CONVEYANCES, UNDER STAT. 27 ELIZ. CH. 4.

In a recent English case, *Doe d. Newman v. Rusham*, it was held—

(1.) The statute 27 Eliz. c. 4, does not apply to the case of a purchase for valuable consideration from the heir or devisee of one who has made a voluntary conveyance of the same property in his lifetime.

(2.) The principle upon which voluntary conveyances have been held *fraudulent and void* as against subsequent purchasers for value is, that by the sale the vendor so entirely repudiates the former conveyance as that, against himself and the purchaser for value, it shall be conclusively taken that the intention to sell existed when he made the voluntary conveyance, and that it was made in order to defeat the subsequent purchaser.

(3.) When the same person executes the voluntary conveyance, and afterwards sells and conveys the property, this principle applies; but *seccus* where the seller is a different person from him who executed the voluntary conveyance, for the acts of one man cannot shew the mind and intention of another.

Upon this well considered case of the Court of Queen's Bench, the London Law Magazine, has a note, the importance of which demands republication.

This case decides a point on which two great authorities, Lord St. Leonards (in his book on Vendors and Purchasers, 10th ed. vol. iii. p. 230, and 11th ed. p. 928,) and Mr. Jarman (in his note to Bythewood's Conveyancing, vol. viii. p. 144), appeared to be at issue.

The question stood thus:—By the 27 Eliz. c. 4, a voluntary conveyance is rendered void; and, by construction of law, even where not actually so, *fraudulent* as against a subsequent bonâ fide purchaser for value. Thus a voluntary settlement on B. by

2 Vol. 48, p. 140.
A., who afterwards sells to C., is, as against C., fraudulent and void; but whether it would be so on a sale by any one claiming through A. is a point on which the above-cited authorities appear entirely to differ; we say appear, because from the following passages it will be seen that no difference as to some part (as, for instance, the application in cases of actual fraud) exists:—

"Lord St. Leonards (as above quoted) thus expresses himself:—

'It has been holden that, although the fraudulent conveyance is not made by the vendor himself, yet it is void against a purchaser. Therefore if a father make a fraudulent lease, and then die, and the person claiming under him sell the estate, the purchaser shall avoid the lease, whether the vendor did or did not know of its existence;' giving as authority Burrell's case (6 Rep. 72), Jones v. Groobham (3 Co. Litt. 3 b), Warburton v. Loveland (1 Dow & Clark, 497). This position seems, however, two pages further on, to be virtually restrained to cases of actual fraud. 'But still the rule has never been carried to this extent, that a father's bona fide conveyance of the fee or of any partial interest, although voluntary, can be set aside by a sale by the devisee or heir-at-law of the father. The rule, properly confined to transactions really fraudulent, or fraudulently kept on foot, seems to be open to no solid objection, and it is not likely to be carried further.'

"On the other hand, Mr. Jarman, after citing the first of the above-quoted passages, together with the authorities adduced in support of it, proceeds to observe, that 'the second of those cases is not relevant to the learned author's position, but merely negatived the application of the statute to the case of a lessee forging a lease for a term longer than his own, and selling the forged lease. Burrell's case, however, is not so easily disposed of, for the resolutions in that case certainly maintain the doctrine in question; but the case itself, attentively examined, does not go so far. Though the resolutions of the Court go the whole length of maintaining that a settlement by a deceased owner may be avoided by his heir, yet the determination of the Court does not involve such a proposition.' Here Mr. Jarman proves his position by an accurate statement of the facts in Burrell's case, which is also done
VOLUNTARY CONVEYANCES.

by Lord Campbell, C. J., in the subject of this note:—'But by far the strongest argument against the construction in question, may be drawn from the import and terms of the statute itself, which vacates conveyances, &c., made for the intent and of purpose to defraud and deceive purchasers;' which words necessarily imply that the conveyance and the sale proceed from the same person; for how is the intent to defraud purchasers to be collected or inferred from the mere act of making a settlement, unless the settlor afterwards disposes of the same lands to a purchaser? Where a man settles lands, and afterwards sells them, the law, looking simultaneously at the several acts, sees the motive for the one in the other. The sale shows quo animo the previous settlement was executed; but if there is no sale, upon what is the inference of fraudulent intention to be built? Certainly not upon the sale by the heir, over whose acts the settlor has no control, and to disinherit whom might have been his sole object in making the conveyance settlement.'

"It will be seen, on an attentive perusal of the passages in which these contending opinions are expressed, that the difference is not so great as it would at first sight seem to be, and that what exists, springs chiefly from taking the adverse position into consideration without the limitations engrafted upon it.

"The point at issue, however, whether large or narrow, had been decided by the Irish Court of Exchequer in accordance with the views expressed (not indeed as the author's own, so much as the result of the authorities) in the Vendors and Purchasers, in the case of Jones v. Whittaker (Long. & Towns. 14), which was cited as a direct authority (and that it was such was conceded by Lord Campbell, C. J.) for the defendant in this case, the facts of which may be concisely stated to be as follows:—J. N. voluntarily settled the disputed lands (after his own death) upon S. N. for life, with remainder to the lessor of the plaintiff in fee. J. N. subsequently devised them to S. N. for life, with remainder to one T. M. in fee. After J. N.'s death, S. N. and T. M. sold to the defendant. S. N. having died, the ejectment was brought, in which Martin, B., directed a verdict for the plaintiff, subject to leave reserved to
move to enter it for the defendant. A rule nisi, obtained for this purpose in Easter Term, 1851, was discharged in Hilary Term of this year, Lord Campbell, C. J., stating as the reason for the delay, 'We have deferred giving judgment in this case for several terms from our respect for the decision of the Irish Court of Exchequer in Jones v. Whittaker, and from a desire, after an attentive examination of all the authorities upon the subject, to state fully the grounds on which we feel ourselves bound to differ from that decision.'

"Now, although the decision thus expressed in the judgment, 'we are all clearly of opinion that a purchaser from the devisee of one who has made a voluntary conveyance in his lifetime is not within the statute,' is there limited to the case before the Court of a sale by the 'devisee,' still the following dicta, viz.:—1. 'If there are two voluntary conveyances, the purchaser under the second takes nothing;' per Lord Campbell, C. J. 2. 'The statute does not operate until a deed for valuable consideration has been executed (i. e. by the settlor), and that divests all the estate of the voluntary grantee;' per Coleridge, J. 3. 'A voluntary conveyance is not fraudulent per se; it only becomes so when the conveyor subsequently conveys for value: but a sale by the devisee cannot affect the conveyance of his testator;' per Patteson, C. J.;—seem to stamp the remarks of Mr. Jarman with the seal of eminent authority, and show clearly that, if the subsequent sale had been by the heir, the decision would have been to the same effect. This is further made manifest in the judgment, where, after stating the facts in Burrell's case, and the first resolution there come to, Lord Campbell, C. J., adds, 'The resolution is entitled to great respect; but as it goes beyond what is required by the facts of the case, we do not consider it to be conclusive; and further, the second resolution in Burrell's case is quite in accordance with the view we have just taken; for it is there said, 'It was resolved that although the father had nothing in the inheritance of the land at the time of the assignment of his term, but the whole estate of inheritance was in the grandfather, yet when the grandfather died, and the father sold the land, his vendee shall avoid the said term by the said act
VOLUNTARY CONVEYANCES.

135

(the said assignment on the evidence being taken to be fraudulent); for if he had bargained and sold the said term only, the bargainee should have avoided the said fraudulent assignment, and by conveyance the vendee of the whole fee-simple shall avoid it.' Now, if the term only had been sold, it would plainly have been sold by the same person who made the fraudulent assignment.' Now it is entirely upon that first resolution in Burrell's case, that Lord St. Leonards' opinion and the decision in Jones v. Whittaker rest. All the mischief was produced by deference to the supposed authority of that case. But in the very recent case of Richards v. Lewis (20 Law J. C. P. 177), Jervis, C. J., had observed, 'Burrell's case is misunderstood. It does not appear that the Courts at that time held mere voluntariness a badge of fraud; they do not say every voluntary deed is fraudulent;' and, quoting the case related by Popham, C. J. (in fine, Burrell's case), added, 'It is clear from this that cases of actual fraud were alone in their consideration. . . . . There was fraud in fact there, and not merely fraud in law.' And in the same case, Williams, J., says, 'As to the mortgage, Burrell's case, if good law, shows that where there is actual fraud in a conveyance, a subsequent purchase from one not guilty of the fraud, is protected; but that case has no application where the fraud is only constructive;' and, the same learned judge had before asked, whether 'Where there is no actual fraud, the revoking conveyance must not be made by the same person who made the voluntary conveyance.' We may observe, by way of conclusion, that these passages were quoted with approval, and adopted in the judgment of Lord Campbell in the present case, which, as it was the result of long and attentive consideration, and as it agrees with the opinion of the Court of Common Pleas, must be looked upon as of great authority, and as settling the points at issue.

"With regard to a totally different point, the authority of Irish decisions in English Courts, it is also valuable as a clear enunciation of judicial opinion. Some misunderstanding had arisen from the former rejection of some Irish case upon practice as an authority, which, as Irish and English rules of practice differ, it could