed, which was to be delivered to the owner; and it was provided that no registry should be made except at the port to which the ship belonged. The 17th section enacted, "that so often as the property in any ship should be transferred in whole or in part, *the certificate of the registry of such ship or vessel should be truly and accurately recited in words at length, in the bill or other instrument of sale thereof* (*c*), and that otherwise such bill of sale should be utterly *null and void* to all intents and purposes."

A case (*d*) occurred soon after the passing of this

(*b*) 26 Geo. III. c. 60, is repealed by the 4 Geo. IV. cap. 41, so far as relates to the registering of ships or vessels.

(*c*) As to this, *vide infra*, p. 336.

(*d*) Rolleston and others, assignees of Margetson, a bankrupt, *v.* Hibbert and others, 3 Term Rep. 406.

statute in which it became necessary to consider the effect of its provisions, both at law and in equity. Margetson executed on the 21st June, 1788, a bill of sale of the ship Commerce, to Hibbert and others, and deposited with them the grand bill of sale, but the assignment did not contain a recital of the certificate. Hibbert and Co. gave Margetson an acknowledgment in writing, promising to return the grand bill of sale on payment of certain sums then due; the ship was at sea, and before her arrival in port Margetson became bankrupt; the assignees afterwards brought trover for the ship; it was contended by the defendants, that the transfer of ships at sea was not within the act, because it was necessary the certificate should be on board the ship, and therefore could not be recited, or that, at all events, the defendants had a lien on the ship for the money due. The Court held the case to be within the statute; for the parties might have extracted from the registry at the custom-house all that was necessary for the recital; and that it was a pledge and not a lien, and the bill of sale was absolutely void. On this (*e*) the defendants at law filed their bill in equity against the assignees for relief, on the ground that the bill of sale was a defective assurance, which ought to be made good by the assignees within the principle of the cases of Burgh *v.* Frances (*f*), and Taylor *v.* Wheeler (*g*). On the other hand it was contended, that the Court could not give relief against the act

(*e*) Hibbert and others *v.* Rolleston and others, 3 B. C. C. 571.
(*f*) *Supra.* (*g*) *Supra.*

of parliament, and that the case resembled the void grant of an annuity, for which it was never thought there was remedy in equity, although the grantee might recover back the consideration-money. Lord Chancellor Thurlow, after expressing great doubts, dismissed the bill without costs (*h*).

The same assignees (*i*) afterwards brought trover for the recovery of another ship assigned by Margetson, which ship was also at sea, but in this case, application had been made at the register-general's office in the custom-house for a copy of the certificate, which was recited in the bill of sale, but it turned out, there was a clerical error in the custom-house copy, and the signatures of the officers were not mentioned in the recital. The Court held that the clerical error did not vitiate the bargain and sale (*k*), and that mention of the signatures was not necessary.

A very strong case (*l*), was afterwards heard in the King's Bench in an action upon a policy of insurance on freight. The ship had been paid for by four partners, but was registered in the names of two only; the action was brought in the names of three; the declaration consisted of two counts: the first averred the interest to be in the three plaintiffs; the second averred the interest to be in them and the fourth

(*h*) On this point *vide infra*.

(*i*) Rolleston and others *v.* Smith, 4 Term Rep. 161.

(*k*) On this point *vide infra*.

(*l*) Camden *v.* Anderson, 5 T. R. 709.

partner. It was argued for the plaintiffs, that the two partners in whose name the register was made, might by parol agreement transfer their right to the other two in conjunction with themselves. Lord Kenyon intimated a strong opinion, that no title could be made to a ship, except by a bill of sale in writing pursuant to the act. The Court decided, that the right to the freight resulted from the ownership, and that the plaintiffs had neither legal nor equitable interest in the ship, and the plaintiffs were nonsuited (*m*).

Shortly after the determination of the case of Camden *v.* Anderson, and to remove the doubt, whether the interest in a ship could be transferred by parol, the act of the 34 Geo. III. cap. 68, now repealed (*n*), enacted, that no *transfer, contract or agreement* of property, in any ship or vessel, should be valid or effectual, for any purpose whatsoever, either at law or in equity, unless by bill of sale or instrument in writing, containing such recital as prescribed by the act; and it enacted, that the indorsement upon the certificate of register should be made in the manner and form therein mentioned, and signed by the party making the transfer, and a copy of it delivered to the person authorized to make registry, otherwise such *sale, or contract or agreement,* should be utterly null and void. The 16th sect. provided, that if any ship or vessel should be at sea, or absent from the port to which she belonged at the

(*m*) As to partners, owners of vessels, *vide infra.*

(*n*) 34 Geo. III. c. 68, sec. 14, is in part repealed by 4 Geo. IV. c. 41; *vide infra.*

time when such alteration in the property thereof should be made as aforesaid, so that an indorsement on the certificate could not be immediately made, the sale, or contract or agreement for the sale thereof, should, notwithstanding, be made by a bill of sale or other instrument in writing, as before directed, and a copy of such bill of sale or other instrument in writing should be delivered, and an entry thereof should be indorsed on the oath or affidavit, and a memorandum thereof should be made in the book of registers, and notice of the same should be given to the commissioners of the customs in the manner thereinbefore directed; and *within ten days* after such ship or vessel should return to the port to which she belonged, an indorsement should be made and signed by the owner or owners, or some person legally authorized for that purpose by him, her, or them, and a copy thereof should be delivered in manner thereinbefore mentioned, otherwise such bill of sale, or contract or agreement for sale thereof, should be utterly null and void to all intents and purposes whatsoever; and entry thereof should be indorsed and a memorandum thereof made in the manner thereinbefore directed. The 21st section provided for the granting of registers *de novo* on the alteration of property in the ship or vessel without change of port, at the request of the owners or proprietors (*o*).

On these statutes many important decisions occurred both at law and in equity, but principally turning on the assignment of vessels *while at sea*.

(*o*) Vide *infra*.

In the case of Moss *v.* Charnock (*p*), two-thirds of a vessel were in August, 1800, assigned by way of security. In November, the assignor became bankrupt. None of the requisites of the acts of the 26 and 34 Geo. III. were complied with until December following, when all was done which could be then performed. On the 7th March the ship came into port, and within ten days the remainder of the requisites of the acts were performed. The assignees of the bankrupt brought trover, and contended, that the bankruptcy having intervened between the time of the execution of the bill of sale and the compliance with the requisites of the acts, no property passed from the bankrupt prior to his bankruptcy; on the other hand, it was contended, that as the requisites of the statute of the 34 Geo. III. were complied with within a *reasonable* time after the assignment, that would by relation make the sale complete; the Court held that the public would be most effectually served by holding that no interest should pass from any owner of British ships to any other until the public had that information which was so essential to its commercial welfare, which would be best done by construing the statute as enacting, that no bill of sale or other such instrument should have *any operation or effect*, until the requisites imposed on the parties by the sale were complied with, and by not allowing any relation to hold good, so as to make the conveyance effectual from any antecedent time; and the Court was not

(*p*) Moss *v.* Charnock, 2 East, 399.

aware of any authority to shew, that if a statute directed a certain thing to be done without limiting a time for doing it, that such statute was to be construed as if it had said that it should be sufficient, if the thing was done within a *reasonable* time, instead of understanding the statute as enacting that the instrument should have no operation or effect, until what the statute required should have been complied with. Verdict was therefore given for the plaintiffs.

Lord Eldon justly remarked, that the generality of the reasoning in Moss *v.* Charnock, went to this extent, viz. that if a man sold a ship at sea, the vendee having done every thing required by the act that could be done, but afterwards before the arrival of the ship in port an act of bankruptcy was committed by the vendor, the assignees under the commission of the bankruptcy and not the vendee would take the ship. In this his lordship said he could not concur (*q*).

Baron Wood also in delivering his opinion in the Exchequer Chamber in the case of Hubbard *v.* Johnstone (*r*) expressed his disapprobation of the principle laid down in Moss *v.* Charnock, and said he thought the property passed instantly by the bill of sale, and that the subsequent acts to be done were not necessary to *transfer the property;* but the grant was

(*q*) Mestaer *v.* Gillespie, 11 Ves. jun. 637.
(*r*) 3 Taunt. 206.

defeasible by subsequent omissions, in cases where it was expressly provided but not otherwise; or, in other words, that the property vested in the vendee *instanter* on the execution of the bill of sale, supposing it to contain a proper recital of the certificate, subject to be divested on non-performance of the subsequent acts required by the statute (*s*).

In another case (*t*) the question arose on the effect of a writ of *fi. fa.* sued out by a creditor after the execution of the bill of sale and a memorandum of the transfer on the certificate of registry, but previously to a copy of the indorsement being delivered to the proper office, which however was done the next day. The Court held that the case of Moss *v.* Charnock was under the circumstances rightly decided, because there was gross delay, and the requisites of the statute were not complied with in a reasonable time, but they agreed in Baron Wood's construction of the statute, viz. that the bill of sale vested the property in the vendee, and that the requisites of the statute were in the nature of conditions subsequent, and as they were complied with as nearly *instanter* as could be and within a reasonable time, the writ of *fi. fa.* came too late (*u*).

Of this decision Lord Eldon expressed his approbation (*x*), and decided that the bankruptcy of the

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(*s*) As to this point, *vide infra.*

(*t*) Palmer *v.* Moxon, 2 M. & S. 43.

(*u*) *Vide infra.*

(*x*) Dixon *v.* Ewart, 3 Mer. 332; *sed vide* Ritchie *v.* St. Barbe, Taunt. 768.

vendor did not vitiate the bill of sale, the indorsement being made on the certificate within ten days after the ship's return as required by the act, and that a power of attorney given by the vendee to make the indorsement was not revoked by the bankruptcy. On the same principle Sir Thomas Plomer, Vice-Chancellor, granted an injunction to prevent an improper indorsement being put on the certificate (*y*).

The doubts raised in the several cases before noticed have been now set at rest by the statutes we have next to consider. These are, the 4 Geo. IV. cap. 41, intituled, "An Act for the Registering of Vessels:" and the 6 Geo. IV. cap. 110, intituled, "An Act for the Registering of British Vessels."— These statutes enact, that when and so often as the property in any ship or vessel, or any part thereof, belonging to any of his majesty's subjects shall, after registry thereof, be sold to any other or others of his majesty's subjects, the same shall be transferred by bill of sale or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, *or the principal contents thereof*, otherwise such transfer shall not be valid or effectual for any purpose whatever in law or in equity. The reader will observe that the words "or the principal contents thereof" are here introduced, which are not in the 26 Geo. III., and that the directions of the present acts are in other respects not so express as in

(*y*) Thompson *v.* Smith, 1 Madd. 395.

the former statute. But it is provided, that no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry instead of the existing certificate, if the identity of the ship or vessel be effectually proved thereby. This latter enactment appears intended to meet the objections raised in Rolleston *v.* Smith, before noticed.

It is then enacted, that the property in every ship or vessel of which there are more than one owner shall be taken and considered to be divided into *sixty-four* parts or shares, and the proportion held by each owner shall be described in the registry as being a certain number of sixty-fourth parts or shares, and that no person shall be entitled to be registered as an owner of any ship or vessel, in respect of any proportion of such ship or vessel which shall not be an integral sixty-fourth part or share of the same; and that upon the first registry of any ship or vessel, the owner or owners, who shall take and subscribe the oath required by the acts before registry be made, shall also declare upon oath the number of such parts or shares then held by each owner, and the same shall be so registered accordingly; but that if at any time it shall happen that the property of any owner or owners in any ship or vessel cannot be reduced by division into any number of integral sixty-fourth parts or shares, it shall be lawful for the owner or owners of such fractional parts, as shall be over and above such number of integral sixty-fourth parts or shares, into which such property in any ship or vessel can be reduced by division, to transfer the same one to another, or jointly to any new owner, by memoran-

dum upon their respective bills of sale, without such transfer being made liable to any stamp duty; and also that the right of such owner or owners to such fractional parts shall not be affected by reason of the same not having been registered. The regulations here introduced by the statute are very clear and precise.

Provision is then made to meet the case of shares belonging to *a partnership or trading company,* by declaring that it shall be lawful for any number of such owners named and described in such registry, being partners in any house or copartnership, *actually carrying on trade in* any part of his Majesty's dominions, to hold any ship or vessel, or any share or shares of any ship or vessel, *in the name of such house or copartnership,* as joint owners thereof, without distinguishing the proportionate interest of each such owner, and that such ship or vessel, or the share or shares thereof so held in copartnership, shall be deemed and taken to be partnership property to all intents and purposes, and shall be governed by the same rules, both in law and in equity, as relate to and govern all other partnership property in any other goods, chattels, and effects whatsoever. The case of Camden *v.* Anderson, before noticed, probably suggested this provision.

The statute then declares, that no greater number than thirty-two persons shall be entitled to be the *legal owners* at one and the same time of any ship or vessel as tenants in common, or to be registered as such. But that nothing shall affect the *equitable* title of minors, heirs, legatees, creditors or others exceeding that number duly represented by or holding

from any of the persons within the said number registered as legal owners of any share or shares of such ship or vessel. By this provision the number of owners on the register is restricted to one-half the number of aliquot parts into which the ownership is to be divided, but the equitable rights of other owners are not to be prejudiced.

An important provision is then made to meet the case of *joint stock companies*, by declaring that if it shall be proved to the satisfaction of the Commissioners of his Majesty's Customs, that any number of persons have associated themselves as a *joint stock company* for the purpose of owning any ship or vessel, or any number of ships or vessels, as the joint property of such company, and that such company have duly appointed or elected any number not less than three of the members of the same to be trustees of the property in such ship or vessel, or ships or vessels, so owned by such company, it shall be lawful for such trustees, or any three of them, with the permission of such commissioners, to take the oath required by the acts before registry be made, except that instead of stating therein the names and descriptions of the other owners, they shall state the name and description of the company to which such ship or vessel, or ships or vessels, shall in such manner belong.

In the 4 Geo. IV. (*a*) a proviso is inserted in respect of the registry of ships or vessels belonging to any corporate body, in which case the oath

(*a*) See sect. 31.

was to be taken before registry by the secretary or other proper officer of such corporate body, who should in such oath declare the name and description of such corporate body, instead of the names and descriptions of the owners of such ship or vessel. But in the 6 Geo. IV. (*b*) this proviso appears to be omitted.

These statutes then proceed to dispose of the doubt raised in the cases of Moss *v.* Charnock, Mestaer *v.* Gillespie, Hubbard *v.* Johnstone, Palmer *v.* Moxon, and Dixon *v.* Evans, before noticed, by enacting, that no bill of sale or other instrument in writing shall be valid and effectual *to pass the property* in any ship or vessel, or in any share thereof, or for any other purpose, *until* such bill of sale or other instrument in writing shall have been produced to the collector and comptroller of the port at which such ship or vessel is registered, or to the collector and comptroller of any other port at which she is about to be registered *de novo*, as the case may be, nor *until* such collector or comptroller respectively shall have entered in the book of registry, or in the book of intended registry, of such ship or vessel, as the case may be, (and which they are respectively thereby required to do upon the production of the bill of sale or other instrument for that purpose,) the name, residence, and description of the vendor *or mortgagor*, or of each vendor *or mortgagor* if more than one, the number of shares transferred, the name, residence, and description of the pur-

(*b*) See sect. 33.

chaser *or mortgagee,* or of each purchaser *or mortgagee,* if more than one, and the date of the bill of sale or other instrument and of the production of it; and further, if such ship or vessel is not about to be registered *de novo,* the collector and comptroller of the port where such ship is registered shall and they are thereby required to *indorse* the aforesaid particulars of such bill of sale or other instrument on the certificate of registry of the said ship or vessel, when the same shall be produced to them for that purpose, in manner and to the effect following, viz.

"Custom House, [*port and date, name, resi-*
"*dence, and description of vendor or mortgagor,*]
"has transferred by [bill of sale, *or other instru-*
"*ment*] dated [*date, number of shares*] to [*name,*
"*residence, and description of purchaser or mort-*
"*gagee.*]

"A. B. Collector.
"C. D. Comptroller."

And forthwith to give notice thereof to the Commissioners of Customs; and in case the collector and comptroller shall be desired so to do, and the bill of sale and other instrument shall be produced to them for that purpose, then the said collector and comptroller are thereby required to certify by indorsement on the said bill of sale or other instrument, that the particulars before mentioned have been so entered in the book of registry, and indorsed upon the certificate of registry as aforesaid.

And that *when* and so soon as the particulars of

any bill of sale, or other instrument, by which any ship or vessel, or any share or shares thereof, shall have been transferred, shall have been so entered in the book of registry as aforesaid, *the said bill of sale or other instrument shall be valid and effectual to pass the property* thereby intended to be transferred, as against all and every person and persons whatsoever, and to all intents and purposes, *except* as against such subsequent purchasers and mortgagees who shall *first* procure the indorsement to be made upon the certificate of registry of such ship or vessel, in manner thereinafter mentioned.

And further that when and after the particulars of any bill of sale or other instrument by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book, of registry as aforesaid, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale, or instrument purporting to be a transfer by the same vendor or mortgagor or vendors or mortgagors of the same ship or vessel, share or shares thereof, to any other person or persons, unless *thirty days* shall elapse from the day on which the particulars of the former bill of sale or other instrument were entered in the book of registry, *or, in case the ship or vessel was absent* from the port to which she belonged at the time when the particulars of such former bill of sale or other instrument were entered in the book of registry, then unless thirty days shall have elapsed *from the day on which the ship or vessel arrived at the port* to which the same belonged; and in case the

particulars of two or more such bills of sale, or other instruments as aforesaid, shall at any time have been entered in the book of registry of the said ship or vessel, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale or other instrument as aforesaid, unless thirty days shall in like manner have elapsed from the day on which the particulars of the last of such bills of sale or other instrument were entered in the books of registry, or from the day on which the ship or vessel arrived at the port to which she belonged, in case of her absence as aforesaid; and in every case where there shall at any time happen to be two or more transfers by the same owner or owners of the same property in any ship or vessel entered in the book of registry as aforesaid, the collector and comptroller are thereby required to indorse upon the certificate of registry of such ship or vessel the particulars of that bill of sale or other instrument, under which the person or persons claims or claim property, *who shall produce the certificate of registry for that purpose within thirty days next after the entry of his said bill of sale or other instrument in the book of registry as aforesaid, or within thirty days next after the return of the said ship or vessel to the port to which she belongs, in case of her absence at the time of such entry as aforesaid;* and in case no person or persons shall produce the certificate of registry within either of the said spaces of thirty days, then it shall be lawful for the collector and comptroller, and they are thereby required to indorse upon the certificate of registry the particulars of the bill of sale or other instrument, to such person or persons

as shall first produce the certificate of registry for that purpose, it being the true intent and meaning of the act that the several purchasers *and mortgagees* of such ship or vessel, share or shares thereof, when more than one appear to claim the said property, shall have priority one over the other, not according to the respective times when the particulars of the bill of sale or other instrument by which such property was transferred to them, was entered in the book of registry as aforesaid, *but according to the time when the indorsement is made upon the certificate of registry as aforesaid.*

But that if the certificate of registry shall be lost or mislaid, or shall be detained by any person whatever, so that the indorsement cannot in due time be made thereon, and proof thereof shall be made by the purchaser or mortgagee or his known agent, to the satisfaction of the Commissioners of his Majesty's Customs, it shall be lawful for the said commissioners to grant such *further* time as to them shall appear necessary for the recovery of the certificate of registry, or for the registry *de novo* of the said ship or vessel under the provisions of the act; and thereupon the collector and comptroller shall make a memorandum in the book of registers of the further time so granted, and during such time no other bill of sale shall be entered for the transfer of the same ship or vessel or the share or shares thereof.

It will be observed that these provisions of the statute law are in some respects opposed to the opinions of the judges in the cases of Mestaer *v.* Gil-

lespie, Hubbard *v.* Johnstone, Palmer *v.* Moxon, and Dixon *v.* Evans, and in accordance with the decision in Moss *v.* Charnock, by enacting, that no interest shall be vested in the transferree *until* the bill of sale shall be entered on the register, which is to give the party preference against all persons excepting a subsequent purchaser or mortgagee who shall first procure an indorsement on the certificate; and for the protection of the first party, the statute gives him thirty days after his bill of sale has been entered, in case the ship is in port, or, if the vessel is at sea, thirty days after she arrives in port, to produce the ship's certificate for the purpose of indorsement, with a like saving in favour of each successive transferree, and if more than one transferree shall get on the register, then the priority is given to the party first producing the certificate for the purpose of indorsement.

Prior to the passing of the late statutes, it was considered safest to recite the certificate *in hæc verba*, for a material variation would totally vitiate the instrument (*c*). But this is no longer necessary if the principal contents are inserted.

An agreement for a sale must recite the certificate, or it will not be available in equity (*d*), or at law (*e*).

Neither the bill of sale nor an agreement for a sale need, however, recite the indorsements on the certificate (*f*).

(*c*) For an instance of this, see Westerdell *v.* Dale, 7 T. R. 306.

(*d*) Brewster and others *v.* Clarke and others, 2 Mer. 75.

(*e*) Biddell *v.* Leeder and Pulham, 1 Barn. & Cres. 327.

(*f*) Capadose *v.* Codnor, 1 Bos. & Pul. 483.

Although the bill of sale may be null and void as an instrument of assignment, yet it will not be nullified *to all intents;* and therefore a mortgagee may maintain an action of covenant against the mortgagor for the money lent under a covenant contained in the deed (*g*).

It was decided on the former acts that there could be no *equitable title* in a ship arising by implication of equity on acts between the parties, and that the register was conclusive evidence of the property even between joint and separate creditors, and that parol evidence was not admissible in equity to show the money was advanced out of the joint concern (*h*). But it will be seen that the recent statutes admit the introduction of trusts.

In case the assurance is defective, relief will not be had in equity on the contract as in the case of other defective assurances, but the transfer is *void* to all intents and purposes (*i*).

Whether equity will relieve in case of *fraud* on the part of the vendor preventing a compliance with the requisites of the statutes has been much doubted (*k*). In two cases (*l*), the Master of the Rolls refused to relieve on the ground of fraud, but, in another case,

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(*g*) Kerrison *v.* Cole, 8 East, 231.

(*h*) *Ex parte* Yallop, 15 Ves. jun. 60; *Ex parte* Houghton, 17 Ves. jun. 251; 1 Rose, 177; *et vide* Curtis *v.* Perry, 6 Ves. jun. 739.

(*i*) Spildt *v.* Lechmere, 13 Ves. jun. 589.

(*k*) Mestaer *v.* Gillespie, *supra.*

(*l*) See cases in note, 1 Madd. 400.

Lord Chancellor Eldon is said to have expressed a doubt (*m*).

A declaration of trust would not, even prior to the late statutes, have vitiated the legal effect of the bill of sale if the requisites of the statutes were complied with (*n*).

In the case of Thompson *v.* Smith (*o*), a doubt was started whether under the former statutes there could be a valid mortgage of a ship, or whether the right of redemption did not rest on honour between the parties, to obviate which the statutes now under consideration enact, that when any transfer of any ship or vessel, or any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage, or assignment to a trustee or trustees for the purpose of selling the same for the payment of any debt or debts, then and in every such case the collector and comptroller of the port where the ship or vessel is registered, shall in the entry in the book of registry, and also in the indorsement on the certificate of registry in manner thereinbefore directed, state and express that such transfer was only made as a security for the payment of a debt or debts, or by way of mortgage or to that effect; and the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as mortgagee or

(*m*) *Vide* 1 Madd. 406.
(*n*) Heath *v.* Hubbard, 4 East, 110.
(*o*) 1 Madd. 395.

mortgagees or as trustee or trustees only, shall not by reason thereof be deemed to be the owner or owners of such ship or vessel, share or shares thereof, nor shall the person or persons making such transfer be deemed, by reason thereof, to have ceased to be an owner or owners of such ship or vessel any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred, available by sale or otherwise for the payment of the debt or debts, for securing the payment of which such transfer shall be made.

And that when any transfer of any ship or vessel, or of any share or shares thereof, shall have been made as a security for the payment of any debt or debts, either by way of mortgage or of assignment as aforesaid, and such transfer shall have been duly registered according to the provisions of this act, the right or interest of the mortgagee or other assignee as aforesaid, shall not be in any manner affected by any act or acts of bankruptcy committed by such mortgagor or assignor, mortgagors or assignors, after the time when such mortgage or assignment shall have been so registered as aforesaid, notwithstanding such mortgagor or assignor, mortgagors or assignors, at the time he or they should so become bankrupt as aforesaid, shall have in his or their possession, order and disposition, and shall be the reputed owner or owners of the said ship or vessel, or the share or shares thereof, so by him or them mortgaged or assigned as aforesaid, but that such mortgage or assignment shall

take place of, and be preferred to, any right, claim, or interest which may belong to the assignee or assignees of such bankrupt or bankrupts in such ship or vessel, share or shares thereof, any law or statute to the contrary thereof notwithstanding.

A doubt formerly existed, whether a mortgagee of a ship was not liable as legal owner, for goods furnished, although he had not taken possession, notwithstanding the decision in the case of Jackson *v.* Vernon(*p*) to the contrary. Any doubt, however, which may have existed on this point is now set at rest by the statute of the 6 Geo. IV. cap. 110 (*q*), that the mortgagee shall not be deemed owner by reason of the transfer to him by way of mortgage, nor the mortgagor, by reason of such transfer, be deemed to have ceased to be the owner, except so far as may be necessary for rendering the ship available by sale or otherwise for payment of the mortgage debt.

On the other hand, as the mortgagee is not to be considered as legal owner, except for the purpose of his security, he ought not to recover on a policy of insurance beyond the amount of the sum secured(*r*).

In a case(*s*) in which a purchaser of a ship, pre-

(*p*) 1 H. Blackstone, 117, note. (*q*) Sect. 45.
(*r*) Irving *v.* Richardson, 2 B. & Ad. 193.
(*s*) Young and another *v.* Brand and another, 8 East, 10.

vious to the completion of the conveyance, ordered the master to take the vessel to a shipwright to be repaired, it was held that the seller, although the legal owner, was not liable; and (*t*) where a ship was sold in the interval between an order for stores given by the seller, and their delivery on board, the purchaser was held not responsible. The principle deciding these cases is, that the credit was not given to the legal owner, but to a third person. It may be also proper to add in this place, that *the register alone* is not even *primâ facie* evidence to charge a person as owner of a ship, in a suit between private individuals (*u*), nor is the bill of sale, unless it appears to have been accepted by the assignee (*x*).

The freight, if in a charter-party, may, it seems, be assigned independently of the ship, and will not be within the registry acts; and equity will grant an injunction to prevent payment to the mortgagor (*y*).

But otherwise the earnings cannot, it seems, be separated from the ship itself (*z*). And, although the 6 Geo. IV. cap. 110, has declared that a mortgagee shall not be deemed owner, except for the

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(*t*) Trewbella *v.* Rowe, 11 East, 435.

(*u*) Frazer *v.* Hopkins and another, 2 Taunt. 5.

(*x*) Tinkler *v.* Walpole, 14 East, 226; *et vide* Cooper *v.* South, 4 Taunt. 802; Price *v.* Anderson, ibid. 652.

(*y*) Mestaer *v.* Gillespie, *supra*.

(*z*) Spildt *v.* Lechmere, *supra*. Abbott on Shipping, 31.

purpose of making a transfer, yet the freight will pass to him by the mortgage on his reducing the ship into possession (*a*).

(*a*) Dean *v.* M'Ghie, 4 Bingham, 47. But see Chinnery *v.* Blackburne, 1 H. Blackstone, 117, note, where the mortgagee has not taken possession.

CHAPTER XVII.

MORTGAGES OF STOCK.

Sir William Grant, when Master of the Rolls, justly remarked, that public stocks or funds are, in fact, *perpetual annuities* granted for ever redeemable by the public. They are a mere right; and the circumstance that government is the debtor makes no difference. They constitute a mere demand of dividends as they become due, having no resemblance to a chattel moveable or coin-money capable of possession and manual apprehension. He there determined, that if stock be transferred into the name of a married woman, and her husband die in her lifetime, without having accepted the stock in the Bank books, or otherwise reduced it into possession, the stock will survive to the wife, although the husband and wife should in his lifetime have signed partial transfers of the stock (*a*).

In another case (*b*), the Master of the Rolls remarked, there was a very untechnical expression used with regard to stock; there is literally no such thing as one hundred pounds stock: knowing, however, that in common parlance, people, speaking of

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(*a*) Wildman *v.* Wildman, 9 Ves. jun. 174.
(*b*) Kirby *v.* Potter, 4 Ves. jun. 751.

stock, will so express themselves, the Court will apply it.

Public stock may become the *subject of loan*, or it may be itself *the security* for the repayment of money.

It was formerly doubted whether a loan of stock was lawful, or whether it was not prohibited by the 7 Geo. II. cap. 8, s. 8, which enacts that "all contracts and agreements whatsoever, which shall from and after the first day of June, 1734, be made or entered into for the buying, selling, assigning, or transferring of any public or joint stock or stocks, or other public securities whatsoever, or of any part, share, or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made, to sell, assign, and transfer the same, shall not, at the time of making such contract or agreement, be actually possessed of or entitled unto in his, her, or their own right, or in his, her, or their own name or names, or in the name or names of a trustee or trustees to their use, shall be null and void to all intents and purposes whatsoever; and all and every person and persons whatsoever contracting or agreeing, or on whose behalf, and with whose consent any contract or agreement shall be made, to sell, assign, or transfer any public or joint stock or stocks, or other public securities, whereof such person or persons shall not at the time of making such contract or agreement be actually possessed of or entitled in his, her, or their own name or names, or in the name or names of a trustee or

trustees, to their use or their own right as aforesaid, shall forfeit and pay the sum of 500*l.*, to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's Courts of Record at Westminster, in which no essoign, privilege, protection, or wager of law, or more than one imparlance shall be allowed; one moiety thereof to the use of his Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them, who shall sue for the same; and all and every broker or brokers, agent or agents, who shall negotiate, transact, or intermeddle in the making or procuring to be made any such contract or agreement as aforesaid, and shall know that the person or persons by whom or on whose behalf such contract or agreement shall be made is or are not possessed of or entitled unto the stock or security, concerning which such contract or agreement shall be made in his, her, or their own name or names, or in the name or names of a trustee or trustees for their use, or right, shall for every such offence forfeit and pay the sum of 100*l.*, to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's Courts of Record at Westminster, in which no essoign, privilege, protection, or wager of law, or more than one imparlance, shall be allowed, one moiety thereof to the use of his Majesty, his heirs and successors, and the other moiety thereof to the use of him, her or them who shall sue for the same."

The question was tried in an action of assumpsit, before Lord Kenyon (*c*), when a verdict was found

(*c*) Sanders *v.* Kentish and Hawkesley, 8 T. R. 162.

for the plaintiff, subject to the opinion of the Court of King's Bench. The circumstances were, the plaintiff, Saunders, who was a clergyman, lent the defendant, Kentish, who was a stockjobber, 3000*l.* 4 *per cent.* annuities; the defendant, Hawkesley, was a surety with Kentish for the re-transfer. The defence set up to the action by the defendants was, that the loan was within the prohibition of the 7 Geo. II. cap. 8. It was answered, that the transaction was within the saving of the 11th section, namely, "that nothing in this act contained shall extend or be construed to extend to hinder or prevent any person or persons from lending any sum or sums of money, or any public or joint stock, or other public securities whatsoever, or any part, share, or interest therein, or to prevent or hinder any defeazance, contract, or agreement being made and entered into for the redelivering, assigning, or transferring such public or joint stock, or other public securities, or any part, share, or interest therein, upon the repayment of the sum or sums of money which shall have been lent and borrowed thereupon, with interest for the same, so as no premium or other consideration whatsoever be paid to or received by the person or persons lending such money, for or in consideration of such loan, more than legal interest." In this opinion the Court coincided. Lord Kenyon remarked, the act is intituled, "An Act to prevent the infamous Practice of Stockjobbing." But if the defendants' objections are to prevail, the title of the act ought to be altered, and it should run thus: "An Act to encourage the wickedness of stockjobbers, and to give

them the exclusive privilege of cheating the rest of mankind."

A loan of stock is therefore lawful; and the parties may agree that a sum of money equal to the dividends shall be paid in the mean time, although the dividends shall exceed five *per cent.* on the money produced by the sale of the stock; for the lender takes the hazard of the rise and fall of the market price; and if an action is brought at law on a bond given as a security for the re-transfer of stock in estimating the measure of damages, the lender will be entitled to recover the highest value of the stock on the day of trial (*d*); and if a bonus has been declared on the stock, the lender will have a right in equity to insist on the replacement of the original stock increased by the amount of bonus (*e*).

It is not material whether the stock is actually transferred to the mortgagor, or whether the stock is sold out, and the net produce paid to him (*f*).

And if a person is indebted to another man in a sum of money, an agreement between them that the debtor shall transfer to the creditor within a given time such a quantity of stock as the amount of the debt would have purchased on the day of the agreement, and pay dividends in the meantime, is lawful (*g*).

(*d*) Shepherd *v.* Johnson, 2 East, 211.
(*e*) Vaughan *v.* Wood, 1 Mylne & Keen, 403.
(*f*) Tate *v.* Wellings, 3 T. R. 537.
(*g*) Maddock *v.* Rumball and another, 8 East, 304.

The chief question in matters of this sort is, whether the transaction is usurious? and the general principle to be deduced from the cases seems to be, that if the principal money lent is not put in hazard, and the creditor may obtain an advantage exceeding legal interest, the loan will be tainted with usury; but some of the adjudged cases are not easily reconcileable to this principle.

In Barnard *v.* Young (*h*), heard before Sir William Grant, when Master of the Rolls, it appeared that 10,000*l.* had become due on bond, and the agreement was to transfer to the creditor, on a given day, so much stock as upon the 12th day of February then last, on which day the 10,000*l.* secured by bond became due, could have been purchased with the 10,000*l.*; OR, to pay the said 10,000*l.* *at the option of the creditor*, and also in the mean time to pay interest at five *per cent.* on the 10,000*l.* The Master of the Rolls said, this was in fact an usurious contract; for the principal money was never at hazard, the creditor was at all events sure of having that with lawful interest, and had the chance of an advantage if the stock rose. It was usurious to stipulate for that chance.

The Master of the Rolls in Barnard *v.* Young, distinguished that case from the case of Forrest *v.* Elwes (*i*), which had been heard before Lord Alvanley, and the ground of distinction taken by the Master of the Rolls was, that in Forrest *v.* Elwes there

(*h*) Barnard v. Young, 17 Ves. jun. 44.
(*i*) Forrest v. Elwes, 4 Ves. jun. 492.

was no option. In that case it appeared, that Mr. Elwes had in the year 1766 lent Commodore Forrest 8000*l.* Old South Sea Annuities, valued on the day of transfer at 7170*l.* The condition of the bond was, that Forrest should, at the end of six months, retransfer the 8000*l.* stock, and pay interest *at five per cent. on the* 7170*l.* Breach was made by Forrest in the condition of the bond by non-transfer of the stock within the six months, and a long period elapsed, during which part of the principal was discharged, but a great arrear of interest accrued on the residue. After the death of Forrest a suit was instituted in equity by his executors, in which Elwes was a defendant, and it was directed that the balance due to Elwes should be paid, and that the master should take an account of the money due. In the year 1798 the master reported that 6500*l.* was due for principal, with a very large sum for interest. It was objected on the part of the executors, that the master ought to have reported that so much was due as would purchase 8000*l.* South Sea Annuities, when the same might be purchased at some given period of time, after deducting the several sums already paid on the bond. On the other hand it was contended, that Mr. Elwes was entitled to the residue of the 7170*l.* The Master of the Rolls said, the question was, what was the fair measure of the damage? and asked, whether he should do justice in giving the same annuities, which were formerly worth eighty-nine *per cent.* and were then much depreciated? and he overruled the exception. Now it is with much deference suggested, that the effect of this decision was, after the expiration of the six months, to remove

from Mr. Elwes the hazard alluded to in Barnard *v.* Young, and to give him the same chance of rise without the risk of fall which vitiated the transaction in that case; unless it be supposed that if after the expiration of the six months, the stock had risen in value, Mr. Elwes would not have been entitled to the advantage of the rise, but have been kept to the 7170*l.*, which it seems difficult to conceive, for under such a determination Mr. Elwes would have sustained an actual loss through the default of the borrower.

There is also a case (*k*) heard in the King's Bench, which appears at variance with the principle before stated. The circumstances were; that the defendant Wellings applied to the plaintiff's testator to advance him a sum of money, which was agreed to, but the testator said he should expect the same interest which he received in the short annuities, namely, eight and a half *per cent.* To this the defendant assented. The money was accordingly raised by the testator by sale of short annuities, and the agreement was, that the defendant should replace the stock by the 1st day of September, 1785; but if it was not replaced by that time, then he should *repay the money raised* on the 1st of January, 1786; and in the mean time should pay *such interest as the stock would have produced.* On the trial Lord Kenyon left it to the jury to say, whether this was intended as a *bonâ fide* loan of stock to be replaced at a subse-

(*k*) Tate *v.* Wellings, 3 Term Rep. 537.

quent time, or repaid in money; or whether it was intended to be a loan of money, and the present device a mere colour for usury; the jury found it a mere loan of stock, and gave the plaintiff a verdict. A rule was afterwards obtained to shew cause why the verdict should not be set aside, and a new trial granted on the ground of usury, and it was argued that a contract for a loan of stock to be replaced on a given day, or to be repaid in money, reserving a greater interest than the law allows, in other cases was clearly usurious. The Court considered that they were precluded by the verdict of the jury from considering whether the transaction was a mere cloak for usury. Lord Kenyon thought that as the transaction was legal during the first year, there was nothing superadded to make it usurious. Mr. Justice Ashhurst thought, that from the contract the creditor derived no advantage, for he was only to receive in the mean time the same interest which the stock would have produced; and Mr. Justice Buller said this was not like the case cited from Cro. James (*l*), where the principal was always secure, for here the testator might have been a loser in the event of the stock rising after the first year. A new trial was therefore refused.

On consideration of the foregoing case, it is submitted, that the opinion given by Lord Kenyon, viz. that there was nothing superadded after the first year to make the transaction usurious,

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(*a*) Roberts v. Tremayne, Cro. Jac. 507.

appears singular, considering that it was an agreement to repay *a sum of money* with eight and a half *per cent.* interest. The reason given by Mr. Justice Ashhurst is yet more remarkable, for it would seem to imply that an agreement to repay money raised by the sale of stock would not be usurious, if the rate of interest did not exceed the dividends of the stocks sold. The reasoning of Mr. Justice Buller, namely, that the lender ran the hazard that the stock might rise after the year, would apparently apply to any loan of money raised by the sale of stock.

During the late war when the price of stock was so low as to render more than 5*l. per cent.* interest, mortgages of stock were frequent, and almost superseded money mortgages; they have now nearly disappeared. The most prudent course in such species of mortgage is, to make the land redeemable on the replacing of the stock on a given day, and payment of dividends in the mean time. The cases, however, seem to imply that it will not be unlawful to stipulate for the re-transfer of the stock, and to reserve five *per cent.* on the amount of the money produced by the sale, instead of the dividends, but the lender cannot be advised to rely on the case of Tate *v.* Wellings, as an authority for the proposition, that he may stipulate for the re-transfer of stock at a given day, and in default of transfer, then for the payment of the amount of the money produced by the sale, and reserve a rate of interest equal to the dividends. The case of Forrest *v.* Elwes may be considered as decided on the par-

ticular circumstances of hardship attending the case, and not as an authority for a general rule, that under a similar proviso, the Court of Chancery would decree a redemption on payment of the money instead of the transfer of stock, in order to save the lender from a loss; and it may be concluded from the case of Barnard *v.* Young, that the lender must not reserve to himself an option to require the transfer of stock, or payment of the money (*a*).

If stock is itself made the security for money and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself, principal and interest, without any authority from the mortgagor, and without filing his bill of foreclosure (*b*). But the mortgagee will be decreed to account for the surplus (*c*).

(*a*) For a precedent of a mortgage of stock, see App.

(*b*) Tucker *v.* Wilson, 1 P. Wms. 261; Lockwood and others *v.* Ewar, 2 Atk. 303.

(*c*) Harrison *v.* Hart, Comyns, 393. *Nota.* The circumstances of this case form a striking proof of the extent of the South Sea bubble, for it appears that 20,000*l.* South Sea stock was transferred as a security for 70,000*l.* money and interest, and that the 20,000*l* South Sea stock actually produced the sum of 86,291*l.* 17*s.* 8¾*d.* By the deposition of one witness, Hart agreed to sell him 1000*l.* South Sea stock at 1000*l. per cent.* premium.

CHAPTER XVIII.

Of Liens in general.

It is perhaps hardly within the scope of the present Treatise to enter into a consideration of the general doctrine of lien; of that particular branch which is confined to equity, and relates to real estate, mention has been already made (*a*). A few observations on the subject may, however, be not considered in this place irrelevant.

Lien may subsist both at law and in equity, although there are some liens which subsist in equity only (*b*).

Liens are general or specific. By the common law, every one has a lien on a specific article delivered to him to work on for the amount of the labour done; and this has even been extended to give a certificated conveyancer or special pleader a lien on the papers in his hands, so far as respects his costs on that particular account (*c*). But this species of lien does not extend to general balances or money due on former or different accounts (*d*).

The cases turn principally on the point, whether

(*a*) *Vide* Chap. XIII. Book II.
(*b*) 2 Mer. 403.
(*c*) Hollis *v.* Claridge, 4 Taunt. 807.
(*d*) *Ex parte* Ockenden, 1 Atk. 235.

the lien is confined to the particular transaction, or is extended to the general balance?

Lord Mansfield has stated (*e*), that the convenience of commerce and natural justice are on the side of liens, and that therefore, of late years, Courts have leant that way:—first, where it is *an express contract;* secondly, where it is implied from the usage of trade; or, thirdly, from the manner of dealing between the parties on the particular case; or, fourthly, where the party has acted as factor. It may not be improper briefly to consider the doctrine under these several divisions:—

First: In the case of an express contract. The Court of King's Bench has decided, that an agreement amongst a number of dyers, bleachers, &c. entered into at a general meeting, that they would not receive any goods without having a lien on the goods in hand for a general balance, was good in law; and that every person afterwards sending goods to such persons with notice of that agreement, must be considered as assenting to it and bound by it (*f*).

Secondly: In the case of implication from the usage of trade. On this principle it was decided, that a packer had a lien for his general balance, even including loans of money (*g*). It is also held that

(*e*) 4 Burr. 2221.

(*f*) Kirkman v. Shawcross, 6 Term Rep. 14.

(*g*) *Ex parte* Deeze, 1 Atk. 228.

bankers (*h*), and policy brokers (*i*), have a general lien for the balance of their accounts. But dyers (*k*), and common carriers (*l*), it seems, have not a lien by general usage.

Thirdly: From the manner of dealing between the parties, as in the case of Downman *v.* Matthews (*m*), which was a transaction between a clothier and a dyer, and there being evidence that they always made up their accounts by giving mutual credit, the lien for the general balance was allowed.

Fourthly: As to factors. In the case of Kruger *v.* Wilcox (*n*), Lord Hardwicke took the opinion of four merchants, who agreed, that if there is a course of dealings and general account between the merchant and the factor, and a balance is due to the factor, he may retain the ship and goods or produce for such balance of the general account, as well as for the charges, customs, &c. paid on the account of the particular cargo; but that if the factor deliver up the goods to the merchant, by his parting with the possession he parts with the specific lien; and the Court decreed accordingly.

(*h*) Davis *v.* Bowsher, 5 Term Rep. 488.

(*i*) Cooke's Bankrupt Laws, 442.

(*k*) *Vide* Green *v.* Farmer, 4 Burr. 2214; Close *v.* Waterhouse, 6 East, 525.

(*l*) Rushforth *v.* Hadfield, 6 East, 518.

(*m*) Prec. in Cha. 580; *et vide* Rushforth *v.* Hadfield, *supra*.

(*n*) Kruger *v.* Wilcox, Amb. 254.

It is now also decided, that a solicitor has a general lien for his costs, &c. on the papers in his hands (*o*). If a mortgagee deposits the title deeds with his solicitor, the latter has a lien on them to the amount of the mortgage debt for his bill of costs, even against a purchaser from the mortgagor, who ought to have inquired at the time of his purchase in whose hands the deeds were (*p*). But if on an intended mortgage the deeds are delivered by the proposed mortgagee to his solicitors, and the mortgage goes off, the solicitors will not have a lien for their bill of costs (*q*). It seems a solicitor may obtain an order to prevent his client from receiving money recovered in a suit, in which he has been employed for him, until his bill be paid (*r*). But if his client substitutes another solicitor, he cannot prevent the cause coming to a hearing, subject to his lien (*s*), nor can he prevent his client discontinuing the action, subject to the costs incurred (*t*).

Sir William Grant observed, that as to liens of one man on goods in the possession of another, he knew of no difference between the rules of decision in courts of law and in courts of equity (*u*).

To create the lien, the goods must come into the

(*o*) Stevenson *v.* Blakelock, 1 M. & S. 535.
(*p*) Ogle *v.* Story, 4 Barn. & Adol. 735; 1 Nev. & M. 474.
(*q*) Pratt *v.* Vizard, 2 Nev. & M. 455.
(*r*) *Vide* Dougl. 101.
(*s*) O'Dea *v.* O'Dea, 1 Sch. & Lefroy, 315.
(*t*) Merrywether *v.* Mellish, 13 Ves. jun. 162.
(*u*) Gladstone *v.* Birley, 2 Mer. 403.

actual possession of the party claiming it, on which principle it was held (*x*), that if a factor, in consideration of goods being consigned to him, accept bills drawn on him by the consignor, and pay part of the freight before the goods arrive, and afterwards become insolvent before the bills are due, the consignor may stop the goods *in transitu*.

It appears from the cases to be decided, that the right of lien does not extend beyond the time of *actual possession*, and, therefore, if the factor, &c. deliver up the goods before payment of his account, his lien is gone, and he cannot stop the goods even *in transitu* (*y*). And in one case it was held that a delivery of part only destroyed the lien (*z*).

It is also decided, that if the factor, solicitor, or other person having a specific or general lien on goods in his hands take a specific security, the lien is totally gone (*a*), so far as respects the debt for which the security is taken.

(*x*) Kinloch *v.* Craig, 3 Term Rep. 119.

(*y*) Sweet *v.* Pym, 1 East, 2; *et vide* Amb. 254.

(*z*) *Ex parte* Gwynne, 12 Ves. jun. 383; *et vide* Crawshay *v.* Eades, 1 Barn. & Cress. 181.

(*a*) Cowell *v.* Simpson, 16 Ves. jun. 275.

CHAPTER XIX.

Of Assignments of Mortgage.

In equity, the mortgage debt is the principal, the land the accessory. An assignment of mortgage is, therefore, in equity, a transfer of a debt with its attendant securities; and, as the accessary always follows the principal, it results that when the debt is satisfied, the security is determined.

On this principle, equity holds, that on an assignment of mortgage, without the concurrence of the mortgagor, the assignee, standing in the place of the original creditor, is subject in all respects to the like equities and settlement of accounts as the mortgagee himself would be (*a*). In Matthews *v.* Wallwyn (*b*), Matthews mortgaged to Baker for 2000*l.* The mortgage being paid off by Shepheard, who was Matthews's attorney, Matthews executed to Shepheard a bond for 2000*l.*, and Baker assigned the mortgaged premises to Shepheard, who afterwards deposited the bond and deed with Hercy and Co. for 2000*l.* Hercy and Co. requiring payment, Shepheard applied

(*a*) Earl of Macclesfield *v.* Fitton, 1 Vern. 169; 1 Ch. Ca. 68; Matthews *v.* Wallwyn, 4 Ves. jun. 118; Williams *v.* Sorrell, *ibid;* Bradwell *v.* Catchpole, 3 Swanst. 79, note.

(*b*) *Supra.*

to Wallwyn and Co. to lend him 2000*l.* They agreed to open an account with him on a deposit of the securities and his own note of hand. The securities were accordingly redeemed out of the hands of Hercy and Co., and deposited by Shepheard with Wallwyn and Co. Shepheard became bankrupt; and subsequently, under a decree of Chancery, his assignees executed an assignment of the mortgage to Wallwyn and Co. Matthews had no notice of the dealings with Hercy and Co. and Wallwyn and Co. Shepheard had been in the habit of receiving and paying large sums on account of Matthews. The bill was filed by Matthews against Wallwyn and Co. for redemption; and it is stated that, subsequently to the settlement of an account between Matthews and Shepheard in October, 1794, which was subsequent to the deposit to Wallwyn, Matthews had discovered that Shepheard had received divers sums of money not accounted for by him, and that the latter had, since the settlement, received other sums, and that on deducting these sums, a considerable balance would be due to Matthews. Wallwyn and Co. submitted that they had a specific lien for their balance. The Lord Chancellor, after stating the question to be whether the assignee of a mortgage had a right to be paid according to the sum that appeared due on the mortgage deed, whatever might be the state of the account between the mortgagor and mortgagee, and noticing the practice of conveyancers not to recommend as a good title an assignment of a mortgage, without making the mortgagor a party, and being satisfied that the money was really due, proceeded to state the particulars of the case of Lunn *v.* Lodge

and others, from a note of the case in his possession; from which it appeared that Lodge mortgaged to Pitman, who assigned to Saint John. Lodge and Pitman both became bankrupt. The bill was filed by the assignees of Lodge, insisting that nothing was due between the estates. Lord Thurlow directed the Master to inquire "what was due at the time of the mortgage? what was due at the time of the assignment? and what remained due?" The Master reported that 7000*l.* was due *from Pitman to Lodge;* and it was decreed that the assignments were void against the estate of Lodge. This, the Lord Chancellor said, was a direct authority in favour of Matthews. He then noticed that if an action was brought on the bond in the name of the mortgagee, which, the bond not being assignable at law, it must be (*a*), the mortgagor would pay no more than was really due on the bond; and if an action was brought on the covenant, the account must be settled in that action; and in a Court of Equity, the condition of the assignee could not be better than it was at law. Therefore the plaintiff must be at liberty to redeem upon payment of what the Master should find due on the original mortgage to Shepheard; and he directed the account to be taken in exactly the same way as Lord Thurlow had done, viz. an account of what was due at the time of the mortgage; what was due at the time of the assignment; and what was then due.

(*a*) As to this, see remarks *infra* on the case of the debt being secured by an *assignable instrument*.

The case of Matthews *v.* Wallwyn is a leading authority, that the mortgagor not concurring in the assignment, is not bound by the amount appearing due on the face of the mortgage. In a case (*c*) decided soon after that of Matthews *v.* Wallwyn, the same doctrine was acted upon. It appeared that Sorrell mortgaged to Clifton. Clifton assigned to Williams, without the concurrence of Sorrell, who, after the assignment, and without notice of it, made several payments to Clifton. The property was leasehold, lying in Middlesex, and the deed of assignment was registered. The bill was filed by the assignee, praying a foreclosure, and charging the mortgagor with notice by reason of the registry; but the point was scarcely contended by the counsel for the plaintiff. The decree was, that the defendant might redeem on payment of what was due, deducting the payments made to Clifton. In this case the mortgagor had made a tender of *the balance* to the assignee, subsequent to the filing of the bill; in consequence of which the costs of the suit were allowed the assignee up to the time of the tender only.

This doctrine has been confirmed by Lord Eldon (*d*), and may be considered as settled, as well in respect to payments before and after the assignment as also on a running account. The concurrence of the mortgagor in the assignment of a mortgage consequently should, if possible, ne-

(*c*) Williams *v.* Sorrell, 4 Ves. jun. 389.

(*d*) Chambers *v.* Goldwin, 9 Ves. jun. 284.

ver be dispensed with; and in cases in which, from unavoidable circumstances, an assignment is taken from the mortgagee only, the precaution should be had of obtaining a covenant from the mortgagee, that the money alleged to be owing is actually due; and notice of the assignment should be given to the mortgagor with the least practicable delay.

The mortgagor not being bound by the settlement of account between the mortgagee and assignee, *à fortiori* he cannot be prejudiced by any agreement between them to increase the amount of the *principal* due; and, consequently, the arrears of interest at the time of the assignment cannot, generally speaking, without his concurrence, be converted into principal, and tacked to the mortgage (*e*). And even with his consent, the interest cannot *with notice* be tacked to the prejudice of other creditors having then a lien on the estate (*f*). But it is submitted that as equity will on the settlement of accounts allow the necessary costs of defending and maintaining the title (*g*), renewal of leases (*h*), and the like, with interest in the mean time, the amount of such costs may on an assignment be tacked to the principal, and will carry interest without the mortgagor's con-

(*e*) Macclesfield *v.* Fitton, *supra*; Ashenhurst *v.* James, 3 Atk. 271; Porter *v.* Hubbard, 3 Atk. ch. 78; *et vide* Matthews *v.* Wallwyn, *supra*.

(*f*) Digby *v.* Craggs, Amb. 612.

(*g*) Godfrey *v.* Watson, 3 Atk. 518.

(*h*) Lucam *v.* Mertins, 1 Wils. 34; Manlove *v.* Bale, 2 Vern. 84.

currence, and have preference to other subsisting charges.

A further advantage arising from the concurrence of the mortgagor in the assignment is, that in such case the mortgagee need not be made a party to a bill of redemption, which otherwise is necessary, that he may account for the profits received in his time (*i*).

There is another most important point to be attended to by the mortgagee in an assignment of mortgage, viz. that if he is *in possession*, he is considered in equity, in some measure, in the light of a trustee, and accountable for the profits; and, therefore, if without the assent of the mortgagor, he assigns over the mortgage to another, he will be held liable to account for the profits received *subsequently* to the assignment (*k*), on the principle that, having turned the mortgagor out of possession, it is incumbent on him to take care in whose hands he places the estate. A query is added in Equity Cases Abridged, whether, if the mortgagor hides, so that he cannot be served with a *subpœna*, the mortgagee in possession may not assign without being accountable for the subsequent profits; but the query only tends to shew the general rule.

If the assignee is a *purchaser* of the mortgage debt, or, in other words, pays a less sum for it than the amount due, he will be entitled to the full benefit

(*i*) 2 Eq. Ca. Ab. 594. (*k*) 1 Eq. Ca. Ab. 328.

of his purchase (*l*). It has, however, been questioned, and an attempt made to confine the purchaser to the amount of the sum which he actually paid on the assignment; but, as observed by Lord Cowper, since he runs the hazard of a loss, he ought to have the benefit of the gain (*m*). If indeed the purchaser is in the situation of *a trustee* for the owner of the estate, then equity will hold that he made the purchase for the benefit of the estate, and consequently an executor, or guardian, or trustee, shall be only repaid the sum which he actually gave (*n*). In like manner, if the *heir at law* is the purchaser, and there be judgment or specialty creditors, he shall not have the benefit of the assignment beyond the amount of the purchase to their prejudice (*o*); and the like doctrine was, in one case (*p*), attempted to be extended to the instance of a purchase by a stranger to the estate, but Lord Hardwicke has remarked (*q*), he knew no subsequent case in which it had been laid down as a general rule, but held only with regard to agent, trustee, heir at law, or executor (*r*). And even with regard to those persons, if the mortgage is purchased

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(*l*) Phillips *v.* Vaughan, 1 Vern. 336; Baker *v.* Kellett, 3 Rep. Ch. 13; Nels. 117; Anon. 1 Salk. 155; Ascough *v.* Johnson, 2 Vern. 66; Morrett *v.* Paske, 2 At. 53; Darcy *v.* Hall, 1 Vern. 49.

(*m*) Anon. 1 Salk. 154.

(*n*) Morrett *v.* Paske, *supra*.

(*o*) Braithwaite *v.* Braithwaite, 1 Vern. 335; Long *v.* Clopton, *ibid.* 464.

(*p*) Williams *v.* Springfield, 1 Vern. 335, 476; *et vide* Long *v.* Clopton, *supra*.

(*q*) Morrett *v.* Paske, 2 Atk. 53, 54.

(*r*) *Et vide* Bromley *v.* Holland, 5 Ves. jun. 620.

for the purpose of protecting a subsequent incumbrance to which they are entitled in *their own right*, they may take the full benefit of the prior security (*s*). In a subsequent chapter, this doctrine will be more fully dilated on. These general observations may be therefore sufficient in this place.

At law, the debt being a chose in action, is not, in general, assignable. A power of attorney must be therefore given by the mortgagee to the assignee, to enable him to proceed in his name on the covenant and bond. The debt may, indeed, under special circumstances, be assignable at law as if secured by a negotiable instrument, such as a bill of exchange, which passes by indorsement; and Mr. Powell (*t*) has suggested, whether in such a case the general rule before stated (*u*), as to the liability of the assignee to the state of the account between the mortgagor and mortgagee would apply; for the assignee or indorsee has a legal right in the debt, and a legal remedy at law, which equity will not take from him. There certainly seems considerable force in the reasoning.

(*s*) Darcy *v.* Hall, 1 Vern. 49.

(*t*) Powell on Mortgage, page 973, 4th edit.

(*u*) *Supra*, p. 215.

CHAPTER XX.

STAMPS.

THE amount of the proper stamps to be placed on the deed of mortgage security is frequently the subject of much doubt and perplexity.

This has arisen from the obscure language used in the stamp acts, which might, it may be thought, have been avoided with little trouble.

As a preliminary remark, however, it should be observed, that the fiscal laws do not in general alter the operation of the laws of property; and therefore a deed of conveyance without any stamps will pass the estate. But the instrument will not, until stamped, be receivable in evidence; the consequence is, that when the stamp is affixed to the deed, it will take effect from the time of its delivery, as if the stamp had been then placed on it, and not from the time when the stamp is affixed on the deed.

It has recently been decided by the judges of the Court of King's Bench that if a deed is produced to them bearing the proper stamp, but which is proved not to have been stamped at the time of its execution, the Court will receive it in evidence,

without inquiring whether the stamp was affixed on payment of the proper penalties (*i. e.* 10*l.* or 5*l.*), nor will the memorandum by the commissioners of stamps indorsed on the deed, of the payment of 5*l.* be admissible as evidence of the actual amount of penalty paid. But if the revenue laws require the stamp to be affixed within a given period, the Court will, in such case, inquire into the time when the deed was stamped (*a*).

The laws at present in force relating to the stamps on mortgages are the 55 Geo. III. cap. 184, for Great Britain; the 56 Geo. III. cap. 56, for Ireland; and the 3 Geo. IV. cap. 117, for both countries.

The 55 Geo. III. and 56 Geo. III. imposed the duties on mortgages, in Great Britain and Ireland, as they are still payable; and on this point it may be necessary to observe, that if on the sale of an estate, part or the whole of the purchase money is raised by loan, and the estate is conveyed to the lender, subject to redemption by the purchaser, the *ad valorem* duty on sales to the full amount of the purchase money, and the *ad valorem* duty on mortgage to the amount of the sum borrowed, will be both payable.

These statutes have provided, that if the security is made to different persons for different and separate sums of money, the duty shall be charged in

(*a*) Rex *v.* the Inhabitants of Preston, 3 Nev. & Man. 31.

respect of each separate sum, and not on the aggregate amount thereof. But it has decided, notwithstanding the enactment, if a mortgage is made to several persons for a sum, which is in fact composed of several debts due to them separately, but which fact does not appear on the face of the deed, although proved by evidence, yet an *ad valorem* duty on the entire sum is sufficient (*b*).

The difficulties and doubts have chiefly arisen on the assignment and transfer of mortgages.

The Stamp Acts provided, that on any transfer or assignment of any mortgage, in all cases where the person entitled to the right of redemption or reversion should *not* be made a party to such transfer, and also where the person who originally made the mortgage should continue entitled to the right of redemption or reversion, *and should* be made a party to such transfer, the common deed stamp only should be payable, *provided no further sum of money or stock be added to the principal money or stock already secured.* The act then provided that in *all other* cases such transfer should be charged with the same duty or duties as an original mortgage.

The effect of that clause was, that if the equity of redemption was granted away to a stranger previously to the assignment of the mortgage, and the grantee of the equity concurred in the assignment,

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(*b*) Reed v. Wilmot, 7 Bingh. 577.

the full duty was again payable; which legislative enactment was founded on the idea that the assignee obtained the further personal security of the grantee.

But a question was raised on the effect of the clause dispensing with the payment of the mortgage duty on the assignment of mortgage, *provided no further sum of money or stock was added to the principal money or stock already secured*, followed by the clause directing that in *all other* cases the assignment should be charged with the same duty as an original mortgage. If these united clauses were taken in their literal meaning it certainly seemed to follow, that in *every* case in which a sum of money was added on the assignment of a mortgage, the full duty on the whole was payable, and from the observations made by the Lord Chief Justice of the Court of King's Bench in the case of Doe *v.* Gray, hereafter noticed, it appears that such was the true construction of the statute, although it is difficult to conceive that such could have been the intention of the legislature, because the provision would be frustrated by the simple operation of an assignment of the original mortgage, and an indorsement dated next day, by way of a further charge for the additional sum, and it could not be presumed, that the legislature meant to affix the heavy duty merely on the form of making the additional mortgage.

The Stamp Acts contained an exception from the mortgage duty of deeds made for the further assurance of property on which the mortgage duty had been

already paid, and a further exception, of deeds made as an additional or further security for sums on which the duty had been paid, in case such additional security was made by the same person who made the original security. But if any further money was added, the duty was to be paid in respect of such further sum.

To remove the doubts raised on these acts, the 3 Geo. IV. cap. 117, was passed, which repealed the duties imposed by the 55 Geo. III. and 56 Geo. III. on transfers of mortgage, but which, by adopting in part the language of the former acts, has created some further difficulties.

It may in the first place be observed, that in the commencement of the 2d section of the act, containing the enactment of the duties on assignments and transfers, as it appears in the copies printed by the King's printer, the words "*Great Britain*" are by mistake omitted, although those words are inserted in the subsequent parts of the section, shewing the intention of the legislature. And from the note in 4 Neville and Manning, p. 721, it may be collected, those words are actually on the Parliamentary Rolls.

This latter statute has enacted(*c*), "that from and after the expiration of ten days next after the passing of that act, in lieu and instead of the duties by that act repealed, there shall be granted, raised, levied,

(*c*) Section 2.

collected and paid *in Ireland* unto his Majesty, his heirs and successors, the several sums of money and duties following, that is to say, upon any transfer, *assignment*, disposition, assignation, or reconveyance of any mortgage, or of any other security in the said acts and the schedules thereto annexed, in that respect severally mentioned, or of the benefit thereof, or of the money or stock thereby secured, *provided no further sum of money or stock be added to the principal money or stock already secured*, there shall be paid in Great Britain a stamp duty of 1*l.* 15*s.*, and in Ireland a stamp duty of 1*l.*, British currency, for the first skin or piece of vellum, or parchment, or sheet or piece of paper upon which such transfer, assignment, disposition, assignation, or reconveyance, shall be ingrossed, written or printed, and where any such transfer or assignment, disposition or assignation in Great Britain, thereby charged with the duty of 1*l.* 15*s.*, together with any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, shall contain 2160 words or upwards, then for every entire quantity of 1080 words contained therein, over and above the first 1080, there shall be paid a further progressive duty of 1*l.* 5*s.*; and for every skin or piece of vellum or parchment, or sheet or piece of paper beyond the first, upon which any such transfer, assignment or reconveyance shall be ingrossed, written, or printed, in Ireland, there shall be paid the sum of ten shillings British currency; *and if any further sum of money or stock shall be added to the principal money or stock already secured, the* ad valorem *duty on mortgages payable under the said recited acts respectively, shall be*

charged only in respect of such further sum of money or stock.

And further (*a*), that where any deed or other instrument already made, or thereafter to be made, as an additional or further security for any sum or sums of money, or any share or shares in any of the government or parliamentary stocks or funds, or in the stock and funds of the Governor and Company of the Bank of England, or the Bank of Ireland, already or previously secured by any bond on which the *ad valorem* duty on bonds charged by the said recited acts of the 55th and 56th years of the reign of his late Majesty, and the schedules thereto respectively annexed, shall have been paid, such deed or other instrument shall be, and be deemed to be and to have been exempt from the several *ad valorem* duties charged by the said acts and the said schedules respectively on mortgages, and shall be charged and chargeable only with the ordinary duty payable on deeds in general in Great Britain and Ireland respectively. But if any further sum of money or stock shall be added to the principal money or stock already secured, the said *ad valorem* duties respectively shall be charged in respect of such further sum of money or stock, and if necessary for the sake of evidence the deeds and instruments thereby exempted from the said *ad valorem* duties shall be stamped with a particular stamp, for denoting or testifying the payment of the *ad valorem* duty upon all the deeds and instruments relating to the particular transaction,

(*a*) Section 3.

provided such deeds and instruments shall be produced at the Stamp Office in London or Dublin, (as the case may require,) and shall appear to be duly stamped with the duties to which they are liable."

On this statute a question has in practice arisen, whether, in case a further sum of money be added at the time of transfer, a double duty is not payable, viz. in England, the 1*l.* 15*s.* with the progressive duty of 1*l.* 5*s.* in respect of the transfer, and the *ad valorem* duty on the first skin in respect of the additional sum advanced, and in many cases both the duties have been paid by way of precaution.

In a case in the Court of Common Pleas (*a*), it appeared that a mortgage had been made to Miss Eborall for 2000*l.* The mortgagor requiring a further sum, other parties agreed to lend 2934*l.* in discharge of the first mortgage and as a further advance; two deeds were executed, one being a transfer of mortgage from Miss Eborall to the new mortgagees. On this a duty of 6*l.* was paid. The other was a conveyance of *additional estates*, for securing the full sum of 2934*l.*; on this a duty of 2*l.* was paid for the additional sum.

The Court of Common Pleas seem to have taken the two deeds together as one transaction, and to have held, that the advance of 934*l.* took the case out of the second section of the statute of 3 Geo. IV. by reason of the words "provided no further sum

(*a*) *Ex parte* Martin, 5 Bingham, 160.

be added to the principal sum already secured," and that it was not within the third section of that act, (which it clearly was not,) as that section applies only to cases of duty already paid on *bonds*, but this escaped the attention of the judges, who decided the point on the ground that the third section only applied to transactions between the same parties; the Court therefore, it seems, decided that the 6*l.* was properly paid, not taking into consideration the latter part of the second section, which confines the mortgage duty to the additional sum.

The question of proper amount of duty has recently come before the judges of the Court of King's Bench (*a*), who appear to have taken a correct view of the subject.

According to the printed case, a sum of 150*l.* had been lent by Rowland to Carter on the security of a mortgage term. Worsley afterwards paid off Rowland, and advanced Carter a further sum of 200*l.* Carter conveyed the fee of the land to Worsley for securing 350*l.*, and Rowland assigned the term to a trustee for him. The release was on four skins; the first skin had an *ad valorem* stamp of 2*l.* for the additional sum, and also a stamp of 1*l.* 15*s.* for the assignment, and the other skins had stamps of 1*l.* each, making together 6*l.* 15*s.*

It was objected, that the stamp was not sufficient; that there should have been paid 4*l.* as on an original

(*a*) Doe *v.* Gray, 3 Adol. & Ellis, 89; 4 Neville & Manning, 720.

mortgage for 350*l.*, and three stamps of 1*l.*, making together 7*l.* or that, in addition to 2*l.* and 1*l.* 15*s.* actually paid, there should have been three sums of 1*l.* 5*s.*, making together 7*l.* 10*s.*

The Court held that as a further sum was added, the transfer duty under the 3 Geo. IV. was out of the question; the words of the statute being "provided no further sum of money be added." But the effect of the other part of the clause was to make the deed an original mortgage for 200*l.*, for which a duty of 2*l.* was payable under the 55 Geo. III., with progressive stamps of 1*l.* each, being the stamps actually on the deed.

As to the argument that it was an original mortgage for 350*l.*, by reason of the conveyance in fee, the Court held, that the case did not fall within the exemption of the third section of the 3 Geo. IV., which applies only to cases where the duty on *bonds* has been already paid, but that the question turned on the exemption clause of the 55 Geo. III., in respect of deeds executed by way of further security, charging the *ad valorem* duty on any further sum added; and that as the deed was not a mere further assurance, but also an assignment of the original mortgage, it would not, prior to the 3 Geo. IV., have been within the exemptions of the 55 Geo. III., but would have required the full duty of 4*l.* The 3 Geo. IV. had, however, repealed the transfer duties of the 55 Geo. III., and substituted the same *ad valorem* duty of 2*l.* on the transfer in respect of the additional sum, as the exemption clause

had already charged on the new security in respect of the additional sum, and as the *ad valorem* duty depended on the sum secured, and not on the number of the securities, and was only to be paid once, it followed that the case was the same in effect as if the *ad valorem* duty of 2*l.* had been charged on the transfer, and afterwards the fee had been conveyed as a further security for the whole 350*l.*, in which case a common deed stamp only would have been required. Whether a common deed stamp was necessary, the Court did not think it material to inquire, as the 1*l.* 15*s.* stamp erroneously put on the deed was sufficient to cover that stamp, if requisite.

From this case the conclusion may be drawn, that on a transfer of mortgage with a further advance, the *ad valorem* duty is payable only on the additional sum, with followers of 1*l.*, on each skin, even although other estates are added, provided the mortgagor is the same party who created the original security, subject to the doubt thrown out by the Court of King's Bench, whether, in such last mentioned case, the common deed stamp may not be also requisite.

In the last session of parliament a bill was introduced for the consolidation and amendment of the stamp laws; by which it was proposed to enact, that on any transfer or assignment, disposition or assignation of any mortgage, wadset or bond, or of any such other security as aforesaid, or of the benefit thereof, and of the money or stock thereby secured, if no further sum of money or stock shall be added

to the principal money or stock already secured, then where the amount of the principal money or the value of the stock secured by such mortgage, wadset, or bond shall not exceed 300*l.*, the same duty shall be paid as on a mortgage, wadset, or bond for such principal money or stock. And where the same shall exceed 300*l.* then 1*l.* 15*s.* in Great Britain, and 1*l.* in Ireland. And if any further sum of money or stock shall be added to the principal money or stock already secured, then the same duty as on a mortgage, wadset, or bond for such further sum of money or stock only. It is probable this will be passed into a law in the next session.

BOOK THE THIRD.

CHAPTER I.

OF THE RELATIVE ESTATES OF MORTGAGOR AND MORTGAGEE.

HAVING treated of the origin, nature, and different modes of mortgage, it is next to be considered in what respective relative situations the mortgagor and mortgagee, until redemption or foreclosure, stand to each other; and to what privileges and restrictions they are, during that period, respectively entitled or subject.

On the execution of the mortgage, the mortgagor becomes the equitable owner, the mortgagee the legal owner of the land; in which respective situations they remain until the land is redeemed or foreclosed. In the interim, the land and all its profits form a security for the debt. These general principles govern the decisions on this branch of the law of mortgage.

In most mortgage deeds, a proviso is inserted that until default made in payment by the mortgagor, &c., he and his heir may hold and enjoy the land and

receive the profits without interruption by the mortgagee or his heir. In some instances, however, the mortgage is made without such precaution.

There is some obscurity in the books in what light the mortgagor, during the period of actual possession, or receipt of the rents of the land, stands in respect to the mortgagee. The result of the cases however appears, that he may be considered as tenant for a term, or at will, or by sufferance, or a trespasser, according to circumstances.

The Court of King's Bench has decided that the mere receipt of *interest* from the mortgagor is not a recognition by the mortgagee, that the mortgagor or his tenant was at that time in lawful possession (*a*), and it therefore was no defence to an ejectment in which the demise was laid on the first day of July, 1830, although it was proved that on the 15th day of January, 1831, the mortgagee had admitted payment of interest up to the 25th of December, 1830, being subsequent to the demise.

But this must be distinguished from the case of *rent* eo nomine, demanded and received by the agent of the mortgagee from the tenant of the mortgagor in payment of interest, which would prevent the tenant being treated as a trespasser (*b*).

In the case of Doe *v.* Maisey (*c*) Lord Tenterden

(*a*) Doe *v.* Cadwallader, 2 Barnewall & Ad. 473.

(*b*) Doe v. Hales, 7 Bingh. 322.

(c) 8 Barnewall & Cresswell, 767 ; 3 Manning & Ryland, 109.

is reported to have said, that a mortgagee in possession was not in the situation of tenant at all; or at all events, he was not more than tenant at sufferance, and that in a particular character, liable to be treated as tenant or trespasser, at the option of the mortgagor. But in a prior case (*d*), the Court of King's Bench appeared clear in opinion that the mortgagor might be considered as *tenant* in the strictest definition of that word, for the purpose of enabling the mortgagee to maintain an action against a trespasser.

In Moss *v.* Gallimore (*e*), in which the estate was in the hands of tenants, the mortgagor was considered as a *receiver* for the mortgagee; but Lord Eldon (*f*) expressed his surprise at this doctrine, and said it was a misapplication of the principles of equity. In the earlier case of Birch *v.* Wright (*g*), Mr. Justice Buller considered it sufficient to designate the parties as *mortgagor and mortgagee,* without having recourse to any other description; and he considered a mortgagor was neither a tenant at will nor receiver, nor was it necessary he should be so, for a mortgagor and mortgagee were characters as well known and their rights, powers, and interests as well settled as any in the law. But this view of the question does not meet the difficulty, for the rights, powers, and interests of mortgagor and mortgagee, are in many instances grounded on their respective

(*d*) Partridge *v.* Bere, 5 Barnewall & Ald. 604.
(*e*) Douglas, 283.
(*f*) See *Ex parte* Wilson, 2 Vesey & Beames, 252.
(*g*) Term Rep. 383.

estates in the land; and therefore, we are still driven back to the original question, what are those estates? The common law recognizes no such *estate* as that of mortgagor or mortgagee independently of some other known estate or interest in the land; for the *estates* both of mortgagor and mortgagee are of a compound nature, partaking partly of legal and partly of equitable rights; and it is difficult to perceive in what manner these compound estates can, as such, be regarded in a court of law, although the possession of the mortgagor may, as noticed in the next chapter, confer on him certain privileges under the statute law and poor laws. In addition to which it may under circumstances become essential to ascertain, whether at common law there is any, and what privity of estate between the parties; for if the mortgagor in possession may be considered as tenant at will, or, under the agreement for possession, as tenant for years, to the mortgagee, there will be sufficient privity of estate between them to admit of an enlargement by release alone, which will not be the case, if he is to be considered as tenant at sufferance, or an agent or receiver. So long as the mortgagor is in possession of the land, and the legal ownership is in the mortgagee, there must subsist a tenancy of some sort between the parties (*h*); or otherwise the mortgagor must be a trespasser, for the law of England recognizes no possession independent of a tenancy, either to the lord paramount or a mesne lord. The

(*h*) Partridge v. Bere, 5 Barnewall & Alderson, 664. But see and consider what is said by Lord Tenterden in Doe v. Maisey, *supra*.

mortgagor in possession must hold of some one, and to say that his possession is that of a mortgagor, is in fact leaving the question undecided.

If in the mortgage deed there is the usual proviso for the enjoyment of the land by the mortgagor, *until* default in payment &c., and the mortgagor is in actual possession, he must, it is thought, during the continuance of that agreement, be considered as tenant to the mortgagee, holding for a term (*i*).

If in the case of such agreement the money is not paid at the appointed time, and the mortgagor continues in possession after the determination of the agreement, without any fresh agreement between the parties, or if the mortgage deed contains no such agreement, he may be considered as tenant at sufferance, or treated as a trespasser (*k*), although the mortgagee has been in the receipt of interest on the mortgage debt; and in every case, except where there is an actual agreement for the occupation by the said mortgagor until a certain period, the conti-

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(*i*) Powseley *v.* Blackman, Cro. Jac. 659. In a note to the case of Doe *v.* Maisey, 3 Manning & Ryland, 109, it is considered that the case of Powseley *v.* Blackman does not bear out the above proposition. But, on perusing the case it will be seen, it was admitted that if the proviso *had been* in the form in the text, it would have amounted to a demise for a term. In the note it is ingeniously suggested that a mortgagor may be considered as tenant in fee determinable, as in the case of a shifting use under a marriage settlement, but this would be repugnant to the use already limited to the mortgagee in fee.

(*k*) Doe *v.* Maisey, *supra*.

nuance of the mortgagor in possession, if with the consent of the mortgagee, must be construed strictly as a tenancy at will (*l*).

If the mortgage is transferred to another (*m*), the mortgagor becomes tenant by sufferance to the assignee.

Although the mortgagor is equitable owner, yet the mortgagee is more than a trustee for him, for a trustee is not allowed to deprive his *cestui que trust* of his possession, but a mortgagee may assume the possession whenever he pleases (*n*), if there is no agreement to the contrary, and in point of possession, the mortgagor is tenant at will even in equity, for a Court of Equity never interferes to prevent the mortgagee from assuming the possession (*o*).

(*l*) Keech *v.* Hall, 1 Dougl. 22.

(*m*) Smartle *v.* Williams, 3 Lev. 387, and 1 Salk. 245; Thunder *v.* Belcher, 3 East, 449.

(*n*) Doe *v.* Maisey, *supra*.

(*o*) *Per* Master of the Rolls in Cholmondeley *v.* Clinton, 2 Merivale, 359.

CHAPTER II.

OF THE PRIVILEGES ATTENDING THE ESTATE OF THE MORTGAGOR.

WITH whatever strictness the common law may have originally regarded the breach of the condition by the mortgagor, yet in modern times, the doctrine of the courts of equity, recognizing the mortgagor (until foreclosure) to be the actual owner of the land, has to a certain extent, with reference to the possession by the mortgagor, been acted upon, as well by the courts of common law, as by the legislature.

The statute law (*a*) has provided, that the mortgagor in possession shall have the privilege of voting for the return of members to parliament notwithstanding the mortgage.

At common law his title of ownership while in possession is so far recognized as to gain him a settlement under the poor laws (*b*), but for this purpose he must reside within ten miles of the property (*c*), and be in possession in his capacity of mortgagor, and not by fraud or wrong; and in a case (*d*), in

(*a*) 7 & 8 Will. 3, c. 25, s. 7; 2 & 3 Will. 4, c. 45, s. 23.
(*b*) Dougl. 932; 3 Term Rep. 771.
(*c*) 4 & 5 Will. 4, c. 76, s. 68, a.
(*d*) Rex v. The Inhabitants of Catherington, 3 Term Rep. 771.

which a mortgagee of several messuages having recovered in ejectment, afterwards permitted the mortgagor to inhabit one of the houses for a particular purpose, *i. e.* the overlooking of some repairs, the Court of King's Bench held, that no settlement was gained by such latter residence, for he was not in possession *as mortgagor*. And in another case (*d*) in which an estate had been conveyed to trustees, upon trust to sell for payment of debts, and to pay the residue to the grantor, the grantor before sale got fraudulently into possession, and it was held, he did not by such residence gain a settlement.

A very considerable privilege annexed to the estate of the mortgagor is, that he is not bound to account for the rents and profits while in possession, even although the security shall prove insufficient. For this, the case of Colman *v.* The Duke of St. Albans is in point (*e*). In that case it appeared that the office of register of the Court of Chancery had been granted by King George the First, by letters patent, to Charles Duke of St. Albans, George Earl Cholmondeley, and Lord James Beauclerk for their lives, and the life of the survivor of them, in trust for the Duke, his heirs and assigns. The Duke subsequently assigned one moiety of the fees of office to William Day for securing a sum of money. The Duke and William Day afterwards concurred in an assignment of both moieties to the Archbishop of Canterbury for securing 6000*l.* and interest. On the

(*d*) Rex *v.* The Inhabitants of St. Michael's, Dougl. 630.
(*e*) 3 Ves. jun. 25.

death of Charles Duke of St. Albans, George Duke of St. Albans, his heir at law, entered on the office and received the fees. The mortgage ultimately vested in Bridget Crewys, who joined with Duke George in a surrender to the crown of the grant, and a fresh grant was afterwards obtained for the lives of George Duke of St. Albans, Charles Beauclerk, and Aubrey Beauclerc, afterwards Duke of St. Albans, and the life of the survivor, in trust for Duke George, his heirs and assigns. This grant was assigned to Bridget Crewys. George Duke of St. Albans and Charles Beauclerc afterwards died, and Aubrey, then Duke of St. Albans (the only surviving life) entered and took the profits. A bill was filed by the executors of Bridget Crewys against Aubrey Duke of St. Albans, charging that as there was no other life in the grant except the Duke, the office itself was an insufficient security for the 6000*l.* and interest, and that the defendant ought to account to the plaintiffs for the fees and emoluments received by him, and for any future fees and emoluments, and that the plaintiffs ought to be let into possession; and praying an account of principal and interest, and for a foreclosure, and that a value might be set on the office, or that the office might be sold, and in case of a deficiency, the defendant might account for the fees received by him. The plaintiff demurred to so much of the bill as prayed an account of the fees and emoluments received by him anterior to the instituting of the suit, and the demurrer was allowed.

In a more recent case in equity(*f*), a mortgage was

(*f*) *Ex parte* Wilson, 2 Ves. & Beames, 252.

made for 1000*l.* the property was in lease. The mortgagor became bankrupt. The mortgagee gave the tenant notice to pay the rent to him. The assignees nevertheless received the rent. The mortgagee petitioned that the assignees might be ordered to pay to the petitioner the rent received. Lord Eldon said, "that admitting the case of Moss *v.* Gallimore (*g*) to be sound law, he had been often surprised by the statement that the mortgagor was *receiving* the rents *for the mortgagee.* A mortgagee never could, in that court, make the mortgagor account for the rent for the time past. There was no instance that a mortgagee *per directum* had called on the mortgagor to account for the rents. The consequence is that the mortgagor does not receive the rent for the mortgagee." The petition was dismissed.

This latter case carries the principle to a great extent, if it can be supposed that the assignees were aware of the notice given; for, in such case, they could hardly be considered as acting conscientiously; and they must, it is conceived, have subjected the tenant to the distress or action at common law of the mortgagee, for the amount paid to the assignees.

From the language of Lord Eldon in this case his opinion may be gathered that a mortgagor cannot be viewed in the light of *a receiver;* and, in fact a receiver without liability to account appears a contradiction in terms, it being in truth an *ownership.*

(*g*) 1 Dougl. 282, *et vide* 390.

The act of the 7th of Geo. II. cap 20, claims particular attention. That act recites, that mortgagees frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagors to pay the money secured by such mortgages, and for performing the covenants therein contained, and likewise commence suits in his Majesty's Courts of Equity to foreclose their mortgagors from redeeming their estates; and the Courts of Law where such ejectments are brought, have not power to compel such mortgagees to accept the principal monies and interest due on such mortgages and costs, or to stay such mortgagees from proceeding to judgment and execution in such actions, but such mortgagors must have recourse to a Court of Equity for that purpose; in which case likewise the Courts of Equity do not give relief until the hearing of the cause, for remedy whereof it enacts, that where any action shall be brought on any bond for payment of the money secured by such mortgage or performance of the covenants therein contained, or where any action of ejectment shall be brought in any of the Courts of Record at Westminster, or in the Court of Great Sessions in Wales, or in any of the superior courts in the counties palatine of Chester, Lancaster, or Durham by any mortgagee, his heirs, executors, administrators or assigns, for the recovery of the possession of any mortgaged lands; and no suit shall be then depending in any of his Majesty's Courts of Equity in England, for or touching the foreclosing or redeeming of such mortgaged lands, if the person having right to redeem such mortgaged lands, and

who shall appear and become defendant in such action, shall, at any time pending such action, pay unto such mortgagee or, in case of his refusal, shall bring into court where such action shall be depending, all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit at law or in equity upon such mortgage (such money for principal, interest, and costs to be ascertained and computed by the court where such action is depending, or by the proper officer by such court to be appointed for that purpose) the monies so paid to such mortgagee or brought into such court shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the court shall and may discharge every such mortgagor or defendant of and from the same accordingly, and shall and may, by rule of the same court, compel such mortgagee at the costs of such mortgagor to assign, surrender, or recover such mortgaged lands, and such estate and interest as such mortgagee hath therein, and deliver up all the deeds, evidences, and writings in his custody, relating to the title thereto, unto such mortgagor who shall have brought such monies into the court, his heirs, executors, or administrators or to such other person as he shall for that purpose nominate or appoint. And that where any bill or suit shall be filed, commenced, or brought into any Courts of Equity in England by any person having or claiming any estate, right, or interest in any lands, under or by virtue of any mortgage thereof to compel the defendant in such suit having or claiming a right to redeem the same to pay the plaintiff in such suit, the principal money and inte-

rest due on any such mortgage, or the principal money and interest due on such mortgage, together with any sum of money due on any incumbrance or specialty charged or chargeable on the equity of redemption thereof, and in default of payment thereof to foreclose such defendant of his right of redeeming such mortgaged lands, &c.; such Court of Equity, where such suit shall be depending, upon application made by the defendant having a right to redeem such mortgaged lands, and *upon his admitting the right and title of the plaintiff in such suit*, may and shall at any time before such suit shall be brought to hearing, make such order or decree therein as such court might have made in case such suit had then been regularly brought to hearing, and all parties to such suit shall be bound by such order or decree so made, to all intents and purposes, as if such order or decree had been made by such court at or subsequent to the hearing of such cause or suit. But it is provided, that the act shall not extend to any case where the person against whom the redemption is prayed, shall (by writing under his hand, or the hand of his attorney, agent or solicitor, to be delivered before the money shall be brought into such court, to the attorney or solicitor for the other side,) insist either that the party praying a redemption has not a right to redeem, or *that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side*, nor to any case where the right of redemption to the mortgaged lands and premises in question in any cause or suit shall be controverted or questioned by or between different defendants in the

same cause or suit, nor shall be any prejudice to any subsequent mortgagee or incumbrancer.

On this beneficial statute several cases have arisen. It has been decided in equity (*h*), that if the bill embraces any object distinct from the foreclosure of the mortgage, as, for example, if it sets up another demand on the defendant, and prays it may be also a charge on the estate, no order of reference can be made under the statute. Lord Eldon has remarked, that the justice of the case seems to be, that the reference should be made as to the mortgage, and the cause go on as to the rest, but he had never known it done.

The application for the reference in equity, must be made before the mortgagee is entitled to sue out execution at law (*i*), and will not be granted, if the mortgagor is in contempt (*k*).

It has been stated by judges of high authority, that the Courts of Equity did not require the aid of the legislature for the purpose mentioned in the act, and that the real object of the act was, to give a new authority to the Courts *of Law*, the section as to Courts of Equity being merely incidental and unnecessary. And therefore, in a case in which the bill filed by the mortgagee prayed a sale, and not a foreclo-

(*h*) Bastard *v.* Clark, 7 Ves. jun. 489.
(*i*) Amis *v.* Lloyd, 3 Ves. & Beames, 16.
(*k*) Hewitt *v.* M'Cartney, 13 Ves. jun. 560.

sure, and the mortgagor prayed a reference to the Master to take an account, &c., the Vice-Chancellor, after stating that the case was not within the statute, said, he considered that Courts of Equity had an inherent jurisdiction to stay proceedings in any cause, and in any stage of any cause, whenever the defendants would submit to a decree establishing the full demand made by the bill and the whole relief prayed in respect of that demand, with costs, and he was fully prepared to make such an order as the plaintiff would be entitled to at the hearing, with costs (*l*).

A Court of Law has decided, in reference to this statute (*m*), that if a mortgagor contracts to sell to the mortgagee his equity of redemption, and the mortgagee, before the completion of the contract, proceeds by ejectment to evict the mortgagor from the possession, the court will not stay the proceedings on tender of principal, interest, and costs; on the ground that the mortgagor has now no right to redeem, and that a Court of Equity would decree him to complete the contract. It may, however, be proper to remark, that according to another reported case (*n*), but which is not fully nor correctly stated, the mortgagee should tender a deed of conveyance to the mortgagor, or file his bill in equity for a completion of the contract as a ground for the court to reject the motion for a stay of proceedings.

(*l*) Praed *v.* Hull, 1 Simons & Stuart, 331.

(*m*) Goodtitle *v.* Pope, 7 Term Rep. 186.

(*n*) Skinner *v.* Stacey, 1 Wils. 80.

If the mortgagee commence an action at law against the mortgagor, and afterwards receive notice from a subsequent mortgagee not to part with the title deeds, the case is nevertheless within the statute, and a rule will be granted directing him, on payment of principal, interest and costs, to deliver them up to the mortgagor (*o*).

In equity it has been determined that the reference to the Master under the statute, must proceed on an admission that the principal and interest, mentioned in the foreclosure bill, are due; and the Master cannot admit evidence to shew the contrary (*p*). In the case alluded to, the bill was filed for foreclosure of a mortgage for 392*l.* 4*s.* 3*d.* The defendant petitioned for a reference to the Master under the statute, and stated in his petition that the principal sum due was reduced to 340*l.*, and that the interest on the mortgage had been paid up to August 1792. The order for reference was made. The Master admitted evidence to shew these facts, and reported accordingly. Two exceptions were taken to the Master's report. First, that he ought to have certified that the whole principal sum of 392*l.* 4*s.* 3*d.* was due on the mortgage, the defendant having by the decretal order admitted the fact; and secondly, that he ought to have reported, that the interest was due from the 4th of August, 1778, up to the 18th November, 1794, when the plaintiff took

(*o*) Dixon *v.* Wigram, 2 Crompton & Jervis, 613.

(*p*) Huson *v.* Hewson, 4 Ves. jun. 105.

possession. In support of the exceptions it was argued, that the consequence of a reference under this statute is that the defendant admits the principal and interest to be due. For the defendant it was urged, that under the statute the inquiry was to be made as usual. The Lord Chancellor said he did not see what answer there was to the statute, and he thought if it had been attended to, the order should not have been made. He did not know how to get rid of the objection, and allowed the exception.

The time appointed for the payment of the mortgage money may be enlarged under the statute, in like manner, as if the cause was brought to a hearing (*q*), as will be hereafter noticed (*r*).

A further privilege annexed to the estate of the mortgagor has been already noticed (*s*), viz. the right, where an advowson is the subject of the mortgage, of nominating to the church on an avoidance of the living.

(*q*) Wakerell *v.* Delight, 9 Ves. 36.
(*r*) *Vide infra.*
(*s*) *Vide supra*, page 273.

CHAPTER III.

OF THE RESTRICTIONS AND DISABILITIES ANNEXED TO THE ESTATE OF THE MORTGAGOR.

ALTHOUGH in equity the mortgagor remains the actual owner of the land until foreclosure, entitling him, while in possession, to the receipt of the rents and profits without account, yet equity, regarding the land with all its produce as a security for the mortgage debt, will restrict the right of ownership within those bounds which may not operate to the detriment or injury of the mortgagee.

On this principle equity will interfere to prevent waste by the mortgagor, and for that purpose grant an injunction on bill filed by the mortgagee (*a*).

Equity also will in no instance, it seems, interpose its authority to obstruct the mortgagee from evicting the mortgagor from the possession, but for such purpose will consider the latter a mere tenant at will (*b*).

The mortgagor is liable to eviction by the mortgagee without any notice whatever (*c*), unless protected

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(a) Farrant v. Lovel, 3 Atk. 723; *et vide* Robinson v. Litton, ibid. 210.

(*b*) *Vide* Cholmondeley v. Clinton, 2 Mer. 259.

(c) Doe v. Maisey, *supra*.