REPORT OF THE CASE

BETWEEN

AYLETT AND AYLETT,

DETERMINED BY THE

HIGH COURT OF CHANCERY

IN WHICH

THE DECREE WAS REVERSED

BY THE

COURT OF APPEALS.

RICHMOND: PRINTED AND SOLD BY T. NICOLSON,

M,DCC,XCVI.

BETWEEN
PHILIP AYLETT, plaintiff,
AND
CALLOHILL MINNIS, William Dandridge Claiborne and Thomas Butler, of whom the firſt is ſurviving huſband of Mary, widow and executrix, and the two others are executors, of William Aylett, hereafter deſignated by the appellation, grandſon, and Alexander Moore and Elizabeth his wife, William Aylett, Mary Aylett, Anne Aylett, and Rebecca Aylett, of whom the four laſt named are, with the plaintiff, children of the ſaid William Aylett, the grandſon, defendents.

WILLIAM AYLETT, the grandſon, was ſeiſed in fee ſimple of a large tract of land in Kingwilliam county, of which part was his dwelling plantation, and other parts were occupied by tenents;—was ſeiſed in fee ſimple of lands in James city, Warwick, and Bedford, counties;—and was intitled to fourteen hundred acres part of a tract of land, likewiſe in the county of Kingwilliam, which had been demiſed for 999 years. (a) of this term, if the leaſe were made, as it is ſuppoſed, for it is not among the exhibits, to have been made, ſince the ſettlement of this country by europeans, perhaps 900 years, or more, remained unexpired, at the time of his death.

(a) This terrier is taken from the anſwer of the defendants.

death. for recovering poſſeſſion of part of the leaſehold land, witheld by the huſband of John Ayletts widow, or one claming under him, an action of treſpaſs and ejectment had been commenced by William Aylett, the grandſon, in the name of his leſſee. he died before the trial. afterwards a caſe, made by agreement between his repreſentatives and the other party in that action, inſtead of a ſpecial verdict, ſtating the facts, was argued, and a judgement given, affirming the title of the leſſor of the plaintiff; in conſequence of which, his executors obtained the poſſeſſion.

That William Aylett, the grandſon, knew his title to the leaſehold land to be a term for years only doth not appear. the contrary is more probable, becauſe his grandfather William Aylett, who owned all the demiſed land, in his teſtament, calleth it, ſeveral times, 'land bought,' doth not once mention a leaſe, and, after deviſing the greater part of the tract to three of his ſons, namely, Philip, John, and Benjamin, deviſed 1200 acres, the remainder of it, to four daughters ſeveraly, and to the heirs of their reſpective bodies, with remainders in default of ſuch heirs, annexing ſlaves to every parcel, and, in two of thoſe deviſes, declaring that the ſlaves ſo annexed ſhould DESCEND paſs and go, as part of the FREEHOLD. and John Aylett, in his teſtament, by which William Aylett, the grandſon, claming under his father, derived the title aſſerted by the judgement aforementioned, doth not appear to

have

have ſuppoſed his title to be leſs than a fee ſimple.

William Aylett, the grandſon, by his teſtament, in april, 1780, without taking any notice of a leaſe, deviſed in theſe words: 'i give to my ſon Philip Aylett,' who is the plaintiff, 'the plantation on which i at preſent live, and ALL MY LANDS IN KINGWILLIAM, alſo my land in Drummonds neck, in James city county, to him and his heirs,' and after deviſing his lands in Warwick and Bedford to his ſon William Aylett, one of the defendents, and declaring his will to be, that his wife ſhould hold and enjoy any part of the aforeſaid lands, during her widowhood, to employ thereon certain ſlaves, to be alloted to her, added theſe words: 'all the reſidue of my eſtate, of what kind ſoever, i give and bequeath to my wife aforeſaid and my children, to be equaly divided among them:' and died ſo ſeiſed and intitled.

The plaintiff, after he had, by ſome events not neceſſary to be now ſtated, become intitled to the eſtate deviſed to him, brought his bill in the high court of chancery, claming the leaſehold land, to which his father had been intitled, and praying a decree for the poſſeſſion and profits thereof.

The defendents, by their anſwer, objected, that William Aylett, the grandſon, had no power to deviſe the leaſehold lands, becauſe he had a right to them only, without the poſſeſſion, at the time

time of his death, which bare right, being a choſe en action, was ſaid to be not transferable by law; and, if it were transferable, the defendents inſiſted that it was not comprehended in the deviſe to the plaintiff; and that the words, 'all my lands,' therein were ſatisfied by the part of them whereof that teſtator was ſeiſed in fee ſimple; and that the leaſehold land was included in the reſiduary bequeſt to the wife and children.

The cauſe was heard, on the bill, anſwer, and exhibits, the 13 day of may, 1793.

The court, in the decree, ſlighted the firſt objection, ſuppoſing to be indiſputable, firſt, that a choſe en action is aſſignable in equity, and, ſecondly, that one may bequeath that which he can aſſign; and the defendents counſil not urging the objection, or urging it ſo faintly as to betray a conſciouſneſs that it was not maintainable.

Upon the other point, the counſil for the defendents only quoted and applied the reſolution, by the court of kingsbench, of the firſt queſtion ſtated in the caſe of Roſe *verſus* Bartlett, in trinity term, 7 Car. 1.

The caſe, to be found in the 292, 3 and 4, pages of reports of caſes adjudged during the firſt ſixteen years of the reign of king Charles the firſt, collected and writen in french by George Croke, and after his death reviſed and publiſhed in engliſh by Harbottle Grimſton, was

'*Ejectione firmae*, of the demiſe of John Roſe and Elizabeth his wife, of forty acres of land, and two acres of meadow, in Burnham, for three years. upon not guilty, a ſpecial verdict was found, that Philip Scudamore was ſeiſed in fee of the land in the declaration, *anno* 44 *Elizabeth*, and by indenture demiſed it, by the name of four cloſes of paſture in Burnham, for a hundred years, to Richard Batyne; and that Richard Batyne entered and was poſſeſſed, and being ſo poſſeſſed, and ſeiſed in fee of other lands and tenements in Burnham, afterwards, viz. *duodecimo aprilis, tertio Caroli*, made his will in writing, which is found *in haec verba*: 'i will that my wife Elizabeth ſhall have Burnhams and the lands thereunto belonging, being three half acres in Lentfield. and my will is, if ſhe do marry, my ſon Nicholas ſhall have Burnhams, and three half acres lying in Lentfield. *item* i will my ſon Bartholomew ſhall have for his maintenance out of the land 5l. yearly, as long as ſhe keepeth herſelf unmarried. *item* i will and bequeath to my ſaid wife Elizabeth all the reſt of my lands, lying in the pariſhes of Burnham and Hitchman, during the time of her life, and afterwards to my ſon Bartholomew. alſo i make my wife my full and whole executrix of all my cattle, corn, and moveable goods: except ſuch as i have appointed to be ſold for payment of legacies,' *prout per le volunt*, &c. they find that Richard Batyne died, and the ſaid Elizabeth proved the will in the prerogative court, *quodque adminiſtratio omnium bonorum jurium ac creditorum*

dictum

dictum Richardum Batyne et ejus teſtamentum qudlitercunq' concernent' by the judge of the prerogative court was committed to the ſaid Elizabeth, that ſhe afterwards took to huſband the defendent, whereby they were poſſeſſed of the ſaid leaſe: and that the ſaid Bartlett aſſigned that leaſe to Richard Hammond, upon the condition for the payment of 30 pounds, at a day certain, who, failing of the payment thereof, reaſſigned afterwards that leaſe to the defendent; that the ſaid Elizabeth died, and afterwards the ſaid Bartholomew died, and that Elizabeth, the wife of Bartholomew, obtained letters of admniiſtration *de bonis Richardi Batyne non adminiſtrat'* by Elizabeth the wife of Richard Batyne, who took John Roſe to huſband, and they let to the plaintiff, and the defendent ouſted him, and if, &c.

This caſe was argued by Calthorp for the plaintiff, and by Germin for the defendent.

The firſt queſtion was, whether this leaſe for years be deviſed to Elizabeth for life, remainder to Bartholomew? and all the juſtices (*abſente* Richardſon) reſolved, that if a man hath lands in fee, and lands for years, and deviſeth all his lands and tenements, the fee ſimple lands paſs only, and not the leaſe for years: and if a man hath a leaſe for years, and no fee ſimple, and deviſeth all his lands and tenements, the leaſe for years paſſeth; for otherwiſe the will ſhould be merely void.

Secondly

Secondly, they all agreed, that if one deviſeth his land, which he hath by leaſe, to his executor for life, the remainder over, that there ought to be a ſpecial aſſent thereto by the executor, as to a legacy, otherwiſe it is not executed: and there was not here any ſpecial aſſent.

Thirdly, Jones and myſelf were of opinion, that it appears here that he had other lands in fee, which he deviſed to his wife, *durante viduitate*; and other lands which he deviſed unto her, for life, the remainder over, and then that deviſe may not extend to that leaſe. but Berkley to the contrary, becauſe it may be that land deviſed, as long as ſhe is unmarried, is the ſole land which he had in fee: and the other land deviſed abſolutely is the leaſe for years; but it was thereto anſwered, that the deviſe is unto her, for life, of the lands in Burnham and Hitcham, and clearly no part of the leaſe land extends into Hitcham; ſo as it is clear, it extends not to leaſe lands, but to freehold lands.

Fourthly, Richard Batyne making his wife his ſole and whole executrix of all his cattle, corn, and moveable goods, and not mentioning what ſhall be done concerning the reſidue of his eſtate; whether the wife be abſolute executrix *quoad* all his eſtate, or only particular executrix *quoad* his cattle, corn, and moveable goods, and not *quoad* his leaſes, and his debts? and as touching that point, we all agreed, that one may make ſeveral executors; the one *quoad* things real, the other *quoad* things perſonal, and may divide their autho-

rity;

rity; yet *quoad* creditors, they are all executors, and as one executor, and may be ſued as one executor, 19 H. 8. 8. Dy. fol. 3. 32. H. 8. Br. Exec. 155. but Jones juſtice and myſelf conceived, as this caſe is, that ſhe is ſole and abſolute executrix for the whole eſtate, as well leaſes as debts, and other things: for when he ſaith, that ſhe ſhall be his ſole and whole executrix of his cattle, corn, and moveable goods, it is but an enumeration of the particulars, and no excluſion of any, eſpecialy when he doth not make any other executor, for the reſidue: and *catalla* in latin extends to all things. and it may be intended, that ſo was the intent, when he made not any other executor. but Berkley juſtice conceived, that ſhe is a ſpecial executrix *quoad* the things enumerated, and no general executrix.

The fifth queſtion was, admitting that ſhe is no abſolute executrix *quoad* all the eſtate, but *quoad* the particulars ſpecialy named, and ſhe proving the will, and it being found, that adminiſtration was committed unto her *omnium bonorum*, &c. *prout antea*, whether that be a general adminiſtration committed, or only an adminiſtration of the goods whereof ſhe was made executrix? and Berkley held, that it is but a ſpecial adminiſtration, becauſe it is *bonorum jurium & creditorum praedict'* Richard Batyne *et praedict' teſtament' concernent'* and that coupled to the teſtament; ſo that it extends no further than the will. but Jones and myſelf were of opinion, that it was a general

adminiſtration

adminiſtration committed; for *jurium et creditorum* are general words, and the word *et* ſhould be expounded as *ant*, and it cannot be tied only to the teſtament; for there be not any words of debts, as *creditorum* imports: and they be as general words, as are uſual in general letters of adminiſtration; wherefore upon all the matter, juſtice Jones and myſelf were of opinion againſt the plaintiff, that he ſhould be barred. but juſtice Berkley ê *contra per quod adjournatur*.'

And the counſil for the defendents in the principal caſe relied upon the authority of that reſolution of the firſt queſtion in the caſe cited, which, as he thought, favoured the right clamed by his clients, not leſs than if the caſe had been, for that purpoſe, contrived by himſelf. and

The judge of the high court of chancery, for reaſons hereafter aſſigned, not allowing the authority of the reſolution quoted to be more deciſive than if the caſe had been ſo contrived by the counſil, although that reſolution had been quoted in Weſtminſter hall half a ſcore of times, without diſapprobation, and once or twice with approbation, delivered this opinion: 'that the plaintiff, by the teſtament of his father, was intitled to the leaſehold land clamed by the bill, but that the ſaid land was ſubject, as a ſpecific legacy, to payment of that teſtators debts;' and the court decreed the defendents, who were executors, to deliver to the plaintiff poſſeſſion, and to account with him for the

the profits, of the ſaid leaſehold land, upon his entering into bond, with ſurety, for payment of his proportion of thoſe debts to which a ſpecific legacy is liable.

In juſtification of this opinion and decree, what followeth is ſubmitted to cenſure.

A man, not acquainted with law caſes, to whom, after reading the teſtament of William Aylett, the grandſon, and being informed of the facts before ſtated, was propounded the queſtion, whether Philip Aylett, the deviſee, was intitled to all his fathers lands in the county of Kingwilliam, and, among them, to the lands which he had a right to hold for 900 years only? after recovering from the ſurprize, which a controverſy upon ſuch a deviſe, in which doth not occur an ambiguous ſentence, an equivocal word, or a technical term, muſt occaſion, would probably not haeſitate to anſwer the queſtion affirmatively, if he did not think it too trifling to be aſked or anſwered, obſerving that the fee ſimple lands and the leaſehold lands both were the teſtators lands, although one were his for an indefinite time, and the other were his for a definite time;—that by the complexion of the teſtament, he, who made it, ſeems to have intended to divide all his landed property between his two ſons, and out of his other eſtate to raiſe portions for daughters, which is the moſt uſual mode of proviſion for a family of children;—and that the preſumption in favor

of

of the deviſee Philip is the ſtronger, if the teſtator knew not that his title to the leaſehold land was leſs than a fee ſimple. he would probably have obſerved further, if the teſtator had ſaid, ‘ i give to my ſon Philip Aylett all my lands freehold and leaſehold,’ the terms ‘ freehold and leaſehold’ would not have been any thing more than enumeration of the ſpecies, whereof lands was the genus; and that a deviſe of the genus includeth all its ſpecies. and that if William Aylett, the grandſon, had been ſeiſed moreover of lands holden for the life of another, where the *ceſtuy que vie* ſurvived the teſtator, theſe lands would have been comprehended in the deviſe, as well as thoſe holden in fee ſimple, and for term of years, becauſe included equaly in the generical term.

A man, not altogether unacquainted with law caſes but, emancipated from a ſervile obſequiouſneſs to the authority of adjudications in ſome particular inſtances, to whom was propounded the ſame queſtion, in verification of the affirmative anſwer to it, will endeavour to ſhew the only true meaning of the deviſe in the teſtament of William Aylett, the grandſon, to the plaintiff to be, that he ſhould have the leaſehold as well as the fee ſimple lands in Kingwilliam county, and that, in ſuch a caſe as this, authority ought not to prevale againſt that intention.

I. The true interpretation of the deviſe will appear from theſe conſiderations.

1. Tranſlation, *ex vi termini*, imports motion, and conſequently change of place. for philoſophers, of whom ſome have attempted to define motion, and others have denied motion to be definable, however they differ in that, have all agreed change of place to be either an eſſential part, or a neceſſary concomitant, of motion. and, if to moral entities we may, by analogy, attribute place, which naturaly ſignifieth the part of ſpace occupied excluſively by body, dominion, right, property, may, when it is tranferred, be ſaid to change place, i. e. to change the owner.

2. Tranſlation of dominion, right, property, by teſtament, is perfect, at furtheſt, ſo ſoon as the deviſee or legatary conſenteth to acccept the ſubject deviſed or bequeathed, *(b)* and, according to the opinion of ſome, at the death of the teſtator.

3. If the place of the ſubject transferred be changed, by the transfering act, and the tranſlation be perfect, ſo ſoon as the ſubject of it is accepted; the ſubject transfered is not the thing in which the dominion, right, property, is exerciſeable: for the place of the land, if that be the thing, is not changed; the ſlave, horſe, piece of furniture, garment, library, philoſophical apparatus, if that be the thing, may remain where it was, and yet the dominion, right, property, thereof may be perfectly transfered,—the place of the

(b) See Rutherforth on Grotius b. 1. c. VI. 1. V.

the dominion, right, property, may be changed. ſo that,

4. When one ſaith, he deviſeth land, or bequeaths any other thing, the terms are elliptical; ſome words are left out which are underſtood; and, in ſuch a caſe, the teſtator muſt mean that the deviſe or bequeſt ſhall have, not a ſenſible immediate operation upon the land or other thing ſaid to be deviſed or beqeathed but, a myſtical operation on his dominion, right, property, over, to, in, the land, or other thing.

Thus Juſtinians compilers, Bracton, who followed their method, and other exact writers, intitule their tractates upon ſuch ſubjects *de acquirendo rerum DOMINIO.*

He, who may incline to aſk, by way of objection to what is here ſtated, do men never on ſuch occaſons, ſpeak or write, without ſhrouding, by a figure, half of what they mean, is deſired to conſider the quotations in the note. *(c)*

Some

(c) ' The firſt aim of language is to *communicate* our thoughts; the ſecond, to do it with *diſpatch*. the difficulties and diſputes concerning language have ariſen almoſt intirely from neglecting the conſideration of the latter purpoſe of ſpeech, which, though ſubordinate to the former, is almoſt as neceſſary in the commerce of mankind. *** words have been called *winged*; and they well deſerve that name, when their abbreviations are compared with the progreſs which ſpeech could make without theſe inventions; but, compared with the rapidity of thought, they have not the ſmalleſt clame to that title. philoſophers have calculated the difference of velocity between ſound and light, but who will attempt to calculate the difference between ſpeech and thought? what wonder then that the

Some may aſk too, if tranſlation in general do not operate immediately upon the thing ſaid to be transfered, what, in the particular caſes of a feoffment of lands, and a gift of moveable goods, do livery of ſeiſin, in one, and tradition, in the other, mean? to which queſtion the anſwer is, thoſe ceremonies are images of the tranſition of dominon, right, property;—poſſeſſion of a thing is preſumptive evidence of the poſſeſſors dominion, right, property; delivery of the poſſeſſion is a ſymbol repreſenting a change of the dominion, right, property,

5. The moſt unerring mode of interpreting a teſtament, the terms of which are ſuppoſed to be equivocal or ambiguous, is by inſerting the words neceſſarily underſtood:

For example: in this caſe where the teſtator, who had one tract of land, holden in fee ſimple, and was intitled to another tract of land, holden for term of years, both tracts in Kingwilliam county, deviſed all his lands in Kingwilliam to his ſon Philip Aylett, the man, whoſe wonderfull ſagacity enabled him, after diligently exploring the deviſe, to ſmell or ſpy out in it an equivoque or an ambiguity, would perhaps admit that it vaniſhed,

the invention of all ages ſhould have been upon the ſtretch to add ſuch wings to their converſation as might enable it, if poſſible, to keep pace in ſome meaſure with their minds.' Epea pteroenta, or the diverſions of Purley, by John Horne Tooke, who, in a note there, hath tranſcribed from m le Preſidente de Broſſes, theſe pertinent words: L'eſprit humain veut aller vîte dans ſon operation; plus empreſsé de s'exprimer promptement, que curieux de s'exprimer avec une juſteſſe exacte et reflèchie. s'il n'a pas l'inſtrument qu'il faudroit employer, il ſe ſert de celui qu'il a tout prêt.

vaniſhed, if the words *right to*, which are proved to be neceſſarily underſtood, were ſupplied; with which ſupplement the deviſe would be read thus: 'i give to my ſon Philip Aylett all my *right to* lands in Kingwilliam:' in which caſe,

6 That the deviſee would have been intitled to the leaſehold lands in queſtion, as well as to the fee ſimple lands is affirmed, with confidence, becauſe the concluſion is believed to be undeniable, and, if ſo, the decree was correct. but

It is ſaid to be proved, by authority, that is by the forementioned caſe of Roſe *verſus* Bartlett, to be erroneous; and truth, reaſon, juſtice, and indiſputable principles of law, conſpiring together, will ſometimes no more enable a demand to ſtem the torrent of authority than a fair wind, aided by concurrent tides, will be able to drive through the ſyrtes the bark.

Illiſam vadis atque aggere cinctam arenae.

II. On this part of the caſe, obſervations will tend to ſhew

1. That judicial determinations of queſtions not legal in their nature, although they muſt, ſo long as they remain unreverſed, be definitive in the caſes wherein the queſtions were neceſſarily diſcuſſed, and determined, ought not to be precedents of deciſive authority, when ſimilar queſ-

tions occur in other caſes, if judges in the latter diſcover the determinations in the former to have been erroneous.

2. That a falſe judicial interpretation of one mans teſtament, if the words be not law terms, of a meaning in that ſcience different from their meaning in ordinary diſcourſe, ought not to be a precedent authoriſing a like interpretation of like words in the teſtament of another man.

3. That the caſe of Roſe *verſus* Bartlett is not a precedent of deciſive authority in this caſe, if in any other.

1. That queſtions, which cannot be called queſtions of law, are frequently brought before courts of judicature the experience of every day ſheweth.

The determinations of ſuch queſtions by thoſe courts ought not to be precedents of deciſive authority, unleſs every judge of them were equal to the man whom Juvenal deſcribes, Sat. III v. 77. *(d)*—unleſs every judge were ſuch a prodigy of genius and learning as the man, hight 'the admirable Crichton,' who, inviting all the literati, whitherſoever he went, to diſpute with him, and undertaking to anſwer rightly every queſtion, which could be propounded, in any art or ſcience, and

(d) Grammaticus, rhetor, geometres, pictor, aliptes, Augur, ſchoenobates, medicus, magus; omnia novit.

and in any of twelve languages, and this either in verſe or proſe, at the choice of the antagoniſt or queriſt, is reported to have aſtoniſhed the auditories at all the trials by proving himſelf not to be a vain boaſter.

But ſuch phaenomena are leſs frequent than comets. *(e)* and therefore the authority of ſentences by judges of law, who certainly are not always perfect adepts in every ſcience, may be, in many caſes, diſallowed by their ſucceſſors, if theſe, better informed, diſcover the ſentences to be erroneous. And this the engliſh judges ſcruple not to do, even in caſes where the queſtions were purely legal, as well as in other caſes.

If a man had deviſed a tract of land, on one ſide of a determinate line, to be laid off in a triangle, of which the other ſides ſhould be ſuch that the ſum of their ſquares ſhould be equal to the ſquare of the given line; and if any court had determined upon ſuch a deviſe that the angle ſubtending the hypotheneuſe ſhould be an oblique angle; ought that determination to authoriſe a ſimilar

(e) Quintilian, who would have a youth, intended to be an accompliſhed orator, to be inſtructed in the arts (and what he ſuppoſeth neceſſary to the orator muſt be no leſs neceſſary for qualifying a judge to decide rightly queſtions of every kind which may be diſcuſſed before him) ſo *ut efficiatur orbis ille doctrinae, quam graeci encyclopaediam vocant*, expected ſome might aſk, *quid ad agendam cauſam, dicendamve ſententiam, pertinet, ſcire quemadmodum in data linea conſtitui triangula aequis lateribus poſſint? aut quo melius vel defendet reum vel reget conſilia, qui citharae ſonos nominibus et ſtatiis diſtinxerit?* to which he anſwers thus: *non eum a nobis inſtitui oratorem, qui SIT, aut FUERIT, ſed imaginem quandam concepiſſe nos animo perfecti illius, ex nulla parte ceſſantis.*

ſimilar ſentence in another caſe, where the ſame queſtion occurred, although, in diſcuſſing the latter, ſhould be demonſtrated, as may be demonſtrated, that the angle, which alone can anſwer the conditions of the queſtion, is a right angle?

If ſuch a diſpute as Archimedes rightly decided between Hiero, king of Syracuſe, and the mechanic, who was accuſed of pilfering ſome of the gold delivered to him for making a crown, and of ſupplying the place of what was withdrawn by baſer metal, coming before courts of law had been determined by a mode known to be *fallible*; would not a court of law now, diſregarding any number of thoſe determinations, reſort to the hydroſtatic experiment, which is *infallible*?

In adjuſting the proportion, which a tenent for life ought to have, of the purchaſe money, for which an eſtate of inheritance ſhould be ſold, would a court, at this day, regard the rules obſerved in ſuch caſes by the courts formerly, or have recourſe to the problems and tables invented and formed for that purpoſe by the accurate Demoivre, Halley or Price?

In a queſtion concerning the legitimacy of a poſthumous child, which is a phyſiological queſtion, depending upon the time of birth after a huſbands death, ought a court to regard the authority of opinions, by which former judges of law had limited the time of geſtation, ſo much as the opinion of Hunter, the eminent anatomiſt and accoucheur?

If

If the mother had taken another huſband, ſo ſoon, after the death of a former, that the child might have been begoten *(f)* by either, would a court at this day, permit the child, even if authority could be produced (which ſeems, by Cokes com. on Lyt. fol. 8. b, not impoſſible) for permitting him, to chuſe his father? (*g*)

Formerly, no proof of any thing, leſs than impoſſibility of procreation, ſeemed admiſſible to baſtardize a child, who was born in wedlock, if he might have been begoten, whilſt the huſband was *infra qratuor maria*. for this numberleſs authorities are extant, and ſome of them later than the determination of the caſe between Roſe and Bartlett. do courts at this time abide by thoſe authorities?

In

(f) This might have happened in the caſe of her, who, returning from the interment of her huſband, told a wooer, reſolved to apply early enough as he thought, that he was too late; and in the caſe of the epheſian matron who, as her ſtory is related or perhaps invented by Petronius, to ſave a living huſband, in danger of capital puniſhment, for neglect of duty, whilſt he dallied with her, in watching the corpſe of one who had been gibeted, contrived to make a dead huſband ſupply the place of the malefactor, ſtolen away by ſome of his friends in the guards abſence.

(g) A prince ſatisfactorily decided a diſpute between two women, each alleging herſelf to have borne the ſame child. but a child, if he can tell what father begot him, muſt be wiſer than Solomon. the mother, in ſuch a caſe, muſt be wiſer than either of them. why ſhe might not be a witneſs in it perhaps no good reaſon can be given. the lineaments of the child itſelf in ſome inſtances, e. g. reſemblance of one or other, or of the acknowledged children of one or other, huſband, might qualify the child, in *propria perſona* to prove the matter in queſtion. when a roman proconſul of Sicily ſaid to a man of that country, 'i cannot account for the exact ſimilitude between me and thee, ſince my father was never in this province;' the ſicilian, revenging the inſult on his mothers chaſtity *audacius quam virgis et ſecuribus ſubjecto conveniebat*, as Valerius Maximus obſerves, petulantly retorted, 'but my father went frequently to Rome.'

In Brookes abridgement, title adminiſtr. n. 47, in Swinburnes treatiſe of teſtaments, part 7, ſect. 8 and in the life and opinions of Triſtram Shandy, gentleman, vol. 4. p. 195, we meet with the caſe ſtated in the note. *(b)*

This caſe, in Cokes third book of reports, fol. 40, is indeed denied to be law; becauſe it is erroneous; and, for the ſame reaſon,

The interpretation of a deviſe in one mans teſtament, if the interpretation be erroneous, ought not to be a precedent authorizing a like interpretation of a like deviſe in another mans teſtament.

When

(b) 'In the reign of Edward the ſixth, Charles duke of Suffolk having iſſue a ſon by one venter, and a daughter by another venter, made his laſt will, wherein he deviſed goods to his ſon, and died; after whoſe death the ſon died alſo; but without will, without wife, and without child—his mother and his ſiſter by the fathers ſide (for ſhe was born of the former venter) then living. the mother took the adminiſtration of her ſons goods, according to the ſtatute of the 21ſt of Harry the eighth, whereby it is enacted, that in caſe any perſon die inteſtate, the adminiſtration of his goods ſhall be commited to the next of kin.

The adminiſtration being thus (ſurreptitiouſly) granted to the mother, the ſiſter by the fathers ſide commenced a ſuit before the eccleſiaſtical judge, alleging, 1, that ſhe herſelf was next of kin, and 2, that the mother was not of kin at all to the party deceaſed; and therefore prayed the court, that the adminiſtration granted to the mother might be revoked, and be committed unto her as next of kin to the deceaſed, by force of the ſaid ſtatute.

Hereupon, as it was a great cauſe, and much depending upon its iſſue—and many cauſes of great property likely to be decided in times to come, by the precedent to be then made—the moſt learned, as well in the laws of this realm, as in the civil law, were conſulted together, whether the mother was of kin to her ſon or no.—whereunto not only the temporal lawyers—but the church lawyers, the juris conſulti—the juris prudentes—the civilians—the advocates—the commiſſaries—the judges of the conſiſtory and prerogative courts of Canterbury and York, with the maſter of the faculties, were all unanimouſly of opinion, that the mother was not of kin to her child.'

When a court of law miſinterprets a deviſe, a ſentence, in conformity with that falſe interpretation, depriving one of an eſtate, is no leſs contrary to law, than the ſentence which deprived a mother of her right to an eſtate, upon the falſe principle, that ſhe was not of kin to her own child.

In neither caſe was the queſtion merely legal. in the caſe of the deviſe, where no technical term occurred, the queſtion was purely philological.

The court is as much bound to fullfill the intention of a teſtator, according to the meaning of *his own words* as to grant the adminiſtration to the next of kin.

A court of law, who, interpreting one mans words in his teſtament, about the meaning of which no man could have entertained a doubt, if ſimilar words in the teſtament of another man had not been miſinterpreted by another court, upwards of 160 years before, ſhould be guided in their determination by the authority of ſuch a falſe interpretation, are affirmed to determine contrary to law,—affirmed with the more confidence, becauſe the law doth not preſume the teſtator to know of ſuch miſinterpretation, but, on the contrary, preſuming him to be *inops conſilii*, directs the judges to interpret *his* words according to what they believe to be *his* meaning by *them*, upon

on the ſuppoſition that he is without the aid of thoſe who could inform him of judicial ſentences, by which ſimilar words had been miſinterpreted.

Indeed recurrence to authorities in queſtions upon the meaning of teſtamentary diſpoſitions ſeems improper in moſt caſes, where terms of art do not occur.

If a painter, who had been deſired to draw the picture of William Aylett, hearing that he reſembled one Richard Batyne, ſhould inquire after the latter, draw his picture, and preſent it for William Ayletts, moſt people would think the painter acted abſurdly, and more abſurdly, if the likeneſs which he took of Richard Batyne was not a faithfull likeneſs. when the defendents counſil rummaging inhis *repertorium juridicum*, his lumber room of law caſes and authorities, found a judicial interpretation of ſome words in Richard Batynes teſtament reſembling the words in William Ayletts teſtament, and recommended an adoption of that interpretation in the principal caſe, the judge of the high court of chancery thought, if he had adopted the interpretation recommended, which appeared to him falſe, he ſhould have determined contrary to law, and have acted not leſs abſurdly than the painter; for the interpretation of the teſtament ought to be as true an image of his intention who made it, as the portrait ought to be of him for whom it was drawn: more eſpecially if the caſe of Roſe *verſus* Bartlett

Bartlett be not only contrary to law, as it is clearly proved to be, but, for other reaſons, to be explaned hereafter, ought not to have the weight of an authority.

Some judges and many lawyers revere authority ſo much, that they ſeem to believe nothing, which hath that ſanction, to be wrong, and ſcarcely any thing, which wants it, to be right, and appear to be diſpleaſed with thoſe who have not the ſame kind of implicit faith.

Several years ago, in a caſe between Parſons and Parſons, where the queſtion was upon the interpretation of a deviſe, the chagrine of the plaintiffs counſil, occaſioned by the courts judgement, which he thought contrary to ſome authorities produced by him, broke forth in a declaration that, ſo ſoon as he ſhould return home, he would burn all his books of reports. ſuch an holocauſt might have been an offering not altogether acceptable to Aſtraea; becauſe of the reported caſes are many exceedingly valuable. better would have been an imitation of Prometheus, who is ſaid to have taught men, in ſacrifices, to conſume on the altar the entrails and offal, that is, the vile parts, of victims, and to regale themſelves, in jocund feſtivity, with the dainty parts.

Of the reports more in proportion might be ſpared than the barber and curate ſaved from Don Quixotes library; out of them, well winnowed

from the chaff accumulated with them, a body of civil law may be formed, equal in value with the code, pandects, inſtitutes, and novels, which were uſhered into the world with imperial auſpices.

American judges may contribute to ſuch a deſirable compilation; and will not have to encounter the prejudices, and to ſtruggle againſt the difficulties, which muſt occur in England, and retard a reformation of that part of the law, which is ſaid (Co. inſtit. part 1. fol. 344, a) to 'conſiſt on reports and judicial records:' many of which reports engliſh judges acknowledge to have been ill founded.

But how can this be done by american judges, if they may not reject thoſe caſes in the reports, which are contrary to law, or not reject them, before they ſhall have been reprobated by engliſh judges? if the caſe of Suffolk had not been denied by engliſh judges, muſt it have been admited by american judges to be law? in return for this deference by american judges to engliſh authority, how would engliſh judges reſpect american authority? the reſolution of an american court, quoted in Weſtminſter hall, if any counſil there ſhould venture to expoſe himſelf to ridicule, perhaps to rebuke, by the quotation, would, no doubt, be treated, if not with faſtidious neglect, like a * *sus Minervam.*

The

* *Cic. fam.* IX. 18. *Acad*, 1. 4.

The judge of the high court of chancery, not ſuppoſing himſelf to be in ſuch a humiliating predicament, as that he muſt wait for leave from engliſh judges, before he can venture, to reject an engliſh determination,

III. Denied the authority of the reſolution in the caſe of Roſe *verſus* Bartlett, upon which the defendents counſil in the principal caſe relied.

That it is contrary to law is believed to have been proved.

Upon that, and other parts of the caſe, to ſhew that it ought not to be reſpected, are obſerved,

1. The former part of the reſolution of the firſt queſtion is a dogma, merely didactic imperious and arbitrary, for which no reaſon is aſſigned; and the reaſon given for the other part of it, allowing leaſehold lands to paſs by a deviſe of all his lands, where the teſtator had only leaſehold lands, ſeems, aukward. the reaſon given is, 'for otherwiſe the will would be merely void.' inſtead of which moſt other men would have given this obvious, as well as true, reaſon, why the leaſehold lands ſhould paſs to the deviſee, 'that they were deviſed to him.'

Again; a caſe might have happened in which this reſolution might have been an authority on either ſide of the queſtion, and with equal force. if a man, who had lands in fee ſimple and lands

for

for years, had deviſed all his lands to him who was heir at law of the teſtator. *(i)* the deviſe, without doubt would have been void as to the fee ſimple lands, becauſe they would have deſcended, and therefore could not have paſſed by the deviſe, to the heir. here then might have been urged, on one ſide, the leaſehold lands ſhould paſs, becauſe 'otherwiſe the will would be merely void;' on the other, that the leaſehold lands ſhould not paſs, becauſe 'the teſtator had fee ſimple lands,' as well as leaſehold lands. *(k)*

2 The ſpecial aſſent of an executor, to whom a term for years was deviſed, with a remainder over, in order to execute the remainder, ſeemed not neceſſary, as the court reſolved it to be in the caſe quoted, if ſome facts ſtated in the ſpecial verdict be properly conſidered.

3. On the third queſtion the judges differed in opinion; yet it ſeems included in the firſt queſtion, on which they were unanimous.

4. One queſtion in the caſe was this: *Richard Baſtyne making his wife whole and ſole executrix of all his cattle, corn, and moveable goods, and not mentioning what ſhall be done concerning the reſidue*

(i) If Philip was eldeſt ſon of William Aylett, this was the principal caſe.

(k) When an admirer of Croke lately ſaid, 'his books were the beſt extant,' one, to whom this eulogy was reported, obſerved upon it, 'that men of the law found the caſes collected by that author as uſeful as belligerent nations find ſwiſs ſoldiers, who will fight for either of oppoſite parties;' and this obſervation ſeems verified in this caſe of Roſe *verſus* Bartlett.

reſidue of his eſtate, whether the wife be abſolute executrix quoad *all his eſtate, or only particular executrix* quoad *his cattle, corn, and moveable goods, and not* quoad *his leaſes and his debts?* in diſcuſſing which queſtion, two of the judges, in order to prove the wife to have been, not a ſpecial but, a catholic executrix, uſed one argument, in theſe terms: *catalla in latin extends to all things*, turning the engliſh word 'cattle' in the teſtament, which ſignifies gregarious quadrupeds, into a latin word which may include a leaſe of land for years. as happy an expedient as any of thoſe which occurred to Peter, Martin, and Jack, in Swifts tale of a tub.

5. The caſe doth not appear, by the report of it, to have been finaly decided, and ſo cannot be ſaid *tranſiſſe in rem judicatam*; for it ends thus: 'wherefore upon ALL the matter juſtice Jones and myſelf were of opinion againſt the plaintiff that he ſhould be barred. but juſtice Berkeley *e contra, per quod adjournatur.*'

For theſe reaſons the judge of the high court of chancery, rejecting the clumſy, bungling, unfiniſhed caſe of Roſe *verſus* Bartlett, as he thought it, made the decree, which he believed exactly correſponded with the meaning of William Ayletts *words*, inquiſitive to diſcover that meaning from thoſe words, convinced that *they* only ought to be conſulted for diſcovering it. *(1)*

But

(1) John Locke, in his eſſay for the underſtanding of ſaint Pauls epiſtles, by conſulting ſaint Paul himſelf, obſerved, that ſober inquiſitive readers

But he was miſtaken, as it ſeemeth, for the court of appeals, before whom the decree in the principal caſe was impeached, on the 12 day of march, 1795, delivered this opinion: ' that the teſtator appearing to have had freehold lands in the county of Kingwilliam to ſatisfy the deviſe to his ſon Philip of *all his lands in Kingwilliam*, the leaſehold lands in queſtion did not paſs thereby, ACCORDING TO UNIFORM DECISIONS ON THE SUBJECT, but paſſed in the reſiduary eſtate deviſed to the wife and children of the teſtator, and that there is error in the ſaid decree,' and therefore reverſed the ſaid decree.

Upon the reverſing decree the writer of the proluſions to it will make one remark, and to it ſubjoin one queſtion.

The remark is: the terms ' uniform deciſions,' that is, deciſions in England, ſuggeſt a power-full

ers of thoſe epiſtles, who had a mind to ſee nothing in them but juſt what the author meant, would not find the underſtanding of them difficult; whereas others could ſee in them what they pleaſed.

A turkiſh traveller, introduced into the vatican, when the librarian ſhewed the ſhelves on which were ranged the books relating to theology, the polyglotts, paraphraſes, commentaries, tranſlations, hiſtories, connections, homilies, ſermons, decrees of councils, polemical tracts, and many more, written in order to explane the chriſtians bible, ſaid, ' i ſuppoſe then after all this, every part of your bible muſt be well underſtood.' quite the reverſe, anſwered the librarian, controverſies have multiplied from that cauſe, whether controverſies have increaſed or diminiſhed by the great number of adjudications in caſes where interpretations of teſtaments have been in queſtion the reporter of the principal caſe will not pretend to decide; but he doth verily believe that in 1793, if the caſe of Roſe *verſus* Bartlett, which was diſcuſſed more than 160 years before, had never been publiſhed, no man would have thought whether William Aylett meaned to give all the land to which in Kingwilliam county he had any kind of right to his ſon Philip Aylett, a controvertible queſtion.

full argument in favor of a different deciſion in Virginia, if the firſt engliſh deciſion were erroneous, as it is affirmed to have been. in that country, if *many and uniform deciſions* have eſtabliſhed the doctrine, although it be unſound, *defendit numerus*. but in the principal caſe, if it be the only inſtance (and for any thing appearing to the contrary it is the only inſtance) in which any man ever thought whether a deviſe of the *whole*, was ſatisfied by *part*, of a thing? to be a diſputeable queſtion, the precedent here ought to be the reverſe, as is conceived, of that in England.

The queſtion is: when a man, who had two tracts of land in Kingwilliam county, deviſed all his lands in that county, that is, both the tracts, to his ſon Philip Aylett, and when that deviſe is ſatisfied with half his lands; that is with one of the tracts, in Kingwilliam county; this doctrine being eſtabliſhed; whether, when the ſame teſtator deviſed ALL the reſidue of his eſtate to his wife and children, the deviſe of ALL there was not ſatisfied, as in the other inſtance, with one HALF of the reſiduary eſtate; in conſequence whereof the wife would have been intitled to one ſixth of one half, and to one third of the other half, that is to three twelfths or one fourth part, of the reſidue?

FINIS.