

ENGLAND.

APPEAL FROM THE COURT OF CHANCERY.

RANCLIFFE (LORD), and others—*Appellants*.PARKYNS (LADY), Widow of SIR }
THOMAS PARKYNS, and others } *Respondents*.

FATHER seized in fee of a manor and lands, &c. in R.; by settlement on his second marriage, limits estates tail to the sons of the marriage in his lands, &c. in R. without mentioning the manor, the ultimate remainder in the lands to himself and his heirs. The father having still the manor of R. and the reversion in fee of the lands, &c. and having two sons of the marriage, afterwards makes a will by which he devises all his manor and lands, &c. in B. and R. to his sons for life, with remainders to their sons in tail. Expressions in the will from which, if there had been nothing to oppose that construction, it might be reasonably conjectured or concluded that the testator intended to devise immediate estates for life to his sons, not only in the manor which was his own, but in the lands, &c. in R. in which they had estates tail under the settlement, and thereby to raise a case of election. But in the will he expressly ratifies and confirms the settlement, and every thing therein contained. Held by the Court of Chancery that this was not a case of election, and the judgment affirmed in Dom. Proc.

Lord Eldon, (C.) observing that it is difficult in any case to apply the doctrine of election where the testator has a present interest in the estate devised, although it may not be entirely his own; and here he had manor, and the reversion in fee of the lands; and expressly confirmed the settlement in all its parts; and you cannot, as against that express declaration of intention to the contrary, take it by conjecture, call it demonstration plain, necessary implication, or what you will, but still only conjecture, that he does not mean to confirm.

A. by will dated 1735, devises all his real estates in these general words, to his daughter I. for life, remainder to

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her first and other sons in fee. Marriage of I. and B. (B. having no notice of the will) and petition in 1746 to parliament for an act to enable them to make a settlement, they being minors, in which petition I. is represented as entitled in fee to certain estates which had belonged to her father A.; and act passed and settlement made on that ground. B. by settlement made in 1776, gives considerable interests to C. his eldest son by his wife I. which C. could not otherwise have in his father's life-time. Will of A. of the existence of which the parties had been before ignorant, discovered in 1799; bill in 1800 by C. claiming the estates under the will of A. his grandfather, as eldest son of I. dismissed in Chancery without costs; and the decree affirmed under the circumstances; it being uncertain whether the estates in question passed under the general words in the will of A. and whether the representation to parliament might not have been correct; B. honestly believing that he was a purchaser for val. con.; so long a time having elapsed, &c.

Bill filed 1799;
amended bill
in 1800.

Case of the
Leake and
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estates.

THE case made by the bill as amended in 1800, which will be found more particularly stated in the Lord Chancellor's judgment, was generally and in substance as follows: By articles made in 1707 on the marriage of Sampson Parkyns, eldest son of Sir Thomas Parkyns, and Alice Middlemore, Sir Thomas and Sampson covenanted to settle certain premises in Great or East Leake, and Thorpe *in Glebis* or in the Clotts, in the County of Nottingham, to the use of Sampson for life, then to the use of Alice for life, remainder to the use of the first and other sons of the marriage in tail male, remainder to the right heirs of Sir Thomas. The marriage took place: Sampson died leaving a son Thomas; and afterwards, in 1716, a settlement was made in pursuance of the articles, conveying to Thomas an estate

in tail male in the premises. In 1730 Thomas suffered a recovery of the manor, mansion-house, and estate, in Leake, and of the estate in Thorpe. In 1731, Thomas, who had married Elizabeth Woodroffe, and his wife mortgaged the estates both in Leake and Thorpe to Cornelius Farr, for 2,500*l.*; and, in 1735, for 400*l.* more, making in all 2,900*l.*; and in the same year, 1731, Thomas, by articles, in consideration of his wife Elizabeth having joined him in a fine to secure the mortgages, and for other considerations, covenanted to settle the estates to the uses therein mentioned, and particularly to give a portion of 4,000*l.* to the daughter or daughters of the marriage charged on the Thorpe estate. In 1732, a settlement was made in pursuance of the articles by which the manor, mansion-house, and estate in Leake, and the estate in Thorpe, were settled, subject to the mortgage, to the use of Thomas Parkyns for life, remainder to the use of his wife Elizabeth for life; and then, as to the manor and premises in Leake, remainder to their first and other sons in tail male, remainder to trustees for a term of 500 years, to pay thereout 1,500*l.* to Harriet Parkyns, afterwards the wife of Richard Farrer, only sister of Thomas, remainder to Thomas in fee: and, as to the Thorpe estate, remainder to trustees for a term of 1000 years to raise thereout 4,000*l.* for a daughter's portion if only one, if two or more 5,000*l.* for their portions, remainder to Thomas in fee: and there was a proviso that, in case Thomas died without discharging the mortgage, or leaving at his death sufficient assets to discharge it; the 1,500*l.* for

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Harriet was not to be raised ; and in case Thomas in his life-time should advance the sum, or any part of it, that should be a satisfaction in whole or *pro tanto*. Thomas and Elizabeth had only one child, a daughter, Jane, the mother of the Plaintiff, the late Lord Rancliffe ; and Thomas being, as the bill represented, seised in fee of the reversion of the estates in Leake and Thorpe, and of an estate in fee in a mansion-house and lands in Leake, in a manor, mansion-house, and lands in Sutton Bonnington, and estates in Buckminster and Sawston, and in a new river share, made a will dated 9th May, 1735, directing his estates in Buckminster and Sawston to be sold by his executrix for payment of his debts, devising a small estate to Daniel Woodroffe, a brother of his wife ; and then devising “ all his other real estates not therein-before mentioned,” to his wife Elizabeth for life, remainder to Francis Lewis, in trust for his daughter, Jane, for life ; and then for her first and other sons and their heirs ; then for her daughters and their heirs ; and, in default of any issue of his daughter, for his sister Harriet Farrer for life, remainder for her issue, male and female, and their heirs : and he directed the residue of his personal estates, after payment of his debts, to be laid out upon good security, and the interest to be paid to his wife for life, and, on her death, the principal to be laid out in the purchase of lands to be settled to the same uses as his other real estates : and he appointed his wife sole executrix, who, as the bill alleged, duly proved the will. And the bill alleged that the late Lord Rancliffe, son of Jane, did not, until a short time

before his death, discover the will, and that it had been suppressed and he kept in ignorance of his rights under it.

Leaving there the statement of title to the Leake and Thorpe estates, the bill proceeded to state the title to the Ruddington estate, in the county of Nottingham. Sir Thomas Parkyns, already mentioned, his first wife, by whom he had his son Sampson, the father of Thomas, both above-mentioned, being dead, by a settlement in 1727, made on his marriage with Jane Barratt, conveyed the Ruddington estate, not mentioning the manor, to the use of himself for life, and created a term of ninety-nine years to secure the payment of an annuity of 200*l.* to his intended wife in certain parts of the premises; and a term of 500 years in the rest of the premises, remainder to the first and other sons of the marriage in tail male, remainders over, reversion in fee to himself. The settlement recited that the premises were contiguous to the mansion-house and lands in Bunny, which stood limited to the issue male of Sir Thomas by his first wife, which issue was the above mentioned Thomas, the son of Sampson; and directed that Thomas, or the person entitled to the Bunny estate after the death of Sir Thomas, should have the option to purchase the Ruddington estate for 13,000*l.* to be laid out in the purchase of other estates to be settled to the same uses. The marriage took effect, and Sir Thomas Parkyns, the father of Lord Rancliffe, was the eldest son of the marriage. In 1735, old Sir Thomas, soon after the death of his grandson Thomas, the son of Sampson, which happened on

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the 1st June, 1735, made his will, dated 18th August, 1735, and thereby devised his manors, lands, tenements, and hereditaments in Bunny, Bradmore, Ruddington, &c. &c. to trustees for ninety-nine years, then to his eldest son, by Jane Barratt, Thomas for life, remainder to the first and other sons of Thomas in tail male, with the like limitations to his second son George for life, and to his first and other sons in tail male, remainder to his daughter Ann in tail male, remainder to his own right heirs. The trusts of the ninety-nine years' term were, to lay out the rents and profits of the premises, first, in the maintenance and education of his sons during their minority, the allowance not to exceed 200*l.* for each, and then in the purchase of lands to be settled to the uses before appointed, &c. He then directed that such of his tenants at Bunny and Ruddington as brought him boon coals to pay so much the load in lieu thereof, in case they should not be wanted, and gave some other directions, from which it might be implied that he meant to devise a present interest in the Ruddington estate, and to raise a case of election between the will and the settlement of 1727. That settlement, however, he by his will expressly ratified, with every thing therein contained. Old Sir Thomas died in 1741, leaving his eldest son Thomas about nine years of age. It is material to state that by this will the sons had a power of jointuring to the extent of 100*l.* for every 1,000*l.* fortune that a wife might bring.

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The bill then reverting to the case of the Leake and Thorpe estates, stated that a treaty took place

for a marriage between young Sir Thomas Parkyns and Jane Parkyns, the daughter of Thomas, the son of Sampson, and that a petition was presented to parliament in 1746 for an act of parliament to enable them to make a settlement, they being minors; stating that Jane was seized in fee, in reversion expectant on the death of her mother (among other hereditaments) of the Leake and Thorpe estates, of the yearly rent of 338*l.* subject to a mortgage of 3,000*l.* The bill then stated that Sir Thomas and his agents knew of the will of Thomas, the father of Jane, and had a copy of it in his possession; and that the will, from which it would have appeared that Jane had only a life estate in the premises, was purposely suppressed, and that the judges to whom the petition was referred and parliament had been imposed upon; and that therefore an act was passed reciting that Jane had the fee. The bill then stated the act, and the settlement of 1747, made on the marriage of Sir Thomas and Jane, by which a jointure of 400*l.* was given to Jane; and the estates of Jane, subject to a provision of 2,000*l.* for younger children, were settled to Sir Thomas and his heirs. The bill then alleged that the settlement was not conformable to the act, that the estates in Thorpe and Leake were, when the bill was filed, of the annual value of 700*l.*; and that, on the death of his mother Jane in 1763, they descended to Lord Rancliffe, who was the only son of the marriage.

The bill then stated various proceedings in Chancery relative to moneys arising out of these

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family estates; and, among other things, an order in 1756 to pay to Sir Thomas Parkyns the whole of the rents and profits of the Ruddington estate accrued due since his father's death, he being tenant in tail by the settlement of 1727. The bill then stated that Lord Rancliffe came of age in 1776, and that he was then, being in ignorance of his rights, induced to concur in a settlement for barring the estates tail, &c. Under this settlement, however, various important advantages were given to Lord Rancliffe which he could not otherwise have in his father's life-time. It is proper to state that Farr's mortgages, after various assignments, were, in 1792, purchased by a Mr. Wright, who declared that he was only a trustee for Sir Thomas Parkyns.

Prayer.

And the bill prayed that it might be declared that Lord Rancliffe the Plaintiff was entitled in fee to the Leake and Thorpe estates upon the death of his mother; that the settlement of 1776 might be set aside, except as to certain mortgages therein mentioned; and that it might be declared that the Ruddington estate was meant to be devised by the will of old Sir T. Parkyns, and that the Defendant Sir T. Parkyns might be decreed to settle that estate to the uses of the will, or to make satisfaction to the other devisees, and for various accounts.

Answer.

Sir T. Parkyns admitted in his answer that, as it appeared at the time of putting in the answer, Lord Rancliffe was entitled in fee, on his mother's death, to the Leake and Thorpe estates; but that the Defendant discovered the circumstance only in 1799, and he denied the suppression of the will,

or any knowledge of its existence till two copies of it were discovered among his papers in 1799; or any notice of it, or contents of it, when the act of parliament was obtained; but admitted that it did appear at the time of putting in the answer that Jane was entitled only for life to the Leake and Thorpe estate, provided the will operated thereon. He admitted the will of old Sir Thomas Parkyns, but insisted that it was meant there to pass, not a present interest in the estates at Ruddington, but only the manor, and the reversion of the estates, which alone then belonged to Sir Thomas. He denied that any undue means, or any concealment were used to induce the Plaintiff to execute the settlement of 1776, from which the plaintiff had derived great advantages.

The bill was dismissed in Chancery in 1809 without costs. And from that decree the Plaintiff appealed to the House of Lords.

The two points argued were; 1st, whether the devise of the Ruddington estate raised a case of election; 2d, whether Lord Rancliffe was entitled to the Leake and Thorpe estates, in fee on the death of his mother.

Mr. Hart and Pepys (for Appellants.) If old Sir T. P. had not had the reversion in the Ruddington estate, it would be clear that he intended to pass the whole estate, and that a case of election would have arisen. It is doubtful whether he conceived himself entitled to the manor. In the settlement, 1727, the word manor is not found, but

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Welby, 2 Ves
Beame 191.

the words *all my estate* might have led him to think that it had passed the manor: and that, if excepted, it would have been excepted by name.

Was it possible that one conceiving himself entitled only to a dry, unproductive manor, could have passed it in the words of this will? He would have said, my manor of Ruddington, and nothing else. Then it was hardly possible that the testator, if he intended to pass merely his reversion in the estate, could have introduced the provisions as to waste, the cutting of timber, the 200*l.* for the maintenance and education of his sons; as to the jointure and ninety-nine years' term; and as to younger children. These must have reference to the whole estate and a present interest, otherwise the children would be all dead before the provisions could take effect. The case of *Welby* is a clear authority for us. (*Lord Eldon, C.* We must look at the pleadings in *Welby v. Welby*. According to the print the reversion is expressly mentioned there.) The reversion is not mentioned here; so that our case is the stronger. They will rely on the clause in the will in which he confirms the settlement. But that is referrible merely to the provision for his son George, and means only—"I do not mean to touch the provision which you have under the settlement." And suppose he did mean to confirm the whole settlement, he even there evinced his anxiety that the Ruddington estate should go with the rest of the family estates: and then Lord Rancliffe, if this be not a case of election, is entitled to the benefit of the provision in the settlement, and to purchase at the price there mentioned. Then the provision as to the boon coals

was entirely inapplicable to the reversion; and is it clear that he meant to pass a present interest. There was nothing that prevented the plaintiff's now raising the question, for, though many years have passed, he had no knowledge of the circumstances till about 1800. The election was now decided, and Lord R. was entitled to compensation. The settlement of 1776 was executed by both, but there was no concession to Lord Rancliffe, except a power to burthen the estates after his father's death; and that settlement had no effect as to the Ruddington estate. (*Lord Eldon, C.* Suppose old Sir T. Parkyns, who made the settlement of 1707, had settled to himself for life, remainder to Sampson in tail, remainder to Thomas, if born before, in tail. Then he makes a will devising the reversion to Sampson and Thomas, and failing them, to somebody else, and, they being dead, would not that somebody else take that estate?) Then we produce the will of Thomas of 9th May, 1735, to show the title of Lord Rancliffe to the Leake and Thorpe estates. There is nothing to satisfy the general words of that will except these estates. The attestation did not specify that the witnesses signed in presence of the testator. That was not necessary, if they did so sign; and whether they did or not was a fact to be left to a jury. The point was decided in a case in 2 Str. 1109. There are several deeds in which the will is recited as passing these estates. Then the answer of Sir T. Parkyns in Chancery admits the due execution of the will, and that precluded us from going into evidence of the fact; and yet they now retract. If one admits too much, there are

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means, before hearing, of being relieved from the admissions by a supplemental answer. But otherwise the plaintiff is entitled to read and rely on the admissions as facts. If a will is admitted by the heir at law to be duly executed, the Plaintiff does not prove it; and the heir cannot, at the hearing, retract the admission. Such is the practice of courts of equity; but the defendant has departed from that rule, and endeavours to establish a case different from, and the negative of, that which he admitted in his answer. But supposing he were at liberty to retract his admissions, we have evidence to show it, 1st, a deed of 1736, in which there are recitals by the testator's, widow, and executrix, proceeding on the ground that the will passed the estates; and, she being in possession, and having the fee *prima facie*, her evidence is good to cut down her own estate, which was an estate for life. Estates being devised by the will to pay debts, the deed recites that she did pay them. And there is a covenant, which is not in the cases, that Sir T. Parkyns may enjoy the mansion-house free from disturbance; so that she releases her own title under the will, and covenants as far as she can for her infant daughter. This is strong evidence that these estates passed by the will: what is there against it? It is said, that in 1746, she represented that her daughter was seized in fee, and it was so taken by the act. But the act professes to do no more than to enable them to pass such interests as they before had, as they might have done, if adult, without the act; and, if it recites that one was seized in fee, who was not so seized, that cannot injure an adverse title; *Pomfret v. Bishop of Win-*

chester, 3 Wils. 453 : and, besides, there is a saving clause. But the circumstance of such a misrepresentation, and an act passed upon it are so singular, they say, that the court will raise any presumption against it. What is it that is to be presumed? that some deed or will existed altering the state of the property. But who ever heard of such a presumption in a case like this? It does not appear from the proceedings, with respect to that act, that there was any evidence at all. There was nothing but this representation of the widow against her own acts, and other circumstances. Then it was said that Sir T. P. was a purchaser for val. con. without notice. That did not originally occur to them. There is no trace of it in the pleadings; and it is a rule of equity that a defendant cannot insist upon that, unless he puts it in issue, that the other party may know it and show notice. There is a case in *Ambler*, where leave was given to amend the answer, that is, to file a supplemental answer, so as to introduce this defence. Why? if you can insist upon the point without putting it in issue. This is referrible to the general doctrine of equity that you cannot insist upon that which you do not put in issue: and it would be very hard upon the plaintiff if it were otherwise, as he would be deprived of his opportunity of proving notice. (*Lord Eldon, C.* If the act has a saving clause applicable to your case, you are not under the necessity of insisting on that point. But is there any case in which a court, or this House sitting as a court of judicature, has reserved an act of parliament? I remember a case in the Exchequer, in which it appeared that

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parliament had disposed of the property of one entitled to a reversion ; and it was there held that the matter could be set right only by the legislature.) We are strangers to that title, and claim by a paramount title under the will. A purchaser of a reversion could never claim the benefit of the purchase on the ground of its being without notice. A plea of this description must state that the party was seized, or represented himself to be seized in fee, and was in possession ; and Sir T. P. could not have pleaded it. It is true, that, in some of the treatises on pleading, the contrary is stated, and that a case, in Amb. 421. is cited ; but that case proves the reverse. It is unnecessary to refer to all the cases, as these must be familiar to your Lordships. It is sufficient to mention that of *Daniel v. Davison*, 17 Ves. 432. Here there was no actual possession. Another answer is, that Sir T. P. had, in legal construction, notice. He was bound to inquire, and if he did not, it was *crassa negligentia*. Besides, the will on which we found comes out of his possession, and deeds reciting the will ; and it has been decided that if one is in possession of a document showing the title, he cannot say that he has no notice ; *Shelley v. Shelley*, 2 Vern. 235. (Lord Eldon, C. I suppose they will not dispute this, that one must be taken to have notice of every thing that appears on the face of deeds in his or his agent's possession at the time of the purchase.) The language of Lord Hardwicke in *Promfret v. Windsor*, 2 Ves. Sen. 485. applies to this point. Here Sir T. P. admits the possession of documents, which show that the estates passed under the will.

(*Lord Eldon, C.* The title deeds must have been in the hands of the mortgagee.) He had the deed of 1736, which had nothing to do with the mortgage. (*Lord Eldon, C.* He came of age, in 1776. Now suppose you had made good all these points, would a court of equity sustain this claim by one who suffered the matter to lay over for twenty-four years after he came of age? The question is, whether the bill to remove the term must not be filed within the same space of time as that within which you can bring an ejectment. He being the son of Jane, and the estate being his at her death, when he came of age, if not before, he would naturally inquire about the title. But if he lays by for twenty-four years, can he be heard?) But the father retains the documents which would have discovered the title; and, where the other party is the author of the ignorance, he is not entitled to avail himself of our delay: and in this case he was the parent and guardian.

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Sir S. Romilly and *Mr. Wetheral* (for Respondents). The original ground was fraud in Sir T. P., but that is now abandoned. As to the Ruddington estate, the question is merely this, whether, when the testator devised, in 1735, in strict settlement, he meant to give an estate which he had no power to dispose of. The rule of equity is, that if a testator shows a clear intent to devise an estate which is not in his power, but which is in the power of the devisee, equity compels him to relinquish all benefit under the will, or leave its provisions undisturbed. But it must be clear that the testator intended to dispose of the

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property; for it is not to be presumed or inferred that he intended to dispose of that which was not his own. The question then is, whether the intent to dispose of the whole estate was so clear here as to raise a case of election. Now he had in view the very instrument which restricted his power over the estate. If he had had no other property which would have answered the description, except the Ruddington estate, then a case of election might have arisen. But he had the manor, and it does not appear that it was unproductive. He had also the reversion in fee of the estate in himself. But it is not necessary for us to rely on the reversion. The argument, however, of M. R. in the case of *Welby* and that of *Church v. Church*, proceeded on a wrong view; and, in the latter case, the decision was reversed on appeal, and he approved of that. The other was not appealed. The testator could not, they say, devise 200*l.* a-year out of the manor. How did that apply to a case where he was enumerating a great many other estates that did yield profits? and nothing is more common than to devise money for the maintenance and education of children, though they have an income of their own; the object being to preserve their own property entire. As to the boon coals it is difficult to understand that exactly, but it is not sufficient to raise a case of election. This was no case of election, therefore, even if there had been no reference to the settlement. But then the testator expressly confirms the settlement in every article, which settles the question. They must contend that when he confirms he means to destroy the settlement.

Then as to the Leake and Thorpe estates. The title of Lord R. rests upon an alleged fraud without an object; that the parties conspired to represent that Jane had the fee instead of a life estate; the estate yielding only 338*l.* a year, subject to a mortgage for 3,000*l.* and 4,000*l.* for portions, making 7,000*l.* which was more than the value of the estate. A fraud to get an estate subject to all these incumbrances was unintelligible, and a mistake was no less so. Now the fact was, the father was seized in fee of the estates in reversion, expectant on the death of Elizabeth Parkyns, and devised to Jane for life. They knew of the will and its contents, as it was proved by Elizabeth Parkyns. But it must now be taken that it was no effectual will to pass real estate. The attesting clause does not state that it was signed by the witnesses in presence of the testator; and though it is not necessary that this should be stated, yet it is necessary that it should be so attested: and if the fact was that it was not, then it was not a valid will: and where is the evidence that it was so signed? The will could not prove itself even after the thirty years; the signing not being stated. If the possession had gone according to the will, then it might be presumed that it was a valid will. But here there was no such ground of presumption. There was an adverse possession for forty years, and the question was not raised till the lapse of twenty-four years after the plaintiff came of age. The statement to the legislature is to be accounted for on no other hypothesis than that it was not considered a valid will as to real estate. It does not appear from the

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deed of 1736, which was executed by her merely as executrix, how she sold the estates for payment of debts.

As to the alleged admission, we have not admitted, as a fact, that the will was duly executed; but merely that it so appears on the instrument which you produce; and the answer refers to such proof as the plaintiff may make of it. The will was executed in 1735, when Sir T. P. was only eight years of age; and he speaks only from what appears on the instrument. We could not plead our purchase for val. con. without notice, because the ground of relief was fraud, and the only answer was, no fraud. If there was any thing wrong, it was a mere mistake; and the case comes to this. He becomes purchaser of an estate for val. con., and has the possession from 1747 till 1800, without any attempt to shake the title. It is said, that it was not an estate in possession, but reversion, and that a plea of purchaser for val. con. without notice ought to state that the party, from whom the purchase was made, was in possession. But there is no distinction in principle. The Court says that, where there is a purchaser for val. con. without notice, it will not relieve; and the case of *Walwyn v. Lee* was much stronger than this; where the Court, on a bill by the children, refused assistance against a mortgagee in possession. Sir T. P. had no notice. He got an assignment of the mortgage, but had no connexion with the mortgage deeds till 1760. True, there was a representation to the legislature, in 1746, that there was a mortgage; and it has been decided that he who has notice of a deed shall be

9 Ves. 24, 32,

taken to have notice of every thing which it contains, if it be in his power, not otherwise. It was essential that he should have access. But Sir T. P. could not have access to the mortgage deeds, even if an infant were as much bound as an adult. But then, they say, the father was bound to inform the son as soon as he got notice. But the will was in the Ecclesiastical Court, and might have been known to the son as well as to the father. Sir T. P. was a purchaser for val. con. without notice; and the bill is filed twenty-four years after the plaintiff came of age, and forty years after the title accrued—twenty years being the time to which the bringing an ejectment is confined at law. As to the effect of the act, the cases respecting the effect of private acts of parliament will be found in Cruise's able book, in which a chapter is devoted to the subject. The case of *Blake v. Bunbury* has no resemblance to the present case: and the case of *Welby v. Welby* has gone farther than any case did before.

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1 Ves. 514.

2 Ves. &
Beame. '1914

Mr. Hart (reply). As to the point of election, the question is, what is the intent? I do not know that courts of justice are anxious to find property to which the words may apply without raising a case of election, provided the intent is clear to dispose of that which is not the testator's own property, nor in his power. The testator thought he had power to exclude the issue of his first wife, by a codicil cutting them off with a shilling, and he annexes conditions to the possession of certain medals given to the son by another donor: and might he not also think that he had power to dis-

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pose of the present interest of the Ruddington estate? The income limited to his sons was limited in a way which manifestly showed that he intended that the expenditure should act on their diligence, and was inconsistent with the notion that the Ruddington estate vested collaterally in the sons. It was certainly difficult to understand the article of the boon coals on their view of the case, not upon ours. Though the settlement is confirmed in general terms, he does restrict it in some points, and why not in this? The cases of Riddle and of General Churchill show that where an interest is taken away in express terms by an act of parliament, the matter can be set right only by the legislature. But this act does nothing more than to enable the parties to dispose of their interests as if they were adult, and does not profess to create a new title or to act upon it. The value of the property had been erroneously stated. The guardians had notice of the mortgage, and notice of the deed was notice of the contents, whether in the purchaser's power or not: *Mertins v. Jolliffe*, Amb. 311. And unless the one party could produce the deed, the other must either not deal with him at all, or do it at his peril. A tenant may refuse to show his lease, and yet the purchaser would be taken to have notice. *Eliz. Parkyns, &c.* were parties to the assignment of the mortgage, and the assignee was bound to consider the equity of redemption as belonging to those who took under the will. As to the length of time the Plaintiff was not aware of his interest, and a guardian who ought to have informed him, could not defend him-

self by saying that the possession was adverse from the time of the majority for twenty years, or any other period. The court, where the case is clear, will not only remove impediments, but decree possession. But, if there is a doubt, the Plaintiff ought to be allowed to try his title at law.

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Lord Eldon, (C.) As this case has occupied three days in the hearing, without a word too much having been said, I propose to your Lordships to defer proceeding to judgment till Monday. Another reason is, that, as this is an appeal from a judgment of my own, I am anxious to consider all I have heard, and all that may occur to my own mind with peculiar care, in order that I may be finally right, if before I have been in error.

Lord Eldon, (C.) It would have been a great satisfaction to me if I could have had the assistance of other Noble and Learned Lords in determining this cause, as it is an appeal from a judgment of my own. But I hope I have brought my mind unbiassed to the decision; and, if I know the operations of that mind, the very circumstance that this may be considered as an appeal from myself to myself, instead of producing a bias in favour of that judgment, would rather produce a bias against it; or at least render me so sensible of the great duty I had to perform, as to induce me to examine the whole circumstances of the case with peculiar attention and accuracy.

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I think I can also truly represent that, at the commencement of the hearing of this cause, I had

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no more recollection of it than of a cause which I had never heard; although, unquestionably, in the course of the hearing my memory was refreshed, and I came more quickly to an accurate understanding of the case than I could otherwise have done.

There are two questions in the cause altogether distinct, and depending on very different principles, both of them, however, questions of so much difficulty, that I shall, with your Lordships' permission, state my own opinion on the question as to the Ruddington estate now, reserving the other point till Wednesday.

Case of the
Ruddington
estate.

To attend a little to the pedigree of the family: it appears that Sir T. Parkyns, on his marriage with his first wife Elizabeth, made a settlement about the year 1685, as nearly as can be collected, by which the issue male of that marriage were made tenants in tail of the estates comprised in it. His wife, it seems, proved unfaithful, and eloped from him, and he takes notice of that circumstance in a codicil to his will.

In 1727, he married Jane Barratt, and had issue a son, Thomas, &c.

By his first wife it appeared that he had issue a son, Sampson, and also other issue not material to state, as they all died without issue, and there was no claim under them. Sampson married Alice Middlemore, and had issue Thomas, his son, who married Elizabeth Woodroffe, who is often mentioned in these deeds. Thomas made a will, which has no bearing on this question, and died. Then in 1800 the state of the title was, that Sir Thomas Parkyns was tenant in tail of the Ruddington

estate, under his father's settlement. But the question was, whether the will, made by old Sir Thomas Parkyns, in 1735, was not opposed to that so as to raise a case of election, and give him only a restricted interest.

It becomes necessary, as to these Ruddington estates, to state that, on the 2d and 3d-March, 1697, Thomas Winford conveyed to Sir Thomas Parkyns and his heirs "all that the manor and lordship of Ruddington, in the county of Nottingham, with the rights, members, and appurtenances thereof: and all the several messuages, cottages, lands, &c. in Ruddington aforesaid, then, or late in the several tenures or occupations," of the several persons named: "and all other the manors, messuages, mills, lands, &c. of the said Thomas Winford, or wherein he or any person or persons in trust for him had any manner of estate in reversion, remainder, or expectancy in Ruddington aforesaid."

This conveys not only all the lands, &c. in the possession of Winford, but *ipsissimis verbis*, the manor or lordship of Ruddington, with the rights, members, &c. and all other the manors, messuages, mills, lands, &c. which he had in reversion, remainder, or expectancy in Ruddington; and one need use no argument to show that it is to be presumed *primâ facie*, that Sir Thomas meant in his will of 1735 to pass only what was his own, if he had property answering the description in the instrument; and, if you cast your eye over this deed, you will find the same distinction made as in the will of 1735, with respect to lands and manors.

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1727. Settle-
ment of old
Sir Thomas
Parkyns on
his second
marriage, by
which estates
tail are given
to the sons of
the marriage.

Being then possessed of this estate, he makes the settlement of 1727 on his marriage with Jane Barratt. The parties to that deed were himself of the first part, Jane Barratt of the second part, John Bley and Samuel Sterropp, of the town of Nottingham, gentlemen, of the third part, George Barratt, father of Jane, and John Walters of the fourth part, Henry Sherbrooke and Richard Porter of the fifth part, and Samuel Smith and Abel Smith of the sixth part. And, by that settlement, in which no mention whatever is made of the manor of Rudington, Sir Thomas Parkyns, for the considerations and purposes therein stated, conveys all the messuages, farms, or tenements, &c. situate at Rudington; and the reversion, &c. to hold to Bley and Sterropp and their heirs to the use of himself, Sir Thomas Parkyns, for life: and as to part of the said messuages, farms, lands, &c. to the use and intent that Jane Barratt, after the decease of Sir Thomas, should take thereout a clear annuity of 200*l.* for her jointure and in bar of dower; and then to the use of George Barratt and Joseph Walters, &c. for ninety-nine years, for better securing the regular payment of the annuity: (here I mark the circumstance that Jane Barratt became entitled to an annuity of 200*l.* which over-rode all the limitations made by the will:) then as to the lands, &c. charged, to the use of Sherbrooke and Porter, &c. for 500 years, *sans* waste, upon the trusts after mentioned; remainder to the use of the first and other sons of the marriage successively in tail male, remainder to the use of Samuel and Abel Smith, &c. for 600 years, *sans* waste, upon the

trusts after mentioned; remainder to the use of the right heirs of Sir T. Parkyns. Feb. 23, 1818.

“ And the trusts of said term of 500 years are
 “ declared to be for raising portions for the younger
 “ children of said marriage, *viz.* 1,000*l.* for one
 “ younger child, 1,600*l.* for two younger children,
 “ and 2,000*l.* for three or more younger children,
 “ the said portions to be paid at such times and in
 “ such manner as in the now abstracting indenture
 “ is mentioned: provided that if any younger child
 “ entitled to a portion should die or become an
 “ eldest son before his or her portions should be-
 “ come payable, his or her portions to go to the
 “ survivors: provided, that if all such younger
 “ children should die before any of their portions
 “ should become payable, then such portions not
 “ to be raised, but sink into the estate; and if there
 “ should be no younger children of said marriage,
 “ or being such, all of their portions should be
 “ paid by the person entitled to the reversion of the
 “ premises expectant on the determination of said
 “ term of 500 years, then the said term to cease:
 “ and the trusts of said term of 600 years were
 “ declared to be for raising such portions for daugh-
 “ ters of said marriage (in case of there being no
 “ issue male) as are above appointed to be raised
 “ for the younger children of said marriage, payable
 “ as in the now abstracting indenture is mentioned,
 “ with the like provisoes, as to the shares of such
 “ daughters as should die before their portions be-
 “ came payable, as are above mentioned respecting
 “ the shares of the younger children of said marriage;
 “ the said term of 600 years to cease in case of there

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“ being no daughters of said marriage, or on payment
 “ of the said daughters’ portions by the person entitled
 “ to the inheritance of the same premises expectant
 “ on the determination of the said term; and re-
 “ citing in the now abstracting indenture of release,
 “ that the messuages, farms, lands, and heredita-
 “ ments above granted and released, lay contiguous
 “ to the mansion-house of the said Sir Thomas
 “ Parkyns in Bunny aforesaid, and to several farms,
 “ lands, and hereditaments in Bunny aforesaid,
 “ which, by virtue of a settlement theretofore made,
 “ stood limited to the issue male of the said Sir
 “ Thomas Parkyns, which issue male was Thomas
 “ Parkyns, Esq. the son of Sampson Parkyns, Esq.
 “ deceased, who was the eldest son of said Sir
 “ Thomas Parkyns, party to the now abstracting
 “ indenture: It was thereby agreed and declared,
 “ that if the said Thomas Parkyns the grandson,
 “ or, in case of his death, the person entitled to
 “ the said estate at Bunny aforesaid, should at any
 “ time after the death of said Sir Thomas Parkyns
 “ be desirous to purchase the inheritance of the
 “ lands above granted and released, and should pay
 “ unto the said John Bley and Samuel Sterropp or
 “ the survivor, &c. the sum of 13,000*l.* for the
 “ purposes after mentioned, then, immediately after
 “ payment of said 13,000*l.* the uses, trusts, &c.
 “ before declared of and concerning the said mes-
 “ suage, lands, and premises above granted and re-
 “ leased, should cease and be void, and from thence-
 “ forth the said messuage, lands, and premises
 “ should enure, and the said John Bley and Samuel
 “ Sterropp and the survivor, &c. should stand seized

“ thereof, to the use of the said Thomas Parkyns
 “ the grandson, or such other heir at law as should
 “ be entitled to the said estate at Bunny, paying
 “ the said 13,000*l.* as aforesaid, and to his heirs and
 “ assigns for ever: The said John Bley and Samuel
 “ Sterropp to be possessed of the said 13,000*l.*
 “ upon trust to lay out the same upon freehold es-
 “ tates in the county of Nottingham to be settled
 “ to the same uses, &c.: the said 13,000*l.* and in-
 “ terest in the mean time to be subject to the same
 “ uses and trusts, &c.” There is in this settlement
 a clause which, although not printed, is very mate-
 rial, that if Sir T. P. should advance for the younger
 children in his life-time to the amount of the por-
 tions, this should be a satisfaction, or if he ad-
 vanced a part, it should be in part, or so far, a
 satisfaction. Without entering into the subject at
 length there are cases where, when a provision is
 made for younger children by will, an advancement
 to the amount in the life-time of the testator is held
 to be a satisfaction. And this is material, as your
 Lordships will see by what he did in the will, that
 instead of making the provision there a satisfaction
 of what was due under the settlement, he says that
 it was in addition to the provision in the settlement.
 He takes notice, your Lordships observe, in the set-
 tlement that the lands lay contiguous to the mansion
 house at Bunny, which stood limited to the issue
 male of his first marriage; and if it had stood there,
 limited to the issue male of Sir Thomas Parkyns,
 it might, by possibility, have included not merely
 his grandson Thomas, but the supposed issue of Sir
 T. P. whether his own or not. But he by this par-

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Will of old Sir
T. Parkyns.
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particular description confines it to Thomas, the son of his eldest son Sampson. I call your Lordships' attention to this, as he might be considered as having regard to the circumstance that illegitimate male issue, who might in contemplation of law be legitimate, might be included. The next instrument to which I call your Lordships' attention is the will of August, 1735. And Sir Thomas makes this will after he had made the settlement of 1727, not including in that settlement the manor of Ruddington, of which for any thing that appears he had the fee, and having the reversion in fee of the Ruddington estates. After directing the payment of his debts, funeral and testamentary expenses, he gave and devised—“ All and singular his manors, lands, tenements, and hereditaments, situate, lying, and being in the several towns, parishes, fields, precincts, or territories of Bunny, Bradmore, *Ruddington*, Costock, otherwise Cortlingstock, East Leake, otherwise Great Leake, Wysall, Willoughby, Reyworth, and Gotham, in the said county of Nottingham, or in any of them; and all other his lands, tenements, rents, and hereditaments, lying and being in the said county of Nottingham, and the advowsons of all churches in the several towns and parishes of Bunny, Reyworth, and Costock, otherwise Cortlingstock, above-mentioned; and all his lands, tenements, and hereditaments in Wymeswold and Barrow-upon-Soar, in the county of Leicester, and a fee-farm rent at Bolsover, in the county of Derby, together with an annuity or rent-charge of 100*l.* per annum issuing

“ out of the river Wey, near Guildford, in Surry; Feb. 23, 1818.
 “ and all and singular his chief rents and fee-farm
 “ rents issuing or payable out of any of the said
 “ towns before-mentioned, or any of them, or out
 “ of any lands or tenements in the precincts of the
 “ said towns.

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“ Unto John Sherwin, of the town and county
 “ of Nottingham, Esq. Richard Porter of Arnold,
 “ in the county of Nottingham, Esq. Abel Smith,
 “ of the town and county of the town of Notting-
 “ ham aforesaid, Esq. George Barratt of the city
 “ of York, woollen-draper, and Samuel Sterropp
 “ of the town and county of the town of Notting-
 “ ham aforesaid, Gent. their executors, adminis-
 “ trators, and assigns, for the term of ninety-nine
 “ years, to commence from his (testator's) death,
 “ upon the trusts, and to and for the ends, intents,
 “ and purposes thereafter mentioned, &c. And
 “ from and after the determination thereof.

“ To his eldest son, Thomas Parkyns, by his
 “ then wife, Dame Jane Parkyns for life; re-
 “ mainder to the said John Sherwin, Richard
 “ Porter, Abel Smith, George Barratt, and Samuel
 “ Sterropp, their heirs and assigns, for the life of
 “ the said Thomas Parkyns, upon trust, to preserve
 “ contingent remainders; remainder to the first son
 “ of the body of his said son Thomas Parkyns,
 “ lawfully begotten in tail male; remainder to the
 “ 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and all
 “ and every other son and sons of the body of his
 “ said son Thomas Parkyns, lawfully begotten, se-
 “ verally and successively, in tail male; remainder
 “ to George Parkyns, testator's second son, for life;

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“ remainder to the said John Sherwin, Richard
 “ Porter, Abel Smith, George Barratt; and Samuel
 “ Sterropp, for the life of the said George Parkyns,
 “ upon trust to preserve contingent remainders; re-
 “ mainder to the first son of the body of the said
 “ George Parkyns in tail male; remainder to the
 “ 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and
 “ all and every other the son and sons of the body
 “ of the said George Parkyns, lawfully begotten,
 “ severally and successively, in tail male; remainder
 “ to all and every other the son and sons of the said
 “ testator’s body, lawfully begotten, or to be be-
 “ gotten, severally and successively, in tail male;
 “ remainder to testator’s daughter, Ann Parkyns,
 “ in tail male, with the ultimate remainder or re-
 “ version to testator’s own right heirs for ever:
 “ Proviso, that no wilful waste should be com-
 “ mitted on all or any part of the said estate thereby
 “ limited, or that the person or persons for the time
 “ being entitled to the same by virtue of the said
 “ limitations, should make sale of, cut down, or
 “ destroy, any timber or other trees standing on
 “ said estate (except as therein excepted, and sub-
 “ ject to certain restrictions therein mentioned).”

Now the utmost construction that can be given to this, *primâ facie*, is that he means to dispose of such estates at Ruddington as were his own; and these were only the manor and the reversion. But although it appears, *primâ facie*, that he meant to pass only what was his own, yet if the context shows that he means to propose a case of election, and chooses to consider that which was not his own as his own, for the purposes which he had in view

in making his will, the expression *my* manor, lands, &c. will not prevent a case of election from being raised. And all the cases from that of *Noys v. Mordaunt*, which is usually considered as the first, though I rather think it is not the first, case on the subject, to the present time, election amounts to this. If I choose to devise my real estate to the Noble Marquis opposite, I put it in this way because the illustration will make it more familiar; and in the same will I dispose of an estate which is not mine but his, a court of equity will say that he shall take no benefit from that will unless he makes good the whole of the will: and the Noble Marquis would not take therefore, unless he allows the whole of the will to be effectual, *i. e.* suffers his own to be disposed of according to the will or makes compensation for as much as he takes of mine. That is election. But *primâ facie*, it is not to be supposed that a testator disposes of that which is not his own. It must be by demonstration plain, by necessary implication, meaning by that the utter improbability that he could have meant otherwise, that the case is raised. But where there is that plain demonstration, that necessary implication, then you must give up all to pass according to the will, or make compensation. But it rests upon those contending for a case of election to show that there is that manifest plain demonstration, and utter improbability. So that the question comes to this, whether it is just reasoning in this case to say that there is that clear manifest declaration of intention which raises a case of election. Now it is unquestionable that if by these words describing the premises

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1 Ves. Jun.
514.

he intended to devise a present interest in the premises in which his first son Thomas had an estate tail, that amounts to a case of election; but that did not touch the term of ninety-nine years for the regular payment of the wife's annuity, nor the term created for the purpose of raising portions. The testator then devises and bequeaths a fee-farm rent and a rent charge, as a provision for his second son George. And if he had stopped there, this case would have been similar to that of *Blake v. Bunbury*. But it does not stop there, for he shows that he had in view the settlement of 1727, and declares that this provision was in addition to any portion given to George by that settlement which he expressly *ratifies and confirms with every thing therein contained*. Now in order to raise a case of election, you must either strike out these words, or you must say that these words have the same meaning as those in *Blake v. Bunbury*, *i. e.* that he confirms the settlement only as far as respects the portion given by it to George. George also had an estate tail by the settlement, and he must be supposed to intend to continue that, and to destroy the estate tail of Thomas, or to confirm the settlement, except in so far as respects the estates to Thomas and George; but he has said that he confirms it and *every thing therein contained*. And upon what principle you are to strike out these words of such mighty import, and without any express declaration to warrant it, is more than I am able to state.

Then he declares the trusts of a term to be that the trustees should lay out the rents and profits of

the premises comprised in the terms, first for the maintenance and education of his sons Thomas and George Parkyns, and then in the purchase of lands, &c. to be settled to the same uses as the premises before devised. Then recollecting that he had a daughter, Ann, he gives her 1,000*l.* at her age of twenty-one, or marriage, which should first happen; and then in case of her death before twenty-one and unmarried, he directs that the 1,000*l.* should not be raised, but sink into the residuum of his personal estate; and this 1,000*l.* observe, is over and above the 800*l.* to which she was entitled under the settlement.

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Then he empowers his son to give a jointure to a wife; and it is not immaterial, when we come to consider the case of the Great Leake and Thorpe estates, that the jointure was to be 100*l.* for every 1,000*l.* fortune brought by the wife. This I say is material, because you will see that the value of the fortune of Jane Parkyns is, upon this principle, such as to entitle her to such jointure or nearly so as was provided for her by the settlement made after the act of parliament, of which your Lordships heard so much in the course of the argument.

Then there is a power to Thomas Parkyns, &c. to demise for twenty-one years at the rents mentioned, together with certain boons and services to which the tenants were to be bound: and it has been said that, connecting this with the boon coals afterwards mentioned, Sir Thomas devised an immediate estate in the lands and premises at Rudington. My opinion, however, is that, when a

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testator expressly confirms a settlement and every thing therein contained, you cannot, as against that express declaration of intention, take it by conjecture, call it demonstration plain, or necessary implication, or what you will, but still only conjecture, that he does not mean to confirm : and that you cannot reasonably conclude that, because he uses expressions which apply to some and not to others of the subjects devised, he contradicts himself, and does not mean to confirm, although he says that he does confirm ; and all upon the ground of these nice, critical observations.

Then he directs his trustees to advance a sum not exceeding 200*l.* to each of his sons for their maintenance while at school, the university, or inns of court ; and it has been contended that, considering the fortunes to which the sons would be entitled, he could not have thought it necessary to give the 200*l.* for the maintenance and education of his sons, unless he had intended to raise a case of election. But we should make wild work if we were to draw such an inference from the mere circumstance that the father gives so much for the maintenance and education of his sons, meaning merely that they should not have the power of spending more during their minority.

Then the testator imposes conditions with respect to certain guns, iron trunks, and also certain medals which the son Thomas had as the gift of his grandfather. That raises a clear case of election as to the medals, which the son had as the gift of another person : and the single question is this, whether, as he has raised a case of election as to these medals,

he can be considered as having undone that settlement which he has, in express terms, ratified and confirmed, with every thing therein contained. That appears to me by far too strong an inference.

Then comes the directions with respect to the boon coals, and it has been argued that because this applies to both the Bunny and Ruddington estates, you are to shut out of the will the words "every thing therein contained;" but it is impossible to give that provision an effect which would destroy other parts of the will.

I notice also that he here mentions a gentleman of the name of Weekes who, it appears, had married his sister, and this is material with respect to the Leake and Thorpe estates, as that gentleman must have known something as to the titles.

Then he gives rings of a certain value to the judges, &c. And here I notice a circumstance which has some, though not much bearing upon the other question, but which is not to be overlooked, that among those to whom he gives rings Francis Lewis is mentioned, who was the trustee in the will of Thomas Parkyns, and therefore must have been on terms of intimacy with the family, and have had some knowledge of its affairs. In that same month, August, 1735, the day following the day of the date of his will, he takes into consideration the possibility of his first wife Elizabeth having brought into the world any children after she left him, and he says in a codicil "Whereas Dame Elizabeth Parkyns my late wife did, for the three last years before she left Bunny, elope from my bed and lie separate in another, and afterwards eloped and

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“ parted from me and lived in London for many
“ years, &c. and never returned, but there died, &c.
“ And whereas it may so happen or hath, that my
“ said wife may have had one or more child or chil-
“ dren during the three years she left my bed, and
“ went up to London, or during her elopement
“ thither, &c.” Now the use I make of it is this,
that it manifests that he had it in his mind that Eli-
zabeth, who had lived in his house for some time,
during which she had not been in his bed, might
still have had some children whom the law might
construe to be legitimate; and that if the settlement
made on his first marriage gave the estates to all the
issue of that marriage, a difficulty might occur in
giving even the Bunny estate in possession to the
children of the second marriage. It was usual in
old instruments to give a shilling to those who
would in law have been entitled, and to near re-
latives, from a notion, a very false one, that this
was necessary in order to exclude them: and he
therefore gives each of these children, if any, a
shilling and no more. But it is too much to say that
therefore he meant to take, or thought he could so
take from the children of the second marriage, the
interest which they before had, if they had it.

In the third codicil, he gives a further sum
of 500*l.* to his daughter Ann. He does not say
there that this was to be in addition to her pro-
vision under the settlement; but having given her
before 1,000*l.* which he says was in addition, so
this too must be in addition. But in the last
codicil, that of 1740, he does say that the sum
there given to Ann was in addition. And it is

necessary here to advert to a circumstance which was overlooked in the course of the argument with respect to the Leake and Thorpe estates, in which it was contended that certain persons might be considered as guardians by implication; but there is an end of all doubt as to that, since in this will he expressly appoints the trustees guardians of his children.

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This is the whole of the will; and the question here is, have you that demonstration plain or necessary implication, looking at the whole of this will as I have stated it, that he meant to dispose of the estates tail of his sons under the settlement, and to convert them into estates for life only, with remainders to their first and other sons in tail? Have you that manifest declaration plain? With respect to that, I say that it is difficult in any case to apply the doctrine of election where the testator has some present interest in the estate disposed of, though it may not be entirely his own. In this case he had a present interest: he has a manor in which, for any thing that appears, he had the entire fee; he has the reversion in fee of the whole estate, and he has expressly confirmed the settlement of 1727 in all its parts; so that it was impossible in this case to contend that he forgot the settlement, which, with every thing therein contained, he expressly ratifies.

There are many cases under this head; but they all amount to what I have already stated. One case which I argued, in 1792, was referred to, that of *Blake v. Bunbury*. The case was this: Sir Patrick Blake, in a settlement made on his marriage in 1762, for the considerations therein mentioned,

1 Ves. Jun.
515.

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and for making a provision for the eldest son of the marriage, granted to trustees and their heirs, a clear rent charge of 2,000*l.* per annum upon his estate in the island of St. Christopher's, payable half yearly out of all and singular the lands, tenements, &c. in trust for the first son of the marriage in tale mail; remainder to the second and other sons in the same manner; remainder to himself in fee. To secure this rent charge, a term of 2,000 years was vested in other trustees, upon trust, to permit Sir Patrick Blake to receive the rents, &c. There was a proviso that the rent charge should cease if Sir P. Blake should settle lands of equal value in Great Britain upon the persons to whom it was limited. By this settlement there was also a charge of 20,000*l.* for the younger children, after the death of their mother. The will was made in 1784. He had no real estate in St. Christopher's, except the estates charged. By the will he devised all his real estates in St. Christopher's and Great Britain to trustees in fee, upon trust, as soon as conveniently might be after his decease, to convey those estates for a term of 500 years, and subject to that, to the use of his eldest son in strict settlement; remainder in the same manner to his second and third sons, and to his daughters successively, with other remainders over, with directions that all persons who were to take should take the name of Blake; and it was contended that the eldest son must make his election: and to show your Lordships upon what nice grounds these cases are sometimes argued, it was contended, that this was not like a devise of an estate, A. and another, B. but that the 2,000*l.* rent

charge was not parcel of the estate; that he must mean lands; and that he had nothing of his own but the lands. Then the testator in that case, after specifying the trusts of the 500 years' term, makes another provision for his eldest son out of an estate in Montserrat, and gives him his house in Portland-place, and then follows a very material clause: "And I do hereby ratify and confirm the settlement whereby my younger children, J. H. Blake, and Annabella my daughter, by my former wife, are entitled to 20,000*l.* in equal proportions;" and it was argued there, as it might be here with respect to George and Ann, that if he meant to confirm it in that particular, and not in other respects, a case of election arose. But that is not the whole; for he further says; "So far as the same relates to my said children." So then he, having no present interest in the St. Christopher's estate, gives these interests, and takes notice of the settlement, and confirms it, so far as relates to the younger children; from which it was argued that he did not mean to confirm it, in all respects, as he has here done, when he says, that he confirms it and every thing therein contained. The Court says: "It is the settled doctrine of a court of equity, and agreed on all sides, that no man shall be allowed to disappoint a will under which he takes a benefit. To put the strongest instance at once, if a man takes upon himself to devise to B. lands to which he has no colour of title, and which are in the possession, or are the inheritance of A. to whom some part of the testator's estate, real or personal, is also devised; A. must either

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1 Ves. 528.

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“ renounce, to the extent of his own estate, the
 “ estate devised, or must convey his own estate to
 “ B. It is but a modification of the same case,
 “ where a man has subjected his estates to special
 “ limitations or incumbrances, and by his will
 “ makes a new disposition of the same estate, free
 “ and discharged from the incumbrances, or under
 “ different limitations: the incumbrancers deriving
 “ other interests under the will, if they will take
 “ by it, must not disappoint it; but must permit
 “ the estate to go in the new channel, and as free
 “ from incumbrances as the testator intended.
 “ Therefore, as to the argument from the supposi-
 “ tion, that this had been a mortgage instead of a
 “ rent charge, if it was so, and the estate had been
 “ disposed of by the testator, free from the mort-
 “ gage, the case would be the same, only in dif-
 “ ferent words, for a mortgage comes under the
 “ head of incumbrance. This putting a devisee to
 “ his election, however reasonable and just it may
 “ be, was certainly a very strong operation of a
 “ court of equity; and I agree, the intent of the
 “ testator to dispose of that which is not his, ought
 “ to appear upon the will, with such explanation,
 “ however, of the *prima facie* appearance as the
 “ law admits; and that it ought to appear by de-
 “ claration plain or necessary conclusion from the
 “ circumstances: and no man ought, under pre-
 “ tence of this rule, to be spelt or conjectured out
 “ of his property. But as on the one hand we are
 “ not to do it by conjecture; so on the other, we
 “ are not to refuse our assent to that moral certainty
 “ and demonstration which, in such cases as the

“ present, the general object of both instruments, Feb. 23, 1818.
 “ the nature of the subject, the scope and purview
 “ of the will, the observations upon the particular
 “ clauses, and the force of the expressions, con-
 “ strued, according to their natural import, may
 “ produce.” The Court was of opinion that that
 was a case of election. These are the principles,
 and such the determination.

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Here it was not necessary to mention the reversion. I think, it would pass under the general words, whether particularly mentioned or not, for we must suppose that the testator meant to pass all belonging to himself that may be included in the words. But I ask whether, looking at the whole of this will taken together, it can be justly said, that the testator meant to pass an immediate interest, having the reversion only? This is a case, in which the testator expressly declares that he means to confirm the settlement and every thing contained in it; and not one in which he says that he confirms it in one particular, leaving it open to the inference, that he means to destroy it in all other respects. That is not all. It is the case of a testator making a provision for his younger children, in addition to that which they had under the settlement, and, at the same time, confirming the settlement not as to them only, but as to every thing therein contained; and not only that, but of a testator who had a manor which would satisfy the words of the devise.

Vid. Welby v.
 Welby, 2 Ves.
 Beam. 191.

I do not deny, no man can reasonably deny, that, if the testator had been asked, when he made his will, and it had been read over to him, whether he meant to devise the reversion only, or the posses-

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sion also, he could not but admit that with respect to these boon coals, and some other minor particulars; there was an ambiguity. But what can you do in a case where he himself has expressly declared that he did not mean to dispose of that which was not his own; and confirms the settlement and every thing therein contained.

If then there is an ambiguity, we must, notwithstanding, confirm the settlement in all respects as the testator himself has done, and my humble opinion on that point is exactly the same as it was in 1809.

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Case of the
Leake and
Thorpe estate.

Lord Eldon, (C.) I propose this day merely to state particularly the nature of the title to the Great Leake and Thorpe estate, reserving the consideration of the doctrines in law and equity, upon which the question is to be decided, till the next day of causes.

Additional
circumstance
as to the case
of Rudding-
ton estate.

But first permit me to mention a circumstance, with respect to the Ruddington estate, which I forgot the other day, a circumstance not essential to the decision of that question, but of sufficient importance not to be overlooked. The question there was, whether the will of Sir T. P. in 1735, proposed a case of election as to the Ruddington estate, that is, whether after having settled the Ruddington estate upon his first and other sons in tail male, he meant to devise that estate under the will; and his son Thomas, being himself tenant in tail, independent of the will, whether, if he chose to take under the will, he was bound to allow his interest in that estate to be reduced, so as to make him tenant for life with remainder to his first and other

sons in tail male. In 1756-7, proceedings took place in the Court of Chancery confirmatory, in some of its stages, of my opinion. Your Lordships will recollect that the Ruddington estate was one of the subjects of property then in dispute; that Thomas and his brother were to be allowed only 200*l.* a year each, and that the surplus rents and profits were to be formed into a fund for the purchase of lands to be settled to the same uses as those before limited; the consequence of which would be, that if there was a surplus of the rents and profits of the Ruddington estate, it would be a fund for the purchase of other lands. The property was under the care of the Court of Chancery; and Sir Thomas Parkyns, who was tenant in tail under the settlement of 1727, applied to the Court, stating that a receiver had been appointed, not only of the Bunny estate, but also of the Ruddington estate, of which he was tenant in tail; and that the rents and profits of that estate were his, and were not affected by the dispositions in the will of Sir Thomas Parkyns, of August, 1735. It became therefore necessary to consider the question of election with reference to that point; and the Court, adopting the opinion of the master, ordered the rents and profits of the Ruddington estate to be paid to him. It is quite impossible that the Court should not have looked at the question of election, as the petition proceeded on the ground of the distinction; so that my opinion was then acted upon. And subsequent to the will of 1735, a mortgage was made of that estate, upon the notion that the son was tenant in tail, and might suffer a recovery, and

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Title to the
Leake and
Thorpe estates.
1707.

Articles on
the marriage
of Sampson
Parkyns.

that the will did not pass the Ruddington estate, in which the testator had no present interest, but a manor, and the rest in reversion. The question as to the Leake and Thorpe estate is different.

Now the title to the Leake and Thorpe estates seems to depend on the following instruments. The first of these is, the articles of agreement made on the marriage of Sampson Parkyns, the son of Sir Thomas Parkyns, by his first wife, and Alice Middlemore, reciting that Alice Middlemore was a minor, and seized of two parts, and entitled in reversion, on the death of her mother, to the other third part of certain premises mentioned; and that the mother was willing, in consideration of the marriage, to release her interest in the premises. By that instrument, it was witnessed that the mother covenanted to release accordingly, and that Alice should, on her coming of age, sell the premises; and that the moneys arising from the sale should be paid to Sir Thomas Parkyns, the father of Sampson: and Sir Thomas and Sampson Parkyns covenanted to settle lands in the counties of Nottingham, Lincoln, Derby, &c. of 100*l.* yearly value for every 1,000*l.* that might be received by Sir Thomas from such sale, to the use of Sampson Parkyns for life; remainder to the said Alice for life; remainder to the first and other sons of the marriage in tail male, with several remainders over; the ultimate remainder to Sir Thomas Parkyns in fee. The marriage took effect, and Sampson died, leaving Alice and one son, Thomas Parkyns, the maternal grandfather of the Appellant's father.

Settlement in
1716.

These articles were partly carried into execution

in 1716, after the death of Sampson Parkyns ; and the parties to the settlement were Sir Thomas Parkyns of the first part ; Alice Parkyns, relict of Sampson, and her mother, of the second part ; Andrew Haskett and William Porter of the third part ; and Sir Richard Cust and Thomas Carter of the fourth part. Here I would notice the names of Porter and Carter ; and it is a circumstance which deserves attention, that persons are so often named, who were relations of the parties and witnesses to many of the deeds, and probably knew something of the effect of them. And here I observe that, as in the case of the Ruddington estate, there was a manor as well as lands ; and some of the instruments included both, and some not ; so here, in the case of the Leake estate, where there is also a manor as well as lands, the manor is omitted in some of the instruments, and included in others. The settlement witnessed that in pursuance of the articles Sir T. Parkyns conveyed to Haskett and Porter all these several pieces, or parcels of ground, and inclosures, lying and being within the liberties and precincts of Thorpe in Glebis, in the county of Nottingham, therein described, and all those lands and hereditaments, lying in Great Leake, also particularly mentioned,—(not here including the manor or the mansion-house), to hold to the use of Alice Parkyns for life, remainder to Thomas Parkyns, the only son of Sampson and Alice, in tail male, remainder to Cust and Carter for 1,000 years in trust, &c. remainder to Sir Thomas Parkyns for life, remainders to the third (Sir Thomas having had two sons before, both dead) and other sons

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of Sir T. Parkyns in tail male, remainder to the right heirs of Sir Thomas Parkyns. The trusts of the term were to make a provision for daughters in case of failure of issue male. Your lordships will observe, with respect to all the lands which pass by this deed, that the life estate of Alice, and the estate tail of Thomas, her son by Sampson Parkyns, are prior to the life estate of Sir T. P.; and I mention that, because, if he, thus standing behind them, was in possession, as against Thomas, the son of Sampson, this might furnish a subject for suits, and probably did produce the suits referred to in the deed of 1736. This instrument was executed in 1716.

The next instrument to be considered is that of 1730, made upon a recovery about to be suffered by Thomas, the son of Sampson, who was tenant in tail of the premises under the settlement, which did not include the manor and the mansion-house. Thomas conveys to Thomas Woodroffe, with whom he was nearly connected by marriage, all that the manor or lordship of Great Leake, or East Leake, with the rights, &c. thereof; and the capital messuage, or mansion-house, in Great Leake, and the farms, lands, &c. in the occupation of the several persons mentioned, in Leake and Thorpe, in the county of Nottingham; meaning, therefore, to convey not merely the lands, but the manor and mansion-house in Leake. And the question is, whether it must not be taken that he had an estate tail in the manor and mansion-house, acquired in some manner which does not appear. But it is not at all uncommon to include, in fines and recoveries, pro-

perty, as to which these assurances are not necessary. The effect was to make Woodroffe tenant to the precipe for the purpose of the recovery. Then a mortgage of the premises was made to Cornelius Farr for 1,000*l.*, and then another for 1,500*l.*, and another for 400*l.*, making in all 2,900*l.* And a fine was levied in 5 Geo. 2. by which the dower of Elizabeth Woodroffe, the wife of Thomas Parkyns, was barred.

Then, on the 15th Nov. 1731, articles for a settlement were agreed upon, which, together with the settlement afterwards made in pursuance of them, deserve particular attention, between Thomas Parkyns, and Elizabeth his wife, of the first part; Sarah Woodroffe, mother of Elizabeth, of the second part; and Saville Cust and Thomas Woodroffe of the third part; reciting the indentures of mortgage to Farr; and that, for the more effectual securing the repayment of the mortgage money, Elizabeth Parkyns, at the request, entreaty, and persuasion of Thomas Parkyns, had, together with the said Thomas, acknowledged and levied the fine already mentioned: therefore, the articles witnessed that in consideration of Elizabeth Parkyns having levied the fine and barred her dower, and of 500*l.* paid to Thomas Parkyns by Sarah Woodroffe, Thomas Parkyns covenanted to convey to Saville Cust and Thomas Woodroffe, the manors, lands, &c. in Greak Leake, and Thorpe in the Clotts, to the use of Thomas Parkyns for life, remainder to the use of Elizabeth, his wife, for life. And then, as to the Thorpe estate, to the same persons for a term of 500 years, on trust to raise thereout 4,000*l.* for the daughter or daughters of the marriage; and,

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1731. Settlement by Thomas Parkyns and Elizabeth his wife.

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in default of such issue, to the right heirs of Thomas Parkyns. And as to the manor, mansion-house, and estates in Leake, to the use of the first and other sons of Thomas Parkyns, by Elizabeth his wife, in tail male, remainder to the right heirs of Thomas Parkyns. And it was declared that the fine should enure to the use of Farr till payment of the mortgage money, and then to use of the trustees for the purposes mentioned, or such other purposes as might be agreed upon between Thomas Parkyns and Elizabeth his wife. A settlement was afterwards made in 1732, reciting the articles, and by that settlement Thomas conveyed the manor and estates in Great Leake, and Thorpe in the Clotts, to trustees, to the use of himself for life, remainder to the use of Elizabeth, his wife, for life; and then as to the Great Leake estates, manor, and mansion-house, to their first and other sons in tail male, &c. remainder to trustees for 500 years, and then to the use of Thomas Parkyns and his heirs. The trusts of the 500 years' term were declared to be
 “ in case there should be no such issue male of the
 “ body of the said Thomas Parkyns upon the body
 “ of the said Elizabeth Parkyns begotten; or there
 “ being such issue, all of them should die without
 “ heirs male of their bodies, before any of them
 “ should attain the age of twenty-one years; that
 “ said Saville Cust and Thomas Woodroffe, or
 “ the survivor of them, or the executors or admi-
 “ nistrators of such survivor, should, by mortgage,
 “ sale, or demise of all or any part of said manors,
 “ capital messuages, lands, tenements, and here-
 “ ditaments, situate at Great Leake aforesaid, for all

“ or any part of said term of 500 years, or out of
 “ the rents and profits thereof, raise, within twelve
 “ months after the death of said Thomas Parkyns
 “ and Elizabeth his wife, 1,500*l.* and pay the same
 “ to Harriett Parkyns, only sister to the said
 “ Thomas Parkyns, towards the advancing her
 “ fortune: and in case said Harriett Parkyns
 “ should die before said Thomas and Elizabeth
 “ Parkyns, leaving issue of her body lawfully be-
 “ gotten, then to pay said 1,500*l.* to such her child
 “ or children living at her death, share and share
 “ alike, subject nevertheless to the proviso therein-
 “ after mentioned.

“ And as for and concerning all those lands, te-
 “ nements, and hereditaments lying in Thorpe in
 “ the Clotts, or in the fields, liberties, and precincts,
 “ and territories thereof, from the death of said
 “ Thomas Parkyns and Elizabeth his wife, or the
 “ survivor;

“ To the use of said Savile Cust and Thomas
 “ Woodroffe, their executors, administrators, and
 “ assigns, for 1,000 years, sans waste, upon the
 “ trusts, &c. therein-after declared; and after the ex-
 “ piration or other sooner determinaton of said term,

“ To the use of said Thomas Parkyns, his heirs
 “ and assigns for ever.

“ The said term of 1,000 years was thereby
 “ declared to be limited to said Savile Cust and
 “ Thomas Woodroffe as aforesaid, upon trust, in
 “ case there should be one or more daughter or
 “ daughters of the body of said Thomas Parkyns, on
 “ the body of said Elizabeth Parkyns begotten,
 “ living at the decease of said Thomas Parkyns and

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“ Elizabeth Parkyns, or the survivor, that said
 “ Savile Cust and Thomas Woodroffe, or the sur-
 “ vivor of them, or the executors or administrators
 “ of such survivor, should by mortgage, sale, or
 “ demise of the premises in Thorpe aforesaid, for
 “ all or any part of said term of 1,000 years, or by
 “ the rents and profits thereof, raise, after the
 “ death of said Thomas Parkyns and Elizabeth his
 “ wife, such portion or portions for such daughter or
 “ daughters, viz. if but one daughter 4,000*l.* if two
 “ or more 5,000*l.* equally to be divided amongst
 “ them, and payable at their respective ages of
 “ twenty-one years, or day of marriage, which
 “ should first happen, in case said Thomas Par-
 “ kyns and Elizabeth his wife should be then dead;
 “ and in case they should be then living, within
 “ twelve months after their decease, with mainten-
 “ ance not exceeding the interest of their respective
 “ portions and benefit of survivorship; and when
 “ the portions were raised, that said trustees, or the
 “ survivor, or the executors or administrators of
 “ such survivor, should, at the request of said Tho-
 “ mas Parkyns, his heirs or assigns, surrender the
 “ said estate and term to the said Thomas Parkyns,
 “ his heirs or assigns, or to such person or persons
 “ as he or they should direct or appoint.”

Here your Lordships will observe, that the daughter's portion was charged only on the Thorpe estate; and then, the mortgages to Farr affecting both the estates, she had a right to say to the mortgagee, you shall not apply any part of my fund to the payment of your mortgage, but shall be restrained to the other estate until you show that it is not

sufficient, in order that both of us may be paid. And your Lordships will recollect this circumstance, that under the will of Sir Thomas Parkyns of 1735, his son Thomas had a power of giving by way of jointure 100*l.* a-year, for every 1,000*l.* fortune brought him by his wife. The consequence is, that the daughter being entitled to 4,000*l.* her jointure would be 400*l.* a-year. This is material; and we are not left to speculate here on the value of the estates, as the rents are stated to be 338*l.* a-year. And although the 4,000*l.* was charged on the Thorpe in the Clotts estate only, if that estate should not prove sufficient to pay the sum, and there were other estates sufficient for that purpose, it is to be considered whether she had not a claim on the equity of redemption of the other estates to make good the deficiency. And there is a “ proviso, that said “ term of 500 years limited to said Savile Cust “ and Thomas Woodroffe as aforesaid, was upon “ this express condition; that in case said Thomas “ Parkyns should die, and not pay said sums of “ 1,000*l.* and 1,500*l.* and interest to said Cornelius “ Farr, his heirs, &c. nor leave sufficient assets to “ discharge the same, that then the said term of “ 500 years should cease and be void; and that said “ 1,500*l.* directed to be paid to said Harriett Parkyns as aforesaid, should not be raised or paid; “ and in case said Thomas Parkyns should in his “ life-time give said Harriett Parkyns, or the heirs “ of her body, the said 1,500*l.* that then said Savile “ Cust and Thomas Woodroffe, their executors, “ administrators, and assigns, should, at the request “ of said Thomas Parkyns, his heirs, or assigns,

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“ surrender the said estate and term to said Thomas
“ Parkyns, his heirs, or assigns; or if said Thomas
“ Parkyns should at any time pay said Harriett
“ Parkyns any sum of money towards the ad-
“ vancing her fortune, that the same should be taken
“ as part of the said 1,500*l.* unless the contrary
“ should be signified by writing under his hand and
“ seal.”

And this raises the question whether, when a man makes a provision in his will, it is to be taken as an advance in his life-time. And it is singular, that it has been so held, though the provision cannot take effect till after his death. Then a recovery is suffered in May, 1734, by Thomas Parkyns, of the mansion-house and lands in Great Leake, then late in the occupation of his mother Alice Parkyns, to the use of Thomas Parkyns and his heirs.

This is declared to be a recovery of his own property only; and I notice that, as it may admit of a different consideration from the other estates. In November, 1734, a further mortgage for 400*l.* was made to Farr.

May 9, 1735.
Will of T. Parkyns, who died June 1, 1735.

The title so standing up to 1734, a will was made by Thomas Parkyns in 1735, the same year in which the will of Sir T. Parkyns was made: and the short period that intervened between the death of Thomas and the will of Sir T. P. is to be noticed with reference to the probability or improbability of any acts done by him, Sir T. P. and Elizabeth, the widow of Thomas, in the interval. He directs that his estates at Buckminster should be sold by his executrix, for payment of his debts; she having this character which connected her with the

personal property: but she was to sell lands; and she could do that only if the will was duly executed; and she does afterwards sell, as appears from a deed executed in 1736. Then he devises all other his real estates to his wife Elizabeth, for life, remainder to Francis Lewis, the same, I suppose, who is mentioned in the will of Sir T. P., in trust for the benefit of the testator's only daughter, Jane Parkyns, during her life, and after her death in trust for her first and other sons and their heirs; and in default of issue male, in trust for the issue female of his said daughter: and in case of her death without issue, then for the testator's sister Harriett Farrier for life, and after her death for her sons and daughters, as before; and in default of issue of his sister, in trust for the testator's right heirs. And the testator by his will directed (this is material), "that after payment of his just debts, "legacies, and funeral expenses, the residue of his "personal estate which he was then possessed of or "anyways entitled unto from his grandfather Sir "Thomas Parkyns or otherwise, should be placed "out in the name of said Francis Lewis or his heirs "upon good security, as soon as the same might "conveniently be done; and that the interest "thereof should be paid to his said wife during "her life, and after her death to testator's said "daughter for her life, and afterwards that a purchase of lands should be made with the principal "money, and that the same should be settled in the "same manner as he had above settled the residue "of his real estate, on his said daughter and sister, "and their heirs male and female as aforesaid; and

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“ failing such issue as aforesaid, then that the same
“ should go to his own right heirs for ever; and
“ appointed his said wife Elizabeth Parkyns sole
“ executrix of his said will.”

There is a circumstance with respect to the attestation which deserves to be attended to; for your Lordships know that it is necessary that the three witnesses should sign in presence of the testator. They state here, that the testator signed it in their presence, but not that they signed in presence of the testator. But if it is proved that they did actually sign in the presence of the testator, the not recording that circumstance will not vitiate the will. But when the will is produced in a court of justice, it is necessary that the proof should be made; and if it were necessary for the decision of the question, it would be sent to a court of law, where a will, thirty years old, if the possession has gone under it, and sometimes without the possession, but always with the possession if the signing is sufficiently recorded, proves itself. But if the signing is not sufficiently recorded, it would be a question whether the age proves its validity: and then possession under the will, and claiming and dealing with the property as if it had passed under the will, would be cogent evidence to prove the duly signing, though it should not be recorded.

In 1735 a transaction took place, which it is difficult to account for, as to the mortgages to Farr, if the title to the estates rested upon the will, Elizabeth having only a life estate, her daughter a life estate, with remainder to F. Lewis in trust for others: the power of Elizabeth extending only to

the estates that were to be sold. But in November, 1735, a transfer of the mortgage took place, to which Elizabeth, who had only a life estate alone of those entitled, was a party, reciting the former mortgages and the will of Thomas Parkyns, and that 3,000*l.* was due to Farr for principal and interest, and reserving, on payment of 3,135*l.* the equity of redemption to those who might be entitled: a very important fact that Francis Lewis, the trustee, was no party to this deed, and yet that the interest was converted into principal, although it takes notice of the will, which did not allow Elizabeth to add the interest to the principal, he being no party. But so it is, that she, being only tenant for life, under the will, makes principal of the interest: a most unintelligible transaction, if the will passed the estates, and the title stood as it did on the will. And then in 1742, Eardley Wilmot, a great lawyer, takes an assignment of this mortgage, whether it was that he thought a lawyer taking it would frighten every one from challenging it, or for what other reason, I know not: but a more irregular transaction I have seldom seen, upon the supposition that the title to the estates depended on the will.

It was thought adviseable to bring Jane, the daughter of Thomas, the son of Sampson, the son of Sir Thomas Parkyns, by his first wife, and Sir Thomas Parkyns, the son of Sir Thomas Parkyns, by his second wife, together by marriage, and, they being minors, it was conceived, that an act of parliament was necessary to enable them to make a settlement. It appears that in the year 1746 ap-

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plication was accordingly made to parliament by a petition to this effect :

“ Petition to the Lords Spiritual and Temporal,
“ of Sir Thomas Parkyns, Baronet, an infant, eldest
“ son, and heir of Sir Thomas Parkyns, late of
“ Bunny, in the county of Nottingham, Baronet,
“ deceased, and of the said John Sherwin, Richard
“ Porter, and Samuel Sterropp, his trustees and
“ guardians ; and also of Jane Parkyns, spinster, an
“ infant sole daughter and heir of Thomas Parkyns,
“ Esquire, deceased, who was son and heir of Samp-
“ son Parkyns, Esquire; deceased, who was in his
“ life-time eldest son and heir apparent of the said
“ Sir Thomas Parkyns, deceased, by dame Eliza-
“ beth, his first wife, deceased ; and also of Eliza-
“ beth Parkyns, widow, mother of the said Jane
“ Parkyns the infant.” The petition, after stating
the will of the said Sir Thomas Parkyns herein-
before in part recited, stated—

“ That the said George Barratt died in the life-
“ time of the said Sir Thomas Parkyns, deceased,
“ and that the said Abel Smith did after his death
“ decline and had never acted in the said trust :

“ That the said petitioner, Jane Parkyns, was
“ seized and entitled to her and her heirs, of, in,
“ and to a share or shares in the New River, brought
“ from Chadwell and Amwell to London, valued
“ and estimated at 1,000*l.* and of one undivided
“ moiety of an estate at Sutton Bonnington, in the
“ county of Nottingham, of the yearly rent of 60*l.*
“ but charged with an annuity of 20*l.* for one life ;
“ and that she was also seized, to her and her heirs
“ in reversion expectant on the death of the said

“ Elizabeth Parkyns her mother, of and in divers
 “ other lands and hereditaments in the county of
 “ Nottingham, of the yearly rent of 338*l.* or there-
 “ abouts, but subject to a mortgage for 3,000*l.* and
 “ interest :

“ That the said John Sherwin, Richard Porter,
 “ and S. Sterropp, at the instance and on the be-
 “ half of the said Sir Thomas Parkyns, the infant,
 “ and the said Elizabeth Parkyns, at the instance
 “ and on the behalf of the said Jane Parkyns, her
 “ daughter, had respectively entered into a treaty
 “ for the marriage between the said Sir Thomas
 “ Parkyns and Jane Parkyns, the infants, and for
 “ settling a competent jointure on the said Jane
 “ Parkyns, and making provision for the daughters
 “ and younger sons of the said intended marriage
 “ out of the estates of the said Sir Thomas Parkyns,
 “ the son, in pursuance of the power given him by
 “ his father's will; and also for settling and dis-
 “ posing of the lands and real estate of the said
 “ Jane Parkyns, for the benefit of her and the said
 “ Sir Thomas Parkyns her intended husband, and
 “ their issue :

“ But that as the said Sir Thomas Parkyns the
 “ son, and Jane Parkyns, had neither of them at-
 “ tained the age of twenty-one years, such mutual
 “ settlement could not be made without the aid and
 “ authority of parliament. The petitioners therefore
 “ prayed, that a bill might be brought in to enable
 “ them, the said Sir Thomas Parkyns and Jane Par-
 “ kyns, the infants, with the consent of the other pe-
 “ titioners, their guardians and trustees, to make such
 “ settlement at their inter-marriage as aforesaid.

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 ment.

“ Signed by Thomas Parkyns, John Sherwin,
 “ Richard Porter, Elizabeth Parkyns, Jane Parkyns,
 “ and Samuel Sterropp.”

This petition was referred to the Lord Chief Baron
 Parker and Mr. Justice Abney, and, on their report,
 an act was passed, reciting, “ that the said Jane
 “ Parkyns was seized and entitled to her and the
 “ heirs of her body, remainder to her and her heirs
 “ of, in, and to a share or shares in the New River
 “ brought from Chadwell and Amwell to London,
 “ valued and estimated to be worth 1,000*l.*; and
 “ also seized or entitled to her and her heirs of, in,
 “ and to an undivided moiety of the manor of Sut-
 “ ton Bonnington, and of divers lands, tenements,
 “ and hereditaments situate, lying, and being in
 “ Sutton Bonnington aforesaid, which are therein
 “ mentioned, to be together of the annual rent of
 “ 120*l.* or thereabouts, and subject to annuity of
 “ 40*l.* payable to Stanhope Parkyns, Gentleman,
 “ for his life; and that she was also seized to her
 “ and her heirs in reversion, expectant on the death
 “ of Elizabeth Parkyns, widow, her mother, sub-
 “ ject to a mortgage or security made to Sir Henry
 “ Harper, Baronet, for the sum of 3,000*l.* and in-
 “ terest of and in the manor of Great Leake other-
 “ wise East Leake, and divers lands, tenements,
 “ and hereditaments, situate, lying, and being in
 “ Great Leake otherwise East Leake, and Thorpe-
 “ in-the-Clotts, in the county of Nottingham, of
 “ the yearly value of 338*l.* or thereabouts:” and it
 was thereby enacted, that it should be lawful for Sir
 Thomas Parkyns, with consent of his guardians,
 to settle 400*l.* a-year jointure on Jane, out of the

estates devised to him by the will of Sir Thomas his father, to raise portions not exceeding 500*l.* each, for younger sons or daughters of the marriage, and, in case he, and his intended wife, should survive Elizabeth her mother, to add 100*l.* a-year out of the devised estates to Jane's jointure. And that it should be lawful for Jane Parkyns, and the persons seized in trust for her and her heirs, with consent of Elizabeth her mother, John Sherwin, &c. to convey and settle all her estates to, and upon, such person or persons, and in such manner as might be agreed upon by her mother, Elizabeth Parkyns, John Sherwin, &c.; and the said Sir Thomas and Jane Parkyns; and that the mutual settlements should be as effectual as if the parties had been of full age, &c.

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On the one hand, it was contended that it was enough to say that the defendant was entitled under this act. On the other hand, it was contended that the act only gave her, Jane Parkyns, such power as she would have had if adult; and that it was not intended to give her a greater power than she had before, but merely to remove the disability of infancy. And there was this saving clause:—“ Saving
“ to the king, his heirs and successors, and to all
“ and every person and persons, both politic and
“ corporate, his, her, and their heirs, successors,
“ executors, administrators, and assigns, (other than
“ the said Sir Thomas Parkyns, his heirs and as-
“ signs, and the trustees, of said term of ninety-nine
“ years, limited of said premises as aforesaid, their
“ respective executors, administrators, and assigns,
“ and all other persons claiming under the devises

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“ and limitations of the said will, and other than
 “ the said Jane Parkyns, and the heirs of her body,
 “ and her right heirs, and all and every other per-
 “ son and persons seized in trust for her and her
 “ heirs), all such estate, right, title, interest, claim,
 “ and demands, of, in, to, or out of the premises,
 “ made subject to the powers given, vested, created,
 “ and established by that act, as they or any of
 “ them respectively had before the passing that act,
 “ or could or might have had or enjoyed, in case the
 “ same had not been made.” And it was contended
 at the bar that the Appellant was excluded from this
 saving, as being the heir of her body. On this I
 observe that he was heir of her body, and heir gene-
 ral; but it is not so clear that he was excluded as
 her eldest son; and he claimed as a purchaser, as
 her eldest son, under the will of his grandfather.
 For instance, if Jane had done any act incurring a
 forfeiture in his life-time, he could maintain a suit
 for the property as claiming under the will of his
 grandfather; and not claiming as heir of her body
 or heir general, which he could not do, on the
 maxim that *nemo est heres viventis*.

No bill was brought till 1800. If they were right
 in their construction of the act, that it did nothing
 more than remove the disability of infancy, these
 provisions can have no more effect than they would
 have had if made by the parties when adult. But
 it is still necessary to look at the act in this view.
 You cannot consider the guardians as making any
 fraudulent representations, and against their know-
 ledge, unless it is proved, to induce the legislature
 to pass this act. Jane had an estate for life under

the will; but the application to parliament does not prove that the guardians of Sir T. Parkyns knew Jane's title. That, however, will be better considered when we come to speak of the transaction by which he got the assignment of the mortgages, and had the entire estate in fee in himself at law, leaving no claim against him but in equity, an incapacity which is sought to be removed. Here I observe that the consideration of marriage is not like the consideration in other contracts. In a contract between A. and B. if A does not make it good on the one hand, B. is not bound on the other. But not so in the case of marriage: for if the mutual issue are purchasers, though it is not made good by one of the parties, the issue have a right to say, you shall each of you do what you can do, and we must not be disappointed. The case must be considered with reference to that. Then a settlement was made in 1747, which, it was contended, was not conformable to the act. Before I leave this part of the case, I call your attention to the circumstance that this will of Thomas, not Sir Thomas, was found in the possession of Sir Thomas Parkyns. But it cannot be represented that this was a concealment; as the will must have been proved in the Ecclesiastical Court, and a deed was executed in 1736, in which Elizabeth represents herself as devisee and executrix under that will.

It has been contended, that the answer of the defendant admitted that the will was duly executed, which leads at present only to this observation, that the Court must take care that the admission is very clear, before the defendant can be concluded by it.

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Feb. 25, 1818. But perhaps that is not material in some views of the case.

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In this examination I have two objects in view: 1st. To satisfy both parties, if possible, and with the more anxiety, as this is a judgment of my own. 2d. That when disputes arise between persons so nearly connected, these may be set at rest; or if not, that they may know that as much industry as possible has been bestowed upon the subject: and God knows it is difficult to satisfy both parties.

1736. Re-
lease from Eli-
zabeth Par-
kyns, the wi-
dow of Tho-
mas, to old
Sir T. Par-
kyns.

I now proceed to the deed of 1736, made the year subsequent to the will of Thomas, and of old Sir Thomas, who died at a later period; and that is made between Elizabeth, the widow of Thomas Parkyns, and Sir Thomas Parkyns. This deed recites her character of executrix under the will of Thomas, and speaks of the residue of the money arising from the sale of the estates which the will had directed to be sold by the executrix, and which could not have been sold by her without the intervention of somebody else, unless the will had been duly attested. She releases certain premises in Leake, as executrix and devisee, in both characters; and covenants for her daughter Jane, &c. &c. And this deserves attention for another reason, that one of the witnesses to the deed is Sterropp, who was a trustee in the will of old Sir Thomas, and probably, therefore, knew the state of the titles to the estates of both parties. How far this may go to fix notice upon Sir Thomas, the son, will be a question, and a very material one. But it would be dangerous to say, that merely because a man signed a deed, he therefore knew all its contents. That would be

rather dangerous with reference to the doctrine of notice. Feb. 25, 1818.

Then the mortgage is transferred, as I before observed, to Eardley Wilmot, and from him it is transferred to Sir Thomas Palmer: and there is a proviso that the equity of redemption should be reserved to Elizabeth in fee. This is a great inaccuracy; but in equity she could take it only for the benefit of the person who was really entitled. Then the mortgage is transferred from Sir Thomas Palmer to Richard Farrer. That name suggests another observation. In case Jane died without issue, the estate under the will would belong to Harriett, the wife of Richard Farrer. She then was as near a relation as any that existed, and the wife of a professional gentleman: and, on the death of Jane without issue, she would be entitled: and yet he stands by, and does not oppose the act of 1746; a very extraordinary thing, if Jane had only a life estate, and, on her death without issue, his wife would be entitled, that he should stand by, as if Jane had been entitled in fee. Then in 1780 the mortgage is transferred from the heir at law and surviving executor of Richard Farrer, to the Rev. Richard Farrer: and in 1792 it is transferred from the Rev. Richard Farrer to John Wright, who declares that his name was used only as trustee for Sir Thomas Parkyns, who insists that he has a fee simple in the equity of redemption, with the mortgage attendant upon it, and that the estate is his own entirely. But Lord Rancliffe, on the other hand, says, that the estate is given to him by the will of Thomas Parkyns, and is not affected by all these

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Feb. 25, 1818. transactions. When Lord Rancliffe came of age in 1776, he was induced to join in a settlement of these and other estates, from which settlement he derived some advantages. It is now admitted on all hands, that this is a case, not of fraud, but innocent ignorance: and the bill prays that the settlement made in 1776 may be set aside. It will be difficult to undo that settlement. But in point of fact, in 1776, Lord Rancliffe was ignorant of the title; and till the will was discovered in 1799, Sir T. Parkyns was also ignorant of it. Under these circumstances the bill was filed in 1800, twenty-four years after Lord Rancliffe came of age: and the question is, whether Wright is to be considered as a trustee for Sir Thomas Parkyns, or for Lord Rancliffe as eldest son, and heir of Jane. And that depends on two questions: 1st. Whether Lord R. has a clear title, founded on the will of 1735? and if he has, then, 2d. What is the equitable effect of all the subsequent transactions, and of length of time, as connected with these transactions?

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Frame of the
Bill.

Lord Eldon, (C.) I now proceed to state how this bill is framed. After stating the articles and settlement of 1707 and 1716, on the marriage of Sampson Parkyns and Alice Middlemore, and the articles and settlement of 1731 and 1732, on the marriage of Thomas, the son of Sampson Parkyns, and Elizabeth Woodroffe, the bill goes on to state the will of this Thomas Parkyns. By this will, dated 9th May, 1735, Thomas Parkyns directed that his estate of Buckminster and Sawston, in Leicestershire, should be sold for payment of his

debts by his executrix, and devised all his other estates to his wife Elizabeth for life, remainder to Francis Lewis, in trust for his daughter Jane for life, remainder in trust for the first and other sons of Jane, and their heirs, &c. &c. : and that after payment of his debts, &c. his personal estate should be placed out in the name of Lewis on good security, the interest to be paid to the testator's wife Elizabeth for her life, and afterwards lands to be purchased and settled, as he had settled his other real estates on his daughter and sister, and their heirs male and female: and failing such issue, to his own right heirs. And he appointed his wife Elizabeth sole executrix of his will. The bill represented this will as duly proved by the executrix, and stated that the late Lord Rancliffe, the son of Jane, had not discovered it till a short time before filing the bill; and that by this will he was entitled to the manor, mansion-house, and to the estates in Great Leake and Thorpe, &c. ; and also to the New River Share mentioned in the will, and so he at that time believed. But it appeared that there had been no misrepresentation as to that; and then he states that he had been imposed upon, and kept in ignorance of his rights.

I mention these matters for the sake of this observation, that this case is not now founded on actual fraud or disguised concealment; and it is always a satisfaction when it appears that there is no ground for imputations of that description; and that, if there is a miscarriage, it is owing to complete ignorance on all sides. But it is a quite different consideration whether, when there is innocent

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ignorance on one side, the other party, equally innocent, may not take advantage of that ignorance; that is for consideration.

The bill then, after stating the settlement of the Ruddington estate in 1727, the will of Sir Thomas Parkyns, the act of parliament, and subsequent settlement made on the marriage of Sir Thomas the son and Jane Parkyns, takes notice of the proceedings in Chancery till the rents and profits of the Ruddington estates were separated from the others, which led to the remark that the rents and profits had been directed to accumulate after payment of 200*l.* per annum to each of the sons. But if the Ruddington estate belonged to Sir T. P. the son in tail, and he was not put to his election, it was contended, and that circumstance must be considered and disposed of, that Sir T. P. ought to have received the whole of the rents and profits of that estate, without contributing any thing to the maintenance. And the bill charged that, if the Ruddington estate was his, there had been inaccurate treatment in the Court of Chancery of these rents and profits. Then the bill charges that Sir Thomas kept back the will, and that he, and all those concerned for him, knew the contents thereof, &c. I take notice of these charges merely to state again that there is now, whatever might have been the view first suggested, no ground for the imputation of actual fraud; and that the whole amounts only to ignorance. And, indeed, on looking at the whole of the circumstances, I cannot find, except perhaps from conjecture, upon which I dare not act, the slightest reason to conclude that any one acting for

Sir T. P. knew of this will, except, perhaps, Sterropp, who was a trustee under the will of old Sir T. P. and a witness to the deed of 1736, for I take them to be the same person. But independent of that, there is no agent, solicitor, or other person concerned for Sir T. P. who could be taken to have known of the will. But it is very difficult to say that those concerned for Jane, Elizabeth acting as her guardian, and Thomas Woodroffe being the solicitor for the act of parliament on behalf of Jane, and Elizabeth being a party to the deed of 1736, should not have known of the will, and that Jane was not tenant in fee, unless they knew also, for some reason or other which we cannot now discover, that the will did not operate upon the real estates in East Leake and Thorpe. It is inconceivable that Thomas Woodroffe, who with respect to Elizabeth was so near a relation as to be her brother, should not have known of the will; and if he did, he either misrepresented the state of the title to parliament, or knew that, for some reason or other, it did not operate so as to prevent Jane from having the fee. I remark that, because a great deal has been said about notice of the will; and when we come to consider that point, we shall have to attend to the effect of notice, and who they were who had notice, and for whom they were acting.

The fraud was denied by Sir T. P.; and it was difficult to believe that he, then only eighteen years of age, could have known any thing of this will; and he says he never did know of it till 1799, when two copies of it were found, one among title deeds

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of one denomination, another among title deeds of another denomination.

The bill also states the mortgages, and the transference of them, till they come to Wright, declaring himself a trustee for Sir T. P. Wright is not a party to this suit: and I remark that, as this bill is not a bill for the redemption of a mortgaged estate, a circumstance very material with reference to a late decision in one of the most important cases that ever came before the Court of Chancery.

The bill takes no notice of the species of equity which those claiming under Sir T. P. would have, though they should not be entitled to hold the estate. For, when the marriage with Jane took place, if she was not entitled in fee to the estate of Thorpe, she was entitled to 4,000*l.* portion out of it; with this question hanging about it, whether her life estate was not a *pro tanto* advancement. It is true that this, along with another estate, was subject to a mortgage for 3,000*l.* But she was entitled to say this: the mortgagee has two funds, and my portion is charged on one of them; and if that one is not sufficient to pay both of us, then I am entitled in equity to compel the mortgagee to resort to the other fund, so that the payment of both may be worked out. Then the Great Leake estate also was clearly subject to this 3,000*l.* mortgage, and this charge of 4,000*l.*: and if she had the estate in fee, under the will of her father, T. Parkyns, or if that will did not pass the estates, I can understand how it was that the portion was not raised, because it merged in the fee. But if she was only tenant for life, it seems most extra-

ordinary, that when the guardians of Sir T. P. were making this settlement, they should not take notice that she was entitled to this 4,000*l.* and more especially as the jointure which he was empowered to make when adult was to be regulated by the portion or estate brought to him by his wife, and which is that which he applies under the act,—so that this is to be considered that if Jane had the fee, there was no occasion to raise the portion; if only tenant for life, she was entitled to this 4,000*l.* portion out of the estate, and he might have given the same jointure 400*l.* and have been in a better situation. The value was not misrepresented, for they do not speak of the value, but of the actual rent. It is said that now the estate is worth 700*l.* a-year. But it was then stated, that the rent was 338*l.*; and in the answer of Sir T. P. it was stated, so little was then the appearance of increase, that the actual rent was 314*l.* And when one looks at that as the rent of an estate subject to a mortgage for 3,000*l.* and to a portion of 4,000*l.* it is impossible to say that Sir T. could have been much the better for getting the estate, and certainly there was very little temptation for fraud. But whether there was ignorance, and what were the consequences, is another question.

Why, then, if the bill fails on the ground of fraud, and of notice at the time of the marriage, then you have to consider the case with reference to the inferences in fact, and in law and equity. 1st. As to the inference in fact, whether the will of Thomas is the foundation of the title to the Leake and Thorpe estates? 2d. In law and equity, whether it can be so taken by a jury if the question were to

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be tried at law; and if deeds were executed contrary to that supposition, and the possession went a different way, whether you are authorized at this day to say that it did pass the estate? And then if it did pass it, you have to consider whether it may not be said by those who claim under Sir T. P. that the portion and mortgage moneys are to be accounted for; and so both the mortgage money and the portion, with the interest from the time when they became due, to be paid in a due mode of taking the account as between the estate and the charges upon it. But this bill is not framed upon any such equity, nor has it proper parties upon this view of the case, nor is it a bill to redeem a mortgage. But suppose it be so framed, you have to consider what ought to be the effect of the assignments of the mortgage, first to Holden, &c. and afterwards to Wright, he declaring himself a trustee for the late Sir Thomas Parkyns; and then what is the effect of Sir T. Parkyns having the equitable estate, and getting in the legal estate, with more or less of notice that the equity of redemption was in another. And then you must have considered of what it was that he had notice, supposing him to have carefully looked at all the deeds. That is very material with reference to the question of the length of time. Then suppose it cannot be proved that he had notice at the time of the marriage, and that he and all concerned for him conceived that he had the equitable estate in fee, what is the effect of his getting in the legal estate, Wright declaring himself a trustee for him, regard being had to the fact, that neither he himself, nor his solicitors, agents, nor any concerned

for him, had notice that the fee, if it should happen so to turn out, was not in Jane; and that such notice as he could have had of the will of Thomas was notice to be derived from the reading of certain deeds, and regard being also had to what he has admitted in his answer?

Then the deed of settlement of 1776 was stated in the pleadings, and you will have to consider the effect of that deed, by which a valuable interest was given to Lord Rancliffe: and though that settlement does not notice the will, as it could not, since it appears that all parties were quite ignorant of it, that supposes that a family arrangement as to the estates was made: and then you are to consider whether it would be fair at this day, when the deed gave that valuable interest to Lord Rancliffe, if the question should not be considered as having been settled with reference to that arrangement. In 1776 Lord Rancliffe came of age, and he does not file his bill till 1800, and he seeks to set aside in part the settlement of 1776. How that can be set aside as to one part, and not as to the rest, is not mentioned. But there is no ground upon which that can be disturbed; and, on the other hand, it cannot be said that there is any thing in it that bars relief, if due upon other grounds. The bill was then altogether founded on fraud: but the Court might judge upon that state of the pleadings, what was the effect of innocent ignorance; and if so to be considered with respect to the Leake and Thorpe estates, you are to say what is the true doctrine of equity in that view of the case, regard being had to the circumstance that Jane ought to have had the

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real estate in fee, or a personal estate of 4,000*l.*; and that the claim is made against one honestly purchasing the equitable fee, and honestly taking in the legal estate, if the fact should so turn out,—and having no notice, if such should be the fact, of the adverse claim, except in as far as notice may be presumed from the fact that he does take in that estate and execute that deed: and that also connected with the fact, that the bill was not filed till 1800. And then you will consider whether you can now inquire into the transactions of 1746, at the hazard of disturbing titles of such ancient standing, and which the parties themselves at this day do not clearly understand.

Thus then the case is to be considered with a view to the nature of the bill in some measure; and I am anxious that this should not escape notice, lest any doctrine now to be stated should be thought to bear either one way or the other upon certain cases in the Court of Chancery, particularly on one case which has excited a great deal of attention, and as to which there prevailed a great difference of opinion. I wish to guard against the notion, that the doctrine in this case trenches one way or the other on the doctrine understood to be established on that case; and I am anxious it should be known, that the question here turns on the particular facts of the case connected with the nature of the bill.

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Doctrines in
law and equity
on which the
case depends.

Lord Eldon, (C.) I now proceed to consider the case with respect to the doctrines in law and equity on which it depends; and your Lordships will permit me again to mention that the bill was filed in

1800, claiming certain estates as belonging to Lord Rancliffe, he being the son of the late Lord Rancliffe, who was the eldest son of Jane by the late Sir T. Parkyns. And the first question on the claim so put was whether the estates passed under the will of Thomas Parkyns, the father of Jane. And it is not immaterial to inquire what would be the effect if the premises were comprised in that will. I have now an accurate copy of the will under which it was contended that the property in Leake and Thorpe passed: and when I call your attention to that, I do it for the purpose of observing that when it is contended that Sir Thomas Parkyns when he married Jane was a purchaser for valuable consideration without notice, it is one thing to say that he had notice of a prior title to these estates, and another thing to say that he had notice of a will with general words which might have effect without including that species of property which formed the subject of controversy.

The will directed the estates in Buckminster and Sawston to be sold by the executrix. The testator lived but a very short time after having made his will; and yet, from documents lately discovered, it appears probable, that he had sold, or contracted to sell, these estates in his life-time; and I request your attention to the circumstance, that instruments were brought forward in the course of the proceedings, and properly brought forward, which were not noticed in the first stages of the cause, and could not be then brought forward, because they had been only subsequently discovered, and were not known at first. The will directs the Buckminster and

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Notice and effect of will of Thomas Parkyns.

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Sawston estates to be sold; and after giving one estate to Daniel Woodroffe, who was the brother of Thomas, who was solicitor on behalf of Jane for the act of 1746-7, and brother of her mother, the testator says: "I give and devise," not estates by particular denominations, but "all my other real estates, not herein-before mentioned," to Elizabeth his wife for life, remainder to Francis Lewis, who is also mentioned in the will of Sir T. Parkyns, and appears to have been his friend, in trust, as follows. Suppose then those concerned for Sir T. Parkyns had notice of this will, it was notice only that it passed all the other real estates of Thomas; but it could not be considered as giving notice of what were the estates which he had to pass. For instance, if it had not been necessary to sell the whole of the Buckminster and Sawston estates to pay the debts, or if it had happened that there were no debts to be paid, might not these estates, or the surplus, be quite sufficient to satisfy the words, "all my other real estate whatsoever?"

With respect to Elizabeth, I again say, that she must have had notice of the will. The deed of 1736 takes notice of the will, and also of her character as devisee: and there are passages which make it very difficult to believe that she had not notice of all his property.

I observe, on looking at my notes, that it was felt, that it might be found difficult to support the limitations to the issue male of Jane, so as to keep the estate in the male line, as these limitations were to the first and other sons of Jane, and their heirs. Suppose she had a son, and he died without a son,

but leaving a daughter, there may be a doubt whether the daughter would not take in preference to those in remainder? And considering the length of time between 1735 and 1800, that would be a question of some importance, if the title could be discussed at law, which it could not, as it was covered by a mortgage; and there would be still a difficulty as to what equity ought to do to open the way to that discussion, for that is the utmost it could do.

I therefore beg leave here to say that, if at the time the act was passed, notice of this will had been given to Sir T. Parkyns, or to his agents, so as to bind him to the effect of notice, the amount of it would be this, that he would have had notice that Thomas Parkyns made a will, by which he gave to Jane for life, not the estates in Great Leake, *eo nomine*, but in this manner, "all my other real estates," the will not explaining what real estates he had to pass under these words; and I do not apprehend that notice of a will is to be considered as notice, not only of the general words passing "all my other real estate," but of each particular interest, and that you are to inquire all over the world to ascertain what were the particular interests which he had to pass.

But the question is, whether he had notice at the time of the marriage. And I cannot find any ground to conclude that Sir T. Parkyns, or any one concerned for him, can be said to have notice even of the will, except Samuel Sterropp, and he could only have had notice of the will, such as it is. And then you are called upon to say, that Sir T. P. who was a purchaser for valuable consideration, for the

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most meritorious consideration, had notice at that time, not only of the will, but of all the interests which Thomas Parkyns had to pass under it, because one of those concerned for him had notice of a will, executed ten years before, which does not mention the particular property, but a will passing generally “all my real estate.” There was an old determination that a witness to a will or deed must be taken to have cognizance of all its contents. But that doctrine has not of late been acceded to; and it would be most mischievous, if one who has been a witness to a deed or will, and afterwards happens to be concerned in a transaction relative to other property, should be supposed to have notice of the contents of the will or deed to which he was a witness, so as to fix notice of them upon his principal on that accidental ground.

But the case here would be still stronger, looking at the circumstances as they stood at the time of the marriage. For though I believe that at the bottom there was no intentional fraud or concealment on either side, yet if you were to ask who had or had not notice, there could be no pretence for saying that Sir T. Parkyns had notice personally, and it might be that none of these concerned and dealing for him had notice: but if the fact be, that the will is to have the effect contended for, it is impossible to say that Elizabeth, who was acting on behalf of Jane, did not know of the will, and that the effect of it was to give Jane only an estate for life; and she, Elizabeth, was tenant for life antecedent to the will, and is expressly stated so to be in the act of parliament. She who proved the will, and who executed the deed of 1736, in which the will is

noticed, if the daughter's interest was limited to an estate for life, she must have known it at the time of the transactions in 1746-7; and during the ten years which elapsed from the death of Thomas till the passing of the act of parliament, she had abundant opportunity carefully to consider and ruminate upon the effect of the will. Then what notice had others concerned for Jane? Francis Lewis was a trustee under the will of Thomas. He was no party to the subsequent mortgage transactions; and that gives rise to another observation. The mortgage being charged on the Leake and Thorpe estate, if it passed under the will, how was it that Lewis was not a party to these instruments? And then, as the deed of compromise of 1736 was executed the year after the death of the testator Thomas, if there had been any controversy between Jane and Sir Thomas Parkyns, about the East Leake estate, it must have been mentioned in that deed. But the deed mentions only the capital messuage. Another observation arises from the situation and interest of Harriett Farrer. She was the wife of a professional gentleman; and from the highest to the lowest of us, I hope I may be permitted to say it without offence, we are not apt to give up that to which we are justly entitled. She was entitled under the settlement of Thomas to a provision of 1,500*l.* which, however, was not to be paid unless there were assets to pay the mortgage. But then under the will, if Jane should die without issue, Harriett would be entitled to the estate in remainder. Now regard being had to how many Farrers are parties to the subsequent mortgages, how do you account for an act of par-

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liament passed without any opposition from them which proceeded on the ground that they had no interest, but that Jane had the fee expectant on the death of her mother, shutting out altogether Harriett and all her issue, unless one of two or three suppositions be true; either that, under these general words in the will "all my other real estate," the Leake and Thorpe estate did not pass, because he had it not to pass; or; if he had it, that he altered the limitations by some instrument executed in the intermediate time between the making of his will and his death, as he did with respect to the Buckminster and Sawston estates; or then that, if it did pass, yet considering the value of the Leake and Thorpe estate, that it was subject to a mortgage of 2,900*l.*, the interest not being properly convertible into principal unless Lewis had been a party, and that Jane might say, this estate may be liable to pay about 7,000*l.* I being entitled to a portion of 4,000*l.* and in order that the Thorpe estate may pay my portion, equity will throw the mortgage on the East Leake estate, it was not worth while to interfere? Besides, Elizabeth, in consideration of the covenant by Thomas to settle this portion, had consented to bar her dower and postpone her jointure. She was a covenantee; and under these covenants he was personally engaged, and the equity of redemption was general assets to satisfy the portion, under the covenants and by force of the will, as part of the debts. So that it comes to this, either that the information to parliament was true, and that this estate was not in the will, which mentioned no specific denomination; or that if it was comprised in

the will, something was done between the execution of the will and the testator's death, altering the limitations: or that, if there was no such thing, still the demand was such as was not worth contending about. The internal evidence goes further: suppose Elizabeth bargaining for Jane, if you impute to her that she was wicked enough, from affection for Jane, to conceal that she was only tenant for life, how do you account for the other fact, her concealing that she was entitled to 4,000*l.* portion? If Jane was tenant in fee either because the estate did not pass under the will, or by an arrangement after the will was made, one can see a rational ground for saying nothing about the 4,000*l.* because it merged in the title to the estate, and it was unnecessary to mention it. Another circumstance is strong evidence. Under the will of old Sir Thomas, the sons were tenants for life with power of jointuring, regard being had to the amount of the fortune brought by the wife; and the material object was her jointure, which was fixed at 400*l.*; and as she brought 4,000*l.* fortune, she was entitled to that, whether the estate was hers or not. And that again brings forward the observation that it was not worth while to contend against the act.

I am now treating the subject as if we were trying the question at law whether the estate passed under the will. You must look at both wills to see who are concerned. Francis Lewis is mentioned in both, as a trustee in the one, as a friend in the other, and a gentleman who was one of those whom Sir Thomas mentions as one of his standing counsel. And when you consider the short period that inter-

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vened between the deaths of Thomas and Sir Thomas, and consider who they were who were then alive, it is utterly impossible that the friends and advisers of the respective parties could have represented as they did, unless Jane actually had the estate in fee, or an interest equal to it. You have besides the authority of Chief Baron Parker, and Justice Abney, who considered this petition; and we are not to presume that it was examined in a slovenly manner. So then you see who must have been in this plot if there was one. Chief Baron Parker might possibly have been deceived, but Justice Abney could not have been imposed upon. Daniel Woodroffe, who was the brother of Thomas Woodroffe, the person who was solicitor and man of business for the Rancliffe branch of the Parkyns' family, was a devisee under the will; and is it possible they should never have heard of the will of Thomas Parkyns?

Then when you look at the assignments of the mortgages to a certain class of men whom you cannot suppose to have advanced their money *de tempore in tempus* without inquiring into the title, the circumstance proves that they must have been aware of the will of Thomas. And a person who has notice of an instrument has notice of every thing which the instrument leads him to know. But suppose the instrument mentions only "all my real estate" generally, without specifying this particular estate, though it might have been included;—and I had been told that the notion that it was included had never been acted on, but the contrary down to the present time, day by day, to

negative every inference that it was included,—who can say that I would be affected with notice that it was included, as we understand notice in equity? And when in 1799 two copies of the will were found, as I have mentioned; if I am mistaken, it is not for want of having taken pains; but if they had been sent to law, it would be a miscarriage if it had been found at law that the will did pass the estate. But it does appear to me that very wild notions have gone abroad as to equity and law; and it may not be improper now to drop a hint of that kind.

But then it is said that Sir Thomas Parkyns has admitted that this will was duly executed, and that it did pass the estate. I have read the pleadings, and I cannot bring myself to the conclusion that that is the fair effect of the answer. I do not ask him whether the attestation is such as to pass real estate. He might admit as a fact whether the will is perfect. I take the result of the answer, however, to be this, that from certain transactions which had taken place the will appeared to have been proved after the death of Thomas; and that it was mentioned in these mortgage deeds, to which there is no evidence that he had access, and to which he could not have access unless the mortgagees chose, and so it seemed and appeared to have been proved, and executed so as to pass lands, but that he was ignorant of it. But when a man admits in that way, he is only stating what he was advised was the legal effect of the will, even if the admission were without qualification; and then if one were to say that he believed that the will passed this estate, another

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Query whether this alludes to a bill then depending in the H. C. respecting proceedings in tithe causes.

Admission.

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would say, examine first, as these are only general words; and he only passed what he could pass; and whether he did or did not pass this estate cannot be known from this will, but only from inquiry as to what interests he had before the will; and that is to be considered with reference to his title before the will, and the enjoyment subsequent to it.

Then it is said that he should have pleaded that he was a purchaser for valuable consideration without notice. Certainly there is a great difference in point of prudence between pleading this, and running the risk of what may appear at the hearing. If a man buys an estate, and a bill is filed, and a title shown to relief, he may plead that he is a purchaser for valuable consideration without notice; and he must support his plea by denying all the circumstances from which notice may be implied: and if, after all that can be said to charge him with notice, he is hardy enough to swear that he had no notice, and to deny all the circumstances; and he does plead, and refuses to try the question in any other way, then it must rest very much with his own conscience. But if he forbears to plead, and, if it turns out in the progress of the suit that he was a purchaser for val. con. without notice, it is too much to deprive him of the effect of that, merely because he does not stop the suit at first, if it be so in fact.

Mortgage.

Now I come to the assignment of 1792; and here I must observe, that the bill has not been framed with an accurate attention to the nature of the case. The nature of the claim is either to redeem the mortgage, or that equity would put it out

of the way so as to allow the right to be tried at law. Then the bill ought to have been a bill to redeem, or simply to put the mortgage out of the way so as to permit the matter to be tried at law. But then it must have gone on to have offered payment of the mortgage money, suppose it to be 2,900*l.* and an account; and then they would have been entitled to charge the 4,000*l.* portion, subject to the question, whether the life estate given to Jane might not be considered as an advancement *pro tanto*. The bill should have come offering to do what was equitable, and tendering all the accounts that were necessary to settle the rights of the parties. But in 1792 the mortgaged estates were in Wright, and he executes a declaration of trust for the Defendant. I do not mention the cases of buying in prior incumbrances to protect the estate against intermediate incumbrances, as they have no direct bearing, though they have some bearing, on this case. But there are cases where subsequent mortgagees have been permitted to purchase prior incumbrances in order to protect their mortgages, and to shut out intermediate incumbrancers, a *tabula in naufragio*, as it has been called. But I do not consider this case as of that nature, as if the estate passed under the will of Thomas; for then the great question might have arisen as to an equitable owner who has, and an equitable owner who has not the legal estate, contending which of them had the right of redemption, regard being had to all the circumstances, and so on. But the difference is, that the question is not here

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Result of the
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applied to the
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with a volunteer as it was in another case, but with a purchaser for the most meritorious consideration, and who was in possession of the estate which he claimed as his, as being a purchaser for valuable consideration.

Then, looking at the settlement of 1776, and at the names of those who were parties to it; and, considering that a very considerable interest *in presenti* was given to Lord Rancliffe, which he could not otherwise have had in his father's life-time; and that Sir Thomas Parkyns honestly believed he had purchased; and that this is a matter of doubt where the scales strongly incline in favour of the supposition that the East Leake estates did not pass; and then considering the enormous lapse of time, and that a scrutiny from day to day is still discovering new deeds; and considering the relative values of the estates and the charges upon them in 1746, and at the present time, I think this is a case where the Plaintiff could not have any relief at law if the question were to be tried there; and upon that is founded my judgment that this bill cannot be sustained.

Costs.

As to costs I never thought about them in this case, as all the parties were acting very honestly and ignorantly; and still doubting in some measure in such a case, where it is impossible, from the materials before us, to be positively certain that we are in the right. But all that can be expected of a court of justice, in a case where additional documents are drawn out in this manner, during the whole progress of the suit, is to fight with the

difficulty as it best can : and then if that difficulty cannot be overcome, the fault does not rest with the court.

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Here then I close, and I have only further to say with respect to this case, that I have given it the utmost attention and consideration in my power, and done every thing that depended on me to make sure of my coming to a sound and accurate conclusion.

Decree AFFIRMED.

IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

GOVERNOR AND CO. OF THE BANK } *Appellants.*
OF IRELAND, and others
BERESFORD, and others—*Respondents.*

COMMISSIONERS under an act of parliament, for giving money by way of loan to merchants, &c. make an advance for A. who, along with B. as his surety, becomes bound to repay within a limited time. A. obtains from the Commissioners several extensions of the time of payment without the privity or knowledge of B. his surety, and at length becomes bankrupt without having paid. Bill to restrain proceedings at law against the surety; the obligation being discharged upon the indulgence granted without his privity or knowledge. Decreed accordingly, and the decree affirmed in *Dom. Proc.*

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SURETY.—
BILL OF EX-
CHANGE, &c.