

# REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS,

UPON APPEALS AND WRITS OF ERROR,

*And decided during the Session 1821,*

1st & 2d GEO. IV.

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ENGLAND.

(COURT OF CHANCERY.)

GEORGE JAMES Marquis of CHOL-  
MONDELEY, and The Honorable } *Appellants ;*  
ANN SEYMOUR DAMER, - }

ROBERT COTTON ST. JOHN Lord } *Respondents.*  
CLINTON, and Others, - }

S. R. devised lands, &c. (subject to a term of 200 years, for raising a portion) to the use of his daughter M. for life, remainder to the use of her first and other sons in tail male, remainder to his cousin J. R. in tail, &c.; and died, leaving his daughter M. his heir at law, who married and had one son G. Earl of O., who upon the death of his mother entered as tenant in tail under the will of his grandfather, and suffered a recovery to the use of himself in fee, and by deed in 1781, reciting "that he was willing and desirous that the said " estates should remain in the family and blood of S. R.," in consideration of "the natural love and affection which he " bore to his relations, the heirs of S. R.; and to the intent " that the estates might continue in the family and blood of " his late mother, on the side of her father," limited the lands,

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&c. to the use of himself for life, remainder to the heirs of his body, and for default of such issue, to such persons as he should appoint; and for default of appointment, "to the use of the right heirs of S. R.," with a general power of revocation and new appointment.

In 1724 the term was assigned upon mortgage to raise the portion.

By deed in 1785 G. executed to E. H. a mortgage in fee. The term of 200 years was assigned on the same occasion.

On the 5th of December, 1791, G. died without issue, leaving H. Earl of O. his uncle and heir at law. Upon the death of G. C. entered, claiming as the then right heir of S. R. under the limitation in the deed of 1781.

Shortly after the death of G. opinions of counsel were taken by H. as to the effect of the deed of 1785 upon the deed of 1781, and he was advised that it operated only as a revocation *pro tanto*.

In 1792, C. proposing to raise money by further mortgage, and also to make family settlements, conveyed the lands, &c. to trustees for those purposes, and the lands, &c. were by a subsequent deed appointed and limited accordingly. But the proposed mortgagees not being satisfied with the title of C. under the limitation in the deed of 1781, H. Earl of O. was applied to by C. on account of the doubts which had arisen with regard to the effect of the deed of 1785, as a revocation of the settlement of 1781, and thereupon H. executed a deed in 1794 by which reciting the several deeds of 1781, 1785, and 1792, and the doubts which had arisen, and that H. being well satisfied that Earl G. did not intend to alter the uses of that settlement, he had agreed to confirm the same; it was witnessed, that he Earl H. "did grant, bargain, sell, release, and confirm" to the trustees of C.'s settlement of 1792, upon the trusts of that settlement "in the same manner as if the deed of 1785 had not been made, and to and for no other use, intent, or purpose whatever."

Earl H. died in 1796, leaving A. his heir at law, and also heir at law of Earl G., and having devised his real estates to B.

C. died in 1798, and upon his death his eldest son entered under the settlement of 1792.

In June, 1812, a bill was filed in Chancery by A. and B. jointly as heir at law and devisee of Earl H., stating an agreement between them to share the lands, &c. equally, and praying a

redemption and reconveyance, and (as against C. the son) an account of rents and profits.

Upon the original hearing in the Court below, it was adjudged, first, upon the construction of the settlement of 1781, that the remainder "to the use of the right heirs of S. R.," vested in the settlor, as himself the right heir of S. R. at the date of the settlement; secondly, that the deed of 1794 did not operate a confirmation except for the limited purpose expressed by the recital; and, lastly, that the length of time, viz. upwards of twenty years, since C. entered, was no bar by the operation of or analogy to the statute of limitations.

It was also adjudged, that Sir L. P. having advanced money to C. by way of mortgage, should not be permitted to avail himself of that security as against the Plaintiff, upon the ground either of want of notice or of acquiescence. But as to the effect of the limitation in the deed of 1781, a case was sent to a court of law and a certificate was returned, in which three of the Judges concurred with the Master of the Rolls, and one differed from him. Upon this certificate the case being brought before the Court upon the equity reserved, the bill was dismissed; and upon appeal the decree was affirmed, upon the ground that the equity (if any) of the Plaintiffs was barred by length of time and adverse possession.

If a party has by his own act put a construction upon a deed; whether he or *à fortiori* those who claim under can dispute that construction. *Qu. D. Redesdale.*

An heir cannot sue in equity by analogy to a writ of right, or so as not to be barred by a limitation of less than sixty years. If the heir proceeds by ejectment, he is barred by twenty years adverse possession; and it seems that this analogy is adopted in equity. *D. Redesdale.*

Between co-Plaintiffs having adverse rights there can be no decree. If the heir and a devisee are co-Plaintiffs in a suit seeking a redemption of lands in mortgage, there can be no decree upon a bill so framed. *D. Redesdale.*

If a deed has a legal effect contrary to the intention of the grantor, and a party having an interest under the deed, according to its legal effect, proceeds upon the supposed intention to permit acts which create rights in the property, whether he can obtain relief in equity to the prejudice of the rights so enacted. *Qu. D. Eldon.*

An agreement made by parties out of possession to proceed in

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a court of equity to recover and to divide lands, &c. when recovered, is contrary to the policy of the law as well as the statute of *Hen. 8.* against pretended titles. *D. Eldon C.*

Whether a court of equity can entertain a bill stating such an agreement. *Qu. D. Eldon C.*

If a deed is produced as matter of defence, and it appears that it has an effect beyond what was intended, it is not necessary to file a bill to reduce it. *D. Eldon C.*

If a deed is executed which does not effectuate the intention of the grantor, and parties who claim under it act under a common mistake that A. is the supposed grantee, and A. creates incumbrances upon the land supposed to be granted, whether it is not a bar to relief in equity, and whether relief will be granted after such transactions and a lapse of time. *Qu. D. Eldon C.*

Acts done by a trustee or termor for years cannot have the effect of adverse possession. But the rule does not apply to the case of mortgagor and mortgagee. *D. Eldon C.*

A mortgagee in possession keeping no account, and making no acknowledgment, becomes owner of the estate after the lapse of twenty years. *D. Eldon C.*

Adverse possession, as against an equitable estate, may create or defeat a right where the possessor has no duty to discharge for the party against whom possession is pleaded. *D. Eldon C.*

The effect of adverse possession cannot be suspended during the continuance of long terms of years. *D. Eldon C.*

If a deed of confirmation is executed under a mistake, and the party confirming being dead, there is a probability from circumstances that he would not, or a doubt whether he could have raised any question upon the mistake, it is doubtful whether a court of equity would permit parties claiming under him to take advantage of the mistake. *D. Eldon C.*

Adverse possession of an equity of redemption for twenty years is a bar to any other claim of the equity of redemption, producing the same effect as abatement, intrusion, and disseisin with respect to legal estates. *D. Eldon C.*

Title of entry in equity is by writ of subpœna.

**I**N June, 1811, a bill was filed on behalf of the Appellants in the High Court of Chancery.

The facts stated were as follows:—

By indentures dated in 1704, manors, &c. of Samuel Rolle in Devon and Cornwall and Dorset were settled to the use of Samuel Rolle for his life; remainder to trustees, &c. to preserve, &c.; and after the decease of Samuel Rolle, to the use of the said trustees for the term of 200 years, upon trust to raise 20,000*l.* as a portion for a daughter; remainder to sons successively in tail male; remainder to the use of Samuel Rolle, his heirs, &c.

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Samuel Rolle had issue by the marriage only one daughter, Margaret, and by his will, dated in 1717, devised the fee-simple of the estates to his wife *durante viduitate*; remainder to trustees and their heirs, to the use of the sons of his body in tail male in succession; and for default of such issue, to the use of his daughter Margaret for her life; remainder to trustees to preserve, &c.; remainder to children of his daughter as she should appoint; and for default of appointment, to the use of her sons successively in tail male.

Samuel Rolle, died in 1719, leaving Margaret his heir at law, who upon his death entered into possession of the estates devised to her for her life, and by indenture dated in 1720, the remainder of the term of 200 years was assigned to *Arscott* and *Spicer* upon the subsisting trusts of the settlement.

In 1724, Margaret Rolle married Robert Lord Walpole, and by articles made previous to the marriage, it was agreed that the Earl of Orford (Lord Walpole's father) should receive the 20,000*l.* under the trusts of the 200 years' term, and that *Arscott* and *Spicer* should by mortgage, &c. raise and pay the same accordingly.

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By indenture dated in July, 1724, *Arscott* and *Spicer*, in consideration of 20,000*l.* paid to Sir Robert Walpole, assigned the premises to Decker, his executors, &c. for all the remainder of the term of 200 years, subject to a proviso for redemption by Robert Lord Walpole and Margaret his wife.

There was issue of this marriage only one son, George Earl of Orford, who upon the death of his mother in 1781, entered into possession as tenant in tail under the will of Samuel Rolle.

By indenture of bargain and sale inrolled, dated the 11th of June, 1781, the uses of a recovery of the premises shortly afterwards suffered by George Earl of Orford were declared to himself in fee.

By indenture of lease and release, dated the 1st and 2d of August, 1781, and made between George Earl of Orford (described as only son and heir of Robert Earl of Orford by Margaret his wife, who was daughter and only son and heir of Samuel Rolle, who was only son and heir of Robert Rolle, Esq., by Arabella his wife, who was daughter and co-heir of Theophilus Clinton Earl of Lincoln, and Baron Clinton,) of the one part, and Joshua Sharpe of the other part, reciting the will of Samuel Rolle and his death, leaving his daughter Margaret him surviving, her marriage with Robert Earl of Orford, and her death, leaving him the said George Earl of Orford her only son, who thereby became tenant in tail of the premises; and reciting the said indenture of bargain and sale and recovery, and *that he was willing and desirous that the said premises should continue and remain in the family and blood of the said Samuel Rolle*, it was witnessed, that “for and in consideration of the natural love and

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“ affection which the said George Earl of Orford  
 “ had and bore unto his relations, the heirs of the  
 “ said Samuel Rolle, and to the intent that the  
 “ manors, &c. and hereditaments thereafter men-  
 “ tioned, might remain, continue, and be in the  
 “ family and blood of his late mother the said Mar-  
 “ garet Countess of Orford, on the side or part of  
 “ her father the said Samuel Rolle ;” and for other  
 considerations, he the said George Earl of Orford  
 conveyed, &c. “ all and singular the manors and  
 “ hereditaments therein mentioned (being the es-  
 “ tates devised by the will of Samuel Rolle) to the  
 “ said Joshua Sharpe, his heirs and assigns, to the  
 “ use of him the said George Earl of Orford for life ;  
 “ and after his decease to the use of the heirs of  
 “ the body of him the said George Earl of Orford ;  
 “ and for default of such issue, to the use of such  
 “ person, &c. for such estate, &c. as the said George  
 “ Earl of Orford by deed or will should appoint ;  
 “ and in default of appointment, *to the use of the*  
 “ *right heirs of the said Samuel Rolle.*” The deed  
 also contained a general power to the said George  
 Earl of Orford of revoking the uses therein before  
 specified, and of limiting and declaring new uses  
 of the same premises, or any part thereof.

By several mesne assignments, the manors, &c.  
 comprized in the 200 years' term became vested  
 for the residue of that term as to four fifths in Lord  
 Keppel, redeemable on payment of 16,000*l.* and  
 interest; and as to one fifth, in Adair and Bullock,  
 redeemable on payment of 4000*l.* and interest.

By indentures of lease and release, dated the  
 4th and 5th of June, 1785, George Earl of Or-  
 ford, in consideration of 16,000*l.* paid to Lord

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Keppel, and of 4000*l.* paid to Adair and Bullock, granted, released, and confirmed to Sir Edward Hughes, his heirs and assigns, all the premises to the use of the said Sir Edward Hughes, his heirs and assigns for ever, subject to reconveyance to the said George Earl of Orford, his heirs and assigns, or such person, &c. as he should appoint, on payment of 20,000*l.* with interest.

The residue of term 200 years became vested by assignment in the Respondent Seymour.

On the 5th of December, 1791, George Earl of Orford being seised in fee of the equity of redemption of the mortgaged estates, died without issue and intestate as to the equity of redemption, without having altered or revoked the limitation of the deed of 1781, otherwise than by the indentures of 1785, and leaving Horace Earl of Orford, his uncle and heir at law, on whom (as the Plaintiffs alleged), the equity of redemption descended; and the bill stated that Horace Earl of Orford being advised that by virtue of the limitations in the deed of 1781, the heir *ex parte materná* of Earl George was entitled to the equity of redemption, in consequence of such belief, did not enter into the mortgaged estates; but that upon the death of Earl George, Robert George William Trefusis, Esq., afterwards Lord Clinton, entered into possession thereof as the cousin and heir of Earl George *ex parte materná*.

By indenture of lease and release, dated the 5th and 6th of October, 1792, after reciting the deed of 1785, and that the premises, upon the death of the said George Earl of Orford, became vested in the said R. G. W. Trefusis in fee, as the right

heir of the said Samuel Rolle by virtue of the settlement of 1781, and that the said R. G. W. Trefusis was desirous of raising 34,000*l.* for certain purposes, and had proposed to convey, &c., it was witnessed, that, in consideration of the premises, the said R. G. W. Trefusis granted, &c. and confirmed unto the Earl of Coventry, Hall, St. John, and Fortescue, their heirs and assigns, &c., all the manors, &c. of the said R. G. W. Trefusis, which were the estate of Samuel Rolle deceased, to the use of them the said Earl of Coventry, &c., their heirs and assigns, upon trust to raise by sale or mortgage the said 34,000*l.* for the purposes therein mentioned, and subject thereto, to stand seised, &c. in trust, and to such uses, &c. as the said R. G. W. Trefusis should appoint; and in default of appointment, in trust for the said R. G. W. Trefusis, his heirs and assigns; and by other indentures of the 7th and 8th of October, 1792, it was witnessed, that for settling and assuring the several manors, &c. therein contained, and in consideration of his natural love and affection to his wife and children, and brothers and sisters, the said R. G. W. Trefusis granted, &c. and confirmed to the same trustees and their heirs, upon the trusts and with powers under which interests by way of lease and jointure were created.

The bill then stated, that shortly after the death of Earl George a doubt was suggested to Earl Horace, whether the deed of 1785 had not revoked the uses of the settlement of 1781, and thereby defeated the limitation to the right heirs of Samuel Rolle, under which Lord Clinton claimed to be entitled to the equity of redemption of these

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estates, and that Earl Horace thereupon caused a case to be stated for the opinion of counsel, which case being laid before Sir Archibald Macdonald (afterwards Lord Chief Baron) and Mr. Shadwell, Earl Horace was advised by both those gentlemen that the indentures of 1785 had revoked the uses of the settlement of 1781 only *pro tanto*.

The bill then proceeded to state that in the beginning of 1794 Lord Clinton (the Defendant's father) being about to raise money by way of loan on the security of the estates, caused a representation to be made to Earl Horace, that although by the limitation to the right heirs of Samuel Rolle in the settlement of 1781 he (Lord Clinton) had become entitled to the equity of redemption, yet some embarrassment had arisen to his title by reason of a doubt which had been raised whether the indentures of 1785 had not revoked that limitation, and therefore requesting Earl Horace to execute such deed or instrument as should be necessary to remove that doubt: and that Earl Horace having already taken the aforesaid opinions, and being therefore satisfied that such doubt was unfounded, consented to execute such deed or instrument as was required.

Accordingly, by indentures of lease and release, dated the 1st and 2d of April, 1794, the release being made between Horace Earl of Orford (described as uncle and heir at law of George Earl of Orford deceased) of the first part, the Earl of Coventry and others (trustees in the settlement of 1792) of the second part, and the said Lord Clinton (described with an accurate statement of his pedigree from Theophilus Earl of Lincoln as

heir at law *ex parte maternâ* of the said George Earl of Orford) of the third part, after reciting the settlement of 1781, the indentures of 1785, the death of Earl George, and the deed of 1792, and “that doubts had arisen whether the said George Earl of Orford having joined in the indenture of 1785, did not revoke the limitations contained in the settlement of 1781, and thereby defeat the settlement of 1792, and vest the estates in Horace as heir at law of the said George Earl of Orford; but the said Horace Earl of Orford, being well satisfied that the said late Earl did not intend to alter the uses limited by the settlement of 1781, had, at the request of Lord Clinton, agreed to confirm the uses of the said settlement in manner thereafter mentioned,” it was witnessed, that in pursuance of the said agreement, and being desirous to confirm the settlements of 1781 and 1792, the said Horace Earl of Orford “did grant, bargain, sell, release, and confirm” unto the said Earl of Coventry, &c. and their heirs, all the aforesaid manors, &c., which were the inheritance of Samuel Rolle and George Earl of Orford, “to, for, and upon such and so many of the powers, provisoes, limitations, declarations, and agreements limited and declared, or any ways expressed of or concerning the same, in and by the said indentures of release bearing date respectively the 6th and 8th of October, 1792, as were then existing undetermined or capable of taking effect in the same manner as if the said indenture of the 6th of June, 1785, had not been made, and to and for no other use, intent, or purpose whatsoever.”

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Lord Clinton (formerly R. G. W. Trefusis) died

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on the 28th of August, 1798, leaving the Defendant, Lord Clinton, his eldest son and heir at law, who entered into possession on the death of his father, claiming to be entitled as tenant in tail under the settlement of 1792, subject to the mortgage.

Horace Earl of Orford made his will, dated the 15th of May, 1793, by which, after disposing of his estates in Norfolk, Essex, and Middlesex, and giving several pecuniary and specific legacies, he gave, devised, and bequeathed to his cousin General Conway, his heirs, executors, &c. “all the rest and residue of his estate and effects, real and personal, freehold and copyhold, whatsoever and wheresoever, and of what nature, kind, or quality soever not therein-before by him otherwise disposed of, which he then was or should be at his death seised or possessed of, interested in or entitled to, or over which he had a disposing power;” and the said General Conway having afterwards died in his lifetime, by a codicil to his will dated the 27th of December, 1796, Earl Horace appointed the Plaintiff, Ann Seymour Damer, to be his residuary legatee and devisee in the room of her late father, the said General Conway, deceased, and gave, devised, and bequeathed to her, the said Plaintiff, her heirs, executors, &c. all the rest and residue, &c. in the same words as he had given the same by his will to her late father.

Earl Horace died shortly after the date of this codicil, leaving the Plaintiff, George James Earl (since Marquis) of Cholmondeley, his grand nephew and heir at law, and the Plaintiff, Ann Seymour Damer, him surviving.

The bill then stated, that some questions had

arisen between the Plaintiffs respecting the will and codicil of Horace Earl of Orford, as far as regarded the equity of redemption of the said mortgaged estates; and that, in order to put an end to such questions, they had agreed to share the same between them: that they were advised, that by virtue of the limitations in the settlement of 1781, Earl Horace became, on the death of Earl George, absolutely entitled to the equity of redemption of the said estates; and that the Plaintiffs, upon the death of Earl Horace, became entitled to the same; that by divers mesne assignments, the legal estate in the said mortgaged premises had become vested in the Defendant Francis Drake, subject to redemption on payment of 20,000*l.* and interest; and that the other Defendants respectively claimed some interest in the same, and the bill charged that the deed of 1794 did not absolutely confirm the settlement of 1792, but only removed the doubts which embarrassed the supposed title of Lord Clinton, by reason of the mortgage deed of 1785 conveying the estates to the uses of the settlement only in such manner as if that mortgage had not been made; and that Earl Horace executed the deed of 1794 under the advice he had received as to the effect of that mortgage, and not considering that he was, in fact, parting with any substantial right or interest whatever, but fully believing, that by the limitation to the right heirs of Samuel Rolle in the settlement of 1781, Lord Clinton became absolutely entitled to the equity of redemption on the death of George Earl of Orford. The bill prayed a redemption and reconveyance to the Plaintiffs, and that the

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Defendant, Lord Clinton, might be decreed to deliver up to them the possession of the premises, and the Defendant Seymour to assign to them, or as they should direct, the 200 years' term then vested in him in trust to attend the inheritance, together with an account of rents and profits received by the Defendant, Lord Clinton; and that he might be decreed to pay the amount of what should be found due in taking such account, upon being allowed all sums paid by him in reduction of interest on the mortgage.

The Defendant, Lord Clinton, by his answer, submitted that it was the true intent and meaning of the indenture of settlement of 1781 to limit the estates to such person as should be heir at law of Samuel Rolle, in case George Earl of Orford died without issue. He insisted that the deed of 1794 was executed by Horace Earl of Orford, for the purpose of confirming the limitations created by the settlement of 1792, and barring himself and his heirs from making any claim to the estates, or deriving any title thereto by the operation of the settlement of 1781 or otherwise, and in order effectually to carry into execution Earl George's intention, that the estates should vest in the right heirs of Samuel Rolle, being the right heirs of him (George Earl of Orford), *ex parte materná*, the Rolles being the family from which he had derived those estates. He admitted the possession of his father Lord Clinton, and afterwards of the trustees in the settlement of 1792, and of receivers appointed by the Court in a suit in which the Defendant (then an infant) was Plaintiff, and the Earl of Coventry and others Defendants, to carry

into execution the settlement of 1792, which possession was alleged to have been quiet and uninterrupted till the filing of the bill. The answer then stated indentures of lease and release, dated the 26th and 27th of November, 1811, between Edward Hughes Ball, then an infant, and heir at law of Sir Edward Hughes, deceased, of the first part; certain parties therein named of the second part; and the Defendant, Drake, of the third part: by which, after reciting the mortgage deed of 1785, and an order by which it was referred to enquire whether the said E. H. Ball was an infant trustee within the meaning of the statute and the report of the Master thereon, it was witnessed, that in consideration of 20,000*l.* paid by the Defendant Drake to the parties of the second part, the said E. H. Ball conveyed to the said Defendant, his heirs and assigns, subject to the equity of redemption subsisting in the said estates, which sum of 20,000*l.* so paid was the proper monies of the Defendant Lord Clinton, the name of the Defendant Drake being made use of only as a trustee for him. The Defendant further said, that no application had ever been made by the Plaintiffs to him, or to the Defendants the trustees, to his knowledge, previous to filing the bill, except by two letters to the Defendant Drake, written in May and June, 1812, and thereby referred to; but that both the Plaintiffs permitted him, the Defendant, and those claiming under him, to enjoy the estates without setting up any claim thereto, although under no disability to do so. He submitted, that it was the intention both of Earl George when he executed the settlement of 1781, and of Earl Horace when he

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executed the deed of 1794, that the estates should become vested in the family of Samuel Rolle, so as to be a provision for the person entitled to the barony of Clinton, which title was in Earl George, and descendible to the family of the said Samuel Rolle. The answer then stated indentures of the 4th and 5th of July, 1794, between Lord Clinton (described as heir of Samuel Rolle, and heir *ex parte maternâ* of George Earl of Orford,) of the first part; the trustees of the settlement of 1792 of the second part; and Sir Lawrence Palk, Bart., of the third part: whereby, after reciting that the estates were, on the death of Earl George, vested in the said Lord Clinton in fee as right heir of Samuel Rolle, and that the trustees of the said settlement had applied to Sir Lawrence Palk to advance 25,000*l.* on the security of the said estates, under the trust of the settlement which he had agreed to do, it was witnessed, that the said trustees at the request of Lord Clinton, and the said Lord Clinton did grant, &c. and confirm to the said Sir Lawrence Palk, his heirs, &c. all the said manors, &c. which were the estate and inheritance of the said Samuel Rolle, and afterwards of the said George Earl of Orford, in the counties of Devon and Cornwall, subject to the said mortgage for 20,000*l.* to Sir Edward Hughes, and subject also to redemption on payment of the said 25,000*l.*, and such further sum as Sir Lawrence Palk might thereafter advance, with interest. The Defendant then submitted, that the Plaintiffs were entitled to no relief in equity: and the late Lord Clinton, and the trustees and receivers, having been in quiet and undisturbed possession and enjoyment for upwards

of twenty years before the filing of the bill without any claim made, except by the said two letters, the Defendant claimed the same benefit of such length of possession and of the statutes as if he had pleaded the same. He further said, that on the faith of having a good title under the deeds of 1781 and 1794, he had made several dispositions of large parts of the estates of his grandfather Trefusis, and had paid various debts of his father which he was not liable to pay; and that his father was, as he believed, principally induced to claim the barony of Clinton, in consequence of his possessing the estate which had been enjoyed with that barony.

The Defendant Drake, in like manner, submitted the construction and effect of the deeds of 1781 and 1794, and claimed, as trustee for Lord Clinton, the full benefit of the length of time and of the statutes.

The Defendants St. John and Fortescue (surviving trustees of the settlement of 1792) said, that until the filing of the present bill no notice of the claim or demand of the Plaintiffs was ever made to them, or either of them, and claimed indemnity.

The Defendant, Sir Lawrence Palk, stated the application made to him by Lord Clinton, then being in the possession or enjoyment of the estates, and being or pretending to be with the full knowledge of Earl Horace, absolutely seised of and entitled thereto, and his consequent advances of money on the security of the estates under the mortgage deed of 1794, amounting, together with interest, at the time of putting in his answer, to 41,000*l.* and upwards. He claimed to be entitled

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to the full benefit of that mortgage, as well against the Plaintiffs as against Lord Clinton and those claiming under him; and also all such benefit of the mortgage to Sir Edward Hughes as a collateral security for his advances generally, and especially for sums paid for interest by him to the representatives of Sir Edward Hughes upon his mortgage of 20,000*l.* as he had in any manner become entitled to in equity by virtue of his contract with Lord Clinton and his trustees, and under the circumstances of the case; he alleged that he had never, until long after he had made these advances, any knowledge or notice of any right or title in Earl Horace or any person claiming under him, or any belief or suspicion, or any reason to believe or suspect that Lord Clinton and his trustees had not full right and title: And he submitted that, even if Lord Clinton's title was not absolutely good and indefeasible at law against Earl Horace and those claiming under him, yet, Earl Horace having permitted Lord Clinton to enjoy the estates as his own under a claim of absolute ownership, and having, with full knowledge of the trust-deed of 1792, instead of questioning Lord Clinton's right to the estates, confirmed it in the manner before mentioned; and having also permitted the Defendant to advance his money upon the faith of the title so claimed, and suffered to be enjoyed, the Plaintiffs ought not, claiming under the said Earl Horace, to be permitted to impeach the title of the Defendant as a mortgagee, and were entitled to no relief against him, except to redeem him by paying off the whole principal and interest due on his mortgage; and he claimed the same benefit of the mortgage security as if he had pleaded the same.

Sir Lawrence Palk having died after he had put in his answer, the suit was revived as against his representatives.

The cause came on for hearing at the Rolls before *Sir W. Grant*, the Master of the Rolls, and was most elaborately argued \* by *Mr. Leach* (now *Sir John Leach*, M. R.), *Mr. Shadwell* (now *Sir L. Shadwell*; V. C.), and *Mr. Sugden*, for the Plaintiffs; by *Sir Samuel Romilly*, *Mr. Bell*, *Mr. Heald*, and *Mr. Preston*, for the Defendant, Lord Clinton; by *Mr. Benyon* and *Mr. Blake*, for the Defendants, St. John and Fortescue, trustees in the settlement of 1792; and by *Mr. Hart*, *Mr. Horne*, and *Mr. Longley*, for the Defendant, Sir Rob. Palk, the mortgagee.

The decree was in favour of the Plaintiff on all the questions raised in the argument; but upon the effect of the limitation in the deed of 1781, being a question of law, the Master of the Rolls, considering the importance of the interests to be affected by the decision, thought it right, if desired by the counsel of Lord Clinton, to send a case for the opinion of a Court of law; and, accordingly, after the original hearing of this cause, a case was sent for the opinion of the Judges of the Court of King's Bench, in which the question was, whether R. G. W. Trefusis, afterwards Lord Clinton, the father of the Defendant Lord Clinton, took any estate under the deed of the 2d day of August, 1781?

The case was twice argued † in the Court of King's Bench; first by *Mr. Richardson* ‡ for the

\* See the Report, 2 Mer. 171.

† See the Report, 2 B. & A. 625.

‡ Afterwards a Judge of the K. B.

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Plaintiffs, and *Mr. Preston* for the Defendants; and afterwards by *Mr. Shadwell* for the Plaintiffs, and *Mr. Serjeant Copley* for the Defendants. The following certificates were sent by the Judges: —

“ This case has been argued before us by counsel, and considering that the words ‘ the right heirs of Samuel Rolle,’ are words of plain and well-known import, and according to that import must denote George Earl of Orford, the settlor, we think that R. G. W. Trefusis, afterwards Lord Clinton, took no estate under the said indenture of the 2d of August, 1781. Supposing a different construction might be put upon those words in a deed, and that they might be held to designate some other persons in order to carry into effect a manifest intention on the part of the settlor, yet, we do not collect with certainty, from the language of the deed, what other person the settlor intended to designate by those words. *C. Abbott, G. S. Holroyd, W. D. Best.*

“ The case has been twice argued; and considering that it appears by the indenture of the 2d of August, 1781, that the said George Earl of Orford knew himself to be the then heir of Samuel Rolle; considering, also, that during the life of the said George Earl of Orford, or so long as there should be any issue of his body, no person could legally come within the description of right heir of Samuel Rolle but the said George Earl of Orford and his issue, who were of the united line of Walpole and Rolle, and were also provided for by the estate tail created by the indenture; considering, also, that it appears plainly by that indenture that the said George Earl of Orford meant to provide for the separate line of

“ Rolle, that no person of that separate line could  
 “ come within the description of right heir of  
 “ Samuel Rolle till the united line should be ex-  
 “ hausted, and that a limitation, by way of re-  
 “ mainder to heirs or children, is not necessarily  
 “ confined to such persons as are within that de-  
 “ scription at the time the limitation is created,  
 “ I am of opinion, that the effect of the indenture  
 “ of the 2d of August, 1781, was to vest in the  
 “ said George Earl of Orford an estate in tail ge-  
 “ neral; with remainder (if he should make no  
 “ appointment) to such persons as at the expiration  
 “ of the estate tail should be the right heir of  
 “ Samuel Rolle in fee; and, consequently, that the  
 “ said R. G. W. Trefusis took an estate in fee  
 “ under the said indenture. — *J. Bayley.*”

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In 1820 the cause came on for hearing before *Sir Thos. Plumer*, M. R. \*, on the equity reserved. Two objections were taken for want of parties, upon which the Master of the Rolls reserved his opinion till the delivery of his judgment on the merits.

The first objection was, that the brothers and sisters of the Defendant Lord Clinton, or the eldest brother, were not made parties.

The second objection was, that the persons entitled to the equity of redemption of certain estates formerly belonging to George Earl of Orford, in the county of Dorset, and which were included with the estates in question in the cause in the mortgage made in 1785 to Sir E. Hughes, were not parties to the suit.

The case then proceeded upon the merits, and was argued by *Mr. Shadwell*, *Mr. Sugden*, and

\* Sir W. Grant had retired.

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*Mr. Brent* (in the absence of the *Attorney-General*) for the Plaintiffs.

*Mr. Bell, Mr. Heald, and Mr. Pepys* for the Defendant Lord Clinton.

*Mr. Benyon and Mr. Blake* for the Defendants St. John and Fortescue; and

*Mr. Hart, Mr. Horne, and Mr. Longley* for the representatives of Sir L. Palk.

*The Master of the Rolls*, on the 8th of August, 1820, pronounced a judgment\* in favour of the Defendants, dismissing the bill by a decree which was adopted, *pro formâ*, as the decree of the Lord Chancellor, and enrolled, and thereupon an appeal was presented by the Plaintiffs to the House of Lords, which was brought on for hearing, and argued during many days in May and June 1821.

For the Appellants, *The Attorney-General*.†

There is no such thing as equitable disseisin. *Hansard v. Hardy*, 18 Ves. 455.; *Lord Grenville v. Blyth*, 16 Ves. 224.; *Hopkins v. Hopkins*, 1 Atk. 581.; *Beckford v. Wade*, 17 Ves. 87.; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 633. : the possession of the tenant of a mortgagee is like the possession of the tenant for years, it is the possession of the person in whom the freehold is vested; Co. Litt. 15 a. as to the doctrine of *possessio fratris* : the receipt of rent cannot amount to an equitable disseisin, except at election; the title of a reversioner is not displaced after levying a fine by the lapse of five years. His right accruing afterwards may be enforced, even in a case of forfeiture,

\* See the Report, 2 J. & W.

† Sir Robert (afterwards) Lord Gifford, M. R. The arguments were nearly the same as in the courts below; a very short summary, therefore, is given chiefly for the sake of the interlocutory judicial observations.

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Co. Litt. 252 a.: Mrs. Damer's right could not be barred if the equity of redemption was in her, since her title did not accrue until after the death of George Earl of Orford. If there was an equitable disseisin, no estate passed by the will of Horace Earl of Orford. Then it descended to Lord Cholmondeley as heir at law. If it was in Mrs. Damer, the title accrued by the death of Horace Earl of Orford in 1797, and the twenty years had not elapsed. It is not a universal rule that twenty years is the term of limitation in equity. *Collins v. Goodall*, 2 Vern. 235. A rent commencing by grant is not barred by forty years. *Stackhouse v. Barnston*, 10 Ves. 453. The statute of limitations does not apply to a legal, much less to an equitable rent-charge. It is a principle of equity that no act of a trustee can prejudice or narrow the interest of the *cestuique trust*. The mortgagee was a trustee for the party entitled; and if an estate had been gained by wrong, it was the act or permission of the trustee. Fonb. Tr. Eq. 2. 166.

*The Lord Chancellor* said, — that a mortgagee was only in a certain qualified sense a trustee, since a mortgagee in possession, keeping no account and receiving the rents for twenty years without account, would become the owner of the estate. The mortgagor would be barred by the lapse of time; that it had been held in a cause at the Cockpit, where Lord Kenyon assisted, that such a case stated in a pleading would leave it open to demurrer.\*

*The Attorney-General* continued, — The mortgagee cannot, by collusion with a stranger, defeat

\* See *Cuthbert v. Creasy*, in a note at the end of the Report of this case.

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the equitable right; that some person had the right to redeem was admitted; that the mortgagee had gained an absolute estate by acquiescence was not contended; under the deed of 1781 there never had been a possession adverse to the title, nor could be, as it was settled in a similar case, that abatement by a younger son does not operate against the elder, because they claim under the same title; Litt. Ten.; that the limitation in the deed of 1781 had not been disturbed; and if Lord Clinton applied to redeem, he could only state a wrongful possession under the mortgagee, who is a trustee for the right owner; that in the deed assigning the mortgage to Drake in 1811, the equity of redemption is reserved to the same persons who were entitled under the deed of 1785, and according to the limitations of the deed of 1781; that is the heirs of George Earl of Orford.

Here *The Lord Chancellor* observed, that Lord Clinton was not a party to the deed of assignment.

*The Attorney-General* answered, that Drake was a trustee for Lord Clinton, as appeared by the answer of Lord Clinton; and, therefore, it was the admission of his agent that the limitations of the deed of 1781 remained untouched. He then submitted the four following positions:— 1. That there was no equitable disseisin, if the estate of the mortgagee was untouched; that the right to redeem was in the party shewing a right under the original mortgagor; that no act of the mortgagee, by receipt of rents or otherwise, could alter that right; and, therefore, the lapse of twenty years did not affect the right. 2. If there could have been an equitable disseisin, as the right passed under the will to Mrs. Damer by the death of Horace Earl of

Orford, the twenty years had not elapsed. 3. That if there was an equitable disseisin by analogy to legal disseisin, the right did not pass, but descended to Lord Cholmondeley as heir-at-law. 4. That if at the death of George Earl of Orford there was a doubt whether the estate passed under the will or descended to Lord Cholmondeley as heir, it was competent to the heir and devisee to agree to divide the estate, and that it was not material to prove the fact, because it is immaterial to the Defendant; that it is not a case of champerty, because there was a right or claim to the estates in one or other of the Plaintiffs.

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*The Lord Chancellor* said, the allegation of the bill was, that doubts and difficulties had arisen which were compromised by the agreement, and that the truth of this fact could not appear but by the production of the agreement.

*The Attorney-General* answered, that it had been held by the Vice-Chancellor\* in *Ryan v. Anderson*, 3 Mad. 174. that such agreement was legal, and that the allegation need not be proved, as it was immaterial to the Defendant, whose interest was not affected by it; that the same doctrine appears in *Stapilton v. Stapilton*, 1 Atk. 2. cited 1 V. & B. 28.

*Mr. Shadwell*—for the Appellants—contended that such an agreement could not amount to champerty or maintenance, according to the definitions of those offences. Co. Litt. 368., Blac. Com. 4. 134.; for the supposed offenders were here parties to the record. Nor is it within the statute 32 *Hen. 8. c. 9.* If the possession of the mortgagee is the possession of the party entitled to the equity of re-

\* Sir John Leach.

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demption, it cannot be a pretended title, for the statute excepts the case of possession.

The agreement is by parol, although minutes have been taken of what the agreement is to be.

*The Lord Chancellor.* — It may be said, when you come to redeem, that you must shew your title as you state it. If by the proviso in a mortgage I agree to account with A. B., I cannot be compelled by C. D. to account. If, under the proviso for redemption you can shew that the two Plaintiffs are entitled to have the account, that will do. If Mrs. Damer were the sole Plaintiff, she might require the account, and it would be immaterial what agreement was made out of Court. If a mortgagor files a bill for redemption, it may be material who is to pay him the surplus.

*Mr. Shadwell.* — The account is not the substance of the Plaintiff's case, and he may waive any part of the prayer of his bill. As to the effect of the deed of confirmation, it is limited, not general nor absolute, and ought not to be extended beyond the intention, and will be rectified if there is a mistake. *Lansdowne v. Lansdowne*, Moseley, 364.

*The Lord Chancellor.* — Many cases in Moseley are extremely well reported, others not so.

*Mr. Shadwell* then proceeded to argue that courts of equity interfere after the lapse of twenty years, and cited *Bonney v. Ridgard*, 1 Cox. 145. cited in *Andrews v. Wriley*, 4 Bro. C. C. 124.; *Medlicott v. O'Donnell*, 1 Ba. & Be. 156.; and *Moore v. Blake*, 1 Ba. & Be. 62. reversed on appeal, 4 Dow. 230. As to mortgagees in possession, he said the doctrine had been fluctuating, and cited *Pearson v. Pulley*, 1 Ch. Ca. 102., and 3 P. W.

287. note B; *Meller v. Lees*, 2 Atk. 494.; *Aggas v. Pickerell*, 3 Atk. 225.; *Acherley v. Roe*, 5 Ves. 565.; *Harmood v. Oglander*, 6 Ves. jun. 199.; and the appeal against the judgment, 8 Ves. 106., in which the Lord Chancellor says that relief is not to be denied on account of lapse of time. *Collins v. Goodall*, 2 Vern. 235., decided on the authority of *Foster's case*, 8 Co. 128.; *Hansard v. Hardy*, 18 Ves. 455.; *Hardy v. Reeves*, 4 Ves. 466., to prove that adverse beneficial ownership for twenty years is not in equity a sufficient bar, but that after that time the courts will interfere against persons not having the legal estate. He then argued, that if there were such a thing as equitable disseisin, Horace Lord Orford could not devise an estate of which he was not seised; and the heir at law might have brought his writ.

*Lord Redesdale.* — But Lord Cholmondeley must claim as heir of George and Horace Lord Orford. Then comes the question whether he can quarrel with the deed of Horace Earl of Orford:

*Mr. Shadwell.* — The descent would have enabled the party to bring a writ of right. Seisin is not necessary. Co. Litt. 281 a. Fitz. N. B. 11. Lord Cholmondeley, if he claims at law, might sue as the heir of George Earl of Orford; the question is, whether a possession originally tortious can be made good by length of time, unless it is clothed with the legal estate. *Bowles v. Stewart*, 1 Sch. & Lef. 209.

The mortgagee is not simply a trustee, but by accounting remains a trustee for the party entitled while he is out of possession; receiving interest and willing to be redeemed, he holds for the party entitled. A court of equity might refuse

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the account by analogy of the statute of limitations, but yet direct the conveyance of the legal estate. Courts have laid hold of slight circumstances to uphold the rights of the mortgagor to redeem. In 1811 there is a formal recognition of Lord Clinton that the estate is redeemable, the limitation is to be taken from the time of the recognition. Courts of equity decide upon legal possession, *Harrison v. Hollins* \*, Rolls, 24th February, 1812, decided on the authority of *Dallas v. Floyd*, Rolls, 1737. The right must be clothed with a legal estate, *Pim v. Goodwin*, not reported †, but cited *Cholmondeley v. Clinton*, 2 Meri 309. In that case, it was the opinion of the Lord Chancellor, that the right of redemption was in the party successively entitled reckoning from the time when their titles respectively accrued.

*The Lord Chancellor.* — The question there was, whether the time is to be counted from a certain date, or when each title successively accrues. Nothing was decided in the case, but only judicial doubts intimated.

*Mr. Heald* and *Mr. Butler*, for the Respondent Lord Clinton. — There are four points of defence: 1. The construction of the deed of 1781; 2. The confirmation by Earl Horace in 1794; 3. The bar by length of time; 4. The agreement entered into between Lord Cholmondeley and Mrs. Damer, which would prevent the Plaintiffs from having the relief prayed by the bill, and they could not have different relief on this bill.

On the hearing before Sir William Grant he made no decree, but referred it to law. The Judges

\* Since shortly reported, 1 Sim. & Stu. 471.

† See the note at the end of the report of this case.

differed in opinion. Sir Thomas Plumer, after consideration of all the cases cited, and of all which his own researches furnished, dismissed the bill.

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The deed of 1794, if we are right in our construction of the deed of 1781, is a needless instrument; but in the manner in which we are directed to argue, it is of the first importance.

Nothing was concealed in 1794 from Earl Horace. The recitals of the deed of 1794 are important.\* In the exercise of the ownership of these estates, the late Lord Clinton, in 1792, conveyed the fee of these estates to trustees. Then the deed of 1794 recites that “doubts had arisen whether George Earl of Orford having joined in the mortgage of 1785, did not revoke,” &c. The existence or retention of a particle of title in Earl Horace was inconsistent with the confirmation of the uses of the settlement of 1792 contained in this deed. The Attorney-General says this deed of 1794 was made merely to remove the objection from the deed of 1785, and that it would be monstrous to hold this a complete conveyance: but in many instances, as in the construction of wills, the particular intention is sacrificed to the general intention.

Under the powers to lease contained in the deed of 1792, a large tenantry have acquired considerable interests. A lady has been induced to ally herself by marriage with this noble Lord. 34,000*l.* has been raised; and other acts done, on the supposition that the title was in Lord Clinton.

\* Mr. Heald quoted and argued at great length upon the *reiltacs*; see this topic fully discussed in the judgment, *post*.

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If Earl Horace did labour under this mistake, a bill must be filed to rectify it. There is no such bill.

The cases of *Bingham v. Bingham*, 1 Ves. sen. 126.; *Pusey v. Desbouverie*, 3 P. Wms. 315.; *Farewell v. Coker*; cited 2 Mer. 353.; *Cole v. Gibson*, 1 Ves. sen. 503. have been relied on. But a bill was filed for the purpose of rectifying the deed in all those cases. On this bill to redeem a mortgage, there is nothing said about rectifying the instrument.

As to *time*, there is no variation of opinion among all the Judges in equity here and in Ireland. As a general proposition equity follows the law. Equity follows the law either in obedience or by analogy to the statute of limitations. This doctrine is as old as the statute itself. *Smith v. Clay*, 3 Bro. C. C. 639. *note*; and Lord Redesdale's observations about the statute of limitations in *Bond v. Hopkins*, 1 Scho. & Lefroy, 428. In *Hovenden v. Lord Annesley*, 2 Scho. & Lefroy, 637. he says, "The same time would bar a redemption that would bar any other equity." *Underwood v. Lord Courtown*, 2 Scho. & Lefroy, 41.; *Beckford v. Wade*, 17 Ves. 87.; *Bonney v. Ridgard*, cited *ibid.* 97. are all authorities on this point.

A large tenantry is in this case waiting with great anxiety the decision of your Lordships. Lord Kenyon observes, in a similar case, that there are many parties interested. *Andrew v. Wrigley*, 4 Bro. C. C. 125.; *Townshend v. Townshend*, 1 Bro. C. C. 550.

The "exception to the statute of limitations holds only between a trustee and *cestui que trust*." Mr. Butler's argument in *Cholmondeley v. Clinton*, 2 Jac. & Walk. 29.; *Davie v. Beardsham*; 1 Cha. Ca. 39. We deny that the mortgagee is a trustee to

all intents and purposes. No title can be acquired by a trustee against his *cestui que* trust, but a mortgagee may acquire a title against the mortgagor.

*Hopkins v. Hopkins*, 1 Atk. 581. was cited by the Plaintiffs' counsel, and by Sir W. Grant (2 Mer. 358.) as one of the grounds of his judgment. This case has been looked into, and Atkyns's Report found to be incorrect. The original MS. in Lord Hardwicke's handwriting has been produced, and shews the incorrectness of Atkyns's Report.\*

It is not necessary for the purposes of this suit to decide on Lord Clinton's title, it is only on the Plaintiffs' title your Lordships have to decide. The judgment of Sir William Grant was founded on a mistaken idea of the point before him: he overlooks the length of time, and considers the right to redeem only. *Lomax v. Bird*, 1 Vern. 182. was cited by Plaintiffs. *Harmood v. Oglan-der*, 8 Ves. 106. was cited by Sir William Grant.

Two misreported cases, and one inapplicable, were cited in support of the judgment.

Mr. Shadwell seems to consider that the case of mortgagor and mortgagee rests on the circumstance of the legal estate which the mortgagee has. A second mortgagee could, if let into possession, avail himself of his long possession and keeping no account. Why was Lord Clinton's title discussed at the Rolls? The Plaintiffs' title to redeem was the only question. It was unnecessary to consider Lord Clinton's title. The question on the record being whether or not Lord Cholmondeley's bill shall be dismissed. I do not rest Lord Clinton's success in this cause on his right to succeed if he

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should file a bill to redeem. But I think he would succeed in such bill.

*Casborn v. Scarfe*, 1 Atk. 603.; *Stackhouse v. Barnston*, 10 Ves. 453.; *Mellor v. Lees*, 2 Atk. 494. relate to rents, and do not concern lands.

*Stapitton v. Stapilton*, 1 Atk. 2.; *Stockley v. Stockley*, 1 Ves. & Beam. 23. relate to family arrangements, which are not easily disturbed in equity.

*Bowles v. Stewart*, 1 Scho. & Lef. 209. was cited as a case where relief beyond twenty years was given. It was under very particular circumstances of suppression of deeds, most dissimilar to the present.

*Pearson v. Pulley*, 1 Ch. Ca. 102., merely referred to a rule to be adopted in future.

*Acherley v. Roe*, 5 Ves. Jun. 565., has very little to do with the present case.

There is no evidence whether the agreement entered into by the Appellants to divide the estate between them is voluntary or for valuable consideration, whether in writing and by parol, or whether it would give a valid title in equity or not. Both parties could not be entitled.

In the absence of the agreement, we may assume that it would give a valid title. Now, if we suppose this to be a good, valid, and binding agreement, how can your Lordships decree, according to the prayer of this bill, to both; or, as they now urge at the bar, to Mrs. Damer only?\*

\* Mr. Butler's argument for the Respondent, Lord Clinton, was the same, *verbatim*, as in the Court below.

For the other parties, the same counsel as in the Court below appeared and argued the case. There was no material difference in the arguments.

*The Attorney-General* in reply. —

The objection as to parties was not taken in time. If the Court thinks the objection material, we may be allowed to amend by making parties. Sir T. Plumer decided only on length of time. In substance and in effect this is a bill to redeem a mortgage, and get in the legal estate outstanding in the mortgagee, Mr. Drake. I shall consider the case, first, with reference to the question between a mortgagor and mortgagee.

Now, if twenty or twice twenty years had elapsed, and the mortgagee admits the right to redeem —

*The Lord Chancellor.* — There is a difficulty as to the term. The term includes the Dorset estate.

*The Attorney-General.* — We are content the Dorset estate shall be free from the mortgage.

*Lord Redesdale.* — There is a question who is entitled to the mortgage money. All the persons claiming under the settlement of 1792 may claim as against Lord Clinton. This is a question, not between mortgagee and mortgagor, but between persons claiming an equity of redemption under the mortgagor. Suppose the mortgage 200 years old; that there is a mistake as to the right at the end of fifty years; and after 150 years' possession, an estate claimed by the right owner; could the claim be allowed? All the great estates in the kingdom are subject to mortgage for portions for daughters, &c. The question is, whether the existence of a mortgage is to make the statute of limitations of no effect for an indefinite time; you must hold, too, that fine and non-claim would not bar.

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*The Attorney-General.* — The difficulty now thrown out exists at law in cases of ninety-nine years' leases.

*Lord Redesdale.* — The question between mortgagor and mortgagee cannot possibly satisfy this case. The estate descending to co-heirs, one half may be redeemed and the other not, if one co-heir has been admitted and the other not: this has been decided. The mortgagee is an indifferent person. Can a tenant who has attorned reject his landlord? Your decree must be against Lord Clinton, not against Mr. Drake. The real question as to operation of time here is, whether persons claiming under the settlement of 1792, or Lord Cholmondeley, or Mrs. Damer, are entitled to this property. You go on mere right, and the question is, whether mere right is not barred by the statute of limitations. There are other questions also.

*The Attorney-General.* — The passage in Lord Clinton's answer, as to the assignment to Drake in 1811, is an admission of the right of redemption under the deed of 1781.

It comes to the question, whether Lord Cholmondeley and Mrs. Damer, or Lord Clinton, has the right to redeem in this cause. If Lord Clinton, on the strength of his twenty years' possession, had come to redeem, could he have redeemed? All parties agree that George Earl of Orford had the equity of redemption in him; he died seised thereof; the ultimate decision must rest on the preferable right to redeem; and the question is, whether twenty years' possession will give Lord Clinton a right to redeem, whether Lord Clinton and his father have gained the equity of redemption. It is impossible we can be barred, unless Lord Clinton has acquired

the right. The Defendants' counsel were cautious in arguing that question. Mr. Butler indeed stated, that at the end of twenty years he acquired the right to redeem.

I come now to examine the question, how the rule in equity is. There is no such thing as acquiring an equitable estate by wrong.

*Lord Redesdale.* — Yes, if there is possession in equity.

*The Lord Chancellor.* — The estate, if gained at all, is not gained merely by an act between mortgagor and mortgagee, but by laches of the person really entitled. Upon the last minute of the twentieth year the mortgagee may be redeemed; upon the first minute of the twenty-first year he cannot. Is there any thing so monstrous in saying, that an equity may be acquired by twenty years' possession?

*The Attorney-General.* — After a lapse of 200 years, the Courts would presume a release or conveyance. It must come to this, whether tortious possession by Lord Clinton, and the laches of the Appellants, give Lord Clinton a right to redeem. Adverse possession has been confounded in the argument for the Respondent, with adverse seisin; and adverse possession at law, will not prevent the recovery of an estate. Can there be a disseisin of an equitable interest? The negative is shewn by *Hopkins v. Hopkins*, 1 Atk. 581. The alteration in expression which has been discovered by the Respondent's counsel in this case, in the observations of Lord Hardwicke in delivering judgment; makes no difference in the substance of the doctrine. Mr. Horne contended, that Lord Clinton

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disseised the trustee and gained the legal estate. In point of law, the trustee has continued in possession. The possession of Lord Clinton was the possession of the mortgagee or trustee. All the cases cited by Mr. Butler, except the first class, are where the tenant in possession had the legal estate. All, except the first class, come within Lord Hardwicke's exception.

As to the second class. In *Davie v. Beardsham* there was an acknowledgment of title. There was an adverse possession of legal estate for twenty years, and the lord had admitted the heir. How does that case apply?

The third class is between mortgagor and mortgagee. There the mortgagee has the legal estate.

The fourth class relates to the time for a bill of review. At law twenty years bars a writ of error, and so it shall bar a bill of review. It is so laid down in *Smith v. Clay*, 3 B. C. C. 639. note.

Courts of equity have interfered in cases of rents after forty years. *Acherley v. Roe*, 5 Ves. jun. 565.

As to the fifth class. In *Bonney v. Ridgard* the legal estate was in the party in possession.

But suppose an equitable estate can be gained by wrong. Has Lord Clinton's possession gained an estate by disseisin? There is a distinction between disseisin and ouster of possession. Receipt of rents is nothing. The possession of the trustee is the possession of the person equitably entitled. The language of the statute of limitations, 21 Jac. 1. c. 16., should be looked to, — "No person shall make any entry into any land, &c. unless within twenty years from the time when his title shall accrue." *Reading v. Royston*, 2 Salk. 423. shews that the

statute does not run except where there is an actual ouster or disseisin. Mere receipt of rent is not necessarily a disseisin: it is only a disseisin at election. Roll. Abr. Disseisin, (C) pl. 12. Tenant at Sufferance. Where the statute of limitations runs there must be a disseisin at the commencement of the twenty years. *Doe v. Danvers*, 7 East, 299.

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*The Lord Chancellor.* — I question the applicability of the legal doctrine of disseisin. Suppose the case of mortgagee after twenty-five years, admitting by will the estate to be a mortgage estate, will this affect a third person in possession? Time, and time only, courts of equity have put it upon. Out of a court of equity it might be held rank nonsense to say you may file the bill in the morning, but not after twelve o'clock at night; but so it has been held in equity.

*The Attorney-General* mentioned *Acherley v. Roe*.

*The Lord Chancellor.* — That was not a case of mortgage certainly.

*The Attorney-General.* — It must follow from this doctrine that twenty years' possession will give a right to redeem.

*Mr. Butler.* — Yes.

*The Attorney-General.* — This is the first time I have heard it maintained. In *Lomax v. Bird*, 1 Vern. 182., which was the case of a lease for ninety-nine years at law, it was held that fifty or sixty years' wrong payment of rent will not prevent a recovery by a rightful owner after the lease has expired. There are other authorities: *Doe v. Danvers*, 7 East, 299.; *Williams v. Thomas*, 12 East, 141.; *Doe v. Perkins*, 3 Maule & Sel. 271.

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Qu. If A. B.  
is in possession.

*The Lord Chancellor.* — If A. B. is trustee for C. D., and C. D. mortgages to E. F., and E. F. holds for more than twenty years without admission, would equity permit C. D. to come to redeem after twenty years? to redeem either E. F. or A. B.? does not A. B. after twenty years become trustee for E. F.?

*The Attorney-General.* — The question is between the contending equities in these parties.

In 1811, Lord Clinton admits that the lands are to be conveyed to him, subject to the redemption under the deed of 1785; and it comes to the question, who is entitled to the redemption under the deed of 1785? I submit there is no dictum or case to shew a right can be gained by a wrongful possession in equity. — *Lord Grenville v. Blyth*; *Harwood v. Oglander*. Lord Clinton entered under the deed of 1781. This is a most important question, as to time, in your Lordships' view; and important on the other side, if your Lordships decide that an estate in equity may be gained by wrong.

Another question is, whether a mortgagee or trustee, in collusion with a third party, shall deprive the party rightfully entitled of his right. The hardship is as much to the Appellants as to the Respondents. I never have understood that Courts have been anxious and astute to tie parties down to the strict line of the statute.

A more important question upon principle was never before your Lordships, than to decide whether an equitable estate can be gained by wrong.

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*The Lord Chancellor.\** — In a case of this extreme importance, both to the parties and the pub-

\* Lord Eldon, at the conclusion of the argument.

lic, and recollecting that two very eminent Judges have differed in their opinion, on a case of so much importance, and calling your Lordships' attention to the very able manner, and the very great display of legal learning with which this has been argued at your Lordships' bar, I do not think your Lordships can be, properly, advised to deal with this case as you ought to deal with it, unless I should suggest the propriety of deferring judgment till Friday se'nnight. In the mean time, it may perhaps be useful to proceed so far in the consideration of this case, as to state to your Lordships what appears to *me* to be the nature of the cause, as we are to collect it from the record, not meaning to give any opinion whatever, at this moment, upon any of the important points which have been discussed at the bar. Whenever it becomes my duty to give that declaration of opinion, it will be necessary to preface it by a statement of the facts, as they appear upon the record, and, probably, it may be a useful employment of an hour, at present, to state those facts as they are to be collected from the record.

I am desirous, however, first to say, that when I proposed to hear the counsel on the equitable point first, I certainly did not make that proposition under any notion, that it would or would not, eventually, turn out that it would be necessary or unnecessary to hear the counsel on the effect of the deed of 1781. I had long foreseen, that in a case where the property was so large, where to the parties themselves the question was so important, and where the bearing of the decision upon titles in this country was so excessively important, it was next to impossible but that one or other of the

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parties would bring this case before your Lordships, finally, to be here decided; and I felt it to be my duty, as far as I could, to approach the discussion which I was to hear at the bar, and the decision which was to be made afterwards, with a mind unprejudiced and unaffected by any other matter than what I had heard judicially.

There was another mode of proceeding which might have been recommended to you, but it seemed to me to be less advisable; that is, to have begun first by considering what was the effect of the deed of 1781, because, if the legal effect of the deed of 1781 was to leave the property not in George Earl of Orford, but to have given it to those under whom the Clinton family might claim, that would have put an end to all equitable questions; but it would have decided a mere legal point on a single instrument, and upon one of the most important questions that in the course of my professional life I ever remember to have occurred, affecting so deeply and to such an extent titles in this country as the equitable question does — it would have left the case in circumstances the most unadvisable, namely, that question having been decided one way by one great Judge, and another way by another, and it, therefore, appeared to me important for the interests of all persons entitled to landed property that the equitable question should be set at rest one way or the other. If it ought to be decided with Lord Clinton, there is no occasion to discuss the legal question; if it is not to be decided with him, then it may become necessary to discuss the legal question; and in this view of the case, it appeared to me we should best consult the general adminis-

tration of justice by taking the equitable question first.

It must, certainly, be stated to your Lordships, that this is a case in which you must decide by an attention to the rules of law, by which I mean the rules of equity with reference to this point, and by attention to those rules only. No considerations of hardship must influence your minds; and the real question here will be, what a court of equity ought to do under the circumstances in which this case is brought before you upon this record. Those circumstances I will now endeavour to state. I am very well aware, that this sort of formal statement cannot gain much of your attention, but it is a statement that must be made, and, perhaps, it will be best made while the circumstances of the case are fresh in your recollection, and you will be better able to retain the memory of them when they are stated in detail than when picked up in the course of the hearing of the cause.

As to the circumstance of the want of parties in this case, unless I mistake the nature of this case, I think there are some absent who ought to be here. I understand it to be the wish of both parties to waive that question, as far as it can be waived; but in one way of determining this case I do not think it can be waived. If your Lordships shall be of opinion that Lord Clinton has the equitable title, the want of parties may be waived; but if your Lordships should be of opinion the other way, then, if there are parties who have interests that may be bound by your decision, inasmuch as you have them not before you to consent to the decision, I do not know that you could, in consequence of any thing that has passed from the

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bar, waive the necessity of making others parties ; and if the case should take that turn, it may be necessary to go no further than direct the record to be amended.

The first question that here arises is, (if I may so term it, having of late been very conversant with Scotch cases,) the title of the plaintiff to pursue. Now let me suppose, and I only put it now by way of supposition, I do not say the fact is so, but let me suppose, for the sake of argument, that there had been a possession of more than twenty years when this bill was filed, adverse to every body who could claim under George Lord Orford, or under Horatio Lord Orford ; indeed, it is not necessary, with a view to the circumstance which I am now alluding to, that there should have been an adverse possession for twenty years ; but let me suppose, that it appears upon this record, that neither Mrs. Damer, nor Lord Cholmondeley, nor any body for them, had been in possession. I do not now enter into the question whether the mortgagee must not be considered in possession for them ; but assuming for a moment that the mortgagee was not to be considered in possession for them, under the circumstances of the case. Let me suppose that they had been out of possession for five years or two years, how do they state their title to bring a joint bill. They do so by a sort of allegation, of which there is no proof, and fortunate, perhaps, it is that there is no proof ; — but it is insisted at the bar that allegation is enough, and that you need not proceed in such a case *secundum allegata et probata*, but *secundum allegata*. After Lord Cholmondeley had stated himself to be the heir at law of Horatio Earl of Orford, and

not claiming by this bill as the heir at law of George Earl of Orford, he says, “that some questions had arisen between the Appellants respecting the will and codicil of Horatio Earl of Orford, so far as regards the equity of redemption of the said mortgaged hereditaments; and in order to put an end to such questions, the Appellants had agreed to share the same hereditaments between them.” Whether this was a written agreement or a parol agreement, or what sort of agreement it was, or whether it was a promise, is not explained on the record, and it has not been produced to your Lordships if it exists in a producible shape.

Now the policy of our law, both the common law and the statute law, has certainly set its face very much against persons entering into agreements with respect to property of which neither of them have had possession for a limited period. I do not trouble you with a discussion as to the doctrine of maintenance or champerty, or about the meaning of expressions which we find falling from the mouths of some of our Chancellors in courts of equity as to the evidence relative to what they say, “savours or smells of maintenance or champerty;” but your attention must be called in this case, I think, to that upon which I do not observe that the Attorney-General said one word, I mean, the *32 Hen. 8.*, as to pretended titles. Give me leave to suppose for a moment, that no person alive could doubt that the right and title was either in Mrs. Damer or in Lord Cholmondeley, or, if you please so to put it in both, the question then would be whether, consistently with that statute of the

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32 *Hen.* 8. they could enter into such an agreement as they have here stated upon their bill. It is a question, undoubtedly, which must be agitated with great seriousness, because, if they could not, the fact of entering into it exposes them to very great penalties.

Now I will read a passage which will call your attention, with some degree of accuracy, to what is the question on this part of the record, a passage from one of our best reporters \* in the law. He says, “ But before I enter into the consideration  
 “ of the statute, I will lay down what is a pre-  
 “ tenced right or title. It seems to me that a pre-  
 “ tenced right or title is but in one case, and that  
 “ is, where one is in possession of lands or tene-  
 “ ments, and another, that is out of possession,  
 “ claims them, or sues for them, that is a pretended  
 “ right or title. For if one has right or title to  
 “ land, and afterwards he comes to the possession  
 “ of the same land, his right or title is extinct or  
 “ suspended in the land, for during the time that  
 “ he has the land, it is not in *esse, ergo*, during  
 “ that time it cannot be termed a right or title.  
 “ And that such is a pretended right or title, is  
 “ proved by the statute itself, which has a *proviso*  
 “ in it, that *it shall be lawful for any one, being in*  
 “ *lawful possession, to buy or obtain the pretended*  
 “ *right or title of any person or persons to such*  
 “ *lands, &c.* so that, when the statute saith, *he in*  
 “ *possession may buy the pretended right of any*  
 “ *other*, it declares my definition to be true. Fur-  
 “ ther, I take the statute, that if he, who is out of

\* Plowden, p. 88.

“ possession, bargains or sells, or makes any cove-  
 “ nant or promise to part with the land after he  
 “ shall have obtained the possession of it, this shall  
 “ be within the danger of the statute, whether he,  
 “ who so bargains, sells, or promises, have a good  
 “ and true right or title or not, and in this point the  
 “ statute has not altered the law; for the common  
 “ law before this statute was, that he, who was out of  
 “ possession, might not bargain, grant, or let his  
 “ right or title, and if he had done it, it should  
 “ have been void. Then this statute was made in  
 “ affirmance of the common law, and not in alter-  
 “ ation of it, and all that the statute has done is,  
 “ it has added a greater penalty to that which was  
 “ contrary to the common law, viz. that a man shall  
 “ forfeit the value of the thing bargained or pro-  
 “ mised, &c.; and to avoid such bargains or pro-  
 “ mises, where a man is out of possession, is the  
 “ only point which the statute here remedies.”

Many cases, perhaps, cannot be brought even  
 within that construction of the statute, but courts  
 of equity, I believe, have always set their faces  
 against giving any effect to contracts which came  
 within the mischief, which the policy of the sta-  
 tute was intended to guard against; and though  
 the transaction may not be, precisely and accurately,  
 hit by the statute, yet if it comes within the mis-  
 chief of the statute the Court will not grant relief.  
 Besides this, difficulties will arise as to the manner  
 in which, supposing the plaintiffs should succeed,  
 the decree is to be framed in order to give them  
 such rights, as by conjecture or by information  
 hereafter (if any such information should be given  
 to us) we may be able to ascertain, are vested in  
 them by this agreement, if it be legal.

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Courts of  
 equity will not  
 give relief upon  
 a contract  
 which is against  
 the policy of a  
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Here, I come to the consideration of that part of the subject. The title, as far as depends on these deeds, begins in the year 1704. By a deed of that date, which was made in consideration of a marriage then intended, and afterwards had between Samuel Rolle and Margaret Tuckfield, the younger, several estates which are therein mentioned, were conveyed to uses which I need not now trouble you with mentioning, except, that there was one use expressed in the creation of a term of 200 years, which still exists upon trust to raise, if there should be issue of the marriage, only one daughter and no other child, the sum of 20,000*l.* for the portion of such daughter.

That term is still in existence, and one question in this cause will be, for whom is the person in whom that term is now vested, according to the true application of the doctrines of equity, to be considered as holding in trust : a point which it may be right to consider with great attention, and the rather, because of late with respect to those trust terms which are to attend the inheritance, doctrines appear to me to have been held, which bring into question what was understood to be the old law with reference to titles : I mean rules that we seem to have been approaching, that terms, if satisfied, must be considered also as having been surrendered, although I take it, that according to the habit of old conveyancers, there was many a case where the term, although satisfied, was supposed to be kept alive, and not meant to be surrendered ; the term being kept alive by the effect of a declaration, that it is to attend the inheritance in some formal instrument, or by that which is the declaration of equity, if there be no such declaration in any instrument.

After a trust-term has been satisfied, it ought not to be presumed that it has been surrendered. But, if there is no

I take it to be a clear rule, that when a term is satisfied until it is put an end to and is surrendered, it is a trust which can mould itself so as to be applicable to the benefit of all who take the property according to their rights, subject to that trust. It is necessary to observe that this was a trust term, because the original mortgage is a mortgage for a term; and putting mortgages out of the question, the great doctrines as to length of time may be very different in those cases that apply to a term of years, and those that apply to a fee-simple of inheritance.

The author of this settlement, Samuel Rolle, made his will in 1717, and he died in the year 1719. He left an only daughter, of the name of Margaret Rolle, who afterwards became the wife of Robert Walpole, Earl of Orford; he died in 1751; she died in January 1781; and they left issue, George Earl of Orford, who died on the 15th of December 1791. This bill being filed in June 1812, and therefore more than twenty years after the death of George Earl of Orford.

The papers upon the table, the deeds, the execution of which is admitted, trace that term of two hundred years to its being vested in the Respondent William Seymour, who, by the prayer of this bill, is called upon to assign that term to the Appellants; and it is unnecessary to state the various instruments which have been executed, under the effect of which by mesne assignments, that term is vested in William Seymour. The question will be for whom is he a trustee of that term.

It appears that recoveries of the estates were suffered in 1781, by George Earl of Orford, and

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express declaration, it is to be implied in equity that the term is subsisting to attend the inheritance.

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that on the 1st and 2d of August 1781, he made that deed, under which the question, with respect to the legal effect of the last limitation contained in it, arises. The deed is a very peculiar one in the terms of it.

You have before you the question of the equitable rights of the parties, and must, for the present, (whatever may be your opinion upon the effect of that deed of 1781, at law, if it becomes hereafter necessary to determine what is its effect,) understand that deed as vesting the ultimate limitation in the grantor. It may turn out, or it may not, on the discussion of the legal effect of the instrument and the intentions of the grantor, as the intention is to be collected from what appears in the instrument itself, that you may be of opinion, as one of the Judges of the Court of King's Bench was of opinion, and as the present Master of the Rolls has intimated his opinion, that the legal effect of that instrument was such as to shut out the equitable consideration; but for the purpose we are now engaged in, your Lordships will take it, without prejudice to future decision on this subject, that this deed did not (either in consequence of a mistake of the nature of the law, or of the mode of executing his intention,) vest the ultimate limitation of this estate in the persons under whom the Clinton family now claim. It may be necessary to state the deed, if any thing of equity is to depend upon the probable intention as to what Horatio Lord Orford would have done, or would not have done, in case he had discovered the mistake; and if any thing is to turn on the question, whether Horatio Lord Orford died with-

out discovering the mistake, or if he discovered it without stating what his intention would be in such a case. If the question should arise, whether those who take after him can be at liberty to avail themselves of a mistake which he did not avail himself of, and while you are in ignorance of the state of his mind on that subject at his death, except so far as you can discover that he devises all his estates by the will, (although it is hardly to be conceived that he really meant by that will to pass this estate with respect to which he had executed the deed of 1794,) what you are to look at is the legal effect of the will, and the legal effect of the will perhaps only. This will constitutes a very singular case in one respect; because, if it should be your opinion that the deed of 1781 has vested the estate in the grantor of that deed, I mean the ultimate limitation, it would be very difficult to deny, in point of fact, that the circumstances would make no difference in point of law, that that deed has not passed to the ancestors of the Clinton family, what it was probably meant to pass to the ancestors of the Clinton family, and this singularity will arise on the other hand, that if the will of Horatio Earl of Orford has the effect to give those estates, that will probably will pass what Horatio did not suppose he was about to pass by his will. These singularities will not justify any different determination as to the deed or will than you would otherwise make.

The deed of 1781, after reciting the recoveries which had been suffered, proceeds thus: “ And  
 “ whereas the said Samuel Rolle did in or about  
 “ the month of November, 1719, depart this life,

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“ without revoking his said will, leaving the said  
“ Margaret Rolle, his daughter and only child,  
“ him surviving, who afterwards intermarried with  
“ the said Robert, then Lord Walpole, afterwards  
“ Earl of Orford. And whereas the said Margaret,  
“ late Countess of Orford, did in or about the  
“ month of January last past depart this life,  
“ leaving the said George Earl of Orford her son  
“ and only child, who by virtue of the aforesaid  
“ will of the said Samuel Rolle became entitled to  
“ all his manors, lands, tenements, and heredita-  
“ ments as tenant in tail.” And then it proceeds  
to state the recoveries which had been suffered,  
which were to the use and behoof of the said  
George Earl of Orford for and during his natural  
life, without impeachment of and with full power  
to do and commit any manner of waste on the  
said premises, or any part or parts thereof; and  
from and after his decease to the use and behoof  
of the heirs of the body of him the said George  
Earl of Orford lawfully to be begotten; and in  
default of such issue, to the use and behoof of  
such person or persons, for such estate or estates,  
rights and interests, to and for and upon such  
uses, trusts, intents, and purposes, and subject to  
such provisoes, conditions, and agreements as the  
said George Earl of Orford by any deed or writing  
or deeds or writings, or by his last will and testa-  
ment in writing, by him duly executed in the pre-  
sence of and attested by two or more credible  
witnesses, shall declare, limit, direct, or appoint;  
and in default of such declaration, limitation,  
direction, and appointment, to the use of the  
right heirs of the said Samuel Rolle for ever, and

to and for and upon no other use, intent, or purpose whatsoever.

The legal question is, who, in construction of law, will take under that use so limited to the right heirs of Samuel Rolle for ever, and to and for and upon no other use, intent, or purpose whatsoever, in an instrument made by George Earl of Orford, describing himself to be “the only son and heir of “Robert Earl of Orford by Margaret his wife, who “was the daughter and only surviving child and “heir of Samuel Rolle, late of Heanton, in the “county of Devon, Esquire, deceased, who was the “only son and heir at law of Robert Rolle, of the “same place, Esquire, by Arabella his wife, who was “the daughter and one of the co-heirs of Theophilus “Clinton, Earl of Lincoln and Baron of Clinton, “also deceased, of the one part,” and those other persons of the other part.

The next instrument which I will state, is a deed of the 4th and 6th of June, 1785; it is made between certain persons here described, and particularly George Earl of Orford, the person who had made the deed of 1781; it recites the term in the deed of 1704; and in the recital, it points to a fact which has been repeatedly mentioned, that part of these mortgaged premises are in the county of Dorset; and we have no mortgagee here representing the lands in the county of Dorset; the other parts of them are in the counties of Devon and Cornwall. It then recites certain articles that had been made on the marriage in 1724, and that that marriage had taken place by which Robert Lord Walpole had become entitled to the sum of 20,000*l.* which was the portion to be raised under

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the first instruments. Then it states certain proceedings in the Court of Chancery, under which a mortgage was made of the term of two hundred years, to raise that sum of 20,000*l.* for Robert Walpole. Then it recites that the mortgage was transferred to Lord Keppel and others, and by various assignments of the term, finally in 1811 became a mortgage for the benefit of Lord Clinton. On that assignment of 1811, much has been argued at the bar.

This mortgage having been made, and the assignment of the term having been made at the same time, it appears, that in the year 1792, a conveyance was made by Robert George William Trefusis late Lord Clinton, George Earl of Orford having died in December 1791. It is stated in the pleadings, that upon the death of George Earl of Orford, this Lord Clinton entered into the possession and receipt of the rents and profits of the premises; and being so in possession, and conceiving, either according to law, or without sufficient warrant of law, that under the limitation of the deed of 1781, he was entitled, on the death of George Earl of Orford, to enter into possession; he accordingly did enter into the possession, and proceeded immediately to act as the owner of the property, for in the year 1792, on the 6th day of October, he executed a deed which recites the mortgage for the 20,000*l.* and that by divers mesne acts as to the term and fee, they became vested in Lord Keppel; it recites the death of Margaret Countess of Orford, that her son George Earl of Orford, being tenant in tail, suffered recoveries; that Lord Keppel had occasion for the money;

and that the Earl of Orford had applied to Sir Edward Hughes to advance the 20,000*l.*: it states the title as vested in Sir Edward Hughes; and then it represents the effect of the deed of 1781, which contains the disputed limitation. It then has the following recitals: “Whereas the said Earl  
 “of Orford never did make any appointment  
 “of the said manors and premises; and the said  
 “Robert George William Trefusis is heir of  
 “the said Earl of Orford, *ex parte materná.*”  
 (Horatio Earl of Orford, was not a party to this deed; but it will be to be considered, what is to be the effect of his joining in another deed, which takes notice of this deed.) “And whereas the  
 “said Robert George William Trefusis, is desirous  
 “of raising the sum of 34,000*l.* for certain pur-  
 “poses, and such further or other sum or sums as  
 “hereinafter mentioned, and hath proposed to  
 “convey the settled premises subject to the mort-  
 “gage, money of 20,000*l.* to the Earl of Coventry,  
 “Humphrey Hall, Ambrose St. John, and John  
 “Inglett Fortescue.” (Some of them are dead, and other trustees appointed in the stead of them.)  
 Then all these premises in the counties of Devon and Cornwall, but not in the county of Dorset, are conveyed by this deed to the Earl of Coventry, Humphrey Hall, Ambrose Saint John, and John Inglett Fortescue; and they are to raise the sum of 34,000*l.* for certain purposes which I shall have occasion to mention to your Lordships presently; and subject to those charges by another deed of the 7th and 8th of October, 1792, the estates are conveyed first of all to raise some pin money for the grantor’s lady, then to himself for life, then to

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trustees to preserve contingent remainders, and then to the intent that she should receive her rent charge of 700*l.* a year. (It is said that she is dead.) Then there is a term created in Robert Mackreth and Sir William Lemon of 300 years, and then there is a term of 500 years, and subject to that term of 500 years the estate is limited to the use of Robert Cotton St. John Trefusis, eldest son of Robert George William Trefusis, for life, and after his death to the trustees, to support the contingent remainders; then to the sons of Robert Cotton St. John Trefusis, one after the other; and then to various other persons of the name of Trefusis and their issue, male and female.

Under the term of 300 years, the limitations are extremely extensive with respect to the number of persons who in different events are to take under them; with respect to the term of 500 years that is expressed to be in trust to raise several sums of money as portions for sons and daughters; in some instances for daughters only, in others for the sons and daughters; and whether there may or may not now be alive individuals who may have interests under that term of 500 years, I know not; if there are, one question is, whether they also would not have a right to litigate the question before your Lordships.

This deed having been made in the year 1792, a doubt seems to have arisen in the year 1794, and to have been communicated to Horatio Earl of Orford, with respect to what might be the effect of the mortgage which had been made in 1785 upon the deed of 1781. If the intention of Earl George was that that deed of 1781 should have

effect at his death, and if that deed of 1781 should be a deed which, if it had not effect at his death, his intention in that deed might be supposed to be an intention which would miscarry, it was of very little importance whether his deed of 1781 had or had not been revoked by that deed of 1785, supposing that under that deed of 1781 he was himself to take as the heir of Samuel Rolle; for then the effect of that deed would amount to no more than if that limitation had not been expressed in the deed; because if a person entitled to the fee of an estate makes no ultimate limitation, it vests in himself. It seems, therefore, to be another proof, either that he did not mean that deed of 1781 to operate in favour of himself, or that he was still under some mistake, or had not discovered that it would have that operation, or that he meant that some operation should be given to it, which it is contended is not given to it by the effect of that deed of 1794, and that it has no effect in either law or equity, with reference not only to the Clinton family, but with reference to all the persons who after that deed of 1794, had upon the faith of that deed, but, as it is said, under a mistake of its real meaning, advanced their money in very considerable sums.

That deed bears date on the 2d of April, 1794, and if the operation of the deed turns out to be mistaken, it is enough to make men tremble whose property depends upon the accuracy of deeds. You have here a gentleman made tenant to the præcipe, Mr. Joshua Sharpe, whom my noble friend\*

\* Lord Redesdale.

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and I recollect to have been a man of great knowledge in his profession; you have the opinion of the late Sir Archibald M'Donald, and of as complete a conveyancer as existed in our time, the late Mr. Shadwell, before whom cases were laid. Undoubtedly their attention was not directed to the point; but if it should appear that mistake has crept in, the case having travelled through so much advice, any man might be alarmed for fear his instruments should not operate according to his intention; and this deed contains a particularity of description and expression which will very well deserve your attention. It is one thing certainly (and ought to be remembered) to say that a deed of confirmation, (if you may give it that name,) shall not go to weaken the title which it was meant to confirm, and another thing to say that a deed of confirmation shall come to strengthen a title that before existed. They are different propositions in law, and with reference to both, this case must be considered. The parties are described as "The  
" Right Honourable Horatio Earl of Orford, uncle  
" and heir at law of the Right Honourable George  
" late Earl of Orford, deceased, of the first part;  
" the Right Honourable George William Earl of  
" Coventry, Humphrey Hall, Ambrose St. John,  
" and John Inglett Fortescue, Esquires, (the trus-  
" tees,) of the second part;"—"The Right Ho-  
" nourable George William Baron Clinton, eldest  
" son and heir at law of Robert Cotton Trefusis,  
" late of Trefusis, in the county of Cornwall, Esq.  
" deceased," (the description of whom only three  
years after the death of George Earl of Orford, is  
not unimportant;) "who was the eldest son and

“ heir at law of Robert Trefusis, of the same place,  
 “ Esq., also deceased, who was the eldest son and  
 “ heir at law of Samuel Trefusis, of the same place,  
 “ Esq., also deceased, who was the eldest son and  
 “ heir at law of Francis Trefusis, of the same place,  
 “ Esq., also deceased, by Bridget his wife, who was  
 “ the daughter of Robert Rolle, formerly of Hean-  
 “ ton Satchville Hall, in the parish of Petrockstow,  
 “ in the county of Devon, Esq., deceased, by Ara-  
 “ bella his wife, the daughter of Theophilus Earl  
 “ of Lincoln, Baron Clinton, and Baron Saye, de-  
 “ ceased, and was also the only surviving sister to  
 “ Samuel Rolle, late of Heanton aforesaid, Esq.,  
 “ deceased, the only son of the said Robert Rolle  
 “ by the said Arabella his wife.” (You see the ex-  
 treme anxiety of description to point out who this  
 individual was, and then the description is con-  
 cluded by this still more general description :)  
 “ and the said Lord Clinton being also heir at law,  
 “ *ex parte materná*, of the said George Earl of Or-  
 “ ford, and also Baron Clinton, who was the son  
 “ and only child and heir at law of the Right Ho-  
 “ nourable Margaret Countess of Orford, deceased,  
 “ who was the daughter and only child of the  
 “ said Samuel Rolle, of the third part;” it then  
 recites the deed of August, 1781, (and, in law, this  
 is the recital of Horatio Earl of Orford, as well as  
 the recital of the other parties;) and then it recites,  
 that the said Samuel Rolle died in November, 1719,  
 without revoking his will, leaving the said Margaret  
 Rolle, his daughter and only child, him surviving,  
 who afterwards intermarried with the said Robert,  
 then Lord Walpole, afterwards Earl of Orford;  
 it also recites, that the said Margaret Countess

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of Orford did in or about the month of January then last past depart this life, leaving the said George Earl of Orford her son and only child, who by virtue of the aforesaid will of the said Samuel Rolle, became entitled to all his manors, lands, tenements, and hereditaments, as tenant in tail: then it proceeds to state that two recoveries of those manors had been suffered, but that the said George Earl of Orford was willing and desirous that the same premises should continue and remain in the family and blood of the said Samuel Rolle: it then recites, “that by the indenture of  
 “release of August 1781 it was witnessed, that in  
 “consideration of the natural love and affection  
 “which the said George Earl of Orford had and bore  
 “unto his relations the heirs of the said Samuel  
 “Rolle,” (that is, (taking the limitation to operate in favour of himself) in consideration of the natural love and affection he had for himself, as the relation of the said Samuel Rolle;) “and to the intent that  
 “the said manors, messuages, lands, tenements,  
 “and hereditaments therein and hereinafter mentioned might remain, continue, and be in the  
 “family and blood of his late mother the said late  
 “Margaret Countess of Orford, on the side or  
 “part of her said father the said Samuel Rolle,  
 “and in consideration of 5s. by the said Joshua  
 “Sharpe to the said Earl of Orford paid, and for  
 “other good causes and considerations, him the  
 “said George Earl of Orford thereunto moving;” and then (for those considerations, and with this intent thus expressed) subject to the estates vested in his own issue, comes a limitation in this deed, as recited in the deed of 1794, “to the right heirs

“ of the said Samuel Rolle for ever.” (Upon which limitation the question arises, whether in point of law this instrument, by “ the right heirs “ of the said Samuel Rolle,” means the grantor of the deed according to the construction which law must put on the words, or whether, with this exposition of the intent, the general legal effect of the words will or will not in point of law give way to the expression of a particular purpose, supposing that particular purpose to be sufficiently expressed for the intent of raising that question.) The deed of 1794 then proceeds to state the indenture of 1785 (which is an instrument of mortgage, and that instrument of mortgage having been made after the deed of 1781, a doubt, (so much at least must be admitted clearly to be the fact,) arose as to what was the effect of the deed of 1785 on the deed of 1781). The deed of 1794 then goes on with the following recital: “ And whereas by indentures of lease and release, “ bearing date respectively the 7th and 8th of “ October, 1792, the release being tripartite, and “ made or mentioned to be made between the said “ Lord Clinton ;” (then he is described in these words :) “ who was and is heir at law of the said “ Samuel Rolle by his then name of Robert George “ William Trefusis, and such description as herein- “ before contained, of the first part.” It then mentions the other parties of the second and third parts, reciting that the said manors, lordships, and hereditaments therein and hereinafter mentioned and described to be the estates and inheritance of the said Samuel Rolle, and thereby granted and released, with others, did, upon the decease of the

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*Quære.*

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said George late Earl of Orford, come to and vest in the said Lord Clinton, subject and liable, together with other manors and hereditaments situate and being in the county of Dorset, to a mortgage made by the said George Earl of Orford by the before-mentioned indentures of lease and release, bearing date respectively the 5th and 6th days of June, 1785, for securing the repayment of the said sum of 20,000*l.*; and that Lord Clinton, by indenture of the 6th of October, 1792, had conveyed the estates to Lord Coventry and others for the purpose of raising the 34,000*l.* and such further sum of money, not exceeding in the whole the sum of 10,000*l.* as should be found requisite and necessary as therein mentioned, in the manner directed by that instrument of 1792; (it will be material to state to your Lordships presently what was directed to be the application of those sums raised under the deed of 1792;) and this deed of 1794, to which Horatio Earl of Orford was a party and Lord Clinton was a party, under the particular descriptions of each of them, which I have before mentioned, does not rest with the mere general statement of the effect of the deed of 1792, with a view to the power of raising that sum of 34,000*l.* and the sum of 10,000*l.*, but it goes on to state with great particularity, all the limitations that were made by the settlement of 1792, subject to the raising those sums of money upon all the various branches of the Trefusis family; and then it recites this: “ And whereas  
 “ doubts have arisen whether the said George  
 “ Earl of Orford’s having joined in the said in-  
 “ denture of release of the 6th day of June, 1785,

“ did not revoke the limitations contained in the  
 “ said recited indenture of release of the 2d day of  
 “ August, 1781, and thereby defeat the said re-  
 “ cited settlement of the 8th of October, which  
 “ was in the year 1792, and vest the hereditaments  
 “ comprized in the last-mentioned indenture in  
 “ the said Horatio Earl of Orford, as heir at law  
 “ of the said George Earl of Orford; but the said  
 “ Horatio Earl of Orford being well satisfied that  
 “ the said late Earl did not intend to alter the said  
 “ uses limited in and by the said recited indenture  
 “ of the 2d day of August, 1781, hath, at the  
 “ request of the said Lord Clinton, agreed to con-  
 “ firm the uses of the said settlement in manner  
 “ hereinafter mentioned.” Those words are very  
 important in this case; for the doubt that is here  
 stated, is a doubt founded upon the notion that  
 the deed of 1781 did not vest the hereditaments  
 in the heir at law of George Earl of Orford by  
 the last limitation, and therefore did not vest the  
 hereditaments in George Earl of Orford himself,  
 so that the heir might take it, and it is a singular  
 circumstance if it so turns out that the deed of  
 1781 did so vest the estate; but the law must be  
 administered, if it should so turn out. This instru-  
 ment was prepared in consequence of the opinions  
 given, and a doubt which had arisen, whether the  
 deed of 1785 would not vest the hereditaments in  
 the heir of George Earl of Orford; and it will be  
 singular if the fact be, that the deed of 1781, in-  
 dependent of the deed of 1785, had vested these  
 premises in the heir at law of George Earl of  
 Orford; but under the deed of 1794 Horatio Earl  
 of Orford being well satisfied that the said late

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Earl did not intend to alter the uses made in and by the said recited indenture of the 2d day of August, 1781, had, at the request of Lord Clinton, agreed to confirm the uses of the said settlement, in manner hereinafter mentioned. This is certainly a declaration, in any way of putting the case, of the intention of Horatio Earl of Orford not to alter the uses limited by the deed of settlement of 1781; but I think it is likewise undeniable that he thought, and whether by mistake or otherwise is another question, but taking for granted it was by mistake, he thought it one of the uses limited by the indenture of the 2d of August, 1781, namely, the last use not to give the estate to George Earl of Orford, and therefore not to himself, but to give it to some person other than himself, and other than George Earl of Orford; and two questions will arise upon this instrument, one of them particularly founded upon the subsequent parts of this instrument, namely, what is the effect of this instrument, regard being had to the recitals of it; and, secondly, whether this instrument is to have a more limited effect than you can bring yourselves to believe that Horatio Earl of Orford meant it should have, and to have that more limited effect because the rules of law require you to give it a more limited effect. Another question, which will not depend altogether on this deed, but on considerations of equity, is, whether after such a deed as this is executed, there is equity in the heirs at law of Horatio Earl of Orford, at the distance of twenty years, to disturb this deed of 1794, without regard to the fact that he lived till 1797, and when it does not

appear that in the course of his life he ever meant to disturb what he actually thought he had done, but which, in one way of putting the case, he was mistaken in thinking he had done by this deed of 1794? By that deed, after stating his entire satisfaction with respect to the intention of George Earl of Orford, he goes on to say, “ Now this “ indenture witnesseth, that in pursuance of the “ said recited agreement, and being desirous to “ confirm the said recited settlements of the 2d “ day of August, 1781, and the 8th day of October, “ 1792, and for and in consideration of the pre- “ mises ;” then he releases his estate and interest therein, as far as he can or lawfully may, and he releases the premises with an *habendum*, the terms of which I will state to your Lordships presently.

The deed of the 7th of August, 1781, contained the limitation, the legal effect of which is in question. The deed of the 8th of October, 1792, is a deed which proceeds upon the persuasion that the person who then represented the Clinton family had, under that limitation of the deed of August 1781, become entitled to the estate for the various purposes of raising money, and for the purpose subject to the purpose of raising money, of sending it throughout all the branches of the family ; and this at least must be clear, that Horatio Earl of Orford takes upon himself to confirm that settlement, as well as the deed of August 1781. He, therefore says, my meaning is as far as I express myself by this deed, that the person to whom the deed has limited it in 1792, shall take it. Then another question is, what induced in his mind that meaning. They say on the one hand, he

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meant to confirm that settlement, because he meant to confirm the deed of 1781, and he meant to confirm the deed of 1781, because he was ignorant of the effect of that deed of 1781, and being ignorant of the effect of that deed of 1781, when he confirms the deed of 1781, he confirms a deed not to insure the supposed effect of it, but the real effect of it; and if the effect of the deed of 1781 was such as not to give an estate which would enable the heir to make the settlement of 1792, then his confirmation of the settlement of 1792 shall have no more effect than his confirming the settlement of 1781; and that they say is a confirmation, only so far as it operates as a confirmation of the settlement which vested the estate in George and Horatio, Earls of Orford, and not in the parties to that deed of 1792; and they further contend, that this is to be the more regarded in consequence of the peculiar expressions in the *habendum* of the release, which is, that the premises are to be held by the Earl of Coventry and others, “to for and upon  
 “such and so many of the uses, trusts, intents and  
 “purposes, and under and subject to such and so  
 “many of the powers, provisoes, limitations, de-  
 “clarations and agreements limited and declared,  
 “or anywise expressed of and concerning the same,  
 “by the indentures bearing date respectively the  
 “6th of October and the 8th of October, which  
 “was in the year 1792, as are now existing unde-  
 “termined and capable of taking effect, in the  
 “same manner as if the said indenture of the 6th  
 “day of June, 1785 had not been made, and to and  
 “for no other use, intent, or purpose whatsoever;”  
 and then it is said, this being the effect of the deed

of the "6th of October and the 8th of October, 1792," you are to enquire how the premises would have been held on the two deeds of the 6th and 8th of October, 1792, in the same manner as if the indenture of the 6th day of June, 1785 had not been made; and if that deed had not been made, though the settlement of the 6th of October purported to convey the estates to raise money, and that of the 8th to convey to the purposes therein expressed for a family settlement; yet if the deed of 1785 had not been made, the deed of 1781 could have no new effect as was supposed in 1792, and therefore the deeds of 1781 and 1792 must not be confirmed at all; that is the way in which it is argued on one side.

On the other it is insisted, that whether Horatio, Earl of Orford, was under a mistake or not with respect to the deed of 1781, this deed of 1794 contains evidence of his intent, that these estates should go in the manner or be applied for the purposes, and be enjoyed by the persons named in the instruments of 1792; and your Lordships will have to consider the nature of those instruments, particularly with respect to those mortgagees, whose case I shall have occasion to mention presently, and with respect to the other persons to take under the settlement of 1792: it is further contended that with respect to the latter claimants, there will be no equity that will authorize your Lordships to disturb the settlement that then was made, if it was made under a mistake, it not appearing that Horatio, Earl of Orford, himself, before his death had discovered that mistake, and it not appearing positively that if he had discovered

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that mistake he would have set up that equity which is contended for by those who claim under him. That is stated with reference to those who take, if I may so express it by way of distinction, as volunteers under the settlement of 1792. But it is said as to the subsequent mortgagees, that this became part of the title which your Lordships ought to suppose was relied upon by those who lent their money, and there can be no equity, it is insisted, as against the mortgagees who have lent their money, upon a mistake of the law if you please so to put it; that is on the mistake of the legal construction of the deed of 1781, when as they say for the purposes of their dealing with the estate and lending the money, the individual who had a right to take advantage of the mistake had, by the execution of this deed, and by the assertion of such facts as are contained in the recital of this deed, authorized the parties claiming under the instruments of 1792, to go to the market with the property for the purpose of raising that money, which Horatio, Earl of Orford, could not but know was the purpose of executing those deeds of 1792, which deeds of 1792 he professes here to confirm.

This deed, which was made upon the 1st and 2d of April, 1794, was followed by a transaction which took place with Sir Lawrence Palk, on the 5th of July, 1794, that is, in about three months after the deed of confirmation; and that deed states the purposes to which the money so to be raised was to be applied.\* It states that the 34,000*l.* was to be disposed of in this way, namely, “the sum of

\* Page 47. of the Appendix.

“ 4,000*l.*, part of the said sum of 34,000*l.*, for and  
 “ in the purchase of all and every or any of the  
 “ messuages, lands, tenements and hereditaments,  
 “ and other the premises late of the said George  
 “ Earl of Orford, deceased, situate, lying and being  
 “ in or near the borough of Ashburton, in the  
 “ county of Devon; and likewise some other pre-  
 “ mises which were also late the estate and in-  
 “ heritance of the said late Earl of Orford,” then  
 they were to apply a further part of the sum of  
 34,000*l.* “ in the purchase of the several and  
 “ respective estates, hereditaments and premises  
 “ thereafter mentioned, and which were formerly  
 “ the estates, hereditaments, and premises of the  
 “ said Robert Cotton Trefusis, the late father of  
 “ the said Baron Clinton;” and it goes on to  
 state the manner in which this sum of money was  
 to be laid out.

These deeds having been executed, the pos-  
 session, (subject to any qualification that belongs  
 to that expression,) the actual possession and per-  
 ception of the rents and profits prior to the exe-  
 cution of all these deeds, and subsequent to the  
 execution of all these deeds, until the filing of this  
 bill was had by the late Lord Clinton, whose personal  
 representative is not before the Court, and whose  
 situation must be materially affected by the de-  
 cision of this question. Upon his death, the rents  
 and profits were received by persons who, as be-  
 tween themselves and the Clinton family, were  
 clearly trustees for the Clinton family, and certainly  
 not for Lord Cholmondeley or Mrs. Damer. They  
 received those rents and profits for a considerable  
 time; afterwards the Court of Chancery took pos-

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session of the rents and profits; a receiver was appointed of the rents and profits; and passing over the various periods in which the rents and profits were received by the late Lord Clinton, the trustees and the receiver; an account is prayed only against the present Lord Clinton.

It is unnecessary for me to state the various assignments that were made of the term of 200 years, which became finally vested in Mr. Seymour; but it is necessary to call your attention to a deed of the 26th and 27th of November 1811, which was made between Sir Edward Hughes Ball, who was understood to be a trustee or mortgagee, of the first part; and Coutts, Antrobus, and Trotter of the second part: it states the indentures of lease and release of 1785, mentioning the premises in Dorset, as well as the premises in Devon and in Cornwall; it traces the title to the fee of the estate, and the title to the money secured by the mortgage; it recites certain transactions that took place in the Court of Chancery, by which it was determined, that this Mr. Ball was a mortgagee in trust for Coutts, Antrobus and Trotter, as the executors of Dame Ruth Hughes, deceased; and then by direction of the Court of Chancery, by which the Master's report is confirmed, he is made to convey the whole of the premises, "subject to the like benefit and equity  
 " of redemption, on payment of the said principal  
 " sum of 20,000*l.*, and the interest henceforth to  
 " grow due for the same, as the said manors, lord-  
 " ships, hundreds, messuages, mills, lands, tene-  
 " ments, and hereditaments are now held by those  
 " persons under and by virtue of the said herein-  
 " before recited indentures of lease and release,

“ bearing date respectively on or about the 4th  
 “ and 6th days of June, 1785, except so far as the  
 “ right to the said sum of 20,000*l.* and the interest  
 “ henceforth to become due for the same, is altered  
 “ or varied by these presents.”

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I call your Lordships' attention to this deed, because, with respect to the question between Lord Cholmondeley and Mrs. Damer and Lord Clinton, it is said, that this is to be considered as a deed in which the person of the name of Drake, accepting the conveyance from this infant trustee, is to be deemed a trustee for Lord Clinton; that Mr. Drake, therefore, in 1811, acknowledges the equity of redemption as existing, because this conveyance is made to him, subject to the equity of redemption, and that he being a trustee for Lord Clinton, it must be considered that Lord Clinton himself has, by his trustee, acknowledged that the equity of redemption existed in 1811.

With reference to that question, your Lordships will have to consider, first, what the effect of such an instrument as that would be with reference to such a question as exists in this case, attending to the practice of equity with respect to re-conveyances of mortgages, and what is the duty of persons to re-convey; whether the persons re-conveying are ever to be considered at liberty to decide where the right in the equity of redemption really exists, or whether, on the other hand, they are not to convey according to the equity of redemption, as it was left under the instrument by which they became mortgagees, leaving it to the forms of courts of justice to whom they may resort, to say what is the effect of the conveyance, subject to

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such equity of redemption; whether it is to go according to the terms used, or according to the rights of those who have got claims, either founded on contract with, or on adverse possession against those to whom in terms the equity of redemption was originally reserved.

With respect to the mortgage which was made to Sir Edward Hughes, and which was finally vested in Mr. Drake, he stating himself to be trustee for Lord Clinton, your Lordships will have the questions in this case to consider, which have been stated at the bar, and likewise the questions in respect to those who have claimed under the powers of raising money, namely, the 34,000*l.* which I have before mentioned: and, when we come to consider what is the decree that should be made against the mortgagees, supposing the event that Lord Clinton cannot sustain the existing decree, I apprehend it will be your duty to see what is stated in this bill as against them, all the circumstances of this case being considered, and especially the effect of the deed of 1794 considered with respect to their lending their money after that deed was executed. They certainly have likewise a right of agitating the general question, which Lord Clinton himself is entitled to agitate, the general question, laying out of consideration the legal effect of the deed of 1781, and taking it as if nothing of the kind had happened: and provided there is not a vice in the title of Lord Cholmondeley and Mrs. Damer, for the reason I have before stated, you will have to consider the doctrine of a court of equity with respect to adverse enjoyment, whether taken by wrong or mistake, or in any other manner.

I do not think that this is a case which can be decided upon the well known doctrines that obtain between mortgagor and mortgagee; but that in considering this case, you will have to declare who is in the contemplation of a court of equity, after twenty years have expired, to be taken to be the mortgagor, Mr. Drake admitting himself certainly to be a mortgagee. If a mortgagee is in possession for twenty years, receiving the rents and profits from time to time, never paying any rents and profits to the mortgagor, never in his deeds or instruments, to which the mortgagor is no party, acknowledging that he is a trustee, there is an end of the question. A mortgagee is *quasi* a trustee for just nineteen years 364 days and twelve hours, short by five minutes: for if he was called on to account at the end of one year, he must say of these rents and profits, I can retain no more to myself than pays my interest for this year, save that I may apply the remainder of those rents and profits to the payment of my principal. But suppose an estate, producing 500*l.* a year, was mortgaged for 500*l.*; in the first year, the mortgagee would receive 500*l.* from the rents of the estates so stated to be 500*l.* a year; and he might be called on to re-convey at the end of the year, and so *de anno in annum*, till the twenty years ran out; but if the twenty years run out before he is called to account, the obligation binding his conscience in a court of equity is shifted. He may hold his tongue, or he may say, I will keep the estate myself, if the facts of the case would warrant the assertion. Such would be the case with those who claim under these Plaintiffs and Mr. Drake as the mortgagee, if Mr. Drake had been in possession, and at the

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end of twenty years could have said, I never acknowledged the mortgage, and they never could have got the estate from him.

I will not say that this is a singular case, because he is a bold man who will say, that because he does not know of such a case being decided, therefore no such case has been decided. But the peculiarity of the case is this, whether the fact that the Clinton family have been in possession for twenty years, will or will not bar those who claim, if they can qualify their claim in the way they put it on the record; whether that fact will or will not entitle the defendants to say that those who claim as plaintiffs are barred whatever was their right originally, or, on the other side, whether, the circumstance of there having been a mortgagee during the whole twenty years, admitting him now to be a mortgagee willing to convey to any person who has the right, the intervention of such a third person who has during the period stated in the pleadings been dealing with the Clinton family as if they were his mortgagors, and dealt with by the Clinton family as if he was their mortgagee, and never dealt with by the other family as standing in any relation to them after the death of George Earl of Orford in 1791, considering the doctrines established to quiet not merely legal but equitable titles does not form a bar to the relief sought by such a bill as this, and likewise whether, regard being had to what should be taken to be the true effect of the deed of 1794, that deed does not amount to a confirmation that would go to prejudice the titles of the Plaintiffs more than if such a deed had not existed.

These appear to be the general questions you

have to decide; I hope I have, in the course of what I have stated, avoided giving any opinion upon it; I am only anxious, if I can, to state the questions as they have affected my mind, with a view of seeing whether, in your Lordships' opinion, or in the opinion of others, I have mistaken the points to which judicial attention ought to be given. If I have not mistaken those points, I do not deny that I have an opinion; what that opinion is I shall not intimate at all, because, if by minute examination of the doctrines in the course of next week, I shall see any reason to alter that opinion, I shall act better in withholding it, than in stating it now; and I can only say, I shall address myself to the decision of this case with all the attention due to its great importance to both parties; with all the attention due to its great importance, as it affects others; with all the attention due to the knowledge and learning of the Judges who have before differed upon the question; certainly not failing to recollect, that the original decision was made by a learned Judge, who, as he has now left the judicial seat, I may be permitted to say of him, that his name will remain respected by the profession as long as it exists; and under the influence of all these impressions, I shall endeavour first to enable myself duly to execute justice, by delivering that opinion which is right; and by giving that attention which will enable me, with satisfaction to say to myself, that if I have erred, I am not able to convince my own mind of it, though it may be manifest to others.

*Lord Redesdale.* — My Lords, — I will trouble you with a very few remarks to relieve my mind

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from the embarrassment which I feel, and for the purpose of stating what will be the considerations which I shall give to this question, in the interval between the present time, and the time that has been mentioned by the noble Lord.

The question which I conceive I shall have to agitate in my own mind during that period, putting out of my consideration what is the true construction of the deed of 1781, and assuming, for the purpose of discussing the other questions, that the construction is as contended on the part of Lord Cholmondeley and Mrs. Damer, is whether your Lordships can decide the case which is now before you, assuming that such is the just construction of the deed of 1781.

If the true construction of the deed of 1781 was to be discussed at this moment, unquestionably you would wish to have the assistance of the Judges, that they might give their opinions *seriatim* upon the subject. But, if that exposition of the law is not necessary, it would not be proper to give them the trouble of attending for the purpose of stating their opinions. It would not be proper to enter into a discussion of that question, if finally your Lordships were not upon that ground to decide this case; and I think it most important that you should not unnecessarily decide that part of the case, because that is a question which can affect only few titles, whereas the other questions are questions which affect most importantly almost every title in the kingdom. Your Lordships must recollect, if you advert only to the settlements in your own families, that almost the whole property of the country, I may say, is covered in some way or other by equitable interests,

resting upon the protection of legal maxims, by mortgages, by terms of years created for the purpose of raising portions for younger children and other purposes, which the necessities of families create; and, therefore, it is of the utmost importance for you to decide, whether the effect of an interest of that kind subsisting upon that property, is to defeat the whole beneficial effect of the statute of limitations, and the statute of fines.

The policy of the law with respect to those statutes, is unquestionably this; possession is always regarded by the law as *primâ facie* title, and it is so regarded with a view to public benefit. It is not with a view to the benefit of the individuals who may be in possession or out of possession, who may have title or who may not have title, but it is with a view to public benefit, because it is the public policy that possession should remain undisturbed. The statute against pretended titles is formed on this view, and it is on such ground that a person out of possession is not at liberty to deal with the property in any way whatever, because it tends to disturb the actual possession to the injury of the public at large.

It strikes me, therefore, that the questions which you will have to consider are numerous: First, you will have to consider what is the effect of the possession, such as it has been, qualified as it may be, of the Clinton family from the death of George Earl of Orford, for there the possession must commence, and indeed upon the face of the bill, which is now under your Lordships' consideration, it is stated, that upon the death of George Earl of Orford, the late Lord Clinton entered into posses-

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sion, or into the receipt of the rents and profits of this estate. You are, therefore, as I conceive upon the face of the bill itself, to consider the possession as with the late Lord Clinton, and those claiming under him from the death of George Earl of Orford.

Then comes the question, whether, on the death of George Earl of Orford, the title vested in Earl Horace and not in Lord Clinton: that question I put out of the case as a question of right, because I assume, for the purposes of the view which you are now to take of the case, that the title was in Horace Earl of Orford and not in Lord Clinton. Then, you will have to consider whether, under all the circumstances of the case, supposing the title upon the death of George Earl of Orford to have been in Horace Earl of Orford, that title so vested in Horace Earl of Orford remained, at the time when this bill was filed, untouched.

Whether it remains at the time that this bill was filed untouched, will depend upon the nature of the possession that was then taken by Lord Clinton, the effect of that possession, the acts which have since been done, and the time which has since elapsed.

With respect to the acts done, (putting for the time out of consideration the acts done by Lord Clinton himself,) I am to consider what were the acts done by Horace Earl of Orford, and whether the deed which he executed in 1794, has the effect of preventing any claim either by Lord Cholmondeley or Mrs. Damer, both claiming under Horace Earl of Orford.

That deed of 1794 is a deed operating to confirm

the settlement made by Lord Clinton in 1792, but in terms which unquestionably are to a certain degree ambiguous: it is not an absolute confirmation of that settlement in words, because it is not a confirmation so far as that settlement might be impeached, supposing the deed of 1781 not to have been affected by the deed of 1785.

But there is one very important question, as it seems to me, for your consideration, and which, perhaps, has not been very fully discussed, namely, what is the effect of the deed executed by Earl Horace in 1794, by which he has put a construction upon the deed of 1781? For Earl Horace, by the deed of 1794, has assumed, that if the deed of 1781 was not affected by the deed of 1785, the deed of 1781 had constituted Lord Clinton the rightful owner of the estate. You will, therefore, have to consider, whether Horace Earl of Orford having put that construction upon the deed of 1781, he himself could, to the prejudice of third persons, say that such was not the construction of the deed of 1781. That has always struck my mind as a very important subject of consideration in this case. - He has led all the world to believe (that is, all who had any dealing with this property) that the true construction of the deed of 1781 gave the property to Lord Clinton. That is a part of the case which it strikes me it will be very important for your Lordships to consider.

There is another question which, upon the deed of 1794, appears to me very important to be considered, viz. what was the motive of Horace Earl of Orford for executing the deed of 1794? It was to fulfil what he conceived to be the intent of

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*Qu.* If a party has by his own act put a construction upon a deed, whether he, or, *à fortiori*, those who claim under him, can dispute that construction.

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George Earl of Orford in the deed of 1781. If Earl Horace were now living, if he had filed this bill, a consideration might arise very different, as it seems to me, from that which will arise upon a bill filed not by him, but by persons claiming under him. Supposing he had not precluded himself by what he has done, he might have a right to say, my intent went no farther. But whether persons claiming under him have the same right, it strikes my mind, is a very different thing, because they cannot have a knowledge of what passed in his mind upon the subject. Whether it can now be said, that if Horace Earl of Orford were living, he would at this moment be at liberty to impeach the title which Lord Clinton supposed himself to have derived, and which Horace Earl of Orford seems to have supposed he had derived under the deed of 1781 may be questioned. It strikes me that there is a very material distinction between what Earl Horace might himself have done, and what persons claiming under him, and claiming under him without any expression of what was his intention upon the subject, can now do.

The next consideration is, whether the length of time which has elapsed since the death of George Earl of Orford is a bar to the relief which is sought by this bill. That I apprehend is a question which is founded upon what is called in law the laches of persons, the inattention to their rights of persons who have rights, and who do not exert those rights in the manner in which, or at the time when the law requires that they should be exerted. With a view to that subject, the common law, to a certain point,

and the legislature more expressly, has laid down certain rules, and the statutes of limitation were formed with a view of drawing certain lines, by which courts of justice should be guided upon that subject. The old rule of law is a general rule, the statutes of limitations have drawn particular lines, beyond which the courts of justice are not to be allowed to pass.

You will then have to consider how those statutes are to affect, first, Mrs. Damer, supposing she were otherwise capable of claiming as devisee of Horace Earl of Orford; secondly, Lord Cholmondeley, supposing he were capable of claiming as heir of Horace Earl of Orford, under the supposition that the will of Horace Earl of Orford does not touch his title.

With respect to the title of Mrs. Damer, she claims as devisee of Horace Earl of Orford. Either there is no limitation created by the statute of limitations with respect to what are called equitable titles, or the time which has elapsed must, I presume, be considered as being a bar to her right; I mean, taking the possession to have been a possession of that description which is under the protection of the law, and taking that possession to have commenced upon the death of George Earl of Orford.

With respect to Lord Cholmondeley, his title is alleged in this bill as heir of Horace Earl of Orford. Now, upon any question which he can raise upon this subject, you will have to consider, whether all the ground of equity which is insisted upon against the title of Lord Clinton is not a ground of equity which will have the effect of

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*D.* A vested equitable right in land may be devised.

making the disposition of Horace Earl of Orford a good disposition, though he was not seised as required by the statute of wills, because courts of equity have constantly considered equitable rights by analogy to legal rights, and if an equitable right was vested in the party who makes the will, the will disposes of that property, though that person was not in the view of the law, supposing it to be a legal title, seised of the estate which he devised.

It seems to me, therefore, that you will have to consider, whether, as between Lord Cholmondeley and Mrs. Damer, (supposing you can enter into any consideration of the titles between them,) the will of Horace Earl of Orford might not be considered (I am not certain that it would be so, but it might be so considered) as a bar to the claim of Lord Cholmondeley. Lord Cholmondeley's title must also be affected in the same way by the release of Earl Horace; for although a person out of possession cannot deal with a wrong, a person out of possession, having a good title, may release to a person in possession having a bad title or no title at all; you will therefore have to consider with respect to Lord Cholmondeley, as well as with respect to Mrs. Damer, what is the operation of the deed executed in 1794 by Horace Earl of Orford.

With respect to the statute of limitations, as affecting the claim of Lord Cholmondeley, I apprehend that you will find, that in no instance (at least I have been unable to find any) has a court of equity considered the privilege given to an heir at law of suing by a writ of right, and that of not being barred in less than sixty years, as that limit-

*D.* An heir cannot sue in equity by analogy to a writ of right, or so as not to be barred by a

ation which, in the case of an heir at law, is fixed in equity with respect to equitable titles; it is a particular privilege given to a particular right. There are other rights to which also particular privileges are given; but if the heir at law is not to pursue, and does not pursue by that particular right, but pursues by another mode of proceeding; for instance, if he proceeds by ejectment, the heir at law is as much barred by twenty years' possession as any other person.

Then comes another consideration, which does not decide precisely upon the rights of the parties, but may decide the present suit. You observe that in this suit Lord Cholmondeley and Mrs. Damer are co-plaintiffs. Now, if you were of opinion that the right is in Mrs. Damer, the consequence must be, that Lord Cholmondeley has no right; but you are to decide that question against Lord Cholmondeley; you cannot decide that question, as I apprehend, against Lord Cholmondeley upon this bill, because between co-plaintiffs you cannot so decide; your decision now must be in favour of Mrs. Damer, that the property passed by the will of Horace Earl of Orford, and you must establish that will as an effectual instrument against Lord Cholmondeley by a decree; and for that purpose, I apprehend, he must have been a defendant to the suit, and not a co-plaintiff. In the same manner, if you are to determine in favour of Lord Cholmondeley you must decide against Mrs. Damer, and you must decree against Mrs. Damer, that the will of Horace Earl of Orford did not operate upon this property.

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limitation of less than sixty years. If the heir proceeds by ejectment, he is barred by twenty years' adverse possession; and it seems that this analogy is adopted in equity.

*D.* Between co-plaintiffs having adverse rights, there can be no decree. If the heir and a devisee are co-plaintiffs in a suit seeking a redemption of lands in mortgage, there can be no decree upon a bill so framed,

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An attempt has been made to avoid this difficulty by the frame of the bill, by stating an agreement between the parties to divide the property between them. The noble and learned Lord who has just addressed you has stated what is the effect of such an agreement. Unquestionably it is an agreement directly contrary to law; and if such an agreement actually existed and were now produced before your Lordships, that agreement would unquestionably subject each of these parties to a proceeding which would have the effect of making each of them liable to forfeit a sum equal to the value of the whole of this property. I therefore hope that the agreement has never been reduced into the form of a deed, and indeed no such deed is offered to the House. It is therefore to be considered as a mere allegation contained in this bill. It has not that which binds the parties; but, independent of the allegation of that agreement, it will be impossible to sustain this bill between these two parties as co-plaintiffs. I should be extremely unwilling that such should be the ground upon which you should come finally to a decision upon the subject, because it would not determine the important question in this case with respect to the effect of possession upon a property where the legal estate is in one person, and the possession in another person. I take that to be a question of the highest importance to the safety and the quiet enjoyment of the property of almost every person in the country; because in consequence of what are now the habits of the country, there is scarcely any property in which the legal estate is not in one person, and the equitable estate somehow or other in another.

These are the considerations which I shall think myself bound to enter into between the present time and the time when you shall come to a final decision upon the subject. I have thought it my duty to state to your Lordships what pressed on my mind on the subject, for the purpose of drawing the attention of all your Lordships to the same subjects; and to request that you will consider them with all the attention you are capable of giving to them, conceiving there perhaps never was a case which came in judgment before your Lordships more important in respect to the general rights of persons possessing landed property than this case.

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*The Lord Chancellor.*— My Lords, you will not fail to call to your recollection, that the mode you have been pleased to adopt in this proceeding, is, for the present, to assume that the effect of the ultimate limitation in the deed of 1781, was such as the present Plaintiffs represent it to be, namely, that that ultimate limitation vested the estate in the grantor of that deed himself, and not in a third person. Taking that for granted, for the present, I would take the liberty, at this moment, to intimate, that although you are bound by law to give the legal effect to the terms in which the instrument is expressed, I am not ready to admit, that if the limitation has had a different effect from that which appears to have been the intention of the grantor, provided you can, by legal means, get at the evidence of that intention, and if that intention, differing from the legal effect of the deed, has

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*Qu.* If a deed has a legal effect contrary to the intention of the grantor, and a party having an interest under the deed, according to its

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legal effect,  
proceeds upon  
the supposed  
intention to  
permit acts  
which create  
rights in the  
property,  
whether he can  
obtain relief in  
equity to the  
prejudice of the  
rights so cre-  
ated.

been followed by a great variety of most important acts, deeply interesting to the welfare and property of other persons, I am not prepared to say, that, because such might be the legal effect of that limitation, therefore the grantor having mistaken his way of executing his intention, a party who has permitted those acts, proceeding upon the supposed intention, can at all times effectually come into a court of equity, and obtain a relief which must be injurious to those parties whose acts he has permitted.

I took the liberty the other day, for the purpose of saving time, to endeavour to represent to your Lordships the facts of this case; and it does not appear to me to be material to call your attention in much of detail, or repetition of those facts and circumstances. At the same time, with a view to render intelligible what I shall have the honour to state, I will simply repeat the dates of the several transactions, the effect of which is to be considered; and perhaps mention one or two circumstances which it did not occur to me at the time when I before addressed your Lordships to take notice of.

The first instrument you will recollect, was a deed of the year 1704. In that deed there is a term of 200 years created; the deed provides for what we call the cesser of that term; but the circumstances, if I understand the case upon which that term was to determine, have not yet taken effect, and the term remains a subsisting term, by virtue of the assignment of 1811, in a gentleman of the name of Seymour. I wish to call your most particular attention to this part of the case,

because, unless I now misunderstand, and unless I have misunderstood for a good many years in which I have been laboriously in different situations discharging the duties which belong to the profession of which I have the honour to be a member, there arise, out of the circumstances which I am about to mention, many observations bearing upon this case with a great degree of importance; and bearing, unless I misunderstand the case very much, upon the titles to property in this kingdom.

This deed of 1704 provides for the cessation of the interest which the term creates. Let me suppose, for a moment, that there had been no such declaration with respect to the cesser of the term, or what comes to the same thing, that the state of things has not yet arisen in which the term is to cease. That term, created in 1704, would, according to all the ideas that I ever had of the law of this country, (I am speaking now of what would have been done twenty-five years ago, instead of speaking particularly of the present time,) be considered as a term which, whether the instrument that created it or not did so declare, would be attendant upon the inheritance, when the ends and trusts of it were satisfied, that is, it would be to be considered as a term where neither presumption that it was satisfied, or presumption that it was surrendered, would, at that period, have been entertained, unless there had been some dealing with the term, which would authorize a presumption either of the one nature or of the other; but it would be taken to be, what, in the language of those who are now no more, I have often heard stated to be the best part of a title, namely, an old

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term that could be got in to protect the inheritance; and I conceive, that such a term, whether there was any intention that it should or should not attend the inheritance, would be a term held in trust to attend the inheritance, protecting the equities of all who had equities, during the existence of that term; (all the estates to a certain extent, that is, for the duration of the term, would be equitable estates;) but protecting them all according to the due course and order, and priority in which they existed, and according to their equities.

Give me leave then to ask, if it be true that the trust and the equity are indissolubly connected, what is the consequence of that, supposing we had no mortgage in fee here at all? I would put the case, that George Lord Orford had been living in the year 1705, and that George Lord Orford had made, in the year 1705, the deed which now bears date in 1781, then that he had died in 1706; and having died in 1706, that the ancestors of the claimant had taken possession of this estate in 1706; and taking it so, had paid the interest on the mortgage created by virtue of that term, which is dated in 1704. Suppose a mortgage had been created to raise the 20,000*l.* in 1704, if the doctrine which has held the equitable estate not to be capable of being barred, as long as the legal estate existed, be correct, it seems to me, it must follow of course that if the Clintons had been in possession since 1706 down to 1811, yet that adverse possession would not do. If that adverse possession would do, it would have been effectual on no other ground whatever, but because it was

long adverse possession; and we are not puzzled in this case, as we have been in many Scotch cases, as to what is a long lease, and what is a short lease, what is a long adverse possession, and what is a short adverse possession; I take twenty years, in such a case as this, to be a long adverse possession; and it is a matter of no moment whether one half minute had elapsed after the twenty years had closed, or twenty years had elapsed, after the twenty years had closed.

In this case there has been that degree of discretion used which is always commendable, namely, that from time to time this term has been assigned; but either I am very ignorant, or the law has been very much changed; or if there had been no such assignments from time to time, this term not assigned, when the trusts were satisfied, and subject to the satisfaction of the trusts, while they were unsatisfied, would have been a term attendant upon the inheritance, according to the equities of all who claimed that inheritance? But would that connection have been indissoluble? By no means; for we have long laid it down, and I understand it to be still the law of the land, that if I lend my money on a mortgage, and the noble Lord who sits near me afterwards lends his money upon a mortgage of the same estate, having no notice of my mortgage; if he goes to the trustee of an old term, and gets in that term, having no notice to affect his conscience that I have a mortgage before, although that term was held prior to his getting it in, in trust, first for me, and then for him; yet his conscience not being barred against the getting in that term, he will protect himself by that term;

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that is, he shifts the equity, which was first in me, into himself, and by his diligence he gets the advantage, which by my negligence I have lost. I have thought it necessary to say thus much as to this term of 1704, because I have found it extremely difficult to know how to deal with the objection which I have now been alluding to; namely, that if this possession of twenty years and upwards, will not do with the objection, what are you to say then, supposing there had been a mortgage, and the possession had been from 1705 to the present day.

Without tracing this down through the different assignments, but again mentioning that this term is vested in Mr. Seymour, I wish to take notice of another circumstance which escaped my attention the last time I had the honour of addressing you; and that is, that this bill expressly states the fact of an entry upon the lands by Lord Clinton's father, immediately upon the death of George Lord Orford; it is not, therefore, a bill stating merely that he claimed the right, but that he had made an entry upon the lands at that time.

I wish also to call to your recollection another circumstance: adverting to the cases, and the opinions that were taken upon those cases, when we are discussing this matter about equitable relief, and more particularly with reference to those circumstances, which I am now about to allude to, and to which there is no allusion whatever made in this record, are we sure that Horace Lord Orford or George Lord Orford did not know the effect of that deed of 1781? There are no allegations in this bill to bring that question forward, as

a question to be decided. Now, in February 1792, a case was drawn, and an opinion was taken upon the deed of September 1781, and the deed of September 1785, and the question put upon that occasion was, whether, after the deed of 1785 had been executed, the estates would go to the heir of Lord Orford, or whether they would go according to the deed of 1781. Now those who put that question most clearly understood that the estate going to the heir of Lord Orford, was going one way, and the estate going under the limitation of the deed of 1781, was going another way. That might be a mistake; perhaps it was a mistake, not that I think it makes any difference whether it was a mistake or not; but you may observe that this opinion was taken in February 1792, and this opinion being taken in February 1792, and there being nothing before us to shew what was passing between Horace Lord Orford and the Clinton of that day, not a syllable stated either in the record or in proof about that, the deed to raise the 34,000*l.* is not executed till the month of October 1792, and from the period at which the opinions were taken in February 1792, Horace Lord Orford having those opinions, defers till April 1794, that is to say, more than two years before he executes that deed of confirmation. I point this out, because I think there is some materiality in the period of time during which all parties had an opportunity, if they thought fit, to investigate what were their rights, and what were their claims.

Having mentioned these additional circumstances, and introduced what is a most important question in this cause, by the observations I have

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made with reference to the rules to affect the term, you will allow me now to state, that for the present I would lay out of the case the question, whether there are proper parties before the Court for a decree at all in this cause? intimating it as my humble opinion, that it is extremely difficult to answer that question affirmatively.

I will for the present also lay out of the question, whether, by consent of parties at the bar, a court of justice can overlook the objection which arises upon the policy of the law, where a bill is filed by persons stating such an agreement between themselves, as (intelligibly or unintelligibly stated) is put upon this record, because, if this agreement falls under the censure of the law with respect to dealings as to titles, I do not conceive that it is according to the duty of a court of justice to overlook that objection, even if the parties wished it might be overlooked. I give no opinion at present upon that, neither shall I say that the parties overlook it; but I am anxious to state this, because I think it of public importance, that it should be known that the Court would itself deem it to be an act which its duty required it to do, to take notice of such an objection if it appeared upon the record, whether taken notice of by counsel or not.

Supposing the record to be free from that objection, there is another question, namely, whether, as these Plaintiffs have joined themselves together, and as they have stated the nature of the titles they may respectively have, or that respectively they may not have, the record is put into such a shape that we could give a decree upon it? Upon that question, also, I give no opinion.

*D.* An agreement made by parties out of possession, to proceed in a court of equity to recover and to divide lands, &c., when recovered, is contrary to the policy of the law, as well as the statute *H. 8.* against pretended titles.

Whether a court of equity can entertain a bill stating such an agreement. *Qu.*

There is another question which is upon the effect of the deed of confirmation. That is argued in two ways; indeed in various ways. It is said on the part of those who are counsel for the Appellants, that the deed of 1794, called the deed of confirmation, really operates in this case nothing, and the way in which they put that, is this; they say, that the last limitation in the deed of 1781 gave no estate whatever to those under whom Lord Clinton claims; they say, that the deed of 1785 (the deed of mortgage to Sir Edward Hughes) having been executed, it raised a question, whether the deed of 1785 was a revocation of the instrument of 1781 as to the last limitation; and that the confirmatory deed of 1794 was a deed which was meant to have no other effect, notwithstanding all that it recites, and notwithstanding the terms in which the intent of the instrument is expressed towards the conclusion of the recital, than this, to put the estate exactly in the same circumstances as if the deed of 1785 had not been executed, and then putting the estate exactly in the same circumstances as if the deed of 1785 had not been executed, the matter gets back again to this question, namely, what would the rights of the parties have been if the deed of 1785 had not been executed? and, in order to determine that question, you must then ask yourselves another question, what was the effect of the deed of 1781? and if the effect of the deed of 1781 was to give the estate to the grantor himself, that all the subsequent deeds are to be laid out of the question, and that the deed of 1794 is not to be taken as a general confirmation, but as an instrument which was merely to remove out of the way the objection

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to the title, if an objection can be founded upon that deed of 1785.

With respect to that question, much has been said upon the subject on both sides, and particularly with respect to the mode in which you must proceed, if you mean to insist that this deed is to have no other effect. One side says, You may state it as matter of defence; the other parties say, No, you must file a bill in order to reduce the effect of it. Now when it is urged that you must file a bill to reduce the effect of it, that introduces the question, What is the effect of it? If the effect of it be no more than I have stated, no bill is necessary to reduce the effect of it. If, on the other hand, the effect of it should be greater than that way of putting it admits, then the question is, whether that effect must not be reduced by a bill expressly filed for the purpose? and with reference to that, I confess I should say, when this instrument is produced as matter of defence, if you can fairly see that this instrument has had an effect beyond that which was intended, I cannot conceive that the parties were reduced to file a bill. But all this for the present may be represented to your Lordships as furnishing a question, upon which it is not necessary at this moment to give an opinion; if it were necessary at this moment to give an opinion upon this question so considered, I should be disposed to say here again, there is a view of this case which may not be unimportant, if we are obliged hereafter to deal with that question; and that is this, if I do more by my deed than I intend to do, there may be an equity, a clear equity, an obvious equity, such as nobody can

*D.* If a deed is produced as matter of defence, and it appears that it has an effect beyond what was intended, it is not necessary to file a bill to reduce it.

deny to exist, to relieve me against the excess which has been committed against my intention in the execution of that instrument; but I am not as yet prepared to admit, that if I execute a deed in which I do not effectuate that which I certainly intend to do, that is, if I execute a deed in which I do less than I intended to do; or to put it stronger, if I execute a deed in which I do nothing that I intended to do, and if in the notion of both parties I have done all I intended to do, and if under that common mistake both parties have been acting till the supposed grantee under that instrument has become involved in settlements, in debts, in obligations of every species, which if the mistake is to be rectified must tear him and his property and his family to pieces; although relief in equity might originally have been obtained, I am not prepared to say that subsequent transactions may not produce such an effect as to bar that relief in equity, which might have been given if speedy application had been made to a court for that purpose; nor am I prepared to say, that it must necessarily be the effect in a court of equity that that relief must be given, whether the title to that relief is discovered at the end of one year, or twenty years, or a hundred years, and with that observation for the present I pass over that question.

All these questions, and many more that have not yet been stated, will become necessary to be considered and discussed, if your Lordships shall be finally of opinion, that in this case the circumstance that the late Lord Clinton entered (according to what is expressly stated in this bill) in 1791, and that this bill was not filed till after twenty

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If a deed is executed which does not effectuate the intention of the grantor, and parties who might claim under it act under a common mistake that A. is the supposed grantee, and A. creates incumbrances upon the land supposed to be granted, whether it is not a bar to relief in equity, and whether relief will be granted after such transactions and a lapse of time.  
*Qu.*

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years, is not decisive. That brings us to what has been stated to be the great point in this case, the point which induces me to trespass upon your time contrary to what is the ordinary practice of this Court when you affirm the judgment. The practice of this House, if you affirm the judgment, is to affirm without saying more. That is certainly the practice of the House; and I take leave now to notice it, because, though I am the last man in the world to question the wisdom of the practice, yet I cannot help saying, that I have frequently felt in the different situations in which I have stood in this House very considerable doubts, whether that is a practice useful in the administration of justice or not.

I proceed, therefore, to give a few reasons why this non-claim for above twenty years, (it signifies nothing whether the excess is an excess of one minute above twenty years, or whether it is an excess of a hundred years above twenty years,) in my judgment, is a bar to this claim. It is not my intention to trouble you with a history of what uses were before the statute of uses, nor is it my intention to trouble you with a statement of all the decisions which took place on trusts when the courts of equity, to a certain degree, if I may so express it, nullified that statute of uses; but I take it, that there is a sort of general rule established with respect to doctrines in a court of equity, without which I do not think that those courts would be endured in this country; I mean that they must, as far as they can, assimilate themselves in their proceedings, in those proceedings that are founded upon great public policy, to

the law of the land, that is, they must, as far as the nature of the transactions and their dealings will admit of their so assimilating themselves, proceed according to that analogy, or to use words which have been cited at the bar from decisions in another part of this kingdom, that they must act in obedience to those laws. I say this the rather, because unless I misunderstand the history of jurisprudence in this country, courts of equity have felt at all times the necessity of quieting possession, by prescribing limitations to suits, and that independently of all statutable limitations for that purpose.

Since our different statutes of limitation have passed, I believe I may venture to say, that it has been our endeavour in courts of equity to assimilate our proceedings to those of courts of law, by attending to the statutes of limitation, not regarding them merely with reference to the statutes themselves, but as they do at law, also, with reference to such circumstances as furnish grounds of presumption, that something may have happened that may be a bar to any claim; and we go much further; for even where the time mentioned in statutes of limitation has not run out, where there is no such presumption that there may have happened something which would be a bar to the demand; yet if the demand is made under circumstances of inconvenience to individuals, that would amount to positive oppression, that would break in upon those principles which are established for the peace of all the families, constituting the great family of the public, courts of equity have said, you must go to those courts that were not made for

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a righteous man, if there be such courts, you cannot have relief in a court of equity.

This being so, unless I misunderstand the law of the country, there is a vast difference between things to which we give the same denomination, I mean trusts. You have a trust expressed; you have a trust implied; you have relations formed between individuals in the matters in which they deal with each other, in which you can hardly say that one of them is a trustee and the other a *cestui que* trust; and yet you cannot deny, that to some intents and some purposes one is a *cestui que* trust and the other a trustee. Of the latter character, I take a mortgagor and mortgagee to be; and it is not upon this occasion, as it appears to me, necessary to be entering into the arguments about abatement, disseisin, intrusion, and so on, in the case of strict trustee and *cestui que* trust; for in the case of strict trustee and *cestui que* trust, you are to consider not only what was done, but what it was the duty of the person to do. It is the duty of the trustee to take care of the interest of the *cestui que* trust, and there are many cases in which you will not permit that individual to do any thing for his own interest, adverse to the interest of the *cestui que* trust. So a termor has a duty to preserve the interest of his landlord, and there are many acts, therefore, which may be done both by a trustee and a person claiming in the character of a termor for years, which, if they were done by persons standing in other relations, would be acts to be denominated acts of adverse possession; but when the law makes it the duty of a man to abstain from doing those acts, the law will not permit him to

Acts done by a trustee or termor for years, cannot have the effect of adverse possession. But

say they are acts of adverse possession, having the effect of acts of adverse possession.

But how is that between mortgagor and mortgagee? When I become a mortgagee, I am bound in the contract of mortgagor and mortgagee to be content with the payment of the interest, not until it is convenient to the mortgagor to pay me my principal, but until it is convenient to me to receive my principal; and if I demand my principal and interest, and he tenders to me my principal and interest, I am a trustee to convey to him the estate; but I am quite at liberty, after the time is out, during which there is a default, to enter and to receive all the rents and profits; and if I choose not to keep an account, that will not protect me, provided there is not negligence. If I make no acknowledgment to myself or a third person; if I do not declare in my will, or somehow or other, that I am only mortgagee, I may go on receiving the rents and profits; and if the negligence of my mortgagor suffers me to go on twenty years, I may turn round and say, "You shall not have your estate again, I will keep it;" why? because public policy says it should be so. I have often heard it said, "This is a very strange kind of public convenience, a very comical kind of public policy; on the last day of the twenty years it has not begun to operate, but at twelve o'clock that night reasons of public policy begin to operate; and though it might be redeemed the minute before, it cannot be redeemed the minute afterwards." Undoubtedly this, so stated, is startling. It seems a singular doctrine; but the fact is, you must lay down some positive rule; if you do not lay

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the rule does not apply to the case of mortgagor and mortgagee.

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down some positive rule, no man knows what he is to do with property; he cannot tell whether he can treat it as his own, or whether he cannot treat it as his own; and unless you lay down some rule applying to all cases, the consequence is, no man in any case can tell how he is to act as to property, or whether it is his property or not; it may be his, or may not be his, according to the caprice of those who may make their demands too soon or too late, as shall suit their own purposes. Without; therefore, reading passages from the books stating those doctrines, which I have been alluding to, with great precision, I may take it for granted, that there can be no doubt that a mortgagor cannot redeem a mortgaged estate after twenty years, except in those cases where there have been accounts kept, &c. that is, in the excepted cases.

I will here mention, lest I should forget it, that a case has been stated in the course of the arguments at the bar of the House, which has very long depended before me, as much because I wished to know what would be the ultimate judgment in this case, as from any other reason, I mean the case of *Pim v. Godwin*. The attention which I have been called upon to give to this case, and my reflections upon that case necessarily connecting themselves with this case, I am now perfectly prepared to know how to deal with that case, and shall give judgment upon it in a very few days. If this had been a legal estate, and the twenty years had been run out, no ejectment could have been brought. But it is said that this is an equitable estate, and it is not only said that this is an equitable, but that it is an equitable estate where there is a third person acknowledging that

he is a mortgagee. Let us take these propositions separately. Is it to be contended, that adverse possession will not do as against an equitable estate, let that adverse possession be ever so long? I mean where there is no duty which the person that has the adverse possession has undertaken to discharge for him against whom he pleads that adverse possession. I cannot agree to that; it is a rule I never heard of; and now that almost all the property in the kingdom is equitable property, it does seem to me that would be a most dangerous doctrine indeed. This case illustrates what would be the consequence of it with respect to outstanding terms; if there is a term of 200 years, a term of 500 years, or a term of 1000 years, taking the mere proposition about equitable estates, (independently of the question of mortgage,) and if there is adverse possession, that is a man taking the rents and profits, and putting them into his own pocket with the knowledge of the other party, and with that knowledge generated, if you please, by his mind being under a mistake, is it to be contended, that possession for 200 years, or 500 years, or 1000 years, will not do, and if it will do for 200 years, or 500 years, or 1000 years, you are then to consider why it will not do for twenty years.

Then it is said that there is a mortgage here. It is very true there is a mortgage here; and in the cases of family settlements, to which I have been alluding, how many family estates are there where mortgages go on from generation to generation unpaid off; is it to be understood that the equitable property in fee is never to change in the course of centuries, or in the course of those

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*D.* Adverse possession, as against an equitable estate, may create or defeat a right where the possessor has no duty to discharge for the party against whom possession is pleaded.

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periods which would give limitation to the title to the estate.

The distinction I take in this case is this: Lord Clinton takes an estate with the consent (founded in mistake, if you please,) of Horace Lord Orford, in the year 1791. His taking the estate by that consent does not make the possession of the estate on his part less adverse, because it is a taking of the possession of the estate for himself, where he owed no duty whatever, as it appeared to me to Horace Lord Orford, and his taking the possession of the estate, and keeping the possession of the estate during all the time in question, is, as it appears to me, an adverse possession of the estate, and intended to be an adverse possession of the estate. The intention on the part of Horace Lord Orford may have been an intention generated in his mind by mistake; but no person can deny that it was his intention that the former Lord Clinton should have a beneficial interest in the property so handed over to him; and if it was his intention that Lord Clinton should have a beneficial interest in the property so handed over to him, it appears to me it must be the intent that he should have an adverse enjoyment.

I really cannot get rid of a difficulty which has pressed on my mind throughout this case, when it is said the mortgagee admits there is a mortgage. Yes, he does so; but does Lord Clinton admit that any body else has the equity of redemption but himself; and I should be glad to know whether the circumstance of Horace Lord Orford from time to time permitting the Clintons to deal with the equity of redemption as owners of

the equity of redemption, and permitting them so to deal with the mortgagee as if he was the mortgagee of the Clintons, and not the mortgagee of Horace Lord Orford, whether that is not an extremely strong case in itself, to shew that adverse possession was intended by Horace Lord Orford; and is it not a strong circumstance to shew, that if a court of equity is not to relieve where persons have been placed in situations of hardship by the concurrence of others, (not fraudulently obtained,) it cannot relieve in such a case as this.

I should be glad to know, whether it is of course that, if a party has no remedy at law, a court of equity is bound to give him relief. The question here is not between mortgagor and mortgagee, but between two persons claiming the equity of redemption, and claiming both of them adverse to the mortgagee; and, under the circumstances, without going through all the cases, every one of which I have carefully examined, it strikes me, that this being the true nature of the question, here has been an adverse possession for above twenty years, and that is a bar in a court of equity. I would ask further, am I entitled to say that there has been mistake? and, if so, am I entitled to say there has been a mistake not discovered? Can I say that Horace Lord Orford, up to the period of his death, had never heard of this doubt? There is nothing in this record to prove the fact of a mistake; then I am in uncertainty on that point: but I go further: for if he died under that mistake, unless I have reason to believe that he would have endeavoured to take advantage of the mistake, which it is very difficult to suppose

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If a deed of confirmation is executed under a mistake, and the party (confirming) being dead, there is a probability, from circumstances, that he would not, or a doubt whether he could have raised any question upon the mistake, it is doubtful whether a court of equity would permit parties claiming under him to take advantage of the mistake.

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if you look to the deeds which have been executed, unless I can find that, knowing of that mistake, he would have endeavoured to take advantage of it, I am by no means without considerable doubt whether a court of equity would allow those who claimed under him to take advantage of it.

But there is another view (most important) of this case. As between these parties, Horace Lord Orford had a right to make his own construction of that settlement of 1781. The deed of 1781 may be represented by a lawyer (I will not say whether it is to be so represented), but it may be represented as by the effect of that last limitation, vesting the estate in Horace Lord Orford himself; but if he chose to involve other persons in all the consequences of his saying, “that is not my construction of the deed; I believe that George Lord Orford meant that some other persons should take the estate; I do not take, and do not mean to take the estate; I believe that George Lord Orford meant to give it to some other persons, to the Clintons for instance,” on what ground is a court of equity to interfere?

With respect to cases, I shall mention only two or three; first, *Bonny v. Ridgard*, a very strong case, — for there, upon the face of the instrument, the parties who took under that instrument, could not but see, that the grantors in that instrument were not dealing with the property as they ought; but there Lord Kenyon (who, after having presided in a court of equity went into a court of law, in which he found no predecessor who knew more of law than himself; and I must do his memory the credit of saying, that he corrected a

great deal of error which had crept into courts of law, particularly in reference to these terms,) says, “there has been so much dealing with respect to those who have acquired interests under this property, that a court of equity must stand neutral.”

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I have certainly a very strong feeling as to this deed of confirmation, whether it is or not to have effect. In the year 1792 opinions were taken, and the lawyers who read the limitations in the deed of 1781, either did or did not (I cannot tell which) find out what was the effect of that deed. Six months after the opinions were taken that settlement was made, such as you see in the year 1792; money was raised upon those deeds, and the interests of families, family after family, wives and children, after wives and children, are involved in the effect of these transactions. Then comes the deed of 1794, which, in effect, lays before Horace Lord Orford all those deeds; for the deed of 1794 recites them, and I take it, in a court of justice, he must be understood to know the effect of them all. He makes a confirmation, not merely a confirmation stating that he meant to confirm the deed of 1781; but he makes a confirmation *eo nomine*, of the deed of October, 1792. I agree that it may be limited in the way which I mentioned before; but then, with all the circumstances before him, the property being carried to market, and made a security to strangers for money advanced, it appears to me to be a very difficult thing, after such transactions, to say that a court of equity ought to interfere.

With reference to Sir Lawrence Palk, what is it that we are asked to do? To redeem against him

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without further enquiry, and that upon speculations at the bar; *videlicet*, that because the deed of 1794 is not recited in his mortgage deed executed a few months afterwards, we are to suppose he had no knowledge of it. If he had knowledge of it, then the case must be discussed upon what would be the effect of his security, having the facts before him; and if we are to take for granted that he had not this before him, the bill, as it appears to me, ought to have been amended. It appears to me that is a measure going a great deal further than we are in the habit of proceeding.

With respect to the other cases of *Casborne v. Scarff*, and the famous case of *Hopkins v. Hopkins*, of which we have heard so often; perhaps one may venture to say, as to two cases decided so nearly about the same time, and which contain language so little reconcileable, the one with the language of the other, that the best way of accounting for that is to intimate, that it is extremely possible that the reports may not be accurate in both. I do not carry now in my recollection precisely the case in which it occurred, but I do recollect the late Lord Loughborough stating distinctly, that that case of *Hopkins v. Hopkins* was most inaccurately reported. When Lord Hardwicke is reported to talk in one of those cases of seisin of equitable estate, I can suppose what he means; but, when he is made to speak of there being no intrusion on an equitable estate, I do not know what he means, with respect to seisin of an equitable estate.

I must act upon my own opinion in this case, as in all cases, but in this case with very great diffidence, because I happen to be differing from

the learned Judge who first decided this case; and of whom I should be proud to have that said of me, when I am gone into my grave, which I think may be justly said of him, as a most able Judge in equity. I am bound to give my own opinion upon the case, and I say, without entangling myself with the difficulties about seisin and intrusion, I am of opinion, that the adverse possession of an equity of redemption for twenty years is a bar to any other person claiming that equity of redemption; and it is an adverse possession which produces the same effect as those things you call abatement, intrusion and disseisin which belong to legal estates. It is an adverse possession which has the same effect, and, for the peace of families, and for the peace of the world, I think ought to have the same effect; and therefore, without going through more of the cases, I submit it to your Lordships, as my humble opinion upon this grave and important question, that this bill cannot be maintained.

If I am right in that opinion, the consequence is, that the bill ought to be dismissed. If your Lordships shall be otherwise advised, or shall hold a different opinion, it will be necessary to enter into the other questions which I have taken the liberty of proposing should be reserved until this was disposed of. I have thought it my duty to put your Lordships in possession of this question, in the first instance, for I think it infinitely better it should be decided wrong, (which, I trust, it will not be,) than that it should not be decided at all; because, where a case, involving a point of so much importance, stands on contrary decisions in two Courts, it is impossible to estimate the mis-

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Adverse possession of an equity of redemption for twenty years, is a bar to any other claim of the equity of redemption, producing the same effect as abatement, intrusion and disseisin with respect to legal estates.

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chief that would ensue to property in general, if the matter were left in doubt.

Lord *Redesdale*. — My Lords, — It appears to me that much of the argument which you have heard at the bar, has been founded upon reasoning drawn from what has been the state of the law at a very distant period, and perhaps without sufficient consideration of the variation which has been introduced by alteration of circumstances, and alteration of the law. In very early times the modes of conveyancing were very simple, but from time to time the devices of men have introduced complications upon that system, and the legislature has interfered upon the subject, and has altered, in a very great degree, the mode which formerly existed of conveying titles from man to man. Your Lordships must well know, that in early times, the simple mode of conveying freehold title was by feoffment and livery of seisin; that is, by delivery of the possession of the property from A. who had the property to B. who was to receive it.

In early times, leases, that is, terms of years granted to tenants, were considered as almost wholly in the power of the person who had the freehold, and were little regarded until a statute (in early times indeed) gave them protection. That alone created a considerable difference with respect to property, because it secured the possession in the person who had a term for years, and it made an entry upon that possession by the person who had the freehold unlawful, unless from some conditions in the grant of the term he had a right to enter. It, therefore, necessarily, has become a very different thing to reason upon titles,

since all these changes have been introduced, from what it was in the early history of the law.

Another very great change was effected (originally, as it is supposed) by the contrivance of the church, to appropriate to themselves property by devising what was called the *indication* of a use. Where the estate was conveyed to A., and he held the estate not for himself, but for B., that brought forward the jurisdiction exercised by courts of equity, operating upon the conscience of the person to whom the estate was conveyed, to give the benefit of the estate to the person for whose benefit it was intended.

A statute was made to remove the inconveniences produced by this mode of conveyance of property, as it affected rights which do not now exist, namely, those rights which were derived from tenures, which have been called Feudal Tenures; whether they have in this country been properly so denominated, or in the extent to which some persons have carried the language which has been used in the statute, it is not very important to determine. I can only say, that as far as I have been able to investigate the subject, the law of feuds, strictly speaking, never was the law of this country; and a great deal of the argument which will be found in modern cases, and which is not to be found in more ancient cases, I think is founded in mistake. However, we cannot now reason upon these principles, if we consider what is the manner in which property is now held: for the actual possession of property in the hands of the owner is now a comparatively rare part of the possessions of this country. The property is in the hands of tenants; those tenants, in many

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parts, enjoying under terms, created for the purpose of giving to the person who was entitled to the inheritance the benefit of the property in the shape of rent, or some other shape.

Much of the reasoning in the cases at the bar has been founded upon an idea which I shall be obliged to advert to by-and-by in speaking of the statute of James, to which I confess I think a great deal more of consequence has been given in some late cases than ought to have been given, without more consideration, at least, than it appears to me those cases have had. I mention this because a good deal of the argument at the bar has been founded upon the authority of recent decisions, which do appear to me to require a great deal of consideration. The statute is almost a nullity with respect to a great deal of property in this country; if the construction with respect to the words entry and right, and title of entry, is to be that which has been supposed. It is perfectly clear that, in courts of equity, (and your Lordships are now considering yourselves as in a court of equity,) the possession and enjoyment of the estate by receipt of the rents and profits, whether by the hands of the tenant or the owner actually taking the profit from the land, has been considered as that possession which courts of equity are bound to protect. I have said so much upon this subject, because it appears to me extremely clear that the distinction between courts of equity and courts of law, supposing the recent decisions in courts of law to be well founded, is material to your decision of this case; and further, because if those decisions are correct, it does seem to me it would be high time for your Lordships to

act in your legislative capacity to make a new statute for limitation of actions.

I propose to consider the questions before you, independently of the construction of the words in the deed of 1781, limiting the estate to the heirs of Samuel Rolle, supposing the true construction to be that which has been put upon them by the Appellants in this case, and entering in no degree into a discussion of that question, upon which, whatever opinion I may have formed, I must have formed without having heard it argued at your Lordships' bar, which I ought to do before I come to any decision upon the subject. I will take up the question simply upon the consideration whether you ought to allow that question to be discussed in the way in which it ought to be discussed in a court of law, by removing the legal bars to a discussion in a court of law which may exist. The nature of the suit which has been instituted by Lord Cholmondeley and Mrs. Damer, is this, in effect; it is saying, we have a legal title; having that legal title, in one sense of the word, there exist legal bars to our exercising that title in a court of law, and we desire a court of equity to remove those bars; that is the most favourable way, in my humble opinion, of discussing the question on their part. The manner in which they have attempted to discuss it has been by considering the property in question as a right in the nature of an estate; and considering it in that light, then you are to consider how estates of that description have been dealt with in courts of equity; for as equitable estates are familiar to courts of equity, you can only judge how you are to deal

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with them, by considering in what manner courts of equity have dealt with such estates.

Lord Cholmondeley and Mrs. Damer come into a court of equity to say that George Earl of Orford being seised of the lands in question, subject to certain interests which he had created, but with an ultimate limitation (all the other interests being now merged) to vest in him the fee-simple, made a mortgage in fee; and upon that occasion a trust term which had been created long previous to his title, but under the settlement by which he derived his title, was assigned to a trustee; that, therefore, George Earl of Orford at the time of his death had, in law, no estate in the strict construction of law, but only an equity of redemption of a mortgaged estate; and a right to have the term considered as a term attendant upon his estate of inheritance, that no person claiming under him could claim more than that equity of redemption, except the mortgagee; that under those circumstances, if a mortgage had not existed, they could have proceeded at law to assert a title to the estate, as vested in the heir of Horace Earl of Orford, or the legatee of Horace Earl of Orford, Horace Earl of Orford having been the heir of George Earl of Orford. They come into equity, therefore, to obtain, first of all, redemption of the mortgage, and a conveyance of the legal estate to them; which legal estate, if conveyed to them, could give them the power of proceeding for the purpose of obtaining the estate and possession at law; and they go on further to pray, also, an account of the rents and profits, which have been received in the mean time. They state, however, that on the death of

Earl George, so long ago as December 1791, the late Lord Clinton entered upon this estate, and received the rents and profits, and that the rents and profits have from that time, to the time of filing their bill, been received by the late Lord Clinton, and the person claiming under him. They contend, that upon the death of George Earl of Orford, Horace Earl of Orford became entitled to this property; and inasmuch as it was an equitable estate, that although he had not actual possession of the estate, he was entitled to that possession; and, therefore, as contended on the part of Mrs. Damer, that it passed by his will, and by Lord Cholmondeley, that the estate, if it did not pass by the will of Earl Horace, vested in him, as heir of Earl Horace, both of them asserting, therefore, that this was an equitable title; that Earl Horace, on the death of Earl George, became the rightful owner of that property; and that, being the rightful owner of that property, a court of equity ought to give the estate, either to the devisee or the heir of Earl Horace. It is observable, that Lord Cholmondeley does not claim the property as heir of Earl George, and therefore he must claim this, if at all, as the heir of Earl Horace.

The objections which are raised on the part of the Defendants to this suit, independently of the construction of the deed, are founded upon the length of possession, upon the construction given by Earl Horace himself to the deed of 1781, the settlement which has been made in 1792, the deed of confirmation of 1794, and the subsequent transactions, all of which have been founded in confidence of the perfectness of that title, which Lord Clinton supposed he had when he entered,

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in December 1791, upon the death of Earl George ; and your Lordships are now called upon, sitting in a Court of Appeal, to say, that after this lapse of time you are to destroy the effect of all those transactions, and to involve all the persons who have been engaged in them in all the difficulties that would necessarily follow, because it is according to good conscience that the estate should be delivered either to Lord Cholmondeley or to Mrs. Damer.

The ground upon which this is attempted to be founded, is, that the possession which was had by the late Lord Clinton, and by those who claimed under him since that time, must be taken to be the possession of the mortgagee ; because, according to a maxim, which has been adopted in courts of equity, and in a certain degree in courts of law, the mortgagor being permitted to remain in possession, with the privity of the mortgagee, the mortgagee receiving his interest, so that there could be no ground for presuming satisfaction, the mortgagor is to be considered as tenant at will of the mortgagee. That is the ground of the argument ; and it has been considered as resembling the case of a *cestui que* trust in possession of a property vested in the trustees, the trustees permitting that enjoyment by the person who was the *cestui que* trust.

Now, we ought to consider upon what ground it was that courts have adopted this principle, that the possession of a mortgagor shall be considered as the possession of the mortgagee, and that the mortgagor is to be considered as tenant at will to the mortgagee. It is founded upon the principle of effectuating the security to the mortgagee, and

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for no other purpose; and being founded upon that view, is to be carried no farther. But the counsel for the Appellants have endeavoured to assimilate the case of a mortgagee to that of a trustee; and a doctrine has been urged here as in the Court below, a position of law, which is submitted in the argument, certainly on a very high authority, that an estate could not be gained by disseisin, intrusion, or abatement, to the prejudice of a party for whom the persons having the legal estate were trustees. Now, that Lord Hardwicke should have used those words in the wide and extended sense attributed is impossible, considering what he himself had done in other cases. The report of *Hopkins v. Hopkins*, as given by Mr. Atkyns, will, upon inspection, be found to be certainly a very inaccurate report, even inaccurate in the statement of the facts of the case, and of the will. I have formerly compared it with the will of Mr. Hopkins; and I found it to be inaccurate in every part; and Lord Loughborough, in the case of *Abbott v. Vincent*, when *Hopkins v. Hopkins* was quoted, said that the case was incorrect throughout; that he had compared it with Mr. Forrester's notes, who was extremely correct, and it differed materially. I happen to have a note of the case, which I believe was Mr. Joddrell's; I have compared it with Mr. Forrester's notes, and there is certainly a very considerable difference between the two notes. However, I will take Lord Hardwicke to have used exactly the words which are stated in Mr. Atkyns's report; but we are to consider for what purpose Lord Hardwicke uses these words. Lord Hardwicke uses these words simply for this purpose. Mr. Hopkins had devised the estate to trustees and

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their heirs, to the use of them and their heirs, so as to make it a complete use executed in them, upon the trust and for the purposes after mentioned. Then, says Lord Hardwicke, they are trustees for all the purposes after mentioned. Mr. Hopkins had devised his estate to the son of his heir at law, and his first and other sons; and if there should be a failure of that estate, then to any after-born sons of the heir at law successively; and if they should all fail, then to the unborn sons of the daughter of this heir at law. There were other remainders in the will, which Lord Hardwicke says went beyond what the law permits in the disposition of property, limiting an estate for life to unborn persons; and he considers simply this, whether an estate limited to those trustees, to the use of them and their heirs in trust for the purposes after mentioned, would or would not support the several contingent estates, and he says nobody can doubt that it would support the contingent estates; therefore, says he, what necessity is there, when the whole is devised upon trust for all the purposes mentioned in the will, to insert distinctly the estates of the same trustees to support contingent remainders; it would not only be nugatory, but it would really be absurd; and then he refers to cases at law before the statute of uses, in which it was clear that such had been the construction of the courts of law before the statute of uses, that when the estate was conveyed to persons to the use of others, the estate so conveyed to the use of others was held sufficient to support contingent remainders, and his sole meaning in introducing those words, appears to me to be, that by the effect of the conveyance to the trustees to the

use of them and their heirs, in trust for the purposes after mentioned, the estate so vested in them would, from time to time, serve for the purpose of supporting contingent trust estates; and in the ancient conveyances, before the statute of uses, such a conveyance would have supported contingent remainders. He illustrates this perfectly by referring to what were the common means of destroying contingent uses where the estate was limited at law; that is, if the estate was conveyed to A. for life, with remainder to the first and other sons in tail male, he having no sons born, so that there was no person in being capable of taking that limitation, and therefore the limitation could not vest, that the conveyance of the person who had the estate for life would have destroyed that contingent remainder, because the estate to support that contingency was gone; and then, he says, the way adopted to obviate that was to substitute trustees, so that if the tenant for life thought fit to destroy his own estate, then the estate of the trustees rose *instanter*, and supported the contingent remainders; and that in reason the case before him was exactly the same thing, because, when the trustees under Mr. Hopkins's will were trustees for all the purposes of the will, they were trustees for the purpose of permitting the enjoyment, by the tenant for life, so long as he should live, and upon his death, conveying the estate to the person who thereupon would become entitled, and therefore in the mean time preserving the estate for the persons entitled, in the same manner as if trustees for preserving contingent remainders had been interposed.

I have made this statement of the case of *Hop-*

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*kins v. Hopkins*, because I observe, that in a very learned judgment, given originally in this case, an expression of Lord Hardwicke, as reported by Mr. Atkyns, and which is very nearly like that in Mr. Joddrell's note, is taken by that learned person in a sense which it was not intended by Lord Hardwicke to convey; it would be perfectly inconsistent with what Lord Hardwicke himself said in other cases. It is clear, from what he says in this very case, that that could not be his meaning, because he distinguishes the case of a devise of a legal estate to the trustees in trust for express purposes, and a devise of an estate of which the deviser had only the trust interest, and which was vested in trustees for him: he says, in such a case, the person who had the equitable interest for life might destroy the equitable remainder, because it was not the purpose of the trust originally created to support the equitable remainder; but the purpose of the trust originally created was to enable the person who had the devise to dispose of the estate, but to dispose of it in the same manner as if it had been a legal estate.

Putting, therefore, that authority out of the question, the only consideration, as it strikes my mind, is this, whether the courts of equity have not constantly considered equitable estates precisely in the situation, and the same in the enjoyment of them, as they have considered legal estates. I do not mean where a trust estate is created for the express purpose of doing certain acts, because there, according to what Lord Hardwicke determined in *Hopkins v. Hopkins*, the trust was to effect all the purposes for which it was created; but I mean a trust estate, having no concern what-

ever with the disposition of the acts in question, where a person, having a trust estate, acts upon it, and the whole is in the contemplation of a court of equity, precisely as if it was a legal estate; and in this very case of *Hopkins v. Hopkins*, Lord Hardwicke over and over again says, that unless such had been the rule in courts of equity, the country could not have endured the existence of that species of estate, it would have introduced so much confusion.

Under these circumstances, the question for your Lordships' consideration is this, Whether the lapse of time between the death of George Earl of Orford and the time of the bill being brought in this case is not a lapse of time which, by the provision of the statute, is a bar to relief in a court of equity. All the statutes for the limitation of actions, are statutes expressly made for the purpose of quieting possession; that is the great object of the policy of those statutes. It is generally immaterial to the public at large, whether A. or B. is the owner of a particular estate; but it is highly important to the public at large, that the person who is in possession should be the owner, for he is dealt with by all men as the owner, they seeing that he is in possession, and therefore it is a consideration of public policy. The statutes of limitation are not simply for the purpose of quieting rights between individuals, but they are founded upon public policy, that the person who is in possession having the credit attributed to that possession, his possession should not be lightly disturbed. The different statutes, made at different times, have given different terms to the limitation of actions. The last, that of 21 James 1., limits cer-

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tain actions upon particular writs, which apply only to particular persons. The general provision, that no entry shall be made by any person, unless within twenty years after the right or title of entry shall have accrued, Lord Hardwicke, and other judges in equity, have said is a provision in the statute upon which courts of equity have acted. It has been attempted, at your bar, to argue upon the ground that Lord Cholmondeley, claiming as heir, might bring a writ of right, if the question was open at law; but that is a particular writ, in which particular privileges are allowed, and the courts of equity have never regarded that, or the writ of *formedon*, or any other particular writ, but have considered the limitation in the statute of James I., of twenty years after the rights or title of entry accrued, as that which was to decide.

Title of entry  
in equity is by  
subpœna.

Now, how is right and title of entry to be construed with respect to an equitable estate? The right and title of entry, in a court of equity, cannot mean a right to go upon the land and take possession of it, in the form of the old entry at the common law; but it means the right of instituting a suit in equity upon the subject, to avoid a fine, if a fine is levied of an equitable estate; it is not by entry in the common way, but it is laid down, over and over again in very ancient cases, that the claim must be by subpœna, because your title is a title with respect to a right in equity, and the way of asserting the title of entry is not by entering on the lands, but by instituting a suit in equity.

I conceive therefore that the very words of the statute of James I., if it is a statute which has any application to a court of equity, apply to such a case as this. The title to this property accrued

above twenty years before the bill filed, and therefore that title in a court of equity is barred by this statute, supposing it to be a statute which courts of equity are to consider as affecting their proceedings, as well as proceedings at common law. Now, although the statute itself applies only to proceedings at common law, in direct words, it must be understood to have been intended by the legislature to affect proceedings in courts of equity; for courts of equity have been constantly declaring, we will, with respect to equitable titles, proceed by analogy to the proceedings of courts of common law; and when the lawgivers were prescribing the mode of proceeding in the courts of law, they must have been considered as intending to make an act of parliament to regulate the proceedings in courts of equity also. It is extremely difficult to frame precise words upon that subject; but if the legislature, at the time when they passed that act, were aware that there were suits in equity, and that all large estates and every considerable property was constantly turned into an equitable property, and if the object of that act was to quiet possession, they would have provided for that very imperfectly, if they had not intended that the enactment contained in that act should be considered as binding upon the courts of equity, as well as the courts of law, according to the mode of proceeding in those courts. I take it therefore to be a positive law, which ought to bind all courts, and for that reason I have taken the liberty in another place to say, that I considered it not simply a rule adopted by courts of equity by analogy to what had been done in courts of law under the statute, but that it was a proceeding in obedience to the statute;

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Courts of equity in giving effect to the statutes of limitation proceed not merely by analogy, but in obedience to the statutes.

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and that the framers of that statute must have meant that courts of equity should adopt that rule of proceeding.

If it were otherwise, only consider in what a situation property in this country would be, where in large settlements of estates terms are created, provisions made for younger children, and mortgages subsist upon the property. The consequence would be, that the title of the person in actual possession would be doubtful: a very large portion of the property of the country being equitable and not legal, if the statute of limitations did not apply even by its enactment to that sort of property, the whole property of the country would be in danger of being disturbed by suits without number, and the object of the statute, namely, the quieting of possession, could never be obtained.

With respect to fines, it is over and over again determined, that a fine will bar an equitable as much as it will a legal estate — it is over and over again determined, that a court of equity does not enter into the question, whether there shall be entry. It is impossible to suppose that Lord Hardwicke, in the case of *Hopkins v. Hopkins*, should not have had this subject in his contemplation.

The next consideration is upon the effect of the deed of 1794. Now, I apprehend, that that deed is extremely important to be considered with respect to the lapse of time: because, independently of the statute of limitations, and if there had been no such statute, what is the effect of that deed of 1794? The deed of 1794 recites the deed of 1781, it recites that under that deed Lord Clinton entered into possession; the deed of 1794 acknowledges that he had a legal title under that

deed, unless it was qualified by the deed of 1785, and then noticing the settlement of 1792, it confirms that settlement, certainly, with a qualification in point of words, so far as the deed of 1781 might have been revoked by the deed of 1785. First of all the deed of 1794 recites, that the motives of Lord Horace in that deed were his conviction that such was the intention of Earl George, and that therefore, if he had the legal right, furthering that intention, he would have preserved that intention. He has, in the same deed, stated his conviction, that under the deed of 1781, if not affected by the deed of 1785, Lord Clinton had by the intention of George Earl of Orford a right to this estate; and what reason is there to suppose that Horace Earl of Orford, had not the same view of the subject, with respect to the deed of 1781. It can hardly be doubted, whether under the deed of 1781, the estate did or did not go to Lord Clinton, whether there was a mistake, or whether it was affected by the deed of 1785 or not. If Lord Horace was here, he might say such was not my intention, but how can Lord Cholmondeley or Mrs. Damer say so; they know nothing of what passed in his mind, except what is in his deed, and what do you see in his deed? you see he was anxious that the intention of Earl George should be carried into execution; not simply, that what was the real right between the parties should have effect, but that the intention of Earl George should be carried into effect, that is, the intention of Earl George to limit his own estate to the person who should be heir of the Rolle family, and Earl Horace might have felt a conscientious desire to perform what he must know was the anxious wish of Earl George. It was the

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wish of Lord Horace also: Lord Horace, by executing the deed of 1794, has declared to all the world, who could deal with the property; "the construction I put on the deed of 1781 is, that it gives the estate to Lord Clinton, for the deed of 1794 recites the deed of 1781: it recites the possession of Lord Clinton, under the deed of 1781, upon the death of George Earl of Orford on the 5th of December, 1791, and it recites the settlement of 1792, and the recital in that settlement, that those estates did, on the decease of the said George late Earl of Orford, come to and vest in the said Lord Clinton, subject and liable with other estates, to the mortgage made by George Earl of Orford." By this deed so executed by him, the contents of which it is to be presumed he was cognizant of, Lord Horace has declared, such is my construction of the deed of 1781: he might have taken it for granted, that that deed did vest the estate in Lord Clinton; but either he did take that for granted, or he was willing that such should be the construction, and he held out to all the world, that the deed of 1781 had conveyed the estate to Lord Clinton. He having held out to all the world that idea, can persons, claiming under him at this distance of time, say that a court of equity is to interfere as a court of conscience, to affect all persons who have been dealing with the property.

What is the common case: if A. were to say to B., C. has a good title to such an estate, therefore, you may deal with him, I will be responsible in damages? If A. himself had the title and said that he would be responsible for all the dealings, it never could be permitted for him to frustrate what had been done in consequence of that declaration.

I conceive, therefore, that under this deed of 1794, a title is gained by those who deal with it, which will prevent a court of equity interfering as a court of conscience, against the effect which Earl Horace has, in that deed, given to the deed of 1781.

The next consideration is with respect to the frame of this bill; and it is utterly impossible that any decree could be made upon this bill, because the persons who are co-Plaintiffs in this bill have opposite interests. If the estate passed by the will of Horace Earl of Orford, Lord Cholmondeley has nothing to do with it; if it did not pass by the will of Horace Earl of Orford, Mrs. Damer has nothing to do with it. Then in what manner would this question arise? If there was no other objection to it, there might be a bill filed by Mrs. Damer, and another by Lord Cholmondeley; and to the bill filed by Mrs. Damer, Lord Cholmondeley must be a party; and to the bill filed by Lord Cholmondeley, Mrs. Damer must be a party; and the court must decree, that Mrs. Damer had no right, in one instance, and Lord Cholmondeley in another; and, how is this sought to be avoided? By an alleged agreement, and that is directly contrary to law. They are both of them out of possession, and are incompetent to make a bargain upon the subject, affecting any person, except the person in possession; they are both competent to make a composition with him, if he thought fit, but competent to deal with no other person by the statute, which is only an affirmance of the common law upon the subject of pretended titles, by adding penalties. By that statute, this agreement is not only contrary to law, but would make the persons who entered into it, liable to heavy penalties.

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It is, therefore, impossible for any decree to be made here; you could not make a decree, if nothing was stated, as to the agreement, because the relation of parties would be inconsistent with the decree. You cannot make a decree at the suit of A. and B. which is to destroy the right of A. and give the right to B.; or give the right to A. and destroy the right of B.: it is utterly inconsistent. To avoid that inconsistency, they state this agreement, which is contrary to law, and which you are bound to destroy. Nothing can be more dangerous than such contracts; and the act against pretended titles, was as much to protect possession, as the statute of limitations; the great object of the law, the policy of the law throughout, has been to protect possession. It is immaterial to the public at large whether the estate belong to A. or B.; but it is material, that the person in possession, should be quieted in that possession, and that all who deal with him, should be protected.

I concur in what has fallen from the noble and learned Lord who last addressed you, that this bill ought to be dismissed. I wish to have it understood, that I am clearly of opinion, that upon the statute of limitations, a court of equity has not jurisdiction to entertain the question, because the right was barred by the effect of that statute. I am also clearly of opinion, that the deed of 1794 has such an effect upon the property, that it would be against conscience for your Lordships now to interfere in the manner which is sought by this bill; and I am further of opinion, that upon this bill, framed as it is, with this allegation of an agreement, it is not only impossible for your Lordships to make a decree, but that it would be the duty of

your Lordships to dismiss the bill, whatever the rights of the parties were. I do not wish to decide the question upon that ground, but principally upon the operation of the statute of limitations, because that is a question which affects all the titles in the kingdom. The other two are more particularly applicable to the particular case; I feel it therefore more important, that it should be understood, that the opinion of the House upon this part of the case, is founded on the operation of the statute of limitations, and not on the other parts of the case.

Decree affirmed.

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*Cuthbert v. Creasy and others.*

THE bill filed on the 18th of July, 1820, and amended by order dated 7th of February, 1821, stated that Robert Cuthbert, late of Friskney, in the county of Lincoln, grazier, was, at the time of making his will, and thenceforward to the time of his death, seised of or otherwise well entitled in fee-simple in possession to certain messuages, cottages, lands, tenements, and hereditaments, situate, lying, and being in the said parish of Friskney, and the said Robert Cuthbert being so seised or entitled, and being of sound and disposing mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the 24th of October, 1767, which was duly executed and attested so as to pass freehold estates by devise, and whereby the said testator devised the said messuages, cottages, tenements, lands, and hereditaments to his wife Ann Cuthbert, for her life, if she should so long continue his widow, with remainder to his sons George Cuthbert and Robert Cuthbert, and their heirs for ever, as tenants in common.

That the said testator departed this life about the year 1771, without having altered or revoked his said will, leaving the said George Cuthbert, his eldest son and heir at law.

That upon or shortly after the death of the said testator, the said Ann Cuthbert entered into the possession of the said pre-

To a bill of discovery in aid of an action of intrusion brought by a remainder-man in a devise after a lapse of thirty-nine years from the death of the tenant for life, and twenty-seven years from the time when the remainder-man attained the age of twenty-one, demurrer allowed.

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mises, or into the receipt of the rents and profits thereof, and continued in the possession thereof, or in the receipt of the rents and profits thereof, till the time of her death, which happened on or about the 9th of September, 1781.

That upon or about or within a few years after the time of the death of the said Ann Cuthbert, and in or about the years 1780, 1781, 1782, or 1783, the then churchwardens and overseers of the poor of the parish of Friskney entered upon and took possession of the said premises so devised by the said will of the said testator Robert Cuthbert as aforesaid, and they and their successors have ever since continued in the possession thereof, or in the receipt of the rents and profits thereof, and the present churchwardens and overseers of the poor of the said parish of Friskney now are, and ever since their appointment to their said situations or offices of churchwardens and overseers of the poor of said parish of Friskney have been, in the possession of the said premises, or in the receipt of the rents and profits thereof, and claim to be entitled thereto by virtue of their said situations or offices.

The bill further stated, that the said George Cuthbert, the devisee, departed this life a long time ago, and in the lifetime of the said Ann Cuthbert, intestate and without issue, leaving the Plaintiff, his eldest son and heir at law; and the said Robert Cuthbert about forty years ago left this kingdom, and went abroad, and has never since been heard of, but is or must be now presumed to be dead intestate and without issue, and Plaintiff is the heir at law of the said Robert Cuthbert, the devisee, and also the heir at law of the said testator; and Plaintiff is, under the circumstances aforesaid, entitled to the said premises in fee-simple.

The bill then stated that the churchwarden and overseers of the said parish refused to deliver up to the Plaintiff the possession of the said premises, and Plaintiff was going to commence an action, by a writ of entry upon an intrusion in the *post*, against the churchwardens and overseers of the poor of said parish of Friskney, to obtain possession of said premises; and that the Plaintiff had been advised, that it was absolutely necessary, that the writ to be issued by Plaintiff for the recovery of the said premises in the said action should contain the names of the churchwardens and overseers of the poor of said parish of Friskney in office at the time of the death of the said Ann Cuthbert, the tenant for life, or at the time when the said churchwarden and overseers first took possession of the said premises, for the purpose of stating by whom the intrusion was

originally made, and that Plaintiff was entirely ignorant what were or was, or are or is, the names or name of the churchwarden or overseers of the poor of Friskney, or any of them, at the time of the death of said Ann Cuthbert, or at the time when the said churchwardens and overseers of the poor of the said parish first took possession of the said premises as aforesaid, and that the Plaintiff, previous to the 13th of November, 1813, and also since that time, had made and caused to be made all possible enquiries and researches, but in vain, to ascertain who were the churchwarden and overseers of the poor of the said parish who first took possession of the said premises as aforesaid.

That Plaintiff, accompanied by his solicitor, on the 13th of November, 1819, went to the said parish of Friskney, and personally demanded of Bletcher Creasy, Thomas Williamson, Thomas Redford, and William Bollon, the churchwarden and overseers of the poor of the said parish of Friskney, permission to inspect the parish books for the purpose of ascertaining the names of the churchwarden and overseers of the poor of the said parish of Friskney by whom the said intrusion was originally made, and that Plaintiff and his said solicitors did at the same time deliver to each of them the said B. Creasy, Thomas Williamson, Thomas Redford, and William Bollon, a demand in writing in the words and figures following; namely, "To Bletcher Creasy, Thomas Williamson, Thomas Redford, and William Bollon, churchwarden and overseers of the poor of the parish of Friskney, in the county of Lincoln. I, Robert Cuthbert, of Swineshead, in the county of Lincoln, miller, do hereby demand of you and require permission to inspect the book or books in which the appointment of the parish officers for your said parish of Friskney is written or contained for the years 1780, 1781, 1782, and 1783. Dated this 13th day of November, 1819. Robert Cuthbert. Witness, William Walker."

That the said Thomas Williamson, Thomas Redford, and William Bollon, upon such demand being made and delivered, declared that they were the overseers of the poor of the said parish of Friskney, but that they had not the books to produce; and Bletcher Creasy then acknowledged that he was the churchwarden of the said parish of Friskney, and could produce the books demanded, but the said Bletcher Creasy positively refused to produce the said books so demanded as aforesaid to Plaintiff, or any other person than a charge bearer.

That the Plaintiff was not a charge bearer of the said parish.

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That the said Bletcher Creasy is the present churchwarden of said parish, and that the said William Bollon, Robert Pinder, and Thomas Carter were the (then present) overseers of the poor of the said parish of Friskney, and that B. Creasy, William Bollon, Robert Pinder, and Thomas Carter were in the possession of said premises, or in the receipt of the rents and profits thereof, and that the B. Creasy, William Bollon, Robert Pinder, and Thomas Carter had in their possession or power the book or books of the said parish, in which were entered the names of the parish officers of the said parish, and particularly of the churchwardens and overseers of the poor of the said parish for said years 1780, 1781, 1782, and 1783, and that Plaintiff is entitled to have the same produced to him, in order that he may inspect the same, and ascertain the names of the churchwardens and overseers of the poor of the said parish for said years 1780, 1781, 1782, and 1783.

The bill charged, that Bletcher Creasy, William Bollon, Robert Pinder, and Thomas Carter knew the names of each of the churchwardens and overseers of the poor of the said parish for each of the said years 1780, 1781, 1782, and 1783, and when they respectively entered into their said respective situations or offices as such churchwardens and overseers, and also knew or believed, or had some reason to know or believe, which of them first took possession of the said premises, and when they or he first took possession thereof, and that Bletcher Creasy, William Bollon, Robert Pinder, and Thomas Carter ought to set forth and discover who were the churchwardens and overseers of the poor of the said parish of Friskney in each of the said years 1780, 1781, 1782, and 1783, and when they respectively entered into their said situations or offices, and how long they respectively continued therein, and which of them first took possession of the said premises, or entered into the receipt of the rents and profits thereof, and when.

The bill further charged, that Robert Cuthbert, the son of the testator, was, at the time of the death of Ann Cuthbert, and for a long time afterwards, and to the time of his death abroad, in very indigent circumstances, and ignorant of his interest and rights in or to the said premises; and Plaintiff was, at the time of the death of the said Ann Cuthbert, and for many years afterwards, an infant, and in indigent circumstances, and at a great distance from the said parish of Friskney, and ignorant of his rights, and attained his age of twenty-one years in the year 1793, but was then and for many years afterwards in very indigent cir-

cumstances, and ignorant of his rights, and at a great distance from the said parish of Friskney.

The bill then charged, that the Defendants ought to set forth a list or schedule of all books, accounts, papers, and writings in their or any of their possession or power containing any entries relative to the said premises, and the possession thereof, and the rents and profits thereof, and ought also to set forth the particulars of all such entries for each of the said years 1780, 1781, 1782, and 1783, in the words and figures thereof; that the Plaintiff on or about the 6th of July, 1820, applied to the said Bletcher Creasy, William Bollin, Robert Pinder, and Thomas Carter, and requested them to produce and shew to him the said parish books or book containing the names of the churchwardens and overseers of the poor of the said parish for the said years 1780, 1781, 1782, and 1783, in order that Plaintiff might inspect the same for the purposes aforesaid; but the said Bletcher Creasy, William Bollin, Robert Pinder, and Thomas Carter refused to shew the same to Plaintiff, and that Plaintiff has frequently applied, and frequent applications have since been made on his behalf, to the said Bletcher Creasy, William Bollin, Robert Pinder, and Thomas Carter to produce for Plaintiff's inspection the book or books of the said parish in which are contained the names of the parish officers of the said parish, and particularly of the churchwardens and overseers of the poor of the said parish for the said years 1780, 1781, 1782, and 1783, and to discover to Plaintiff which of the said churchwardens and overseers of the said parish took possession of the said premises, and when; and also to produce and shew to Plaintiff the said other books, accounts, documents, papers, and writings relating to the said premises, and the possession thereof, and the receipt of the rents and profits thereof; but they refused to comply with such applications.

The bill further charged that it would be necessary for Plaintiff, in order to sustain his intended action for the recovery of the said premises, to have the said books or book, accounts, documents, papers, and writings containing the entries aforesaid, produced at the trial of such action, but that the Plaintiff would not be able to enforce the production thereof without the assistance and order of the Court.

The bill therefore prayed that the Defendants might be ordered to produce, for the inspection of Plaintiff and his solicitor or agent, the book or books of the said parish in their or any of their possession or power containing the entries of

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the names of the several churchwardens and overseers of the poor of the said parish for the said years 1780, 1781, 1782, and 1783, and also all other books, accounts, documents, papers, and writings in their or any of their possession or power containing any entries relative to the said premises, and the possession thereof, and the receipt of the rents and profits thereof, for the said several years 1780, 1781, 1782, and 1783, and each or any of them; and that all the said books or book, accounts or account, papers, documents, and writings might also be produced for Plaintiff's benefit at the trial of the said intended action.

To this bill the Defendants put in a general demurrer for want of equity, both as to the discovery and the relief.

The demurrer was argued before the Vice-Chancellor\*, in February, 1821, when liberty was given to amend the bill, which was accordingly done, and a demurrer was filed to the amended bill. The demurrer to the amended bill was argued in November, 1821, principally on the grounds that such an action could not be maintained, and if it could be maintained, that a court of equity would not aid such an action by a discovery. But the demurrer was overruled, and thereupon a petition of appeal against the order overruling the demurrer, was presented to the Lord Chancellor.† The case was argued in December, 1821, by *Mr. Horne*‡ and *Mr. Pemberton* for the Appeal, and by *Mr. W. Agar* and *Mr. Duckworth* for the Respondents.

The heads of the argument for the Appellant were as follows:—

The first question is, whether the Court will interfere to assist a claim at law after the lapse of twenty years. Secondly, if the Plaintiffs are not able to sustain any action at law, and the Defendant can shew this fact, then the Court will not give any discovery.

The Plaintiff claims under a will, bearing date in the year 1767, and the testator died in or about the year 1771; and in the year 1781 the tenant for life died, and thereupon the Plaintiff became entitled to one moiety, and as to the other moiety there is a lapse of thirty years.

The Court will never interfere in favour of parties who have been out of possession for more than twenty years, against parties who have been in adverse possession for more than twenty

\* Sir John Leach.

† Then Baron (now Earl of) Eldon.

‡ Now (Sir W. Horne) Attorney-General.

years. The measure of legal right is not the measure of equitable right. Will a court of equity after twenty years interfere by direct relief or indirect relief by removing impediments; or by enforcing discovery. Discovery is a species of equitable relief. The limitation of twenty years was adopted by courts of equity above a century previous to the statute of limitations, and continued for a century afterwards without any reference to the statute, and has been now finally established.

*Winchcomb v. Hall*\* was a case to have a deed set aside as being a conveyance by the father in a state of imbecility. The relief was refused, twenty years having elapsed, and two purchases having been made. But this estate might have been recovered at law by writ of right.

In cases of bills for redemption the Court has refused relief at different periods, sometimes thirty years, sometimes twenty years, but the Court always requires the party seeking relief to shew that he comes within a reasonable time.

*Pearson v. Pulley*† is the first case in which twenty years was suggested. It was a case of redemption before Lord Nottingham.

There are cases in Vernon's Reports which establish the same doctrine.

*Low v. Burron*‡ is precisely in point. It was a bill for an account of rents and profits after thirty years. It was not a suit to set aside the deeds for the purpose of trying the right. A plea of the statute of limitations was allowed.

In *Cook v. Arnham*§ it was held, that fourteen years laches, as it would not bar an ejectment, would not bar redemption. In the note to that case, it is laid down, upon authorities cited, that as the twenty years would bar an ejectment, the same period is proper to bar redemption. The Court always fixed the time of twenty years with reference to the statute of *James*, and not to that of *Hen. 8*.

In *Cook v. Cook*|| it was held, that a court of equity will not interfere after twenty years; and it was ordered, that the Defendant should be quieted in his possession after a lapse of twenty-one years. In 3 Atk. ¶ there is a case of a bill for redemption, and the rule as to redemption was held to be analogous to the rule in the statute. All the cases establish this point.

In *Deloraine v. Brown*\*\* , it appears that the doctrine that

\* 1 Ch. Rep. 22. 5 Chap. 1. † 1 Ch. Ca. 102. ‡ 3 P. W. 264.

§ Ibid. 287. ¶ 2 Atk. 67. ¶ Anon. 313.

\*\* 3 B. C. C. 633. See 2 S. & L. 637.

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length of time will bar equitable relief is not novel, but as old as the Court. *Smith v. Clay* in the note to the last case is to the same effect. *Cholmondeley v. Clinton* \* is the last case and conclusive. It may be doubted whether twenty years is not by the provision of the statute a bar to relief in equity. *Sidney v. Perry*. †

Not one case is to be found in which a court of equity has ever interfered after a lapse of twenty years, as against adverse possession, *Foster v. Hodgson* ‡, *Germyn v. Best*. It may also be questioned whether writs of entry are not within the statute 21 Jac. 1., and therefore barred. Writs of entry are possessory actions; and if so, is there any instance where the entry is taken away? How can entry be taken away without right of possession? A writ of right is barred by 60 years, but this might last 100 years.

For the Respondents: *Pickering v. Stamford*, *Roe v. Acherley*, *Hindeman v. Taylor* §, *Harmood v. Oglander* ||, *Pim v. Goodwin* ¶, *Bailey v. Sibbald* \*\*, *The Dean and Chapter of Westminster v. Cross* ††, and *Marston v. Claypole* ‡‡ were cited.

In reply it was said: The principle on which the demurrer rests is, that after so great a length of time, the Plaintiff has no right to call for equity. *Pickering v. Stamford* is a case of *cestui que trusts*. *Roe v. Acherley* does not apply, because there was no adverse possession or ouster. *Harmood v. Oglander* was a very peculiar case, and has no relation to the point in question. There was no ouster of the Plaintiff, for one tenant in common cannot oust another; but the question of ouster must have been tried. *The Dean and Chapter of Westminster v. Cross* §§, and *Marston v. Claypole* |||, are loose notes of no authority.

The bill prays not merely discovery, but inspection and production of documents also. The Plaintiff in equity must shew not only that it is not against conscience, but that it is agreeable to equity that he should recover. The Plaintiff has no title in equity, and the Defendant has title.

The case stood over for consideration until the 11th of March, 1823, when the Lord Chancellor pronounced a judgment reversing the order by which the demurrer was overruled; ordering that the demurrer should be allowed, and that the deposit should be returned.

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|--------------------------------|---------------------|
| * 2 J. & M. and M. D. P. antè. | † Red. Tr. Pl. 207. |
| ‡ 19 Ves. 185.                 | § 2 Dick. 651.      |
| ¶ Post.                        | ** 15 Ves. 185.     |
| ‡‡ Ibid. 213.                  | ‡‡ Bunb. 60.        |
|                                | Ibid. 213.          |

The case before the Vice-Chancellor was argued almost wholly upon the question of law upon the statute of *Hen. 8.*; viz. whether the time elapsed since the death of the settlor was not a bar to the claim. Before the Lord Chancellor, the argument turned principally and almost wholly upon the general question of limitation in equity, and the Lord Chancellor having said at the conclusion of the argument, that the case would require much consideration, a review of all the authorities, and a reference to the principles of a court of equity on the subject of limitation of suits, finally decided the case on the authority of *Cholmondeley v. Clinton*, which he considered as establishing the rule, that a lapse of twenty years operated generally as a limitation and bar to suits in equity.— Ex Rel. Mr. J. Walker.

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*Pim v. Goodwin.*

The bill was filed in 1806, by Richard Pim, of, &c. labourer, and Anne his wife, William Spencer of Derby, &c. and Mary his wife, and Hannah Proctor of Derby, &c. spinster, stating that Joseph Wainwright, of, &c. in the county of Derby, yeoman, was at the time of his death seised in fee of a close of land called Goodages, situate in Chaddesden, containing about six acres, and then in the occupation of John Goodwin; and being so seised, mortgaged (*no date*) the close to Elizabeth Edwards, of Derby, widow, then deceased, either in fee or for a long term of years, to secure the principal sum of 70*l.* and interest, or some other small sum of money which J. W. did not pay off in his lifetime, but being entitled to the equity of redemption of the close, and being of sound mind, made and published his will (*no date*), legally executed and in writing, which in part was the words and figures following; that is to say, “my just debts, &c. being paid, all the residue of my estate, both real and personal, I give, devise, and bequeath unto my wife for her life, hereby giving her full power to give, devise, and dispose of the same to my daughter Anne Wainwright, and my two daughters-in-law, Hannah Newham and Eliz. Newham, in such proportions as my wife shall think proper, but not to any other person, provided they live, all or any of them; and if they shall die before they possess the same, my wife shall have full power to give and devise the same to whom she shall think most convenient.” The bill then stated, that Joseph Wain-

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wright died (*no date*) without having revoked or altered the will, leaving Elizabeth Wainwright his widow, and Anne, the wife of Benjamin Cockayne, deceased, his only child and heir at law ; that Elizabeth Wainwright, soon after the death of the testator, entered upon (*no date*) and took possession of the mortgaged estate, and for some time continued in the possession thereof, but afterwards delivered up possession to Francis Goodwin, then deceased, who was the son in law of Elizabeth Wainwright ; and that it was alleged that Elizabeth Wainwright delivered up possession of the mortgaged estate to Francis Goodwin, in consideration of a provision on his part that he would provide for Elizabeth Wainwright during her life. The will then stated that Elizabeth Wainwright died (*no date*) without having made any disposition, by devise or otherwise, except as above mentioned, of the mortgaged premises, leaving Anne Cockayne surviving, who thereupon became entitled in possession to the close and premises, subject to the mortgage ; that Anne Cockayne afterwards died (*no date*) intestate in the lifetime of her husband, leaving four daughters, her only children and heirs at law, viz. Hannah, &c. ; whereupon the Plaintiffs became entitled to the equity of redemption of the premises as the heirs at law of Anne Cockayne, and also of the testator. The bill then stated that Francis Goodwin, while he was in possession of the mortgaged estate, paid off the principal and interest due upon the mortgage, and procured an assignment of the estate and interest of the mortgagee in the mortgaged premises, and the money due thereon to be made to him, and ever afterwards continued as mortgagee in the possession of the mortgaged estate, and receipt of the rents and profits during his life, and by such means received or might have received more than the amount of the money remaining due for principal and interest upon the mortgage. The bill then stated that Francis Goodwin died in thousand (*sic*) hundred and (*sic*), and by his will devised the mortgaged premises, and all his estate and interest therein, to his son Francis Goodwin, the Defendant, whom he appointed sole executor of his will ; that the Defendant proved the will, and became the legal personal representative of his father, and possessed assets sufficient to pay, &c. and entered upon and took possession of the mortgaged estate, and had ever since been and then was in possession and receipt of the rents and profits thereof. The bill then stated applications and requests to the Defendant to reconvey the mortgaged premises, to deliver up the title-deeds relating

thereto, and to account, &c. for the rents received, and pay over the balance; the Plaintiff offering to pay any balance which might be found due upon the account.

The bill then charged, that if any conveyance was made to the Defendant or his father, it was made by way of mortgage or assignment of mortgage, as would appear if the Defendant would set forth the contents and dates of any such conveyance or assignment. The bill then, after the usual interrogatories, prayed that the Defendant might set forth the deeds under which he claimed to hold; that an account might be taken of the rents received by the Defendant and his father, that the Plaintiff might be admitted to redeem the mortgage on payment of what (if any thing) should be found due, an account of the assets, &c. and a reconveyance, &c.

Francis Goodwin by his answer said, he believed and admitted it to be true, that J. Wainwright in the complainant's said bill of complaint mentioned, was in his lifetime, and at the time of his death, seised in fee-simple of a certain close called the new close, and situate in Chaddesden, in the county of Derby, containing six acres three roods and eight perches, or thereabouts, and which abuts on the north side thereof on lands belonging to Sir R. Wilmot, Bart.; and on the east side thereof on lands belonging to Mrs. J. Goodwin; and on the south side thereof on lands belonging to Sir R. Wilmot, Bart.; and on the west side thereof on lands belonging to the said Sir R. Wilmot, Bart., and which this Defendant believed was the close or piece of ground in the said complainant's bill meant and intended to be described by the name of the Goodages, and which is now in the occupation of John Goodwin; and that he did not know, except by the said bill, that the said J. W. did ever convey the said estate and premises to Elizabeth Edwards by way of mortgage or otherwise, to secure the sum of 70*l.*, or any sum of money. But the said Defendant said, that by indenture, bearing date the 6th day of April, 1759, and made between the said J. W. of the one part, and Francis Goodwin deceased of the other part, and which was duly executed by the said J. W., he the said J. W. in consideration of the sum of 120*l.* to the said J. W. in hand paid by the said Francis Goodwin, the receipt whereof is thereby acknowledged, granted, bargained, sold, demised, leased, set, and to farm let unto the said Francis Goodwin, his executors, administrators, and assigns, the said close or parcel of land, with the appurtenances, to hold the same to the said Francis Goodwin, his executors, administrators, and assigns, from the day of

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the date thereof for the term of 500 years from thence next ensuing, without impeachment of waste, yielding yearly a pepper-corn, if demanded, but subject to a proviso for redemption thereof if the said J. W., his heirs, executors, administrators, or assigns should pay or cause to be paid to the said F. G., his executors, administrators, or assigns, the full sum of 120*l.*, together with interest for the same, after the rate of 3*l.* 10*s.* per cent. per annum, at and upon the 6th day of October then next; and the Defendant admitted it to be true that the said J. W. did duly make and publish, and legally execute his last will and testament in writing, bearing date the 14th of December, 1743, and that the same was executed and attested as by law is required to pass real estates, and that the same was of such purport and effect as in the said bill set forth, and that he appointed the said Elizabeth his wife sole executrix thereof, who duly proved the same in the proper ecclesiastical court, and that the said J. W. departed this life on or about the 11th day of May, 1764, leaving the said Elizabeth W. his widow; and Ann, the wife of B. Cockayne, his only child and heir at law him surviving, and that he did not alter his said will, and that Elizabeth W. did upon, or soon after the death of the said testator, enter into the possession of or into the receipt of the rents and profits of the said mortgaged estate and premises, and continued in the possession thereof, or in the receipt of the rents and profits thereof until the said F. Goodwin entered into the possession thereof, or into the receipt of the rents and profits thereof as hereinafter mentioned, and that by indenture of feoffment, bearing date the 16th day of February, 1765, and made between the said Elizabeth W. of the one part, and the said F. G. of the other part, and which was duly executed by the said Elizabeth W., the said Elizabeth W., in consideration of the sum of 200*l.* to her paid by the said F. Goodwin, and also in consideration of the sum of 3*l.* per year and every year from the date thereof, to be annually paid to her by the said F. G., his heirs, executors; and administrators, or any of them, during her life, granted, bargained, sold, enfeoffed, and confirmed unto the said F. G., his heirs and assigns, all the said close of land called the New Close, then in the occupation of the said Elizabeth W., with the appurtenances, to hold the same unto the said F. G., his heirs and assigns, to the use of the said F. G., his heirs and assigns for ever; and thereupon livery of seisin of the said close of land was, on the day of the date of the said indenture, delivered to the said F. G., the father, by the said Elizabeth W., and that

at or about the time when the said indenture of feoffment bears date the said Francis Goodwin entered into the possession or into the receipt of the rents and profits of the said close or parcel of land, with the appurtenances, and continued in the possession thereof, or into the receipt of the rents and profits thereof, until his death, and the Defendant said that the said Elizabeth W. did not to his knowledge, information, or belief, deliver up the possession of the said mortgaged premises to the said F. G. for the reason in the said bill of complaint mentioned, or for any other reason than such as are thereinbefore in that behalf mentioned, although the Defendant admitted that the said F. G. was the son-in-law of the said Elizabeth W., and that the said E. W. did not to his knowledge, information, or belief, ever make any other disposition of the said mortgaged premises than such as thereinbefore mentioned. And the Defendant said that the said Elizabeth W. departed this life on or about the 14th day of March, 1768, and that she left Ann Cockayne, in the said bill mentioned, who was then of the age of thirty-four years, and under no legal disability of claiming the said close and premises, had she been entitled thereto, the only child and heir at law of the said testator J. W., her surviving. But he submitted and insisted that the said Ann Cockayne did not upon the death of the said Elizabeth W. become entitled to the equity of redemption of the said mortgaged premises, the said Elizabeth W. having conveyed the same away in manner aforesaid; but in case no such disposition had been made thereof, nor any other act done by which the right to redeem the said mortgaged premises was extinguished, he submitted whether the said Ann Cockayne would have become entitled to the same, or whether the said Hannah Newham and Elizabeth Newham took any interest in the same under the will of the said J. W. And the Defendant further said that the said Ann Cockayne departed this life in the lifetime of her husband, and for any thing Defendant knew to the contrary, she might die intestate; and he believed that the said Ann Cockayne left Elizabeth Preston, Ann Pim, Mary Spencer, and Hannah Cockayne, her only children, &c. heiresses at law, her surviving; and that the said Elizabeth Preston departed this life at or about the time in the said bill mentioned, intestate, leaving her three sisters, and the said complainant Hannah Preston, her only child and heiress at law, her surviving; and that the said Hannah Cockayne departed this life at or about the 30th of October, 1793, without having been married, and intestate, leaving her said two sisters, the com-

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plainants Ann Pim and Mary Spencer, and the complainant Hannah Preston, her surviving; and that the said Elizabeth Preston, Ann Pim, Mary Spencer, and Hannah Cockayne were at the death of their mother, the said Ann Cockayne, as the Defendant believed, all of the age of twenty-one years or upwards, and under no legal disability of claiming the said close and premises had they or any of them been entitled thereto; and that the said complainants were then the sole heiresses at law of the said Ann Cockayne and also of the said testator J. W. But the Defendant humbly submitted that the said complainants were not entitled to the equity of redemption of the said mortgaged premises, for the reasons thereafter mentioned; and the said Defendant said, that the said Francis Goodwin did not, to the best of his knowledge, information, and belief, ever procure any other assignment of the said mortgaged premises to be made to him, than the said indentures of mortgage and feoffment herein-before mentioned, which were in the possession or power of the Defendant, but the Defendant submitted and insisted that the said complainants were not entitled to call upon him to produce the same; and the Defendant further said, he verily believed that the said Francis Goodwin duly paid the sums of 80*l.* and 200*l.*, the consideration money in the said indentures mentioned, to the said J. W. and Eliz. W. respectively, or as they directed; and he said, that the said Francis Goodwin continued in the possession of the said estate and premises, or in receipt of the rents and profits during his life, and until the time of his death; and that the said F. Goodwin, the father, departed this life on or about the 20th day of November, 1789, and that previously to his death, he duly made and published his last will and testament, bearing date on or about the 9th day of February, 1787, which was duly executed and attested so as to pass real estates, and thereby gave and bequeathed the said mortgaged premises unto his wife Hannah, for and during the term of her natural life; and from and after her decease, he gave and devised the same unto the Defendant, his heirs and assigns for ever; and he thereby appointed his sons, the Defendant and John Goodwin of Chaddesden aforesaid, farmer, joint executors, but the Defendant alone duly proved the said will of his said father in the consistory court of Lichfield and Coventry, and which he believed was the proper ecclesiastical court, and possessed himself of the said testator's personal estate and effects, or of such parts thereof as he had been able; but the Defendant submitted that the said complainants had no right,

under the circumstances thereinbefore and thereafter mentioned, to any account of such assets. And the Defendant said, that upon the death of his said father, and the said Hannah his mother, he the Defendant did, under and by virtue of the said will, enter upon and take possession of the said close and premises, and ever since had, and was then, by himself or his tenants, in possession thereof, and in the receipt of the rents and profits thereof; and that the said Hannah, the Defendant's mother, departed this life about a week after the death of his said father, and the Defendant denied that the said complainants had made any such applications and requests to him as in the said bill mentioned; but, in case any such had been made to him, he should not have complied therewith, for he said, the said J. W. had, as he was advised, made liable the whole of his estate and effects to the payment of his debts; and and that the said Eliz. W. had, therefore, full power and authority to dispose of the equity of redemption of the said premises, which she accordingly did in manner thereinbefore mentioned; but, in case the said Francis Goodwin had been a mortgagee of the said premises only, yet the said F. G., some time in the year 1765, being upwards of forty years before filing the bill of complaint in this case, entered into the possession, or into the receipt of the rents and profits of the said premises; and that the said F. G. in his life, and the Defendant since his death, had, ever since the said F. G. entered into the possession thereof, or into the receipt of the rents and profits thereof, in the year 1765 been in the peaceable and quiet possession thereof, or in the peaceable and quiet receipt of the rents and profits thereof, and having during all such time treated and considered the same as their own estate, of which they were seised in fee-simple, and had never in any manner since the time when possession was taken thereof in the year 1765 as aforesaid, treated or acknowledged the same as a mortgage, or received any sum of money from any person as for principal or interest of the said mortgage, but have received and taken the rents and profits of the said estate for their own use and benefit; that under the circumstances, and after such length of time, he submitted the said complainants were not entitled to such relief as in the said bill prayed, nor to any discovery of the rents and profits of the said premises, or to any production or discovery of the title-deeds or writings relating to the same except as aforesaid; and the Defendant insisted on the statute in that case made and provided, entitled "An Act for Limitations of Actions, and for avoiding Suits at

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Law," and humbly hoped to have the same benefit thereof as if he had pleaded the same in bar to the said bill of complaint.

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 The reporter, after the utmost research, has been unable to procure any note of the argument or judgment in the case, if any judgment was ever pronounced. *Mr. Barbor*, who was solicitor for the Plaintiff, informed the reporter, that the case stood in the paper for judgment from 1812 to 1821, when his client Pim died. *Mr. Bell*, the king's counsel, has stated to the reporter, that after long hesitation Lord Eldon dismissed the bill in 1823, after the decision of *Forster v. Blake* in the House of Lords, a case which will be reported hereafter.

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*Foster v. Blake, D. P. 1823.*

In this case a mortgage had been made in 1730 of lands belonging to Sir Thomas Blake. In 1733 the mortgage was assigned to Charles Echlin. He in 1737 filed a bill in the Exchequer in Ireland, to obtain the mortgage money by a sale, according to the practice in Ireland, and in 1744 he filed a bill of revivor and supplement. Sir Thomas Blake, by his will in 1748, vested his estate in trustees to raise money by sale or mortgage for the payment of his debts, and subject, &c. he devised his estates to his son Ulick Blake for life, remainder to his issue in tail male; remainder to Thomas Blake for life; remainder to his issue in tail male; remainder to Walter Blake, the father of the Respondent, for life; remainder to his issue, &c. Upon the death of Sir Thomas, the suit of Echlin was revived against Sir Ulick, as heir, taking no notice of the will, which Sir Ulick disputed on the ground that his father was a relapsed Papist. A decree was obtained in 1753, under which the lands were sold as the property of Sir Ulick Blake in fee. After the sale, Walter Blake, the father of the Respondent, applied to the Court for a re-sale, upon the ground that the estate was sold at an undervalue. Upon the re-sale, the estate was purchased by a Mr. Kirwan, as trustee for Lady Blake, the wife of Sir Ulick. The money received upon the sale was applied in discharge of incumbrances, and a conveyance was made to Kirwan in the year 1765. Sir Ulick died in 1767, and thereupon Sir Thomas Blake claiming as a remainder-man under the will of the deviser, Sir Thomas filed a bill against Lady Blake, as guardian of the daughter of Sir Ulick, for an account of rents and possession of the estate. Lady Blake, by her answer, claimed the estate as purchaser under the decree.

The suit was not prosecuted, but Sir Thomas filed a bill against Lady Blake in 1768, insisting that she being a Papist could not purchase or hold the estate. In 1772 a compromise was effected between the parties, and a deed executed to carry it into effect.

In the year 1786 a bill was filed to impeach the purchase by Sir Thomas Blake of Bourdeaux, another party claiming by remainder under the will. He died without issue in 1787, and the suit was revived (according to Irish practice at that day) by Walter Blake, the father of the Respondent, claiming as remainder-man under the will. Lady Blake died in 1791, when her daughter, Mrs. Forster, entered upon the estate under a settlement made in 1771. Answers were put in by Lady Blake and Mrs. Forster to the bill of Walter Blake, who took no step in the cause, and died in 1802. Sir John Blake, in 1802, filed an original bill to set aside the sale in 1765 as fraudulent. In this suit a decree was made in 1813 that the bill should be retained, and that Sir John Blake should bring an ejectment to try whether Thomas Blake, the deviser, was competent to make the will of July 1748. In 1817 Sir John Blake obtained leave, by order of Court, to amend his bill, so as to have the benefit of the proceedings of Sir Thomas and Sir Walter Blake in the suits before mentioned. The bill was accordingly amended, and a prayer was added, that the Plaintiff might be at liberty to redeem the mortgage as remainder-man under the will of Sir Thomas Blake, &c. Upon this bill, so amended, a decree was made for redemption, &c. Against this decree an appeal was presented to the House of Lords, and the decree was reversed, principally on the ground of lapse of time.

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