REPORTS

OF

CASES

ARGUED and DETERMINED

IN THE

High Court of Chancery,

IN THE TIME OF

Lord Chancellor HARDWICKE:

Collected and Methodized by

John Tracy Atkyns,

Of *Lincoln's Inn*, Eſq;

CURSITOR BARON of the EXCHEQUER.

With NOTES and REFERENCES, and Three TABLES; one of the ſeveral TITLES with their DIVISIONS, another of the NAMES of the CASES, and a third of the PRINCIPAL MATTERS.

VOL. I.

LONDON:

Printed by H. WOODFALL and W. STRAHAN, Law-Printers to the King's moſt Excellent Majeſty;

And ſold by J. WORRALL, at the *Dove* in Bell Yard, near Temple-Bar, and W. SANDBY, at the *Ship* in Fleet-ſtreet.

MDCCLXV.

THE

PREFACE.

IN the books of Reports which have lately been publiſhed, the Caſes by being placed in the order they were determined, without the leaſt connection in reſpect to the matter, are, if I may be allowed the expreſſion, a journal of caſes only, and, upon that account, more likely to confound the reader, by ſtepping ſo abruptly from one head of equity to another, than if he was to take in, at one view, the whole that relates to each ſeparate branch: This was the reaſon which induced me to range the Caſes under their particular heads of equity, in an alphabetical ſeries; and though my methodizing them in this manner, has occaſioned me infinite trouble, yet I ſhall think myſelf ſufficiently recompenſed, if it anſwers the end I deſign by it, which is, inſtead of a book of reports, to make it, in ſome meaſure, a digeſt, or ſyſtem of equity.

I am

I am aware only of one objection, that in the ſame caſe there may ariſe different points of equity, which do not correſpond with the principal one; this I hope is obviated, by a reference under the proper heads, to the reſpective pages, where theſe ſeveral points may be found.

It is my chief ambition, to contribute, as far as lies in my power, to the good of the publick, by communicating to the world a collection of caſes, which muſt be of univerſal benefit to mankind, when conſidered as the determinations of a judge, ſo eminently diſtinguiſhed for his ability and integrity.

" *Illius vita multis erit præclariſque*
" *monumentis ad omnem memoriam com-*
" *mendata; admirabilis quædam, et in-*
" *credibilis, et pene divina ejus in legibus*
" *interpretandis, æquitate explicanda, ſci-*
" *entia; neque enim ille magis juris con-*
" *ſultus quam juſtitiæ fuit* *.

* Cic. Orat. Philipp. Nona.

A TABLE

A TABLE OF THE Several TITLES, With their DIVISIONS.

A Table of the ſeveral TITLES,

With their DIVISIONS.

CAP. XVI.

Baron and Feme.

CAP. XVII.

Bills of Exchange.

CAP. XVIII.

Bill.

CAP. XIX.

CAP. XX.

CAP. XXI.

A Table of the ſeveral TITLES,

CAP.

CAP.

A TABLE OF THE NAMES of the CASES.

Alphabetically diſpoſed, in ſuch a double Order, as that the CASES may be found by the Names either of the Plaintiffs or Defendants.

N. B. Where *verſus* follows the firſt Name, it is that of the Plaintiff; where *and*, it is the Name of the Defendant.

A TABLE *of the Names of the Caſes.*

A TABLE *of the Names of the Caſes.*

A TABLE of the Names of the Cases.

A TABLE *of the Names of the Caſes.*

ERRATAS in the Body of the Work.

Page 1. line 6. inſtead of the word *three* read *there*.
165. for Sir *Matthew* read Sir *Malthus Ryal*.
278. line 10. for *Jnducæ* read *Induciæ*.

ERRATAS in the Marginal Notes of the Work.

Page 7. *M. N.* for *warranted* read *covenanted*.
13. line the laſt, for *court* read *the court*.
54. line 5. inſtead of *the cauſes* read *the cauſe*.
59. line 13. a comma wanting between the word *were*, and the word *declared*.
60. line 14. no ſtop at the word *up*, and a full one at the word *accordingly*.
61. *M. N.* 2. line 13. inſtead of *ought not have* read *ought not to have*.
139. *M. N.* line 1. *dele* the words *Vid. Caſe*.
ditto line 14. inſtead of *is proceeding* read *is a proceeding*.
144. line 19. inſtead of *order ſuch, &c.* read *order the bond given by petitioning creditor, to be aſſigned to the bankrupt*.
154. *M. N.* 2. line 9. inſtead of *no poſſeſſion* read *though no poſſeſſion*.
ditto line 13. for *if goods* read *if of goods*.
191. line 8. for *it* read *the releaſe*.
203. line 6. for *Margaret* read *Margaret Lingood*.
ditto line 10. for *Thomas's* read *Thomas Lingood's*.
256. line 7. for *rendue* read *reſidue*.
281. line 1. for *indorſee* read *indorſer*.
348. line 16. for *profits* read *profit*.
361. line 1. inſtead of Sir *Joſeph Jeykll* read Sir *Joſeph Jekyll*.
383. line 3. the word *pay* omitted.
392. line 14. inſtead of *ot* read *to*.
428. *M. N.* 3. line 9. for *tenants* read *tenant*.
448. *M. N.* 2. line 18. inſtead of *him* read *A*.
450. 2. line 9. inſtead of *ceſtuique* read *ceſtuique truſt*.
512. line 2d and 3d *dele* the words *in* and *truſt*.
ditto line 6. after the word *deceaſe*, add *in truſt to pay the intereſt thereof &c.*
612. line 20. inſtead of *opinton* read *opinion*.

Memorandum, That on *Monday* the 21ſt of *February* 1736, LORD HARDWICKE was appointed Lord High Chancellor of *Great Britain*, and on the *Thurſday* following, ſat in **Lincoln's Inn Hall,** to hold the firſt General Seal after *Hilary* term.

N. B. If the firſt volume meets with the approbation of the publick, the remainder of the caſes taken by Mr. Tracy Atkyns *in the time of Lord Chancellor* HARDWICKE, *which are preparing upon the ſame plan, will be ſent, when compleat, to the preſs.*

CAP. I.

Abatement and Revivor.

Vide title *Bill, under the diviſion, Supplemental Bill.*

CAP. II.

Account.

(A) What ſhall be a good bar to a demand of a general one.

Michaelmas term 1737.

Dawſon v. *Dawſon.*

Caſe 1. Where a defendant ſets forth a ſtated account, it is a bar to a general one till particular errors are aſſigned.

Lord Chancellor. WHERE a bill is brought for a general account, and the defendant ſets forth a ſtated one, the plaintiff muſt amend his bill: For the ſtated account is, *prima facie*, a bar till particular errors are aſſigned to the ſtated account.

To ſupport a ſtated account it is not ſufficient to ſay, that three has been a dividend, which implies an account ſtated, for a dividend may be made upon a ſuppoſition that the eſtate will amount to ſo much; but ſtill ſubject to an account that may be taken afterwards.

It is not ſufficient to maintain a ſtated account, to alledge there has been a dividend made between the parties.

CAP. III.

Ademption.

Vide title *Legacies.*

Graves v. *Boyle*, p.

CAP. IV.

Admiſſion.

Vide title *Bill, under the diviſion, Bills of Diſcovery,* &c.

CAP. V.

Advowſon.

Vide title *Truſt and Truſtees, under the diviſion, Reſulting Truſts and Truſts by Implication.*

CAP. VI.

Agreements, Articles, and Covenants.

(A) Agreements and covenants which ought to be perfoꝛmed in ſpecie.

(B) Paꝛol agreements, oꝛ ſuch as aꝛe within the ſtatute of frauds and peꝛjuries.

(C) Voluntaꝛy agreements, in what caſes to be peꝛfoꝛmed.

(D) Concerning the manner of peꝛfoꝛming agreements.

(A) Agreements and covenants which ought to be perfoꝛmed in ſpecie.

Auguſt the 2*d* 1739.

Henry Stapilton an infant, by *Ann* his mother —— Plaintiff.
Philip Stapilton and others —— —— Defendants.

Caſe 2. *Philip Stapilton* tenant of the premiſſes in queſtion for 99 years, if he ſo long lived, remainder to his firſt and other ſons in tail, remainder to his right heirs, having two ſons, *Henry* and *Philip*, they by leaſe and releaſe of the 9*th* and 10*th Sept.* 1724. in order to ſettle and perpetuate the manors, &c. in the name and blood of the *Stapiltons*, and for making proviſion for his ſons, and for preventing diſputes that might poſſibly ariſe between them or any other perſon claiming an intereſt in the eſtates, and for barring all eſtates tail, releaſe and confirm to two truſtees all thoſe manors, &c. to hold to them and their heirs, (as to part) to the uſe of *Philip* the father, his heirs and aſſigns for ever, and (as to another part) to the uſe of the father for life, to *Henry* the ſon for life, remainder to truſtees for preſerving, &c. remainder to his firſt and every other ſon in tail male, remainder to *Philip* the ſon for life, with like remainders to the daughters of *Henry* in tail, remainder to the daughters of *Philip* the ſon in tail, remainder to the right heirs of *Philip* the father. And as to the other part, to the uſe of *Philip* the father for life, remainder to *Philip* the ſon for life, &c.

BY a deed dated on the 21*ſt* of *Auguſt* 1661. *Philip Stapilton* was tenant of the premiſſes in queſtion for 99 years, if he ſo

remainder

remainder to his firſt and other ſons in tail male, remainder to his right heirs.

Philip having two ſons, *Henry* and *Philip*, they by deeds of leaſe and releaſe the *9th* and *10th* of *Sept.* 1724. reciting, that for ſettling and perpetuating all manors, *&c.* in the name and blood of the *Stapiltons*, and for making proviſion for his two ſons, *&c.* for preventing diſputes and controverſies that might poſſibly ariſe between the ſaid two ſons, or any other perſon claiming an intereſt in all or any of the eſtates therein after mentioned, and for barring all eſtates tail, and for anſwering all and every the purpoſe and purpoſes of the parties thereto, and for and in conſideration of the ſum of 5 *s.* releaſe and confirm to *Thomſon* and *Fairfax* all thoſe manors, *&c.* To have and to hold to them, their heirs and aſſigns, to the uſe (as to part) of *Philip* the father, his heirs and aſſigns for ever, and as to another part, to the uſe of *Philip* the father for life, remainder to *Henry* the ſon for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and every other ſon in tail male, remainder to *Philip* the ſon for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail male, remainder to the daughters of *Henry* in tail, remainder to the daughters of *Philip* the ſon in tail, remainder to the right heirs of *Philip* the father. And as to the remaining part, to the uſe of *Philip* the father for life, with like limitations in the firſt place to *Philip* the ſon and his iſſue, and then to *Henry* and his iſſue, remainder in fee to the father.

There were covenants to ſuffer a recovery within 12 months, and likewiſe for farther aſſurances.—*N. B.* To this deed, the heir of the ſurviving truſtee in the deed in 1661 was not a party.

But by deeds of leaſe and releaſe dated the *28th* and *29th* of *Sept.* 1724. to which the heir of the ſurviving truſtee of the deed of 1661 was a party, the father and two ſons make *Thompſon* and *Fairfax* tenants to the præcipe, in order to ſuffer a recovery for the purpoſes mentioned in the former deeds of the *9th* and *10th* of *Sept.*

By leaſe and releaſe *28th* and *29th* of *Sept.* 1724. the father and two ſons make *Thompſon* and *Fairfax* tenants to the præcipe, in order to ſuffer a recovery for the purpoſes mentioned in the former deed: Before any recovery ſuffered *Henry* died leaving iſſue the plaintiff.

Before any recovery ſuffered *Henry* died, leaving iſſue the plaintiff.

Afterwards, by leaſe and releaſe the *12th* and *13th* of *April* 1725. to which the heir of the ſurviving truſtee of the deed of 1661 was a party, *Philip* the father and *Philip* the ſon covenant to ſuffer a recovery, in which *Thompſon* and *Fairfax* were to be tenants to the præcipe, to the uſe, as to part, of *Philip* the father, his heirs and aſſigns; and as to the other part, to the uſe of *Philip* the father for life, remainder to *Philip* the ſon in fee.

Afterwards by leaſe and releaſe, *12th* and *13th* of *April* 1725. *Philip* the father and *Philip* the ſon covenant to ſuffer a recovery, in which *Thompſon* and *Fairfax* were to be tenants to the præcipe, to the uſe, as to part, of *Philip* the father and his heirs; and as to the other part, to the uſe of *Philip* the father for life, remainder to *Philip* the ſon in fee.

In

In *Trinity* term 1725. a recovery was ſuffered, in which were the ſame tenant to the præcipe, the ſame demandant, and the ſame vouchees (except *Henry* who was dead), as were covenanted to be by the firſt deed; it was likewiſe ſuffered within twelve months after the firſt deed.

In *Trinity* term 1725. a recovery was ſuffered, in which were the ſame tenants to the præcipe, the ſame demandants, and the ſame vouchees (except *Henry* who was dead), as were covenanted by the firſt deed, and within 12 months after this deed.

The father being dead, the plaintiff as ſon and heir of *Henry*, brought this bill to eſtabliſh his title to the premiſſes in queſtion, and for the whole eſtate as tenant in tail under the old ſettlement, and to be let into poſſeſſion, and for an account of rents received by *Philip Stapilton* the ſon, due ſince the death of the plaintiff's grandfather, and to have the ſame applied for the plaintiff's benefit during his infancy, and for an injunction to reſtrain the defendants from receiving any more rents.

The father being dead, the plaintiff as ſon and heir of *Henry*, brought this bill to eſtabliſh his title to the premiſſes in queſtion, and for the whole eſtate as tenant in tail under an old ſettlement.

The defendant *Philip* the ſon inſiſted *Henry* was a baſtard, and that by the deed of 1725. and the recovery, he was intitled to the whole eſtate.

The defendant, *Philip* the ſon by his anſwer confeſſes the ſeveral deeds before mentioned, but ſays, *Henry* was a baſtard, and that by vertue of the deed of 1725, and of the recovery, he was intitled to the whole eſtate in queſtion.

Upon an iſſue directed, *Henry* was found illegitimate, and the cauſe was now heard upon the equity reſerved, when the counſel for the plaintiff waiving the claim to the whole eſtate, inſiſted upon theſe two points.

Henry upon an iſſue found illegitimate, and the cauſe came on now on the equity reſerved.

The plaintiff is intitled to the lands limited in remainder to his father, by the deeds of the 9*th* and 10*th* of *Sept.* 1724.

1*ſt*, That the recovery ſuffered in *Trinity* term 1725. ſhould enure to the uſe of the deeds of the 9*th* and 10*th* of *Sept.* 1724. and not to the uſes of the deed in 1725.

2*dly*, Suppoſing it did not, yet that the deed of 1724. was ſuch an agreement, as this court will carry into execution.

according to the uſes therein, notwithſtanding the illegitimacy of his father; a court of equity being deſirous of laying hold of any juſt grounds to carry agreements into execution, made to eſtabliſh the peace of a family.

As to the firſt point; It was ſaid that the uſes when once declared cannot be altered, unleſs all the parties intitled to the uſes join in the new declaration, and *Henry* did not join in the deed of 1725. Tenant in tail may part with his eſtate, and it ſhall be good againſt him, tho' not againſt his iſſue. For tenant in tail is not aided by the ſtatute of *Weſtminſter* the 2*d*, but only his iſſue, therefore by the deed of 1724. the uſes being executed by the ſtatute of *H.* 8. *Henry* gained a baſe fee which is not avoidable by *Philip* during his life, and as his iſſue are barred by the ſubſequent recovery, they will not be able to avoid it, and conſequently *Henry*'s eſtate which was before defeaſible is made indefeaſible by the recovery.

2 Salk. 619. Farr. 18. S. C. Cro. Jac 688. Sir W. Jones 60. S. C.

If tenant in tail confeſſes a judgment, or mortgages the lands, and afterwards ſuffers a recovery to a collateral purpoſe, that recovery ſhall enure to make good all his precedent acts and incumbrances. 1 *Ch. Caſ.* 119. (*Lord Chancellor* mentioned a caſe in lord *King*'s time, where father tenant in tail, remainder to himſelf in fee, contracting debts on ſpecialty, his ſon after his death levying a fine let in his father's creditors.) And if a recovery ſuffered for another purpoſe will ſubſtantiate any prior act of the tenant in tail, much more, in this caſe, this recovery will ſubſtantiate the firſt deed, where there are all the parties who covenanted by that deed.

As to the ſecond point; This cannot be conſidered as a voluntary agreement, for *Henry*'s legitimacy was then doubtful, and if he had proved legitimate, *Philip* would have come into this court to have the agreement executed, and *Henry* would have been bound by it. This court has decreed the performance of agreements like this founded upon miſtakes; as in the caſes of *Frank* v. *Frank*, 1 *Ch. Caſ.* 84. and *Cann* v. *Cann*, 1 *Will.* 723.

For the defendant it was argued, as to the firſt point, that *Henry* being dead before the recovery was ſuffered, the intent of the parties, in the firſt deed, could not be purſued; for the plaintiff (ſuppoſing him legitimate) claims paramount his father, and the deed 1661. therefore as the recovery could not ſubſtantiate the firſt deed, ſuppoſing him legitimate, it ſhall not ſubſtantiate it, now he is found illegitimate.

The plaintiff upon the death of his father had not any uſe veſted in him, for the intent of the parties was, that the uſes ſhould ariſe out of the recovery; the ends recited could not be come at without a recovery, and where the intent of the parties is, that the uſes ſhould paſs by fine or recovery, nothing will paſs by the deed, that is intended only to declare the uſes; the fine and recovery all make but one conveyance. *Cro. Jac.* 643. 2 *Ro. Rep.* 68. 2 *Lev.* 306. 1 *Vent.* 279. 2 *Lev.* 54. *Cromwell*'s caſe. 2 *Co. Cro. Jac.* 320.

As to the ſecond point; Take it as an agreement, this court will not decree a performance of it, for ſuppoſing *Henry* had been found legitimate, this court would not have decreed a performance of it againſt the plaintiff; ſo that, in regard to the defendant, it muſt be conſidered as a voluntary agreement, into which he was drawn without any valuable conſideration, and the covenant for further aſſurance will be void as the deed itſelf to which it is annexed is void; and ſo it was determined in the caſe of *Furzaker* v. *Robinſon*, *Prec. in Chan.* 475.

Lord Chancellor. The plaintiff in this caſe is intitled to have a decree; there was a ſufficient foundation for *Philip* the father, and *Henry* and *Philip* his two ſons to execute the leaſe and releaſe of the 9*th* and 10*th* of *Sept.* 1724. It was to ſave the honour of the father and his family, and was a reaſonable agreement, and therefore if it is poſſible for a court of equity to decree a performance of it, it ought to be done.

Where agreements are entred into to ſave the honour of a family, and are reaſonable ones, a court of equity will, if poſſible, decree a performance.

It would be very hard for the defendant on his ſide, to endeavour to ſet aſide this agreement, and the effect of this deed; conſider the ſtate and ſituation of the family at the time of making the agreement; *Philip* had theſe children grown up, had a very conſiderable real eſtate, both his ſons then owned as legitimate, their father and mother had lived together as huſband and wife for many years, and at the time of this agreement were ſo; there was a foreſight in the father and mother, that ſuch a diſpute between their two ſons might hereafter ariſe, to their diſhonour and likewiſe that of the family.

The foundation of this agreement, the illegitimacy of the eldeſt ſon *Henry*, has now been determined by a trial, and it is found that *Henry* was a baſtard, yet both the ſons are of the ſame blood of the father equally, though not ſo in the notion of the law.

If the elder ſon ſhould be found illegitimate, (as he now is) the father knew he would be left without any proviſion if no ſuch agreement was made; and on the other hand, if his legitimacy ſhould be eſtabliſhed, then *Philip* the younger ſon would have nothing: To prevent theſe diſputes, and ill conſequences, the father brings both his ſons into an agreement to make a diviſion of his real eſtate; it is very plain the parties did not know who was the heir of the ſurviving truſtee, in the ſettlement of 1661, at the time of the leaſe and releaſe the 9*th* and 10*th* of *Sept.* 1724; becauſe they covenant a writ of entry ſhould be ſued out within 12 months, which is a very unuſual time to limit to ſuffer a recovery, and done in order to give time to find out the heir of the ſurviving truſtee, if they could find him out, but he was afterwards found and made a party to the deeds of the 28*th* and 29*th* of *Sept.* 1724.

The bill is brought by the eldeſt ſon and heir of *Henry*, to have the benefit and poſſeſſion of the whole eſtate, and to have an account of the rents and profits, and to be quieted in the poſſeſſion, and for general relief. Upon the firſt hearing an iſſue was directed to try whether *Henry* the father was legitimate, and found he was not, and now the plaintiff inſiſts upon having the benefit of this agreement, whereby he is only intitled to a part; this being the bill of an infant, he may have a decree upon any matter ariſing upon the ſtate of his caſe, though he has not particularly mentioned and inſiſted upon it, and prayed it by his bill; but it might be otherwiſe in the caſe of an adult perſon.

An infant may have a decree upon any matter ariſing on the ſtate of his caſe, though not particularly prayed by his bill.

Upon this caſe there ariſes two general queſtions.

Firſt, Whether the plaintiff has any eſtate in law by vertue of any of the conveyances, or by the recovery?

Secondly, If he has no eſtate at law, or only a defeaſible one, whether he is intitled to have the benefit of this agreement, and to have it carried into execution here?

The firſt queſtion conſiſts of two branches.

Firſt,

Firſt, Whether the leaſe and releaſe of the *9th* and *10th* of *Sept.* 1724. will amount to a good declaration of the uſes of the recovery, notwithſtanding the ſubſequent deed of *April* 1725?

Secondly, If not, whether the recovery of *Trinity* term 1725. having barred the eſtate tail, will make good any eſtate which paſſed by the leaſe and releaſe of the *9th* and *10th* of *Sept.* 1724?

As to the firſt; whether *the leaſe and releaſe* is a good declaration of the uſes of the recovery, I am ſtrongly inclined to think it will amount to a good declaration: This queſtion depends on the conſtruction of law, and the authority of caſes upon the declaration of uſes. It is true, where there is an agreement to ſuffer a recovery, and uſes are declared, if the recovery is after ſuffered, though it varies in point of time from the recovery covenanted to be ſuffered, yet if there is no ſubſequent declaration of uſes, the recovery will enure to the uſes ſo declared.

Where there is an agreement to ſuffer a recovery, and uſes are declared, tho' it is ſuffered at a different time from the recovery warranted to be ſuffered, yet if no ſubſequent declaration of uſes, it will enure to the uſes ſo declared.

And before the ſtatute of frauds, if the deed declaring the uſes had not been purſued, a parol declaration of uſes would have been let in; but if there is a deed declaring the uſes, and the common recovery is ſuffered accordingly, that would, before the ſtatute, exclude a parol declaration of new uſes.

But even now there may be a ſubſequent declaration of uſes, but that declaration muſt be in writing, and ſuch a new declaration of uſes depends upon the agreement of the parties; therefore, though it is ſaid at the bar, that the declaration of uſes is in the power of the tenant in tail, and that he may declare new uſes; I take that not to be law, for ſuch ſubſequent declaration muſt be by all the parties concerned in intereſt; and in the caſe of the counteſs of *Rutland*, 5 *Co.* 25. it is not laid down there, that the tenant in tail might declare new uſes, but ſaid *whilſt it is directory only*, new uſes may be declared, and the meaning of that is, that as the uſes muſt ariſe out of the agreement of the parties, the parties may change the uſes, but that muſt be done by the mutual conſent of all the parties concerned in intereſt, and in that caſe it was a mutual agreement of all parties.

Where there is a deed to lead the uſes of a recovery, it is not in the power of tenant in tail to declare new uſes, but ſuch ſubſequent declaration muſt be by all the parties concerned in intereſt. The expreſſion in the counteſs of *Rutland*'s caſe, 5 *Co.* that whilſt it is directory only, new uſes may be declared, means that as the uſes muſt ariſe out of the agreement of the parties, they by mutual conſent may change the uſes.

And in the caſe of *Jones* v. *Morley*, 2 *Salk.* 677. There was a variance as to the time of ſuffering the recovery, from the deed declaring the uſes, and there held that a declaration of uſes was equally good, whether by deed or not, if in writing.

But in the preſent caſe, the ſecond agreement not being between all the parties concerned in intereſt, ought not to control the firſt declaration, and eſpecially as this recovery was ſuffered within the time preſcribed by the firſt deed, and between the ſame demandant and tenant.

The conſideration for ſuffering the recovery was good both in law and equity, and there is no caſe to warrant me to ſay, the firſt agreement is not good and binding, or that the tenant in tail could by his own agreement afterwards change the uſes.

But if it was doubtful whether the recovery ſuffered in 1725. ſhould enure to the uſes declared by the deed of 1724, I am of opinion the recovery will operate to make good thoſe eſtates which paſſed by the deed of 1724.

But to this two objections have been made.

Firſt, That the uſes muſt be governed by, and operate according to the intention of the parties, therefore the ſubſequent recovery being ſuffered to other uſes, thoſe uſes will take place.

Secondly, If any uſes did paſs by the deed in 1724, yet this recovery will not make thoſe uſes good, becauſe the ſubſequent recovery was ſuffered to particular uſes declared by the deed of 1725.

Where a court of law or equity find that the general and ſubſtantial intent of the parties was, that the eſtate ſhould paſs, they will conſtrue deeds in ſupport of that intention, different from the formal nature of thoſe deeds themſelves.

As to the firſt objection. I am of opinion that a uſe did paſs by the deed of 1724, and according to the intention of the parties. It is certainly true, that according to the ſtatute of uſes, the general doctrine is, that the uſes ſhall be executed according to the intention of the parties, but both the courts of law and equity conſider what was the general and final intent of the parties. In this caſe, their intention was, that the eſtate ſhould paſs, and wherever a court of law or equity find that the general and ſubſtantial intent of the parties was, that the eſtate ſhould paſs, they will conſtrue deeds in ſupport of that intention, different from the formal nature of thoſe deeds themſelves; as a feoffment, to ſerve the intention of the parties, ſhall operate as a covenant to ſtand ſeiſed. The intent here was, that the eſtate in point of law ſhould paſs by the deed of 1724, and that the uſes declared by that deed ſhould veſt in the mean time till the recovery ſuffered.

This is an anſwer to the objection ariſing from the ſtatute of uſes; but there is another queſtion, what eſtate paſſed by the deed of 1724?

It was a defeaſible eſtate to ſerve the uſes of that deed, and ſo is the reſolution in *Machell* v. *Clark* in *Farr.* 18. *Salk.* 619. That tenant in tail may convey a baſe fee and eſtate defeaſible by the entry of the iſſue.

The next queſtion is, Whether the recovery ſuffered in 1725 did enure to make good, and render indefeaſible thoſe baſe eſtates created by the deed of 1724.

And I am of opinion they are made good.

The objection to this is, That the recovery was ſuffered in purſuance of the deed in 1725, wherein there were new uſes limited, but the only uſes which make any difference in that deed are to *Philip* the ſon and his heirs, ſo there is no body concerned in the queſtion but *Philip* and his heirs.

Where there is a recovery for ſtrengthening the title of a purchaſer, with a declaration of the uſes to him and his heirs, notwithſtanding a precedent one to different uſes, it will not enure to make good ſuch former declaration, but the uſes of the purchaſe only.

It has been argued by defendants counſel, that, if the firſt declaration of uſes is in general to prevail, purchaſers of eſtates, though

they

they have a recovery for ſtrengthening their title, with a declaration of the uſes of the recovery to themſelves and their heirs, cannot be ſafe, for the *vendor* may defeat ſuch declaration by a precedent one to different uſes; but in ſuch caſes I think a recovery would not enure to make good ſuch former declaration of uſes, but only the uſes of the purchaſe.

It is admitted, that if tenant in tail confeſſes a judgment, or a ſtatute, or enters into a bond, and afterwards ſuffers a recovery to bar the eſtate tail, it lets in the precedent judgment, *&c.* And it is as clear, if a tenant in tail makes a leaſe not warranted by the ſtatute of the 32 *H.* 8. if he ſuffers a recovery, that lets in the leaſe and makes it good. There are ſo many caſes of this kind, that it is not neceſſary for me to mention them.

If tenant in tail makes a leaſe not warranted by the ſtatute, and ſuffers a recovery, it lets in the leaſe and makes it good; the ſame as to a judgment, ſtatute or bond.

This caſe is different from thoſe that turn only upon the point of the effect of a meer declaration of uſes; for a meer declaration of uſes ſubſiſts only upon the agreement of the parties, and in ſuch caſes, where the agreement has been changed by mutual aſſent of all parties, there a recovery ſhall enure to make good ſuch laſt agreement or declaration.

But if the eſtate was veſted, notwithſtanding ſuch declaration of uſes, yet the recovery has always been held to make good ſuch defeaſible eſtate; for the prior leaſe, charge or eſtate made by tenant in tail is only defeaſible by the iſſue, by virtue of the ſtatute *de donis*, which was made to protect the iſſue againſt the alienation of the tenant in tail; therefore the iſſue would avoid ſuch leaſe, *&c.* but not the tenant in tail himſelf; but when by the recovery he has gained to himſelf a fee, all the reaſoning for avoiding an eſtate made by tenant in tail is gone, for the iſſue is barred by the recovery. The reaſon why the iſſue may avoid a charge made by tenant in tail, is upon account of the protection of the iſſue and his eſtate under the ſtatute *de donis*, and of the privity of the eſtate tail; but when the privity is gone, the reaſon ceaſes, and to this purpoſe is the caſe of *Croker* v. *Kelſey*, Sir *W. Jones* 60.

The iſſue of tenant in tail by virtue of the ſtatute *de donis* may avoid a prior leaſe, charge or eſtate made by ſuch tenant, but not he himſelf; but when by the recovery he has gained a fee, the iſſue being barred, all the reaſoning for their avoiding eſtates, &c. made by him ceaſes.

In the caſe of lord *Derwentwater*, *Mod. Caſes in Law and Equity*, 172. 2*d part*, the queſtion was, Whether a papiſt, tenant in tail, ſuffering a recovery and declaring the uſes to himſelf in fee, gained a new eſtate within the 11th and 12th of *Will.* 3. or was in of the old uſe? And it was held the 5th of *Geo.* 1. by four judges out of five, appointed delegates to determine appeals from the commiſſioners of forfeited eſtates, that he was in of the old uſe; and I take it for law, that a tenant in tail ſuffering a recovery is in of the old uſe, and that the eſtate is diſcharged of the ſtatute *de donis*; and therefore I am of opinion that the recovery has made good this defeaſible eſtate created by the deed of 1724.

Where a tenant in tail ſuffers a recovery, he by conſtruction of law is in of the old uſe, and the eſtate is diſcharged of the ſtatute *de donis*.

It has been objected, that if the plaintiff has any title, his remedy is at law, but I think it is more properly here; he is an infant, and has come recently into this court, nor do I think this caſe depends intirely upon the point of law; for I am of opinion that the plaintiff is intitled to have an execution of the agreement, as a good and binding agreement in this court.

Where a valuable conſideration for an agreement on all ſides, there is a ſufficient ground to come into a court of equity, but a mere volunteer not intitled to come here for an execution of an agreement.

The queſtion is, Whether there was any valuable conſideration on all ſides for entring into this agreement? If ſo, then there is a ſufficient ground for coming here; but a mere volunteer is not intitled to come here for an execution of an agreement; but here is a proper conſideration as appears in the recital of the deed of 1724; neither is it the common caſe of a baſtard, for the law of *England* does allow of ſome privileges to a baſtard *eigne*, and their parents are not puniſhable by the canon law for antenuptial fornication.

An agreement upon a ſuppoſition of a right, though it may afterwards come out on the other ſide, is binding, and ſhall not prevail againſt the agreement of the parties.

In the caſe of *Cann* v. *Cann*, it was laid down by lord *Macclesfield*, that an agreement entred into upon a ſuppoſition of a right, or of a doubtful right, though it after comes out that the right was on the other ſide, ſhall be binding, and the right ſhall not prevail againſt the agreement of the parties, for the right muſt always be on one ſide or the other; and therefore the compromiſe of a doubtful right, is a ſufficient foundation of an agreement.

Another objection has been made to this agreement, that the benefit on *Henry* and *Philip*'s ſide was not mutual and equal.

During both their lives, the benefit and obligation was mutual, and *Henry* would have been equally compellable to ſuffer a recovery with *Philip*.

But it is ſaid, that an alteration as to their mutual benefit has happened by the death of *Henry*, and it is ſaid, that if *Henry* had been legitimate the plaintiff would not have been compellable to ſuffer a recovery, becauſe the iſſue in tail is not compellable to perform the covenants of his anceſtor the tenant in tail.

But here the chance was at firſt equal, and it is hard to ſay, that the act of God ſhould hinder the agreement from being carried into execution; the chance was equal, who died firſt, *Henry* or *Philip*: If *Henry* had been legitimate, and *Philip* had died in *Henry*'s life, leaving children, I am of opinion *Philip*'s ſon would have been intitled to have come againſt *Henry* for an execution of the agreement; and therefore the chance was at firſt equal on both ſides, and we are not to conſider how the event has happened.

Another objection has been taken, that the father made uſe of his coercive power over *Philip* to force him into this agreement, and it is ſaid equity does not favour agreements made by compulſion.

But this court always conſiders the reaſonableneſs of the agreement: beſides here is no proof of compulſion by the father; if there was

any compulſion, it ſeems rather to have been made uſe of againſt *Henry*, who was then eſteemed his eldeſt ſon, and conſidering the conſequence of ſetting aſide this agreement, a court of equity will be glad to lay hold of any juſt ground to carry it into execution, and to eſtabliſh the Peace of a family.

His Lordſhip therefore declared, that the Plaintiff is intitled to the lands and premiſſes limited in remainder, to the firſt ſon of *Henry Stapilton*, his father, by the deeds of the 9th and 10th of *September* 1724, according to the uſes therein, and to the benefit of the covenants in thoſe deeds, and decreed the defendant *Philip* to come to an account for the rents of the ſaid premiſſes, and declared that *Philip* was intitled to hold the lands limited by the deeds of the 9th and 10th of *September* 1724, to *Philip* the elder for life, with remainder to the defendant for life, againſt the plaintiff and his heirs, and that the defendant ſhould make further aſſurance to the plaintiff of his part, and the plaintiff the like aſſurance to the defendant of his part, and no coſts on either ſide.

Collet v. *Collet*. June the 2d 1749.

Caſe 3.

By a ſettlement before marriage, ſecurities for money belonging to the wife were aſſigned to a truſtee, to be laid out in the purchaſe of freehold lands, and ſettled among other uſes, to the firſt ſon in tail male, with like remainders to the ſecond and other ſons, remainder to the heirs female in tail. The father and mother die, leaving the *plaintiff*, two other ſons and four daughters. The eldeſt ſon now prays by his bill, that the ſecurities may be aſſigned to him, being tenant in tail, and not laid out in land.

BY a ſettlement made previous to the marriage of the plaintiff's mother, ſeveral ſecurities for money belonging to her were aſſigned to a truſtee, in truſt within one year after the date of the ſettlement, or as ſoon as conveniently might be after the marriage, to be laid out in the purchaſe of a freehold eſtate in lands or houſes, to be ſettled to the uſe of the huſband for life, to the wife for life, and *to the firſt ſon of the marriage and the heirs male of the body of ſuch firſt ſon*, with like remainders to the ſecond and other ſons of the ſaid marriage, remainder to the heirs female of the marriage in tail.

The father and mother died, leaving the plaintiff, two other ſons and four daughters. The money in the ſaid ſecurities were never inveſted in any freehold land of inheritance, nor were any of the ſecurities changed, except only 1000*l.* which was inveſted in a purchaſe of a moiety of two houſes by the conſent of the plaintiff's mother, and ſettled to the uſes mentioned in the ſettlement; and now the eldeſt ſon being tenant in tail prayed by his bill that the remainder of the ſaid ſecurities might be aſſigned to him, and not laid out, becauſe if lands were purchaſed and ſettled, he could as tenant in tail bar all the remainders over.

The conſtant rule of the court is to order the money to be laid out in land, to give the remainder man his chance. But the brothers and ſiſters in this caſe appearing in court and conſenting, the repreſentative of the truſtee directed to transfer the ſecurities to the plaintiff's own uſe, and pay him the intereſt likewiſe.

Lord Chancellor: The court is to execute the truſt, and the way to carry it into execution is to order the money to be laid out in land,

and

and ſince the caſe of *Colwell* v. *Shadwell* before Lord *Cowper*, it has been the conſtant rule of the court to give the remainder man his chance. But, on the brothers and ſiſters of the plantiff, who were in remainder, appearing in court and conſenting, his Lordſhip ordered that the ſecurities, not already inveſted in land, be aſſigned to the plaintiff, and that the repreſentative of the truſtee do transfer them to the plaintiff to his own uſe, and pay him alſo the intereſt of ſuch ſecurities.

Hil. term 1737. Jan. 31.

Gibſon v. *Patterſon* and others.

Caſe 4.

Though the vendor of an eſtate does not produce his deeds, or tender a conveyance within the time limited by the articles, the court does not regard this neglect, but will decree a ſale notwithſtanding.

A BILL brought for a ſpecifick performance of articles of agreement for ſale of an eſtate, and decreed in favour of the plaintiff, the vendor, without any regard had to the plaintiff's negligence in not producing his title deeds, *&c.* and not tendring a conveyance within the time limited for that purpoſe by the articles; Lord Chancellor ſaying, moſt of the caſes which were brought in this court relating to the execution of articles for ſale of an eſtate were of the ſame kind, and liable to this objection, but thought there was nothing in the objection.

His Lordſhip decreed the articles to be performed and referred to a maſter, to ſee if a good title could be made by the plaintiff of the premiſſes in queſtion, and in caſe a good title could be made, then the defendant to pay plaintiff coſts to be taxed.

(B) Parol agreements, or ſuch as are within the ſtatute of frauds and perjuries.

Hil. term 1737. 8th of February.

Clerk v. *Wright.*

Caſe 5.

A. agrees for the purchaſe of an eſtate, but the agreement not reduced into writing; though *A.* in confidence thereof gave orders for conveyances to be drawn, and went ſeveral times to view the eſtate, this court will not carry ſuch agreement into execution, and the ſtatute of frauds may be pleaded to a bill brought for that purpoſe.

THE plaintiff had agreed for the purchaſe of an eſtate of the defendant, but the agreement was not reduced into writing; however in confidence of the agreement, plaintiff had given orders for conveyances to be drawn and engroſſed, and went ſeveral times to view the eſtate: ſome time after the defendant ſent a letter to the plaintiff, informing him, that at the time he contracted for the ſale of

the eſtate, the value of the timber was not known to him, and that the plaintiff ſhould not have the eſtate unleſs he would give him a larger price.

The bill brought to carry the agreement into execution, to which the ſtatute of frauds afterwards was pleaded.

Lord Chancellor allowed the plea, and obſerved the letter could not be ſufficient evidence of the agreement, the terms of the agreement not being therein mentioned. As to the objection that this agreement was in part performed, he allowed, that when a man takes poſſeſſion in purſuance of an agreement, or does any act of the like nature, the court will decree an execution of it, but the circumſtances only of giving directions for conveyances, and going to take a view of the eſtate, he thought not ſufficient.

A letter is not a ſufficient evidence of the agreement, unleſs the terms of the agreement are mentioned therein, but where a man takes poſſeſſion in purſuance of an agreement, court will decree an execution of it.

(C) Voluntary agreements, in what caſes to be perfomed.

November the 27th 1738.

Edward Ruſſel, *William Hayward*, and others, Plaintiffs.
Elizabeth Hammond, and others, —— Defendants.

Caſe 6.

A court of equity will not lay down any other rule of conſtruction with regard to the ſtatute of frauds and perjuries, than a court of law does.

THE bill was brought by the creditors of *William* and *German Hammond* deceaſed, for a diſcovery of their freehold, copyhold, and perſonal eſtates, and to be relieved againſt the ſeveral ſettlements of ſeveral parts of their freehold, and leaſehold eſtates, which were made after the marriage of *William Hammond*, with the defendant *Elizabeth*, without conſideration, and fraudulent with reſpect to the plaintiffs as creditors, and to have the freehold and leaſehold ſold, and to go in aid of the other eſtates of *William* and *German Hammond*, towards ſatisfaction of the plaintiff's demands.

The defendant *Elizabeth Hammond* inſiſted that about 1720 ſhe intermarried with *William Hammond*, but ſuch marriage being without the conſent of *Thomas Stedman* her father, he then refuſed to give her any portion; but afterwards *William* and *German Hammond* his father, offering to make a ſettlement on her, *Thomas Stedman* agreed to pay 300*l.* as her fortune, and by indentures of leaſe and releaſe of the 16th and 17th of *April* 1722, in conſideration of 200*l.* a freehold eſtate was ſettled on *William* for life, with remainder to *Elizabeth* for life, with remainder to the firſt and other ſons of the marriage, with remainders over, and by two other indentures dated reſpectively the ſaid 17th of *April* 1722, in conſideration of 100*l.* then paid or ſecured, ſeveral leaſehold eſtates of *William Hammond* were ſettled in like manner. Since which *William Hammond* was dead inteſtate, leaving defendant and four children: That the 200*l.* was paid by her father

on the execution of the ſettlements, and the remaining 100*l.* was paid ſoon afterwards.

Upon the 25th of *February* 1734, this cauſe was heard before the Maſter of the Rolls, who decreed an account of the perſonal eſtate of *William Hammond*, and that the ſame ſhould be applied in payment of what the Maſter ſhould certify to be due to the plaintiffs, and all other the bond creditors of *William Hammond* in a courſe of adminiſtration. The ſame direction with regard to the perſonal eſtate of *German Hammond*. And if the perſonal eſtates were not ſufficient to pay the plaintiffs and other bond creditors, then his honour declared, that the ſettlement ſo made of the leaſehold eſtates was fraudulent with reſpect to the creditors, and ought to be ſet aſide; and that ſuch part of the leaſehold as was the proper eſtate of *German Hammond*, at the time of making the ſaid ſettlements, ſhould be applied in ſatisfaction of ſuch of his bond creditors, as his perſonal eſtate ſhould fall ſhort of ſatisfying. The ſame directions with regard to *William Hammond*'s leaſehold eſtates, as were his proper eſtate at the time of the ſettlements, and *Elizabeth Hammond* was to come to an account for the rents of the leaſehold eſtates, and if there ſhould not be ſufficient to pay the bond creditors, then that a competent part of the leaſehold eſtates of *German* and *William* be ſold, and the money applied to pay the bond creditors, and ordered that the matter of the bill that ſought to impeach the ſettlement of the freehold eſtate, and to make the ſame liable to the plaintiff's demands, ſhould be diſmiſſed without coſts.

From which decree *Elizabeth Hammond* appealed, and inſiſted the decree ought to be rectified as to the account directed againſt her of the rents and profits of the leaſehold eſtates; for that it appeared by the proofs in the cauſe, that the 200*l.* was paid down in ſpecie at the execution of the articles by the defendant's father, and that the 100*l.* was afterwards paid by him to *William* and *German Hammond*, and therefore the ſettlement of the leaſehold eſtates was not fraudulent, nor ought defendant to account for the rents and profits thereof, and for that by the ſaid decree, the plaintiff's bill, ſo far as it ſought relief againſt the ſettlement of the freehold, was diſmiſſed without coſts, notwithſtanding the conſideration was proved to have been paid, and for that ſhe had poſſeſſed no part of the perſonal eſtate of *German* or *William*, and her anſwer was in no part falſified; for which reaſons the bill as againſt her ought in general to have been diſmiſſed with coſts, and therefore prayed the decree might be rectified in all ſuch particulars.

Lord Chancellor: There is no evidence whatſoever in the cauſe to impeach the ſettlements of actual fraud.

But what the plaintiffs inſiſt on, is, That *German Hammond* was largely indebted at the time of making the ſettlements on *William* the ſon, and that therefore theſe ſettlements were fraudulent upon the ſtatute of the 13th of *Eliz. ch.* 5. which regards creditors only.

I muſt conſider this act of parliament as it would have been conſidered at law, for I will not lay down any other rule of conſtruction, in equity, than is followed at law upon this ſtatute.

What is prayed by the creditors, is the application of theſe leaſehold terms as aſſets for the ſatisfaction of their debts. The preſent is a caſe of general creditors, and not of mortgagees, judgment creditors or purchaſers; and therefore not ſo ſtrong, as where a man has paid his money for the ſame eſtate; which would have brought it within the ſtatute of the 27 *Eliz. cap.* 4. which makes every conveyance made for the intent to defraud purchaſers, for a good conſideration, to be utterly void.

There are three ſettlements in queſtion, the firſt of a freehold eſtate, the ſecond of a leaſehold eſtate called *Ford*, and the third of another leaſehold eſtate.

William Hammond the ſon married the daughter of one *Stedman* without the conſent of the fathers of either ſide, no articles nor ſettlement were made before the marriage; Mr. *Stedman* afterwards propoſed to *German Hammond* to give 300 *l.* as a portion with his daughter, if he would make an adequate ſettlement; afterwards a kind of ſurvey was taken of the premiſſes propoſed to be ſettled, and therefore the ſettlement was not merely colourable.

The conſideration for ſettling the freehold is 200 *l.* paid; there is no pretence to impeach this, it is a fair tranſaction as can be.

The ſecond is a ſettlement of the leaſehold eſtate called *Ford*, made in conſideration of the marriage already had, and for the conſideration of 100 *l.* paid, or ſecured to be paid.

The queſtion is, Whether this ſhall prevail againſt the creditors of *German* as a good ſettlement?

A great deal has been ſaid upon this head, but it depends upon circumſtances, and every caſe varies in that reſpect.

There are many opinions that every voluntary ſettlement is not fraudulent; what the judges mean, is, that a ſettlement being voluntary is not for that reaſon fraudulent, but an evidence of fraud only. *Bovey*'s caſe in 1 *Vent.* 193. 1 *Mod.* 119. Lord *Finham* v. *Mullins*. Though I have hardly known one caſe, where the perſon conveying was indebted at the time of the conveyance, that has not been deemed fraudulent; there are, to be ſure, caſes of voluntary ſettlements that are not fraudulent, and thoſe are, where the perſon making, is not indebted at the time; in which caſe, ſubſequent debts will not ſhake ſuch ſettlement.

A ſettlement being voluntary, is not for that reaſon fraudulent, but an evidence of fraud only, tho' hardly a caſe, where the perſon conveying was indebted at the time, that it has not been deemed fraudulent.

A voluntary ſettlement is not fraudulent, where the perſon making is not indebted at the time, nor will ſubſequent debts ſhake ſuch ſettlement.

But I will not enter into a nice diſquiſition, Whether every voluntary ſettlement is, or is not, fraudulent? Becauſe I think as to the *Ford* eſtate, there was a valuable conſideration, upon the face of the ſettlement, for the father was tenant for life, and the ſon intitled to the reverſion in tail.

And

And where father and ſon join in a marriage ſettlement, it is a bargain for a good and valuable conſideration, and has been ſo held in ſeveral caſes; but then the queſtion is, Whether it has been extended to creditors.

Where the father tenant for life, and ſon tenant in fee, join in a ſettlement, it is good againſt creditors, for the ſon might have diſpoſed of the reſiduary intereſt without the father's joining.

In the preſent caſe, the ſon could not have ſettled the reſiduary intereſt, without the father's help, becauſe he was tenant in tail in reverſion, and not in poſſeſſion; but if the father had been tenant for life, and the ſon tenant in fee, and had joined in ſuch ſettlement, it would have made a material difference, for then I ſhould have thought this good againſt creditors; for there was no occaſion for the ſon's joining, as the ſon might have diſpoſed of the reſiduary intereſt without him.

I am of opinion beſides, here is a fair pecuniary conſideration, as there was a ſum of money paid, amounting to 100 *l.* by *Stedman* to *German Hammond*, and when paid, expreſſed to be on account of the third 100*l.* agreed to be given by *Stedman* as a portion, and no other account appears to have paſſed between *Stedman* and *Hammond* but this.

As to the aſſignment of the other leaſehold eſtate, it is of a very different nature; for it is expreſſed to be in conſideration of the marriage, and divers other good conſiderations.

All the deeds bear date the ſame day, and it is inſiſted it is inartificial, to ſplit them into three.

But I cannot think it is ſo here; for they have made the conſideration of the freehold 200*l.* and of the *Ford* eſtate 100*l.* and I cannot take in the conſideration of thoſe deeds, which have a *quid pro quo*, and a conſideration of their own, to ſupport a third deed.

Where a father takes back an annuity to the value of the eſtate comprized in the ſettlement, it is *tantamount* to a continuance in poſſeſſion; and creditors will be relieved againſt ſuch ſettlement.

But in the laſt ſettlement is a plain badge of fraud, for *German Hammond* took back an annuity to himſelf and his wife for life of 27 *l.* which probably was the full value of the eſtate comprized in this deed, and therefore gave the ſon nothing; which is almoſt *tantamount* to a continuance in poſſeſſion, and has always been deemed a ſtrong circumſtance of fraud.

Therefore I am of opinion the creditors ought to be relieved againſt this ſettlement.

The decree was made in *Feb.* 1734. very near four years ago, and if I ſhould enter into the conſideration of coſts, I doubt I muſt give the plaintiffs coſts before the maſter, and though the bill, as to two of the matters, has no foundation for relief, yet as to a third part, *viz.* the laſt ſettlement, it is as clearly for the plaintiff; therefore for all parties, it will be better to drop the coſts.

His Lordſhip therefore ordered the ſaid decree to be affirmed, ſave as to that part thereof which relates to the ſettlement of the leaſehold eſtate called *Ford*; and as to the plaintiff's bill, ſo far as it

ſeeks to impeach the ſettlement of that leaſehold eſtate, and to make the ſame liable to the plaintiff's demands; his Lordſhip diſmiſſed the ſame without coſts.

And as to the coſts of the reſt of this ſuit, that the ſaid decree whereby the ſame are reſerved till after the ſaid report, be varied as follows: That to the time of hearing this cauſe at the Rolls, no coſts be paid on either ſide, but that the conſideration of coſts of ſuch other parts of this cauſe from ſuch hearing, be reſerved till the maſter ſhall have made his report; the ten pounds depoſit to be paid back to the defendant.

(D) Concerning the manner of performing agreements.

November 27th 1739.

Arthur O'Keeffe Eſq; and *Iſabella* his wife, — Plaintiffs.

James Calthorpe Eſq; —— —— Defendant.

Caſe 7. Where children under a marriage ſettlement have obtained a contingent advantage, the court will not vary it to the prejudice of the iſſue after marriage.

THE plaintiff *Iſabella* being poſſeſſed of old and new South Sea annuities and Bank ſtock, and a marriage being intended between the plaintiffs, previous thereto, the plaintiff *Iſabella*, for ſecuring the ſtocks and dividends for her ſeparate uſe and diſpoſal, notwithſtanding her coverture, did by indenture with the privity of the plaintiff *Arthur*, transfer the ſtocks to the defendant his executors and adminiſtrators, in truſt that he, his executors and adminiſtrators ſhould pay, or ſuffer plaintiff *Iſabella* to receive the dividends and profits thereof for her ſeparate uſe during her life; provided, that if *Iſabella* ſurvived *Arthur*, then the defendant, his executors or adminiſtrators ſhould transfer the ſame to the plaintiff *Iſabella*, her executors or adminiſtrators, or to ſuch perſon as ſhe ſhould apart from her huſband by deed or will appoint, and for want of appointment, to the iſſue of her body, and for want of ſuch iſſue, then as to one moiety of ſuch of the ſtock as ſhould be remaining at the death of *Iſabella*, in truſt for the plaintiff *Arthur*, his executors and adminiſtrators; and as to the other moiety in truſt for the defendant, and one *John Burrell* the brother of the half blood of *Iſabella*, their executors and adminiſtrators.

The marriage took effect, and plaintiff *Iſabella* by *Arthur*'s conſent applied to the defendant to ſell part of the annuities, and to pay the money to her, and to aſſign the truſt to ſome other truſtees; declaring to him it was not her intention that the ſame ſhould be unalterable, but only to preſerve the ſame in her own diſpoſal; but the defendant inſiſting he could not ſafely ſell the ſame or aſſign his truſt without the directions of the court of chancery, the plaintiffs therefore by their bill pray that the defendant might aſſign his truſt, and that the ſtock and annuities might be transferred, ſubject to ſuch uſes

as *Iſabella* alone ſhould from time to time direct, and for want thereof, ſubject to the truſts in the ſettlement.

Lord Chancellor: Where under a marriage ſettlement, the children have obtained a contingent advantage, I will not vary it to the prejudice of the iſſue after the marriage; if I ſhould, I might ſit here only to alter marriage agreements upon the particular whim of a feme covert. Therefore let the plaintiff *Iſabella* make the appointment, and let the appointee take ſuch intereſt as the law will give him; for I ſhall not lend him the aſſiſtance of this court to make ſuch appointment more effectual than it will be at law.

The court will not change a mere truſtee for a wife under a marriage ſettlement, without ſending it firſt to the maſter; to ſee if the perſon propoſed is a proper perſon.

A perſon might as well bring a bill in this court to change truſtees to preſerve contingent remainders; if the defendant had been merely a truſtee for the lady, there might be ſome grounds for this application; though if I was inclinable to change the truſtee, I would not do it unleſs it went firſt before the Maſter to examine, Whether the perſon propoſed is a proper perſon.

A new truſtee being by the conſent of all parties added to the old one, his Lordſhip decreed the defendant to transfer the annuities in queſtion in ſuch manner, as to veſt the ſame in himſelf and the new truſtee, ſubject to the ſame truſts as are in the ſaid deed of agreement; and decreed that the plaintiff's bill ſhould be as to other matters diſmiſſed.

CAP. VII.

Adminiſtrators.

Vide title *Executors.*

CAP.

CAP. VIII.

Alien.

December the 21ſt 1737.

Anon.

Caſe 8. The perſons of foreigners, ſubject to the authority of this court, only while in *England*; but though their perſons are out of the reach of this court, yet the property they have here in the funds, is under the controul of it.

A Foreigner in the King of *Pruſſia*'s ſervice applies to the court, to compel his wife, now reſiding at *Dantzick*, to deliver up his children; one of 15, and another of 13 years of age, to be educated by him as having a natural right to the care of them. A bill was brought ſome years ago by the wife, who had then been ſeparated from her huſband a conſiderable time, to have an allowance out of ſtocks here in *England*, belonging to her, for the maintenance of the children; which was decreed accordingly.

Lord Chancellor: I have no power over the perſons of foreigners any longer than while they are in *England*, for then they owe a local obedience; but as they are now in foreign countries, my authority will not reach them; but though I cannot come at their perſons, yet I might lay my hand upon any property they have here in ſtocks, *&c.* but as a ſum of money has been already ordered out of a fund belonging to the petitioner's wife, for the maintenance of her children, I cannot make any alteration in that order, while the children continue under her cuſtody, for it is given merely upon their account, and not the mother's.

December the 4th 1739.

Ramkiſſenſeat of the town of *Calcutta*, at *Fort William* in *Bengal* and others, —— } Plaintiffs.

Hugh Barker an infant, by his guardian and others, Defendants.
Et e contra.

Caſe 9. The court directed a commiſſion to the Eaſt Indies, to take the anſwer of the defendant to the croſs bill, who was of the Gentou religion; and impowered two or three of the commiſſioners to adminiſter ſuch oath *in the moſt ſolemn manner*, as in their diſcretions ſhall ſeem meet; and if they adminiſtred any other oath than the Chriſtian, to certify to the court what was done by them; that if there ſhould be any doubt as to the validity, the opinion of the judges might be taken.

IT was moved on behalf of the plaintiff in the original cauſe, that he may be at liberty to ſue out duplicates of the commiſſion, to take his anſwer to the plaintiff's bill in the croſs cauſe, and that the commiſſioners may by ſuch commiſſion be impowered to ſwear an interpreter, to interpret the oath to the defendant in the croſs

bill, and to tranſlate his anſwer from the *Bengall* language into *Engliſh*, if it ſhall be found neceſſary, and that theſe words *corporal* and *upon the holy Evangeliſt* may be left out of the commiſſion, and inſtead of the latter words, on a proper oath in the moſt ſolemn manner, or ſome other proper words, and agreeable to the circumſtances of the defendants caſe, may be inſerted in their room.

In ſupport of the motion was cited 1 *Vern.* 263. *Anon.* Where a Jew was ordered to be ſworn to his anſwer upon the Pentateuch. *Hale's 2d part of the Pleas of the Crown* 279.

Lord Chancellor: It depends upon what is admitted on the other ſide, that the defendant in the croſs cauſe is of the Gentou religion, and an idolater.

I have often wondred, as the dominions of *Great Britain* are ſo extenſive, that there has never been any rule or method in caſes of this ſort.

The general rule is, that all perſons who believe a God, are capable of an oath; and what is univerſally underſtood by an oath is, *that the perſon who takes it, imprecates the vengeance of God upon him, if the oath he takes is falſe.*

Definition of an oath.

It was upon this principle that the judges were inclined to admit the Jews who believed a God, according to our notion of a God, to ſwear upon the Old Teſtament.

And lord *Hale* very juſtly obſerves, it is a wiſe rule in the kingdom of *Spain*; that a heathen and idolater ſhould be ſworn upon what he thinks is the moſt ſacred part of his religion.

If a Jew ſhould be indicted for perjury, and it is laid in the indictment that he ſwore *tactis ſacro-ſanctis Dei evangeliis*; yet according to *Hale* the word *evangeliis* in the indictment may be anſwered by the Old Teſtament, which is the *evangelium* of the Jews.

In order to remove the difficulties in this caſe, I ſhall direct that theſe words, *upon the holy evangeliſts*, may be left out.

The next conſideration, What words muſt be inſerted in their room? Now on the part of the plaintiff in the croſs bill, it is deſired, that I ſhould appoint a ſolemn form for the oath: I think this very improper; becauſe I may poſſibly direct a form that is contrary to the notions of religion entertained by the Gentou people.

I will therefore make this rule, That two or three of the commiſſioners may adminiſter ſuch oath in the moſt ſolemn manner, as in their diſcretions ſhall ſeem meet; and if the perſon upon the uſual oath being explained to him ſhall conſent to take it, and the commiſſioners approve of adminiſtring it (for he may perhaps be a Chriſtian convert) the difficulty is removed; or if they ſhould think proper to adminiſter another oath, that then they ſhall certify to the court, what was done by them, and that will be the proper time to controvert the validity of ſuch an oath, and to take the opinion of the judges upon it, if the court ſhould have any doubt.

The words corporal oath may ſtand, for lifting up an arm, or other bodily member. This will come up to the meaning of a corporal oath;

but upon *the Attorney General*'s ſuggeſting that there might be no ceremonies in their form of taking oaths, theſe words were likewiſe left out, and the words *moſt ſolemnly* to be inſerted in their room. Sir *Dudley Rider.*

There was likewiſe a croſs motion for *Barker* the defendant in the original and plaintiff in the croſs bill, that all further proceedings in the original cauſe may be ſtayed until the plaintiff in the original cauſe, and the defendant in the croſs cauſe, ſhall have fully anſwered the croſs bill.

Lord Chancellor: The general rule in this court is not to ſtay proceedings in an original cauſe, till the anſwer comes in to the croſs bill, but to ſtay publication only. Indeed it would have been of courſe to ſtay proceedings in the original cauſe, if the plaintiff in the croſs cauſe had brought his bill, before he had put in an anſwer to the original bill. The court will not ſtay proceedings in an original cauſe, 'till the anſwer comes in to the croſs bill, but will only ſtay publication.

In the cauſe of *Omychund* v. *Barker*, *&* *Franco* v. *Barker*, there were two more orders of the ſame day to the ſame purpoſe.

Mich. term 1744.

Omychund v. *Barker.*

Caſe 10.

PUrſuant to the order above of the 4th of *December* 1739, a commiſſion went to the *Eaſt-Indies*, and on the 12th of *February* 1742, the commiſſioners certified, that among other witneſſes for the plaintiff, they had examined *Ramkiſſenſeat*, and *Ramchurnecooberage*, and ſeveral others, ſubjects of the Great Mogul, being perſons who profeſs the Gentou religion, and that they were ſolemnly ſworn in the following manner, *viz.* "The ſeveral perſons being before us, with a "Bramin or Prieſt of the Gentou religion, the oath preſcribed to be "taken by the witneſſes was interpreted to each witneſs reſpectively; "after which they did ſeverally with their hands touch the foot of "the Bramin or Prieſt of the Gentou religion, being alſo before us "with another Bramin or Prieſt of the ſame religion, the oath pre-"ſcribed to be taken by the witneſſes was interpreted to him; after "which *Neenderam Surmah*, being himſelf a Prieſt, did touch the "hand of the Bramin, the ſame being the uſual and moſt ſolemn "form, in which oaths are moſt uſually adminiſtred to witneſſes "who profeſs the Gentou religion, and the ſame manner in which "oaths are uſually adminiſtred to ſuch witneſſes in the courts of "juſtice, erected by letters patents of the late King at *Calcutta*." Lord Chancellor, aſſiſted by Lord Chief Juſtice *Lee*, Lord Chief Juſtice *Willes*, and Lord Chief Baron *Parker*, of opinion that the depoſition of witneſſes of the Gentou religion, ſworn according to their ceremonies, ought upon the ſpecial circumſtances of this caſe to be read as evidence in the cauſe.

The cauſe came on this term upon the merits, and the bill was brought to have a ſatisfaction for 67,955 rupees, amounting to about 7,600 *l. Engliſh* money, from the eſtate of the late Mr. *Barker*, the father of the defendant.

Mr. *Barker* in *July* 1729 being appointed, by the *Eaſt-India* Company, Chief of *Patna*, applied to the plaintiff, who was a conſiderable merchant, to be engaged in partnerſhip with him in the ſale of goods.

The plaintiff was to advance the money for buying the goods, and in conſideration thereof Mr. *Barker* was to allow him intereſt upon a moiety at 12 *per cent.*

The goods were ſold by Mr. *Barker* for a great profit, and the whole money received by him; but he refuſed to come to any account with the plaintiff, upon which he filed his bill in 1736, in the mayor's court at *Calcutta*, and when the cauſe was ready for hearing there, Mr. *Barker* left *Calcutta*, and took his paſſage in a *French Eaſt-India* ſhip for *Europe*, and upon his withdrawing himſelf, the court at *Calcutta* interpreted it to be a flight from juſtice, and decreed that he ſhould pay plaintiff's demand in full, and all his coſts.

Mr. *Barker* died in the voyage, but by his will made on the 21ſt of *December* 1736 charges his real and perſonal eſtate with the payment of his debts.

The end of the bill was, that all books and papers relating to the dealings between Mr. *Barker* and the plaintiff might be produced, and that the ſum before mentioned might be paid with ſubſequent intereſt, and the coſts in the mayor's court at *Calcutta*.

Sir *Dudley Rider.*

Mr. Attorney General for the plaintiff offered to read the depoſition of *Ramkiſſenſeat*, but the counſel for the defendant objecting to his being a proper witneſs, Lord Chancellor ordered the commiſſion and the return to be read, and likewiſe the letters patent, bearing date the 12th of *September*, the 13th of the late King.

Mr. *Tracy Atkyns* argued in ſupport of the objection,

1*ſt*, That as the law of *England* now ſtands, no oath can be adminiſtred to make a man a competent witneſs, but the oath upon the evangeliſts.

2*dly*, That it would be contrary even to the rules of equity to admit any other.

The ſubſtance of this argument follows:

I will endeavour to ſhew, from the oldeſt authorities extant down to the preſent time, that the rule has been uniform and invariable as to the particular oath required.

Fleta lib. 5. *cap.* 22. *p.* 344. "*Juramentum eſt affirmatio vel negatio de aliquo atteſtatione ſacræ rei firmata*", ſo that as long ago as *Edward* the firſt's time, which is at leaſt 400 years, the general definition of an oath was a perſon's affirming or denying a thing, with a ſolemn appeal to the ſacred writings for the truth of what he ſaid.

Bracton, fol. 116. the oath that was adminiſtred by the juſtices itinerant, to the jury, ſummoned to inquire for the crown, agrees exactly with this definition: "*Hoc audite juſtitiarii, quod ego veritatem dicam de hoc quod a me interrogabitis ex parte domini regis, et fideliter faciam id quod mihi præcipietis ex parte domini regis, et pro aliquo non omittam, quin ita faciam pro poſſe meo; ſic me deus adjuvet, et hæc ſancta dei evangelia.*"

Briton de Challenge de Jurors, cap. 53. *p.* 135. deſcribes the oath thus: "*Que jeo verite diray, ſi dieu moi aide & les ſeintz, & p' ſout les evangelies beyſes touts hoors ſicome notre foy & notre ſauvation.*"

In Forteſcue de Laud. Leg. Angliæ, cap. 26. *p.* 58. octavo edition, intituled, How jurors ought to be informed by evidence and witneſſes,

ſes, he ſays, " *Et tunc adducere poteſt utraque pars coram eiſdem juſti-*
" *tiariis et juratis, omnes et ſingulos teſtes, quos pro parte ſuâ producere*
" *velit, qui ſuper ſancta dei evangelia, per juſticiarios onerati, teſtifica-*
" *buntur omnia quæ cognoſcunt probantia veritatem facti, de quo partes*
" *contendunt.*"

So that your Lordſhip ſees it is *omnes et ſingulos teſtes*, without any exception of perſons whatſoever, *qui ſuper ſancta dei evangelia onerati teſtificabantur.*

Lord *Coke* in his 2d *Inſtitute* 479, upon the ſtatute of *Weſtminſter* the 2d, ſays, " *A new oath cannot be impoſed upon any ſubject without*
" *authority of parliament, but the giving of every oath muſt be warranted*
" *by act of parliament, or by the common law time out of mind.*" And in the 719th page of the ſame *Inſtitute*, in the margin, " *None can*
" *examine witneſſes in a new manner, or give an oath in a new caſe,*
" *without an act of parliament.*"

And in his third *Inſtitute*, *chap.* 14. *p.* 165. intituled, Of Perjury, Subornation of Perjury, and incidentally of oaths, ſaith, that the word oath is derived from the *Saxon* word *Eoth*, and that it is expreſſed by three ſeveral names, 1ſt, *ſacramentum a ſacrâ & mente*, becauſe it ought to be performed with a ſacred and religious mind, *quia jurare eſt deum in teſtem vocare, et eſt actus divini cultus.* 2dly, by *juramentum a jure, which ſignifieth law and right, becauſe both are required and meant, or becauſe it muſt be done with a juſt and rightful mind.* 3dly, *jus jurandum a jure et jurando.*

And in the very next ſection he ſaith, *An oath is an affirmation or denial, by any Chriſtian, of any thing lawful and honeſt, before one or more that have authority to give the ſame for advancement of truth and right, calling Almighty God to witneſs, that his teſtimony is true. So as an oath is ſo ſacred, and ſo deeply concerneth the conſciences of Chriſtian men, as the ſame cannot be miniſtred to any, unleſs the ſame be allowed by the common law, or by ſome act of parliament; neither can any oath allowed by the common law, or by act of parliament, be altered but by act of parliament; it is called a corporal oath, becauſe he toucheth with his hand ſome part of the holy ſcriptures.*

In the 4th *Inſtitute*, *chap.* 64. *p.* 279. he ſays, An oath ought to be accompanied with the fear of God and ſervice of God, for advancement of truth, *Dominum Deum tuum timebis, et illi ſoli ſervies, et per nomen illius jurabis*, taken out of the *Moſaic* law; and the words immediately following are, *Bracton* ſaith, *That an alien born cannot be a witneſs, which is to be underſtood of an alien infidel.* *Deut. chap. vi. v.* 13.

I ſhall beg leave to mention a ſtatute made in the 21ſt of *Henry* the 8th, *chap.* 16. touching artificers ſtrangers, in the 4th ſection of which 'tis enacted, *that the ſame ſtrangers ſhould, upon lawful warning to them given, by the wardens of divers miſteries, within the cities and towns, preſent themſelves to the common hall of the ſaid crafts, and there to receive and take their oath, and be ſworn before the wardens upon the holy evangeliſts, to be true to the King*, &c.

So that notwithſtanding aliens and ſtrangers are the ſubject of this act of parliament, yet without reſervation of any form or ceremony in their own religion, relating to oaths, they are directed to

take the oath upon the holy evangeliſts: ſo that the legiſlature governed themſelves by the law as it then ſtood, and ſaw no reaſon to alter it for the private convenience of particular perſons.

I appeal to your Lordſhip's judgment, whether the people who are offered as witneſſes, are capable of taking an oath, as the law of *England* conceives of it; the moſt authentick hiſtories of this part of the world repreſent the natives as extremely ignorant, and particularly with regard to their notions of religion, abſurd and ridiculous, and in their ideas of the Deity ſo groſs, that it would be ſhocking even to mention. How then can they be ſaid to perform ſuch a ceremony with a ſacred and religious mind, which the word *ſacramentum* implies?

It appears by the certificates of the commiſſioners, and even by their own witneſſes, who may be ſuppoſed to repreſent it in the moſt favourable light, that the ceremony is for the perſon who ſwears to fall down, and touch the foot of the prieſt with his right hand.

Can this be ſaid *Deum in teſtem vocare?* Or is it *actus divini cultus?* ſo far from being accompanied with the fear [or worſhip of God, as an oath by our law ought to be] it is meanly proſtrating themſelves at the foot of a prieſt, and calling upon the creature inſtead of the creator, and cannot poſſibly raiſe any other emotions, but thoſe of contempt and ridicule.

It is ſaid too, that if ſuch perſons ſhall ſwear any thing contrary to truth, *that he will be eſteemed a vagabond.*

I do not know how far the people of *India* may be deterred by ſuch an apprehenſion; but I am confident great numbers of perſons here, would, be ſo far from thinking this a puniſhment, that if the only effect of forſwearing themſelves was being a vagabond, they would be more inclinable to break an oath, than to keep it.

I do not find that the prieſt tells us what are the general notions of the people, as to the belief of a God, but only *that he himſelf believes in a ſupreme Being*; of whom his ſuperior abilities and education may have given him ſome confuſed knowledge; and yet the bulk of the people who have not had theſe advantages may think quite otherwiſe.

I ſhall now beg leave to mention the later opinions.

Mr. ſerjeant *Hawkins* in his pleas of the crown, the laſt folio edition 434. under the head of evidence; ſays, it ſeems agreed *to be a good exception, that a witneſs is an infidel.* " That is, ſays he, as I " take it, that he believes neither the Old or New Teſtament to " be the word of God, *on one of which* the laws require the oath " ſhould be adminiſtred."

I expect we ſhall be told by the gentlemen of the other ſide, of Sir *Matthew Hale*'s opinion in his pleas of the crown, 2 vol. 279; and therefore I will read the paſſage, and ſubmit to your Lordſhip; it is rather in favour of what we contend for, than againſt us.

" *It is laid down by lord* Coke, (*ſays lord* Hale), *that an infidel* " *is not be admitted as a witneſs; the conſequence whereof would be,* " *that a Jew who only owns the old teſtament, could not be a witneſs.*

" *But*

" *But I take it that although the regular oath, as it is allowed by* " *the laws of* England, *is* tactis ſacro-ſanctis dei evangeliis; *which* " *ſuppoſeth a man to be a Chriſtian: Yet in caſes of neceſſity, as in fo-* " *reign contracts between merchant and merchant, which are many* " *times tranſacted by Jewiſh brokers; the teſtimony of a Jew* tacto li- " bro legis Moſaicæ, *is not to be rejected, and is uſed as I have been* " *informed among all nations.*

" *Yea the oaths of idolatrous infidels have been admitted in the muni-* " *cipal laws of many kingdoms; eſpecially,* ſi juraverit per deum ve- " rum creatorem; *and ſpecial laws are inſtituted in* Spain, *touching* " *the form of the oaths of infidels.*

" *And it were a very hard caſe, if a murder committed here in* " England, *in preſence only of a Turk or a Jew, that owns not the* " *Chriſtian religion, ſhould be diſpuniſhable; becauſe ſuch an oath* " *ſhould not be taken which the witneſs holds binding, and cannot ſwear* " *otherwiſe, and poſſibly might think himſelf under no obligation, if* " *ſworn according to the uſual ſtile of the courts of* England.

" *But then it is agreed, that the credit of ſuch a teſtimony muſt be* " *left to a jury.*"

With deference to ſo great a man, I do not ſee the conſequence drawn from lord *Coke*'s poſition, *that an infidel cannot be a wit-neſs, therefore a Jew cannot be one*; for they believe a God, juſt in the ſame manner the Chriſtians do; and the old teſtament is as much the *evangelium* to them, as the new is to us; and therefore widely different from the infidel, who has no notion of the true God.

And this was the very reaſon for admitting the evidence of Jews in the caſe of *Robeley* v. *Langſton*, 2 Roll. 314. " *Nota*; *Wild*, ſer- " jeant on evidence to a jury in *Guildhall*, yeſterday, (where becauſe " the witneſſes produced were Jews, *Keeling* chief juſtice ſwore " them upon the old teſtament) deſired the opinion of the court, if " this were any oath by the ſtatute of 5 *Eliz.* that might be aſſigned " for perjury; and *per curiam*, it is ſo, and within the general words " of *ſacro-ſancta evangelia*; ſo of the common prayer book that hath " the epiſtles and goſpels; *contra* by *Windham* of a pſalm book " only."

It was upon this I apprehend the court formed their opinion, and not upon a conſideration of their being brokers in foreign contracts between merchant and merchant.

I ſubmit it upon the whole paſſage: Sir *Matthew Hale* does not poſitively ſay, that by the laws of *England*, a perſon who owns not the Chriſtian religion, may be examined according to the form of his own religion, but is only commending the municipal laws of other kingdoms, and throws it out rather as a wiſh, that the rule were to prevail here, in caſes of neceſſity, than as his opinion; therefore the utmoſt which can be collected from what he ſays is, that he thought it a defect in our law.

But though his genius and knowledge were equal perhaps to any one man of the profeſſion; yet I hope I may be allowed to put in the other ſcale, the wiſdom and experience of the great and eminent

perſons, who for ſo many ages before his time have adhered to the form of an oath as a conſtant and invariable rule.

Beſides the preſent cannot be called a caſe of neceſſity, becauſe there are perſons in *India*, privy to all theſe tranſactions, who are under no objection, as to their capacity of taking an oath; but the plaintiff knew very well, that natives of the ſame country, ingaged in the ſame intereſt, and the ſame buſineſs with themſelves, were much more inclinable to ſwear for them.

I will mention but one thing more upon the firſt head, to ſhew your Lordſhip, that nothing but the legiſlature can diſpenſe with the common and uſual form of oaths; and that is the caſe of the quakers, who had entertained a notion that all manner of oaths were unlawful; and there is ſcarce any error perhaps that hath a more plauſible colour from ſcripture than this, which made the caſe of thoſe who were ſeduced by it, the more pityable; and yet, upon their refuſing to take the oath in courts of juſtice, to uſe the words of the preamble to the ſtatute of the 7 & 8 *Will. ch.* 34. *ſ.* 1. for the relief of quakers, *They were frequently impriſoned, and their eſtates ſequeſtred, by proceſs of contempt iſſuing out of ſuch courts, to the ruin of themſelves and families.*

If the law of *England*, with regard to the form of an oath, was ſo ſtrict, that the judges did not think themſelves juſtified in admitting the moſt ſolemn affirmations and declarations of the quakers inſtead of the oath, though in favour of perſons who agreed in the ſubſtantial and fundamental part of the chriſtian religion with the church of *England*, and who are in all reſpects very uſeful and ſerviceable members of the commonwealth; I hope your Lordſhip will ſee no reaſon to do it in this caſe, where the perſons are proved by the plaintiff himſelf to be infidels and idolaters; and whatever ceremony they may have in ſwearing, it cannot be called a ſolemn and religious one.

In the ſecond place, I ſhall endeavour to ſhew, that it would be contrary to the rules of equity to admit this evidence.

And here I muſt ſubmit to the court, that in the admitting this evidence, very great hardſhips and inconveniences muſt neceſſarily ariſe to the defendant, and that he is brought into this court upon very unequal terms.

Should your Lordſhip admit the depoſitions of theſe witneſſes to be read, the plaintiff would have one manifeſt advantage over the defendant; that notwithſtanding his witneſſes ſhould aſſert the groſſeſt falſhoods, and be guilty of the moſt notorious perjury, yet the defendants would be without remedy; for there is no indictment that could be framed againſt them, which could be ſupported; for I apprehend it to be a material ingredient in all indictments of this kind, that *tactо per ſe ſacro evanglio voluntarie et corrupte commiſit perjurium*; and that omitting theſe words would be a fatal error, and quaſh the indictment.

If this expreſſion be neceſſary in the indictment, theſe witneſſes, let them be ever ſo guilty, muſt go unpuniſhed; for I am afraid it

will not be ſufficient to maintain the indictment, to ſay, that *touching the foot of the prieſt* with his right hand, *voluntarie et corrupte commiſit perjurium.*

Upon the commiſſion, your Lordſhip was pleaſed to ſay, that you wondered as the dominions of *Great Britain* are ſo large, and their commerce ſo extenſive, and as things of this kind muſt have happened before, there ſhould be no method, as yet eſtabliſhed on ſuch occaſions.

Whatever prudential reaſons there may be to introduce any new rules in future caſes, we hope that as courts of equity govern themſelves by the ſame rule, with regard to admiſſion of evidence, as the courts of law; and that your Lordſhip will be of opinion, that you cannot without overturning the law intirely, allow theſe depoſitions to be read; and that nothing but an act of parliament can alter the preſent form of ſwearing.

Mr. Attorney General for the plaintiff, by way of anſwer to the objection, ſtated a few particular facts. Sir *Dudley Ridder.*

1ſt, That the matters now in queſtion, are matters of commerce ariſing in a foreign country, in a foreign juriſdiction, between a Chriſtian and an Infidel.

2dly, That in this country the Gentou religion prevailed, and that *Calcutta* was only a factory within this country.

3dly, That the witneſſes do believe in a deity.

4thly, Not only that they believe in a deity, but that in ſwearing they uſe an expreſſion equivalent to ours. *So help me God.*

5thly, That ſolemn oaths to atteſt facts, is uſual amongſt them.

6thly, That they underſtand an oath in the ſame manner we do.

7thly, That by the letters patent eſtabliſhing a court at *Calcutta*, there is all the reaſon in the world to admit their evidence.

8thly, In point of fact, Gentous are admitted as witneſſes in the court of *Calcutta.*

9thly, That the manner made uſe of in the preſent cauſe, is the the moſt ſolemn and cuſtomary.

10thly, That theſe witneſſes are all of the Gentou religion.

He then ſubmitted it, Whether a perſon of ſuch a religion, and an infidel, may be admitted as a witneſs. He then made two propoſitions.

1ſt, That the witneſs is capable of taking an oath as an infidel, according to the opinion we have of oaths.

2dly, That there is nothing in our law that prevents him from being a witneſs.

An Infidel properly defined is a Deiſt, that does not believe the Chriſtian religion.

All that in point of nature and reaſon is neceſſary to qualify a perſon for ſwearing, is the belief of a God, and an imprecation of the divine Being upon him if he ſwears falſely.

This is the ſenſe of all the civilized nations in the world, the foundation of all treaties; *nullum enim vinculum ad aſtringendam fidem*

fidem jurijurando majores arctius esse voluerint. Lib. tert. M. T. C. de Offic. sec. 31.

The best writers on Christian morality have gone so far as to admit the oath to false gods. It is the sense of *Grotius*; *sed et siquis per falsos deos juraverit, obligabitur*; *quia quanquam sub falsis notis, generali tamen complexione, numen intuetur: Ideoque Deus verus, si pejeratum sit, in suam injuriam id factum interpretatur.* Lib. 2. c. 13. s. 12.

Nothing is proper to the oath here, but *so help me God*, when it comes to the corporal part; I own it is *supra sanctum evangelium*, which is a mere ceremony and not essential.

I can go to a higher authority, the authority of the Jewish religion, and of the old patriarchs; and it will appear they constantly considered the heathens capable of an oath. The instance of *Isaac* and *Abimelech* swearing to one another, *Genesis* 26. *v.* 31. and in the 31st of *Genesis* v. 53. *Jacob* swears by the fear of his father *Isaac*, and accepted of *Laban*'s oath without hesitation, though he swore by false gods.

Consider now the circumstances and situation of the Gentous with respect to the oath they have taken.

1st, As to the form of the oath.

And then as the corporal parts.

As to the form of the words: It is the same we make use of here; for the interrogatory, *Do you believe in the supreme Being*, &c. is read over and interpreted to him, and he takes it in the same sense other people do, which will put an end to the whole objection.

As to the corporal part: Where is the objection to it, at least it shews great humility, and is in all respects applicable to the kissing of the book, and equally significant, for both are no more than signs, and not material to the oath.

The gentlemen, by their manner of arguing would make one believe, there is only one form of an oath.

Grotius in the same chapter and book as before mentioned, and 10th sect. says, *Forma juris jurandi verbis differt, re convenit*; *hunc enim sensum habere debet, ut Deus invocetur, puta hoc modo, Deus testis sit, aut Deus sit vindex, quæ duo in idem recidunt.*

Vid. Voet, upon the *Dig. lib.* 12. *tit.* 2. *sec.* 2.

A greater authority, *our Saviour* says, in St. *Matthew*'s gospel, *Who swears by the temple, swears by the God who inhabits it.*

So that all terminates in a solemn appeal to the Deity, for the truth of what he says.

There are several passages in *Livy*, *Polybius*, and *Grotius*, which shew that oaths are totally arbitrary.

The consequence must be, that an Infidel is capable of an oath.

2dly, Whether there is any thing in the law of *England* that impugns it?

It is laid down by lord *Coke*, that an infidel cannot be a witness, and said that his position is proved by all the cases cited out of the old authorities.

It

It may indeed be laid down as a general rule, but therefore does it follow, that there ſhall be no exception? Does not our law ſay, *exceptio probat regulam?*

It is extremely proper there ſhould be ſome general rules in relation to evidence; but if exceptions were not allowed to them, it would be better to demoliſh all the general rules.

There is no general rule without exception that we know of but this, that the beſt evidence ſhall be admitted which the nature of the caſe will afford.

I will ſhew that rules as general as this are broke in upon for the ſake of allowing evidence.

There is no rule that ſeems more binding than that a man ſhall not be admitted an evidence in his own caſe, and yet the ſtatute of Hue and Cry is an exception.

A man's books are allowed to be evidence, or which is in ſubſtance the ſame, his ſervant's books, becauſe the nature of the caſe requires it, as in the caſe of a brewer's ſervants.

Another general rule, that a wife cannot be a witneſs againſt her huſband, has been broke in upon in caſes of treaſon.

Another exception to the general rule, that a man may be examined without oath: The laſt words of a dying man are given in evidence in the caſe of murder; a child may be examined without oath; *Lord Chief Juſtice Hale's Pleas of the Crown*, 1 *vol. p.* 634; but, if capable of conſidering the obligation of an oath, may be ſworn.

This ſufficiently ſhews how much our law allows exceptions againſt oaths.

Lord Chief Juſtice *Lee* interrupted the Attorney General, and ſaid, it was determined at the *Old Baily* upon mature conſideration, that a child ſhould not be admitted as an evidence without oath.

Lord Chief Baron *Parker* likewiſe ſaid, it was ſo rul'd at *Kingſton* aſſizes before Lord *Raymond*, where upon an indictment for a rape he refuſed the evidence of a child without oath.

Mr. Attorney General then proceeded in his argument, and inſiſted that admitting a Jew to be ſworn is an exception from the general rule: What is the definition of an infidel? Why, one who does not believe in the Chriſtian religion! Then a Jew is an infidel, for the ſenſe of *evangelium* has been perverted, and ought to be confined to the New Teſtament only; for it is uſed by our Saviour as good tidings, in oppoſition to the bondage the Jews then underwent, and was delivered to them firſt.

We are taught there are but four evangeliſts, and the prophets are not ſo, and yet the gentlemen of the other ſide would introduce many more. As to the paſſages in *Deuteronomy*, it happens unfortunately that the books of *Moſes* are no part of our religion, nor does the law eſteem them ſuch.

Are all the Jewiſh diſpenſations confirmed by our law? No! this was as much a municipal law to the Jews, as the municipal laws here to *England*, or the laws of *Solon* to *Athens*, or of *Lycurgus* to *Lacedæ-*

mon, and therefore quite foreign, and nothing to do with the preſent queſtion.

He mentioned then what happened before a committee of privy council the 9th of *December* 1738, on a complaint againſt General *Sabine*. A *Turk* was brought there and offered as a witneſs, and to be ſworn upon the alcoran, and was ſworn accordingly.

So far this agrees exactly with the preſent caſe; but it may be ſaid, this was not in a court of juſtice, but rather a matter of ſtate. In that reſpect there is ſome difference, but it will not take away the uſefulneſs of the precedent, to ſhew that a court or perſons may alter the form of an oath.

This *Indian* witneſs has ſworn by the very ſame words that we do, therefore your Lordſhip will not preſume that he means any other God than we do.

It is of the greateſt moment, that we ſhould have commerce and correſpondence with all mankind; trade requires it, policy requires it, and in dealings of this kind it is of infinite conſequence, there ſhould not be a failure of juſtice. It has been objected that we might have other evidence.

But though we may have ſlighter evidence, why ſhould we be tied down to this, and debarred of the preſent, which is much ſtronger? Gentous are the common brokers in this country, and the neceſſity of the caſe will work ſtrongly for us.

There was a time when even Jews were not ſworn, and no longer ſince than the 5th of *November* 1732, there was a commiſſion out of the Exchequer in the cauſe of *Lopes* and *Nunes*, in which there was a diſtinction between the oath for Jews and Chriſtians; for if Jews, they were directed to be ſworn *ſupra vetus Teſtamentum* only.

An *objection* was likewiſe made, that this *Indian* would not be liable to be puniſhed for perjury; to which it is anſwered, That if the court ſhould be of opinion this is an oath which may be taken, of conſequence he is liable to be puniſhed, if forſworn.

Another *objection* is, that Quakers could not be admitted as witneſſes till an expreſs act of parliament to empower them. The *plain anſwer* is, that they would not take the oath at all, therefore their ſolemn affirmation was not ſufficient, becauſe it had not the eſſence of an oath.

Upon the whole, as it is a caſe of neceſſity, and we have fully in proof from the return of the commiſſioners, that they believe in the Supreme Being, theſe witneſſes ought to be admitted.

November the 10th 1744.

* Mr. *Murray*. * Mr. Solicitor General, of the ſame ſide with the Attorney General.

It is expreſsly certified by the commiſſioners, that the oath preſcribed to be taken by our law was read over to the plaintiff's witneſſes.

The *objection* is, That they have not made uſe of the corporal ceremony the kiſſing of the evangeliſts.

But

But they have made uſe of another ſymbol, the taking the prieſt's foot with their right hand, becauſe this is the form and ceremony moſt binding in their own religion, and notwithſtanding this, an objection has been taken to the reading of their evidence.

Firſt, Becauſe they have not touched the evangeliſts and are Pagans, and therefore cannot be admitted.

Secondly, Suppoſing they may be admitted as witneſſes, yet under the ſanction of the oath thus certified, they ought not to be admitted as witneſſes.

In moſt of the reaſons the gentlemen have begged the queſtion, and have inſiſted that the admitting their evidence is contrary to law, and they cannot be indicted for perjury.

But if the admiſſion is not contrary to law, then of courſe the witneſſes are liable to be indicted for perjury as well as a Jew, who may be indicted *tacto libro legis Moſaicæ*.

The ſtatute of the 5th of *Elizabeth* leaves this matter intirely open.

'Tis ſaid there is no one precedent or caſe of a Heathen ſworn according to the ceremonies of his own religion, ever exiſted before in *England* in courts of juſtice, proceeding according to the common law.

Pagans have been ſworn in the court of admiralty, as Dr. *Strahan* and Dr. *Andrews* have informed me; but they had no note of the caſe, and had forgot the name of it.

No wonder that it has not exiſted before, becauſe all our commerce is carried on by our going to them, inſtead of their coming here.

The caſe of a Jew as a witneſs in a private cauſe never exiſted 'till after the reſtoration; they went out of *England* the 18th of *Edward* the 1ſt, and did not return 'till *Oliver Cromwell*'s time.

The only authority of conſequence cited, is a ſaying of Lord *Coke*'s, *Co. Litt.* 6. *b. That an infidel cannot be a witneſs.*

This ſaying is not warranted by any authority, nor ſupported by any reaſon; and laſtly contradicted by common experience. Lord *Coke* meant Jews, as emphatically *Infidels* by ſhutting their eyes againſt the light. He hardly ever mentions them without the appellation of *Infidel* Jews, 2 *Inſt.* 506, 507; *and thus this noble King* (*meaning* Edward *the firſt*) *baniſhed for ever theſe infidel uſurious Jews:* Therefore Lord Chief Juſtice *Hale* was not miſtaken when he underſtood Lord Chief Juſtice *Coke* meant Jews for Infidels as well as others.

That all the law books when they mention an oath mean a Chriſtian oath, is no argument at all; *Fleta*'s definition, *magis licitum jurare per Creatorem quam Creaturam:* This ſhews the oath was not quite fixed, but like the oath ſworn in the *Roman* empire after the eſtabliſhment of Chriſtianity; and Lord *Coke*'s ſaying an oath is an affirmation or denyal by a Chriſtian, is no wonder at all, for the laws of *England* could ſpeak only of the Chriſtian oath, becauſe they had no intercourſe with Pagans.

The arguments of the other ſide therefore prove nothing; for does it follow from hence that no witneſſes can be examined in a caſe that never ſpecifically exiſted before, or that an action cannot be brought in a caſe that never happened before?

Reaſon,

Reaſon, ſtated to be the firſt ground of all laws, by the author of the book called *Doctor and Student*, general principles muſt determine the caſe; therefore the only queſtion is, whether upon principles of reaſon, juſtice, and convenience, this witneſs ought to be admitted. Upon this occaſion I ſhall lay down two propoſitions:

Firſt, That by the practice of *England*, and of all the nations in the world that are Chriſtians, perſons, though not of the Chriſtian perſuaſion, may be admitted as witneſſes, and ſworn according to their own form.

Secondly, That the caſe of a Pagan is within this reaſoning, and authority.

Caſes of law depend upon occaſions which give riſe to them.

Where the commerce and intercourſe is moſt frequently with the Pagans, the inſtances to be ſure will moſt frequently ariſe.

After the *Roman* emperors were converts, Chriſtians, as well as thoſe who continued Pagans, ſwore according to their fancy, without any particular form. *Selden, tom. 2. f.* 1467. "*Mittimus hic, principibus* "*Chriſtianis, ut ex hiſtoriis ſatis obviis liquet, ſolennia fuiſſe et peculia-* "*ria juramenta, ut per vultum ſancti Lucae, per pedem Chriſti, per* "*ſanctum hunc vel illum, ejuſmodi alia nimis crebra: Inolevit vero* "*tandem, ut quemadmodum Pagani ſacris ac myſteriis aliquo ſuis aut* "*tactis aut præſentibus jurari ſolebant, ita ſolenniora Chriſtianorum* "*juramenta fierent, aut tactis ſacroſanctis evangeliis, aut inſpectis,* "*aut in eorum præſentia manu ad pectus amota, ſublata aut protenſa;* "*atqui is corporaliter ſeu perſonaliter juramentum præſtari dictum eſt,* "*ut ab juramentis per epiſtolam, aut in ſcriptis ſolummodo præſtitis* "*diſtingueretur, inde in vulgi paſſim ore.*" Upon my corporal oath.

So that by this paſſage out of *Selden* it appears, the corporal part which prevails now all over Chriſtendom, was taken from the Pagans, and by degrees under the *Greek Roman* emperors, it came to be eſtabliſhed, that this ceremony ſhould be uſed.

The opinion of the *Greek Roman* emperors, as to the oaths of perſons of other perſuaſions, is mentioned by *Selden, tom. 2. p.* 1468. to be as follows: "*Alienæ autem perſuaſionis homines per id quod veneran-* "*tur illi, et juxta modum quo venerantur, adjurari conſueverunt.*" And in *p.* 1469 *Selden* gives a long account of a particular ceremony in ſwearing *a Jew* in courts of juſtice; and before the 18th of *Edward* the Firſt, the perſon adminiſtring an oath to a Jew, ſaid, If you don't ſpeak the truth, *veniant ſuper caput tuum omnia peccata tua, & parentum tuorum, et omnes maledictiones quæ in lege Moſaicâ et prophetarum inſcriptæ ſunt ſemper tecum maneant.*" To which he anſwer'd, *Amen.*

In *Spain* the *Turks* poſſeſſed the greateſt part of the kingdom, till the time of *Ferdinand* the Catholic; what did they then do, when Chriſtians and *Turks* had controverſy together? Why, according to *Selden, tom. 2.* 1470. the form of the oath was in *Spaniſh* to ſwear as he hoped to be ſaved by the contents of the alcoran, and ſays he, "*Pœna autem Mauro perjuro inflicta eſt, non minus quam Chriſtiano, licet pro locorum et ſeculorum diſcrimine diſpar.*"

Thus it ſtands upon the authorities of Chriſtian countries, where ſuch queſtions have ariſen; but as I ſaid before, the queſtion did not ariſe here till after the reſtoration. Was it then determined that a perſon not a Chriſtian ſhould not be ſworn? No! the firſt time it exiſted, the court determined that he ſhould be ſworn according to his own principles.

No caſe of a *Turk* ſworn upon the alcoran in *England* but that before the council, who were of opinion, greatly aſſiſted and greatly attended, that he might be ſworn upon the alcoran.

Here is a material circumſtance in this caſe, a court erected in *Calcutta*, by the authority of the crown of *England*, where *Indians* are ſworn according to the moſt ſolemn part of their own religion.

All occaſions do not ariſe at once; now a particular ſpecies of *Indians* appears; hereafter another ſpecies of *Indians* may ariſe; a ſtatute very ſeldom can take in all caſes, therefore the common law, *that works itſelf pure* by rules drawn from the fountain of juſtice, is for this reaſon ſuperior to an act of parliament.

The oldeſt books of all countries mention the ſolemnity of an oath, as a ſecurity for a perſon's ſpeaking the truth; they can do no more than lay him under the moſt ſacred and binding obligations; they all call it appealing to God for the truth, and deprecating his vengeance as they ſpeak truth.

There is not a book upon the general law of nature and nations, but admits that Chriſtians may allow perſons to ſwear *per Dominum et per falſos Deos.* It is ſo laid down in the Drecetals, in *Grotius*, and in *Puffendorf*, who in his 4th book, 4th ſect. and 122d page, ſaith, "That part of the form in oaths under which God is invoked as a "witneſs, or as an avenger, is to be accommodated to the religious "perſuaſion which the ſwearer entertains of God; it being vain "and inſignificant to compel a man to ſwear by a God whom he "doth not believe, and therefore doth not reverence; and no one "thinks himſelf bound to the Divine Majeſty in any other words, or "under any other titles, than what are agreeable to the doctrines of "his own religion, which in his judgment is the only true way of "worſhip: And hence likewiſe it is, that he who ſwears by falſe "Gods, yet ſuch as were by him accounted true, ſtands obliged, and "if he deceives, is really guilty of perjury, becauſe whatever his "peculiar notions are, he certainly had ſome ſenſe of the Deity be-"fore his eyes, and therefore by wilfully forſwearing himſelf, he "violated, as far as he was able, that awe and reverence he owed "to Almighty God; yet when a perſon, requiring an oath from "another, accepts it under a form agreeable to that worſhip which "the ſwearer holds true, and he himſelf holds for falſe, he cannot "in the leaſt be ſaid hereby to approve of that worſhip."

The oath muſt be always underſtood according to the belief of the perſon who takes it; not only Chriſtian writers now, but before Chriſtianity, the world was divided into a vaſt variety of opinions, and yet every man was admitted to ſpeak according to his own belief, *Dig. lib.* 12. *t.* 2. *ſ.* 5. "*Omni enim omnino licitum jusjurandum,*

" *per quod quis ſibi jurari, idoneum eſt, et ſi ex eo fuerit juratum,*
" *prætori id tuebitur: Divus pius jurejurando, quod propriâ ſuperſti-*
" *tione juratum eſt, ſtandum reſcripſit, dato jurejurando, non aliud quæ-*
" *ritur, quam an juratum ſit: remiſſa quæſtione, an debeatur, quaſi ſa-*
" *tis probatum ſit jurejurando.*" Lord Stairs's Inſtitute 694.

I do not find any authority has been produced from any other country, that ſuch oath ought not to be admitted: The reaſon why lord chief juſtice *Eyre* would not ſuffer the *Indian* a worſhipper of the ſun to be ſworn upon the evangeliſts was, becauſe he did not believe in Chriſtianity; but if he cannot be ſworn at all, manifeſt injuſtice, and manifeſt inconvenience muſt follow.

Heathens bought the goods, heathens ſent them, heathens knew the price, heathens kept the account. Would it do honour then to the Chriſtian religion, to ſay, that you cannot ſwear according to our oath, and therefore you ſhall not be ſworn at all? What muſt the heathen courts think of our proceedings? Will it not deſtroy all faith and confidence between the contracting parties? Is the caſe of the Turk or Jew ſwearing according to their religion, different from the Indians ſwearing according to his? The objection is ſtronger againſt the Turk, becauſe he ſwears upon the Alcoran, which we think an impoſture; but the Indians here ſwear by one ſupreme God, without appealing to any particular book or authority in their religion.

It is ſaid a heathen is not to be believed.

Is it not known that all the heathens believe in a God? I will refer them to *Tully* in his Tuſculan diſputations, *lib.* 1. *ſec.* 13. " *Porro*
" *firmiſſimum hoc afferri videtur, cur Deos eſſe credamus, quod nulla*
" *gens tam fera, nemo omnium tam ſit immanis, cujus mentem non*
" *imbuerit deorum opinio.*" No country can ſubſiſt a twelvemonth where an oath is not thought binding, for the want of it muſt neceſſarily diſſolve ſociety.

2*dly*, It is objected, that ſuppoſing they may be admitted as witneſſes, yet under the ſanction of the oath thus certified, they ought not to be admitted, for that the form is ridiculous, and their notions of religion not certified by the commiſſioners.

But the oath they have taken ſhews it; for the commiſſioners have certified that they have ſworn by one God, and alſo proves that they think themſelves under the tye of an oath.

Look into books of travels, and you will find that heathens, eſpecially Gentous, believe in one God the creator of the world, though they may have ſubordinate deities, as the papiſts who worſhip ſaints. *Relig. Cerem. vol.* 3, 380, 381, 398.

No doubt but they all have a notion of a God, according to *Tully:* But to uſe a greater authority than *Tully*, " They are a law unto
" themſelves, which ſhew the work of the law written in their
" hearts, their conſciences alſo bearing witneſs, and their thoughts
" the mean while accuſing or elſe excuſing one another." St *Paul*'s *epiſtle to the Romans*, 2 *ch.* 14*th* & 15*th verſes.*

The corporal ceremony is a mere matter of form, and not of the eſſence of an oath: *Du Freſne*'s gloſſary ſays, that monks ſwore by kiſſing

kiſſing the feet of the abbot, nay the abbots ſwore by their word only, from whence the expreſſion *in verbum ſacerdotis*; and I cite this to ſhew, that as it has varied ſo much, it is all form.

Lord chief juſtice *Lee* deſired he would anſwer the objection as to the form of indictments of perjury upon the holy evangeliſts which are neceſſary words.

Mr. Solicitor general. There is no inſtance of a Jew's being indicted for perjury.

Lord chief juſtice *Lee*. I have tried a Jew myſelf upon an indictment of perjury.

Mr. Solicitor general inſiſted, That the indictment would not be wrong againſt a Jew, if it was *tacto libro legis Moſaicæ*. No precedents but what are of indictments againſt Chriſtians for perjury before the reſtoration; and ſince that time it is incumbent on the other ſide to ſhew, that it has been held to be ill, when the indictment againſt a Jew ſays, that he was ſworn on the Pentateuch.

Mr. *Clarke* of the ſame ſide.

That religion *ex vi termini* means the belief of the exiſtence of the Deity.

To ſhew further the neceſſity of admitting this evidence even with regard to intercourſes between Chriſtian countries themſelves, *vid. Voet's Commentary on the Pandect.* 602. *Sine evangelii tactu, &c.* If this oath cannot be adminiſtred, becauſe not upon the evangeliſts, the ſame objection will hold as to a *Dutchman*, who does not ſwear as we do on the New Teſtament.

As to the opinions of the commentators on the civil law, *vide Jacumb.* 4 *ſec. c.* 4. *t.* 2. *Meſingius* 6 *Cent. Obſ.* 20. *p.* 301.

There was a time when ſwearing on the holy evangeliſts was not the practice here; for when St. *Auſtin* introduced the Chriſtian religion, the inhabitants were tenacious of their own cuſtoms, and therefore he indulged them.

There were not above twelve Jews in the kingdom before the reſtoration. And they deputed one of the principal perſons amongſt them, in *Oliver Cromwell*'s time, to come over hither, in order to find out, Whether *Oliver* was the Meſſiah or not?

In *Maddox*'s hiſtory of the exchequer, in his chapter relating to the Jews, p. 166, 167, & 174; there are the following paſſages, "*Benedictus frater Aaronis Judæi Lincolniæ debet* xx. *marcas, pro* "*habenda juratione ſecundum conſuetudinem Judæorum, ad convincen-*" *dum ſi Urſellus Judæus Lincolniæ ſit falſonarius, tali videlicet* "*juratione quali alii Judæi falſonarii convinci ſolebant.*" Mag. Rot. 5. Joh. Rot. 9. a. Linc.

"*Judæi Angliæ debent centum libras, ut Judæi retentores, latrones,* "*et eorum receptatores, per inquiſitionem factam per ſacramentum le-*" *galium Chriſtianorum vel Judæorum, vel alio modo de prædicta ma-*" *licia convicti, a regno ejiciantur irrecuperi; ſicut continetur in ori-*" *nali.*" Mag. Rot. 22 H. 3. Londonia & Midd.

Si Judæus ab aliquo appellatus fuerit ſine teſte, de illo appellatu erit quietus ſolo ſacramento ſuo ſuper librum ſuum; et de appellatu illarum rerum quæ ad coronam noſtram pertinent, ſimiliter quietus erit ſolo ſacramento ſuo ſuper rotulum ſuum. Rot. Cart. 2 Joh. N. 49. Titulo Carta Judæorum Angliæ.

Lord *Coke* in the 7th rept. *Calvin*'s caſe 17, ſaith, "All infidels "are in law *perpetui inimici*; for between them, as with the devils, "whoſe ſubjects they be, and the Chriſtian, there is perpetual hoſ- "tility, *&c.*" But he meant perpetual enemies in a ſpiritual ſenſe, and quotes a paſſage in ſcripture to that purpoſe. *What concord hath Chriſt with Belial? or what part hath he that believeth with an infidel?* 2 Cor. 6. 15.

As to the objection that lord *Coke* ſays, no oath can be altered but by act of parliament, it relates to ſome particular officers of the crown. And as to the civil conſequence of puniſhment for perjury, lord *Coke* in his third inſt. 164 on perjury, ſays, that with reſpect to a perſon's being charged with a breach of oath, the queſtion is, Whether it was lawfully adminiſtred.

Then if the oath adminiſtred here is agreeable to the genius of the laws of *England*, will they not be liable to puniſhment for a breach of it; for I would ſubmit it, Whether the crime may not be ſtated ſpecially, and recite the ceremony of the witneſs's taking the oath, provided it cannot be laid in the uſual common form?

Mr. *Chute*'s reply, who was the leading counſel for the defendant *Barker*.—*November* the 12th 1744.

As to the reaſons urged from neceſſity, and inforced from what the law does in ſimilar caſes, it is not put in iſſue, nor proved that there is a neceſſity for having theſe witneſſes. It is not ſaid by the counſel for the plaintiff, that there is no other way of carrying on buſineſs in the *Eaſt Indies*, without thoſe perſons, nor is it even pretended in the bill itſelf; if there is no ſuch neceſſity, the argument from thence can have no weight in this caſe; and I hope this is anſwer to what has been called neceſſity and a failure of juſtice, if theſe witneſſes ſhould not be admitted.

The act of 2 *Geo.* 2. *c.* 21. in the caſe of murder, where the ſtroke was at ſea, and death at land, or *vice verſâ*, is to take effect only *in futuro*; ſo that if a murder of this ſort had been committed by a perſon before, here was certainly a failure of juſtice; and yet the legiſlature would not by a law, *ex poſt facto*, include ſuch perſon in this act.

I ſay this with regard only to the particularity of the perſons concerned as witneſſes. As to the principal queſtion, it is endeavoured to be ſupported by the other ſide, by principles of reaſon, by authority of ſcripture, and by rules of the civil law.

The caſes from ſcripture are not ſimilar, and arguments *a pari*.

To ſay it is natural to have a religion, and to believe a God, I think ſo in ſome meaſure; but yet it is otherwiſe in experience, *Pſalm* 115. *ver.* 4th and 8th. "*Their idols are ſilver and gold, even*

" *the works of mens hands*; *they that make them are like unto them,* " *and ſo are all ſuch as put their truſt in them.*

As to the oath of *Abraham* and *Abimelech*, there was not then any ſet form exiſting, nor was it an oath to be taken in a court of judicature. *Laban's oath to Jacob* was of the ſame kind, and *Jacob* accepted it, as thinking it better than no oath at all.

This therefore is far from convincing, that every religion does reſt in the belief of a God and all his attributes, for it would be proving too much, *viz.* that there never was a falſe religion in the world.

Next, as to the ſort of religion now before the court, nothing is more certain than that the witneſſes are Gentous, and though the commiſſioners need not have certified all the tenor of their religion, yet they ſhould have certified it, ſo far as their religion was concerned in taking an oath; and as to their notions of a Deity's being a rewarder of good, and an avenger of evil, *vid. Maffæus's Hiſt. Judæor' lib.* 1. *fol.* 36.

As to the authorities from the civil law, *Grotius*, *Puffendorf*, *&c.* they are not authorities to conclude upon the common law, for the civil law is not received as the rule of property here, much leſs as to the rule with regard to our criminal law. The civilians hold different rules of property from us, and differ in nothing more than in admitting evidence, for they reject *hiſtriones*, *&c.* and whole tribes of people. Much the greateſt part of the civil law is only opinions and ſayings of great men, but the ſayings of the judges in our law are of much greater weight, becauſe they are ſayings when the cauſe was judicially before them.

The Lord Chief Juſtice *Hale* ſays, Oaths of Heathens have been admitted in the municipal laws of other kingdoms. How far ſoever this great man may differ from Lord *Coke*, he rather ſpeaks of ſpecial laws for allowing Heathens to ſwear according to their own form; but theſe ſpecial laws have not yet been made here, and the paſſage of Lord *Hale* is no more than a wiſh, and not an opinion.

It is material that nothing is certified in this caſe as to the witneſſes opinion of our oath, or that the witneſſes did repeat the oath, or uſed any words at all; but it ſeems that they immediately had recourſe to their own ceremony. It is ſaid here were the words *ſo help me God*, but theſe witneſſes do not appear to have ſaid any thing, and yet care is taken that the Quakers ſhould repeat.

Where would have been the harm if they had ſignified their aſſent to our oath? It would certainly have been more ſatisfactory; it does not appear that the Gentous believe a God of the univerſe, and Lord *Hale* thinks it neceſſary they ſhould believe *Deum Creatorem.*

The moſt material queſtion is, whether theſe witneſſes are admittable by the laws of *England?*

I muſt own that the authorities are few, but I hope there is no exception to be ſhewn of the other ſide, and where it is a general rule, it comes rather of the other ſide to ſhew it has been varied.

No one of the inſtances Mr. Attorney general put of exceptions to the general rules, but where the witneſſes were *primâ facie* admittable.

The ſtatute of Hue and Cry was made, that perſons might paſs and repaſs ſafely in the kingdom. Robberies are committed oftner upon ſingle perſons than more, and there is in moſt inſtances no other method of proving the robbery but by admitting the evidence of the perſon robbed; therefore Judges were inclined to let in this evidence upon neceſſity. It is not certain what the rule would be, in the opinion of Judges, if a third perſon was by.

Lord Chancellor: *This evidence might be allowed notwithſtanding, for a third perſon or ſervant might be at a diſtance, and not know the fact of the robbery ſo well as the perſon robbed.*

Mr. Chute: *The next inſtance is, as to letting in a tradeſman's books kept by his ſervant*; but there the oath of a living perſon is to atteſt them.—The next, *of a wife in caſes of treaſon*; but here is no authority cited, but it is ſaid to be an opinion of Lord Chief Juſtice *Hale*.—The next inſtance brought is, *That the ſayings of dying men may be given in evidence*. This is no more than giving evidence of a nuncupative will, and not ſo much words as evidence of circumſtances. A man, as he is juſt leaving the world, may be ſuppoſed to have a greater regard to truth; but on a trial for murder this kind of evidence will not alter the ſenſe of the court, if it ſhould appear the deceaſed was killed fairly: In Major *Oneby*'s caſe it was mentioned by the ſpecial verdict, that the dying man ſaid he was killed after the manner of ſwordſmen; but this had not weight enough to over-rule ſtronger evidence.

It is ſaid that *in matters of cuſtom and tradition, hear-ſay evidence is admitted*; and rightly ſo, for how can tradition be conveyed but from man to man through a ſuite of ages?

The caſe of the rape of a child, and her evidence being admitted without oath, was denied by Lord Chief Juſtice *Lee*, and Lord Chief Baron *Parker* to be law, and therefore I ſhall not trouble you on that head.

A great deal of ſtreſs has been laid on Lord *Coke*'s putting Jews on a Foot with Infidels; in other places Lord *Coke* calls him *an Infidel Jew*, therefore deſcribes him *ſecundum quid*, and not generally as an *Infidel*.

As to the authority from *Maddox*'s hiſtory of the Exchequer, he determines generally that they ſhould be ſworn and by their own book, but it is not by force of a charter that they are ſworn.

After the reſtoration, when the Jews came over in great numbers, they were admitted to be ſworn; and this was doing no more than declaring what was the ancient law.

The Jews were once the people of God; great and atrocious crimes were forgiven them; they had certainly the promiſe of Scripture largely given them, and the *evangelium* is equally applicable to the Jews as to the Chriſtians—for the good tidings is not confined to the New Teſtament, the ſame being told ſo early as juſt after the fall; *Geneſis* the 3d and 15th. *And I will put enmity between thee and the woman, and between thy ſeed and her ſeed; it ſhall bruiſe thy head, and thou ſhalt bruiſe his heel.*

As to the form of indictments, they ought to be adhered to; if there was nothing but conſcience to awe a perſon in taking an oath, I

am afraid, from the depravity of mankind, it would not be ſo binding, for it is the apprehenſion of temporal puniſhment which in a great meaſure prevails upon perſons to ſpeak the truth.

There is no authority to ſhew that indictments have run otherwiſe than on the holy evangeliſts, and ſaid in *Hall*'s caſe, that the Chriſtian religion is part of the law of *England*.

If there is a poſſibility that the Jews may be reconciled to the New Teſtament, it ought to have weight; and an ingenious author, the Charterhouſe *Burnet*, imagines they will; and as they believe a part of the Holy Scriptures, it muſt give them a ſuperior credit to perſons who do not believe at all in the ſame manner with us.

Suppoſe a Chriſtian ſhould turn apoſtate to the Gentou religion, and ſhould ſay, I am not liable to be indicted? How muſt he be convicted of perjury, any more than a perſon who is a Gentou from his birth? This might be attended with bad conſequences, becauſe perſons of this temper of mind, who are guarded againſt corporal puniſhment, will truſt futurity as to eternal puniſhments.

As to the objection of our bringing a croſs bill, and that we have thereby admitted the defendants capable of putting in an anſwer, it will of courſe fall to the ground, as we do not make any uſe either of *our croſs bill* or *their anſwers*.

As to the admitting the Mahometan as a witneſs before the committee of the council, it was done without debate upon it; for *Sabine*'s counſel, who had a right to make the objection, were ſatisfied of the truth and juſtice of *Sabine*'s cauſe, and therefore it paſſed without oppoſition; but as the Judges ſit there rather as adviſers than in any other light, it wants the form of an authority.

Mr. Solicitor General mentioned a caſe which he had from Dr. *Strahan* and Dr. *Andrews*, where a Heathen was admitted as a witneſs, but the name is not ſo much as known. Dr. *Audley* and Dr. *Simpſon* have informed me, there was a caſe before the commons in a ſuit for a divorce, where a black was rejected as a witneſs, becauſe not of the Chriſtian religion.

As to the charter, nothing is ſaid there, but that *a ſolemn oath* ſhall be given. A charter may be granted which may affect a place out of the kingdom totally, and yet may not infringe the general rule here with regard to ſwearing.

Like the common caſe of a Pie-pouder court, which is a ſummary way of doing juſtice during the fair, and is reſtrained to that particular time, but you cannot follow it afterwards.

That an act of parliament is neceſſary to diſpenſe with the form of an oath, appears from the 10th of the late King in relation to the Jews, this act being made to diſpenſe with their ſwearing upon the faith of a Chriſtian.

Therefore, if it ſhould be thought proper for reaſons of ſtate, and for the ſake of trade, to receive ſuch evidence for the future, let it be done by the legiſlature, and not admitted againſt an infant, where the plaintiff acquieſced for 4 years, till the perſon tranſacting with him was dead.

Lord

Lord Chancellor: My Lord Chief Juſtice, Lord Chief Baron, and myſelf are of opinion, the cauſe ſhould ſtand over till next term, that it may be properly conſidered, this being a point of the utmoſt conſequence; and in the mean time let a ſearch be made in the crown office for precedents of indictments of perjury, to ſee whether in the indictment of a Jew it has been laid *tacto libro legis Moſaicæ*, or whether there is any thing particular in the form with regard to the indictments of Jews; and as caſes have been mentioned in the Admiralty (which is a court where ſuch caſes are moſt likely to happen) of Heathens being admitted to ſwear in their own form, I ſhould be glad to have inquiry made in that court likewiſe.

February the 23d 1744.

This cauſe came on for judgment upon the point above mentioned.

Lord Chief Baron: The counſel for the defendant, in ſupport of their objection to the plaintiff's evidence, cited 1 *Inſt.* 16. and 4 *Inſt.* 279. to ſhew, *That an Alien Infidel can be no witneſs.*

If *my* Lord *Coke* had by an Infidel meant, a *profeſſed Atheiſt*, I ſhould have been of opinion that he could not be a witneſs.

I ſhall ſhew that perſons who profeſs the Gentou religion believe a God to be the Creator of the world. The generality of mankind believe a God. *Tully*, in his *Tuſc. Diſput. lib.* 1. *f.* 13. ſays, "*Quod* "*nulla Gens tam fera, nemo omnium tam ſit immanis, cujus mentem non* "*imbuerit Deorum opinio*;" and expreſſes himſelf to the ſame effect in his treatiſe *de Natura Deorum.*

As to the Gentou religion, *vid. Relig. Cerem. vol.* 3. *p.* 257, 277, 381. and *Tournefort's Voyages, p.* 39, 259. from which it will appear from the beſt teſtimonies, that perſons of this religion do believe in God as the Creator and Governor of the world.

The defendant's counſel cited 2 *Keble* 314. to ſhew that the Old Teſtament is the Goſpel as well as the New, on one of which the law requires the oath ſhould be adminiſtred.

To this I anſwer, that the ritual or ceremonial part of the *Moſaic* law is not binding, but the moral is, upon Chriſtians; therefore I think the Old Teſtament cannot be called the Goſpel.

As my Lord *Hale*'s reaſon will be the baſis of the advice I ſhall give your Lordſhip, I ſhall read the paſſage, and endeavour to comment upon it. *H. P. C.* 2 *vol.* 279.

It has been ſaid by the defendant's counſel, that Lord *Hale* miſunderſtood Lord *Coke*; in anſwer to this, conſider the 3d *Inſt.* 165. and you will find Lord *Hale*'s conſequence is very well founded.

Lord *Hale* ſays, "*I take it that although the regular oath*, &c. *is* "tactis ſacroſanctis Dei evangeliis, &c. *yet in caſes of neceſſity, as* "*in foreign contracts, &c. the teſtimony of a Jew*, tacto libro legis "Moſaicæ, *is not to be rejected.*"

The books, cited by the defendant's counſel, to ſhew jurors or witneſſes muſt be ſworn upon the Goſpel, were *Bracton, Briton, Fleta*, &c. Theſe authors prove no more than that the oaths are

adapted to the natives of the kingdom: But by *Maddox*'s hiſtory of the Exchequer, 166. and *Wilkins*'s *Saxon* Laws, 348. it appears that Jews were alſo ſworn; and in the latter author we find ſomething very particular; a *venire facias* is mentioned to have iſſued to *ſex legales homines, & ſex legales Judæos.*

A doubt aroſe after the reſtoration in what manner a Jew ſhould be ſworn in putting in an anſwer. Upon a motion, Lord Keeper *North* ordered he ſhould be ſworn upon the Pentateuch, and that the plaintiff's clerk ſhould be preſent to ſee him ſworn. *Anon.* 1 *Vern.* 263. *vid.* alſo *Francias*'s Trial in the State Trials. 'Tis likewiſe the conſtant courſe in trials at bar and *niſi prius*, and which is ſtill ſtronger, there is an act of parliament to inforce it.

This overturns Lord *Coke*'s opinion ſo far as Jews are concerned, and eſtabliſhes Lord *Hale*'s.

The next paſſage in Lord *Hale* relates to the ſpecial laws in *Spain*, *Yea the oaths of idolatrous infidels have been admitted in the municipal laws of many kingdoms, eſpecially ſi juraverit per verum Deum Creatorem, and ſpecial laws are inſtituted in Spain touching the form of the oaths of infidels.*

Conſider now whether there is not ſuch a neceſſity here as is ſufficient to render this evidence admiſſible.

An objection is made that the plaintiff ought to have ſhewn he could not have the evidence of Chriſtians.

To this I anſwer, that repugnant to natural juſtice, in the ſtatute of Hue and Cry, the robbed is admitted to be a witneſs of the robbery, as a moral or preſumed neceſſity is ſufficient: And that it ſhall be taken for granted there was the ſame neceſſity in the preſent caſe, as nothing is ſtated to the contrary. Beſides, it appears that the plaintiff did commence a ſuit in *Calcutta*, and obtained a decree there, and what is very material, *Barker* himſelf, the father of the defendant, in that ſuit in the mayor's court, inſiſted that *Omychund* ſhould be aſked whether he was of the Gentou religion, and that he ſhould be ſworn according to his own notion of an oath, which was done accordingly. This certainly bound *Barker*, and of courſe his repreſentative. *Vide* 2 *Rolls Rep.* 346. 1 *Salk.* 283.

In ſhort, I do not ſee what ſhould hinder admitting them as witneſſes. They are admitted by the civil law—by the law of nations—by the common conſent of mankind. (He then cited all the caſes mentioned by plaintiff's counſel, and Lord *Stair*'s Inſtitute, to ſhew what the law of *Scotland* was in this particular.)

Heathens admitted as witneſſes by the civil law, by the law of nations, and by the common conſent of mankind.

But it is objected, that theſe witneſſes do not ſwear by the true God, and for this purpoſe, the defendant's counſel cited *Deuteronomy* 6. 13 and 14 *verſ. Thou ſhalt fear the Lord thy God, and ſerve him, and ſhalt ſwear by his name. Ye ſhall not go after other Gods, of the Gods of the people which are round about.*

Of the other ſide, *Jacob* upon his covenant with *Laban*, *ſwore by the fear of his father Iſaac*, Gen. 31. v. 53.

My anſwer is, This is not true in fact, for they do ſwear by the true God, the Creator of the world.

Lord *Hale* ſays, *a proviſion by the laws of* Spain *for* Moors, *and oaths particularly adapted to the religion of the Mahometans*: But here the oaths taken by theſe witneſſes, is the conſtant oath, and taken in their own manner exactly.

A Jew a competent witneſs to prove a murder.

Lord *Hale* makes a queſtion, *Whether a Turk or a Jew may be admitted to give evidence upon murder.* I will not give a preciſe opinion, but I think *a Jew* a very competent witneſs to prove a murder.

Next as to the form of the oath.

I am very far from ſaying that this is ſo ſolemn and ſignificant as ours is.

The ſcripture has upon this occaſion been cited, and I will therefore mention the opinion of a very great divine, *Tillotſon* in his aſſize ſermon, 1 vol. fo. 194. *The form of an oath is voluntary taken up and inſtituted by men.*

In the caſe of *Dutton* v. *Colt*, 1 *Sid.* 6. Doctor *Owen* vice chancellor of *Oxford* being a witneſs for the plaintiff, refuſed to be ſworn in the uſual manner, by laying his right hand upon the book, and by kiſſing it afterwards; "but he cauſed the book to be held open "before him, and he lifted up his right hand: The jury upon this "prayed the opinion of the court, if they ought to think this teſti-"mony as ſtrong as the teſtimony of another witneſs; and *Glin* "chief juſtice told them, that in his judgment he had taken as "ſtrong an oath as any other witneſs, but ſaid, if he was to be ſworn "himſelf, he would lay his right hand upon the book."

By the policy of all countries, oaths ought to be adminiſtred to perſons according to their own opinion, and laying the hand originally borrowed from the Pagans.

That forms are various, *Vid. Selden, T.* 2. 1467. and *Voet's Pand.* Chriſtians were ſworn ſometimes without laying their hands upon the goſpel, by lifting up their hands to heaven: Jews were ſworn firſt with rites and ceremonies, afterwards without any. It is plain that by the policy of all countries, oaths are to be adminiſtred to all perſons according to their own opinion, and as it moſt affects their conſcience, and laying the hand was originally borrowed from the Pagans.

It is ſaid by defendant's counſel, that no new oath can be impoſed without an act of parliament, and for this purpoſe ſeveral caſes cited.

My anſwer is, This is no new oath.

It was objected, that they ought not to be admitted as witneſſes from the perpetual enmity between Heathens and Chriſtians, upon the authority of *Calvin*'s caſe, 7 *Rep.* 17. and the ſtatute of the 21 *H.* 8.

That Turks and Infidels are *perpetui inimici*, and therefore not to be admitted witneſſes here, is a common error founded on a groundleſs opinion of juſtice *Brooke*.

This is to be underſtood of ſpiritual diſcord only: Sir *Edward Littleton* lord keeper, in his readings upon the ſtatute of the 27 *Edw.* 3. has ſentiments there worthy of a great Chriſtian writer: "Turks "and Infidels, ſaith he, are not *perpetui inimici*, nor is there a par-"ticular enmity between them and us; but this is a common er-"ror founded upon a groundleſs opinion of juſtice *Brooke*; for

"though

" though there be a difference between our religion and theirs, that " does not oblige us to be enemies to their perſons: They are the " creatures of God, and of the ſame kind as we are, and it would be " a ſin in us to hurt their perſons." *Salk.* 46.

In *Wells* v. *Williams*, 1 *L. Raym.* 282. The court ſaid, " That " the neceſſity of trade has mollified the too rigorous rules of the " old law, in their reſtraint and diſcouragement of aliens: A Jew " may ſue at this day, but heretofore he could not; for then they " were looked upon as enemies, but now commerce has taught the " world more humanity; and therefore held that an alien enemy, " *commorant* here by licence of the King, and under his protection, " may maintain debt upon a bond, though he did not come with ſafe " conduct."

The neceſſity of trade has mollified the too rigorous rules of the old law, in their reſtraint of aliens.

A Jew may bring an action now, tho' held otherwiſe formerly.

It was objected by the defendant's counſel, that this is a novelty, and what has never been done, ought not to be done.

The law of *England* is not confined to particular caſes, but is much more governed by reaſon, than by any one caſe whatever. The true rule is laid down by lord *Vaughan*, fol. 37, 38. " Where the law, " ſaith he, is known and clear, tho' it be unequitable and inconve- " nient, the judges muſt determine as the law is, without regarding " the unequitableneſs or inconveniency: Thoſe defects, if they hap- " pen in the law, can only be remedied by parliament; but where " the law is doubtful, and not clear, the judges ought to interpret " the law to be, as is moſt conſonant to equity, and leaſt inconve- " nient."

The law of *England* not confined to particular caſes, but governed more by reaſon, than any one caſe whatſoever.

As to the caſe of *Lee* v. *Lee*, before the court of delegates 1692. They gave no opinion whether the witneſſes were admittable or not?

The counſel for the defendant mentioned a note of a caſe taken by Mr. *Bunbury* in the court of exchequer, in a cauſe between the *Eaſt India* company and admiral *Matthews*, " Where *Orangee* a black be- " ing offered as a witneſs there, ſaid he looked upon *Jeſus Chriſt* as " a good man, and upon ſending to the king's bench for their opi- " nion, they thought he could not be admitted, becauſe he did not " believe in *Jeſus Chriſt*."

This was a note of a caſe taken ſometime after the cauſe was heard, upon memory only, which at a diſtance of time is very treacherous, but I think the reaſon a very bad one, for the ſame would exclude Jews.

Another objection is, That the witneſſes are not liable to a proſecution for perjury.

This is not true in fact, but ſuppoſing it was, yet this is not the only caſe where witneſſes cannot be proſecuted, for there is no poſſibility of proſecuting them, where the depoſitions are taken out of *England*; but if they were here, I ſhould be of opinion, they might be indicted, upon a ſpecial indictment, for I do not think *tactis ſacris*

If theſe witneſſes were here, liable to a proſecution for perjury, and might be indicted upon a ſpecial indictment.

Tactis ſacris evangeliis not neceſſary words in an indictment of perjury, for ſeveral old precedents are, that the party was *juratus generally*.

evangeliis are neceſſary words, for ſeveral old precedents are, that the party was *juratus generally*, or *debito modo juratus*. *Vide Weſt's Symb. 2d part*, under the head of indictments and offences, *ſect.* 160.

As to the precedents of indictments againſt Jews, they are ſo various that nothing is to be drawn from it: Upon the whole, not to admit theſe witneſſes would be deſtructive of trade, and ſubverſive of juſtice, and attended with innumerable inconveniences.

Lord Chief Juſtice Willes: As it is a queſtion of great importance, and in ſome meaſure, a new queſtion, I will give my opinion, firſt, as to the general queſtion; Whether any Infidel may be admitted as an evidence under ſome circumſtances.

Some Infidels may under ſome circumſtances be admitted as witneſſes.

If I was of the ſame opinion with lord *Coke*, the conſequence would be, that theſe depoſitions could not be read; but I am of opinion that ſome Infidels may under ſome circumſtances be admitted as witneſſes.

My lord *Coke* is plainly of opinion, that Jews as well as Heathens were comprized under the ſame excluſion.

The Jews before their expulſion from *England*, and ſince their return to it, have been conſtantly admitted as witneſſes.

Serjeant *Hawkins* in his *Pleas of the Crown*, though a very learned and pains taking man, is miſtaken in his notion of lord *Coke*'s opinion; long before his time, and ever ſince the Jews returned to *England*, they have been conſtantly admitted as witneſſes.

The defendant's counſel are miſtaken in their conſtruction of lord *Coke*, for he puts the Jews upon a footing with ſtigmatized and infamous perſons: This notion, though advanced by ſo great a man, is contrary to religion, common ſenſe, and common humanity; and I think the devils themſelves to whom he has delivered them, could not have ſuggeſted any thing worſe.

Our Saviour and St. *Peter* have ſaid, *God is no reſpecter of perſons.* Acts 10. ver. 34.

Lord *Coke* is a very great lawyer, but our Saviour and St. *Peter* are in this reſpect much better authorities, than a perſon poſſeſſed with ſuch narrow notions, which very well deſerves all that lord *Treby* has ſaid of it.

I lay no ſtreſs upon the authority of *Bracton*, *Briton*, and *Fleta*, for they lived in popiſh times, when no other trade was carried on except the trade of religion; and I hope ſuch times will never come over again: It is very plain too, theſe ancient authorities ſpeak only of Chriſtian oaths.

Maddox's Hiſtory of the exchequer clears it up beyond all contradiction, that Jews were conſtantly ſworn, and from the 19 *Char.* 1. to the preſent time, have never been refuſed.

To this aſſertion of lord *Coke*, I will oppoſe lord *Hale*, though fully cited by lord chief baron *Parker*; yet I will mention it again, becauſe it is full of the true ſpirit of good ſenſe and Chriſtianity, and *decies repetita placebit.*

As to the authority of Civilians, I ſhall ſay once for all, that I do not lay ſo much ſtreſs upon any quotations of the Civil law; becauſe I think there is no occaſion to have recourſe to them.

The laſt anſwer I ſhall give to lord *Coke*'s aſſertion are his own words in *Calvin*'s caſe and 4th Inſt. *If, ſaid he, an oath was clearly of a Chriſtian inſtitution, then I ſhould be forced to admit, that it could not be allowed.*

Oaths are not of Chriſtian inſtitution, but as old as the creation.

But oaths are as old as the creation, look into ſacred hiſtory, and you will find variety of inſtances, in the book of *Geneſis*, in the 30th chapter of *Numbers* throughout.

The nature of an oath is not at all altered by Chriſtianity, but only made more ſolemn from the ſanction of rewards and puniſhments being more openly declared.

The paſſage in the 14th chapter of St. *Matthew*, relating to *Herod* and the daughter of *Herodias* is very extraordinary; a perſon appears there to be ſo very wicked as not to ſtick at murder, and yet thought an oath of ſuch a ſacred nature, as to chooſe rather to commit the former than break the latter.

Pythagoras in his golden verſes, and *Tully* in ſeveral parts of his works, ſpeak of an oath with the higheſt reverence, *Grotius de Jure Belli et Pacis, 1 vol. lib. 2. c. 13. de jurejurando, 1 ſec. apud omnes populos, et ab omni Ævo circa pollicitationes, promiſſa et contractus maxima ſemper vis fuit jurisjurandi.*

The form of oaths varies in countries according to different laws and conſtitutions, but the ſubſtance is the ſame in all.

Grotius in the ſame chapter, ſect. 10. *Forma jurisjurandi verbis differt, re convenit, hunc enim ſenſum habere debet, ut Deus invocetur, puta hoc modo, Deus teſtis ſit, aut Deus ſit vindex.* In our old law books *ſic Deus adjuvet*, and other expreſſions of the like nature and now, *So help me God. Vide* the 23d of St. *Matthew*, 20th, 21ſt, and 22d verſes.

There is nothing in the argument, that as Chriſtianity is the law of *England*, no other oath is conſiſtent with it; and for the reaſons already given, this argument carries no weight with it.

If infidels do not believe a God, or rewards and puniſhments hereafter, they ought not to be admitted.

Though I have ſhewn that an infidel in general cannot be excluded from being a witneſs, and though I am of opinion that infidels who believe a God, and future rewards and puniſhments in the other world, may be witneſſes; yet I am as clearly of opinion, that if they do not believe a God, or future rewards and puniſhments, they ought not to be admitted as witneſſes.

The rule of evidence is, that ſuch ought to be admitted as the neceſſity of the caſe will allow of, but though it they pleaſe.

Next as to diſpenſing with ſtrict rules of evidence: Such evidence is to be admitted as the neceſſity of the caſe will allow of, as for inſtance, a marriage at *Utrecht* certified under the ſeal of the miniſter there, and of the ſaid town, and that they cohabited for two years together as man and wife, was held to be a ſufficient proof they were married. *Cro. Jac.* 541. *Alſop* v. *Bowtrell.*

admitted, muſt be left to the perſons who try the cauſe to give what credit to

It muſt be left to the jury or judge what credit they will give; for it is a known diſtinction, that the evidence though admitted, muſt ſtill be left to the perſons who try the cauſe, to give what credit to it they pleaſe.

The ſame credit ought not to be given to the evidence of an infidel, as of a Chriſtian; becauſe not under the ſame obligations.

It is admitted by the defendants that this cauſe relates to a mercantile affair between *Barker* a merchant, and a ſubject of *England*, and an *Indian* a merchant, and a ſubject of the *Grand Mogul*.

What could the plaintiff do? He had but one remedy, that he takes, he follows his debtor into *England*.

Perſons who do not believe the Chriſtian oath, muſt out of neceſſity, be allowed to ſwear according to their own notion of an oath.

There can be no evidence admitted without oath, it would be abſurd for him to ſwear according to the chriſtian oath, which he does not believe; and therefore out of neceſſity, he muſt be allowed to ſwear according to his own notion of an oath.

Next as to the commiſſion: The certificate fully anſwers this objection, *that it does not appear they believe a God.*

I cannot ſay I lay a great ſtreſs upon the authors which give an account of the Gentou religion, becauſe it muſt depend upon their veracity and private judgment; but I found my opinion upon the certificate, which ſays, the Gentous believe in a God as the creator of the univerſe, and that he is a rewarder of thoſe who do well, and an avenger of thoſe who do ill.

And laſtly, As to the objection of the indictment for perjury.

This has been fully anſwered already by the lord chief baron, but the plain anſwer is, that *ſacroſancta evangelia* are not at all material words.

Upon the whole, I am of opinion, the evidence of the plaintiff's witneſſes, under the circumſtances of this caſe ought be admitted.

Lord Chief Juſtice Lee: I agree intirely with the opinion of lord chief baron *Parker*, and lord chief juſtice *Willes*; that where it is returned by the certificate the witneſs is of a religion, it is ſufficient; for the foundation of all religion is the belief of a God, though difficult to have a diſtinct idea of an infinite and incomprehenſible Being as God is; yet mankind may have a relative idea of the Being of a God, as dependant creatures upon him.

Rules of evidence are to be conſidered as artificial rules, framed by men for convenience in courts of juſtice, and founded upon good reaſon.

An oath is a religious ſanction that mankind have univerſally eſtabliſhed. I would not be thought to declare an opinion, how far perſons under the denomination of Atheiſts, and believing no religion, may in this country be in ſome caſes admitted, but I do apprehend, that the rules of evidence are to be conſidered as artificial rules, framed by men for convenience in courts of juſtice, and founded upon good reaſon: But one rule can never vary, *viz.* the eternal rule of natural juſtice. This is a caſe that ought to be looked upon in that light, and I take it, conſidering evidence in this way, is agreeable to the genius of the law of *England*.

Hearſay cannot be admitted, nor huſband and wife as witneſſes againſt each other, and yet from neceſſity have been allowed.

There is not a more general rule, than that hear-ſay cannot be admitted, nor huſband and wife as witneſſes againſt each other, and yet it is notorious that from neceſſity they have been allowed; and as Lord Chief Baron ſaid, Not an abſolute neceſſity, but a moral one.

Where there are foreign parties intereſted, or in commercial matters, the rules of evidence are not quite the ſame, as in other inſtances in courts of juſtice, the caſe of Hue and Cry, *Brownlow* 47. In Lord Chief Juſtice *Hale*'s Pleas of the Crown, *vol.* the 1ſt, 301. a feme covert is not a lawful witneſs againſt her huſband in caſes of treaſon, but has been admitted in civil caſes: a wife admitted to prove a truſt: the ſame as to hear-ſay evidence. *Skinner* 647.

The rule as to admitting evidence in foreign and commercial matters, differs from other inſtances in courts of juſtice.

As to admitting evidence in foreign matters and commercial, this is different from common caſes. 2 *Rolls Rep.* 346.

The teſtimony of a public notary is evidence by the laws of *France*; contracts are made in the preſence of a public notary, and no other witneſs neceſſary to prove the tranſaction: I ſhould think it could be no doubt at all, but if it came in queſtion here whether this was a valid contract, but a teſtimony from perſons of that credit and reputation would be received as very good proof in foreign tranſactions, and would authenticate the contract. *Cro. Car.* 365. Theſe caſes ſhew that courts always govern themſelves by theſe rules, in caſes of foreign tranſactions. *Preced. in Chanc.* 207. *Tremoult v. Dedire.* 1 *Wms.* 429. In actions of trover, *vid. Comberb.* 340, 366. *Dockwray* and *Dickenſon*. In caſes of ſales of goods a factor is admitted as a witneſs.

Lord Chief Juſtice *Lee* of opinion, if the validity of a foreign contract made in the preſence of a publick notary was in queſtion here, that his teſtimony would be allowed to authenticate the contract.

To apply theſe caſes to the preſent, without delivering an opinion, Whether perſons that do not believe in any religion may be admitted; as I think that theſe witneſſes are under the religious tye of an oath, adminiſtered in the moſt ſolemn manner; as this is a tranſaction wholly in the country of the Mogul; as *Barker* has forced the plaintiffs to have recourſe here to the law in *England*, by quitting a country where, by the letters patent of the crown, they were intitled to juſtice, it would not be conſonant to natural equity to deny them the benefit of this evidence.

In the 13th and 14th of *Cha.* 2. *chap.* 11. *ſec.* 29. an act for preventing frauds and regulating abuſes in his Majeſty's cuſtoms, there is the following clauſe: "Provided, that in caſe the ſeizure or in-"formation ſhall be made upon any clauſe or thing contained in the "late act, intituled, An act for the encouraging and increaſing of "ſhipping and navigation, that then the defendant or defendants ſhall, "on his or their requeſt, have a commiſſion out of the high court "of Chancery, to examine witneſſes beyond the ſeas, and have a "competent time allowed for the return thereof, before any trial ſhall "be had upon the caſe, according to the diſtance of place where "ſuch commiſſion or commiſſions are to be executed, and that the "examination of witneſſes ſo returned ſhall be admitted for evidence "in law at the trial, as if it had been given *vivâ voce*, by the ex-"aminate in court; any law, ſtatute, or uſage to the contrary in any "wiſe notwithſtanding."

Lord Chancellor: As this is a caſe not only of great expence, but of great conſequence, it will be expected that I ſhould not give an opinion without aſſigning my reaſons for it at the ſame time.

Firſt,

Firſt, As to the objection of the defendant's counſel to the certificate and return of the commiſſion, *that the commiſſioners have not followed the directions of this court; that they ſhould have certified of what religion the witneſſes were, and the principles of that religion; whereas they only certify them to be of the Gentou religion, without ſhewing what the principles are of that religion:* It was not the intention of the court they ſhould, for it would have been entring into a wide field, and would have been certifying the hiſtory of the *Banian* or *Gentou* religion.

Caſes determined at law upon evidence taken from hiſtories of countries.

Caſes have been determined at common law upon evidence taken from hiſtories of countries, and we have very authentic accounts of this part of the world. A general hiſtory is evidence to prove a matter relating to the kingdom in general. 1 *Salk* 281.

My intention was to be certified whether theſe people believed the being of a God, and his Providence. The 6th volume of *Churchill's Voyages* 301. particularly deſcribes this religion and their precepts of morality; the latter precept carries almoſt the ſenſe of the ninth commandment.

This objection being removed, the next queſtion will be, whether the depoſitions ought to be read; which depends upon two things?

Firſt, whether it is a proper obligatory oath?

Secondly, Whether on the ſpecial circumſtances in this caſe, ſuch evidence can be admitted according to the law of *England?*

The general learning upon this head has been fully enlarged upon by the Lord Chief Juſtice.

The eſſence of an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth, and avenger of falſhood; and Lord *Coke* the only writer who has grafted the word *Chriſtian* into an oath.

The firſt author I ſhall mention is Biſhop *Sanderſon de juriſjuramenti obligatione. Juriſjuramentum*, ſaith he, *eſt affirmatio religioſa:* All that is neceſſary to an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth, and avenger of falſhood; *vid.* the ſame author, *p.* 5. and 18.

This is not contradicted by any writer that I know of but Lord *Coke*, who has taken upon him to inſert the word *Chriſtian*, and is the only writer that has grafted this word into an oath. As to other writers they are all concurring, *vid. Puffendorf*, *lib.* 4. *ch.* 2. *ſec.* 4. Dr. *Tillotſon*, 1ſt volume of his ſermons upon the lawfulneſs of oaths, *p.* 189. where the very text ſpeaks plainly of an oath among all nations and men, "An oath for confirmation is to them an end "of all ſtrife," *Hebr.* the 6th and 16th. "The neceſſity of "religion to the ſupport of human ſociety in nothing appears more "evidently, than in this, That the obligation of an oath, which "is ſo neceſſary for the maintenance of peace and juſtice among "men, depends wholly upon the ſenſe and belief of a Deity."

The outward act is not eſſential to the oath, for this was always matter of liberty.

The next thing I ſhall take notice of is the form of the oath.

It is laid down by all writers that the outward act is not eſſential to the oath; *Sanderſon* is of that opinion, and ſo is *Tillotſon* in the ſame ſermon, *p.* 144. "As for the ceremonies in uſe among us in the "taking of oaths, it is no juſt exception againſt them, that they are "not found in Scripture, for this was always matter of liberty, and "ſeveral nations have uſed ſeveral rites and ceremonies in their oaths."

All

All that is neceſſary appears in the preſent caſe; an external act was done to make it a corporal act.

Secondly, Whether upon ſpecial circumſtances ſuch evidence may be admitted according to the law of *England?*

The judges and ſages of the law have laid it down that there is but one general rule of evidence, *the beſt that the nature of the caſe will admit.*

The rule is, that if writings have ſubſcribing witneſſes to them, they muſt be proved by thoſe witneſſes.

The firſt ground judges have gone upon in departing from ſtrict rules, is an abſolute ſtrict neceſſity. *Secondly*, a preſumed neceſſity. In the caſe of writings, ſubſcribed by witneſſes, if all are dead, the proof of one of their hands is ſufficient to eſtabliſh the deed: Where an original is loſt, a copy may be admitted; if no copy, then a proof by witneſſes who have heard the deed, and yet it is a thing the law abhors to admit the memory of man for evidence. 1 *Mod.* 4.

An abſolute neceſſity the firſt ground for departing from ſtrict rules of evidence, a preſumed neceſſity the ſecond.

A tradeſman's books are admitted as evidence, though no abſolute neceſſity; but by reaſon of a preſumption of neceſſity only, inferred from the nature of commerce.

As to admitting hear-ſay evidence, ſee the caſe of *Campoverdi Mich.* the 2d of *Q. Anne*, in an action upon a policy of inſurance. There is another inſtance of diſpenſing with the lawful oath, where our courts admit evidence for the crown without oath.

It is a common natural preſumption that perſons of the Gentoo religion ſhould be principally apprized of facts and tranſactions in their own country: There is a ſtronger preſumption of neceſſity here than for admitting a deed of 30 years ſtanding; beſides all this an additional reaſon is, that the parties who entered into this contract preſumed, that if they ſhould be obliged to ſue it would be in their own country, and then they muſt have been admitted. From hence it follows, that if one of the parties ſhould leave this country and change his domicil, the other would be deprived of his evidence, which would have been admitted there, and by that means deprived of juſtice.

As the *Engliſh* have only a factory in this country, (for it is in the empire of the Great Mogul) if we ſhould admit this evidence, it would be agreeable to the genius of the law of *England*. The courts of admiralty have done it, *Carth.* 31. *Beak v. Tyrrell, vid.* the laſt *ſection*, " *An* Engliſh *ſhip was taken by a* French *man of war under* " *colour of a* Dutchman, *and carried into* France, *and there condemned* " *by their court of admiralty as a* Dutch *prize; afterwards an* Engliſh " *merchant bought this ſhip of the* French, *and conveyed her into* Eng- " land, *where the right owner brought an action of trover for the ſhip* " *againſt the purchaſer; and all this matter being found ſpecially, the* " *defendant had judgment, becauſe the ſhip being legally condemned as* " Dutch *prize, this court will give credit to the ſentence of the court of* " *admiralty in* France, *and take it to be according to right, and will not* " *examine their proceedings; for it would be very inconvenient, if one* " *kingdom ſhould by peculiar laws correct the judgments and proceedings* " *of the courts of another kingdom.*"

Courts of law here will give credit to the ſentence of a foreign court of admiralty, and take it to be right without examining their proceedings.

And if we did not give this credence, courts abroad would not allow our determinations here to be valid.

So in matrimonial caſes, they are to be determined according to the ceremonies of marriage in the country where it was ſolemnized.

If a Heathen, not an alien enemy, brings an action, and defendant a bill for an injunction, he ſhall be admitted to anſwer according to his own form of an oath.

Suppoſe a Heathen, not an alien enemy, ſhould bring an action at common law, and the defendant ſhould bring a bill for an injunction, would any body ſay that the plaintiff at law ſhould not be admitted to put in an anſwer according to his own form of an oath? If otherwiſe, the injunction muſt be perpetual, and this would be a manifeſt denial of juſtice.

Framers of indictments multiply words to no purpoſe, therefore the old precedents are the beſt, and by them it appears *ſupra ſanctum Dei evangelium* are not neceſſary words in indictments for perjury.

As to the moſt material objection of the form in indictments for perjury, the words *ſupra ſanctum Dei evangelium* are not at all neceſſary. The framers of indictments are apt to throw in words, and to ſwell them out too much to no purpoſe; therefore the old precedents are the beſt; and beſides, as has been very juſtly ſaid, this would prove too much, for it would hold as well to all depoſitions taken abroad. It has been ſaid by the counſel for the defendant, that the ſpecial laws in *Spain*, for taking thoſe oaths, are of the nature of our acts of parliament.

I will not be poſitive, but I take it to be otherwiſe. *Selden* upon the laws of *Alphonſo* the wiſe king of *Arragon*, ſaith, *It is not a poſitive law for the Moors, but authenticated by him, and transferred into his code of laws, and originally in the nature of what our common law is. Moors have their particular oath which they ought to make in that manner.* This form of expreſſion rather ſhews that he refers to ſome other law that prevailed long before.

This falls in exactly with what Lord *Stair*, *Puffendorf*, &c. ſay, that it has been the wiſdom of all nations to adminiſter ſuch oaths, as are agreeable to the notion of the perſon taking, and does not at all affect the conſcience of the perſon adminiſtring, nor does it in any reſpect adopt ſuch religion: It is not near ſo much a breaking in upon the rule of law, as admitting a perſon to be an evidence in his own cauſe.

The caſe of the *Eaſt India* Company and Admiral *Matthews*, in the court of Exchequer miſtated, for there is no ſuch thing as ſending one Judge out of a court to the Judges of another upon a point of evidence.

I will juſt take notice of the caſe of the *Eaſt-India* Company, and Admiral *Matthews*. I was counſel myſelf in the cauſe, but do not at all remember ſending either to the court of King's Bench, or Common Pleas for their opinion. Mr. *Bunbury* has ſtated it as a trial at bar before Lord Chief Baron *Reynolds*, and therefore it could not be done, for there is no ſuch thing as ſending one Judge out of a court to the Judges of another upon a point of evidence. As to the caſe before Lord Chief Juſtice *Eyre*, the perſon there would not be ſworn either upon the Old or New Teſtament; and therefore, as he was not a *Chriſtian*, he would not admit him to be a witneſs: But upon the ſpecial circumſtances of this caſe, I concur in opinion with my Lords the Judges, that the depoſitions of theſe witneſſes ought to be read as evidence in this cauſe, and do therefore order that the objection be over-ruled, and the depoſitions read.

November the 24th 1737.

Ramkiſſenſeat v. *Barker* and others.

Caſe 11.

A bill brought for an account againſt the repreſentatives of an *Eaſt India* governor, who pleaded that the plaintiff was an alien born, and alien infidel, and could have no ſuit here.

IT came on upon the joint pleas of the widow, and the ſon of the late Mr. *Barker*, governor of *Patna* in the *Eaſt Indies*, who had in his life time employed the plaintiff in private trade, as his banyan or broker: They being made defendants to a bill brought againſt them as the repreſentatives of *Barker* for an account; it was pleaded that the plaintiff was *an alien born*, and *an alien infidel*, not of the Chriſtian faith, and upon a croſs bill incapable of being examined upon oath, and therefore diſqualified from ſuing here.

The plea over-ruled, for being a mere perſonal demand, the plaintiff may bring a bill in this court.

Lord Chancellor ſaid, As the plaintiff's was a mere perſonal demand, it was extremely clear that he might bring a bill in this court; and over-ruled the defendants plea, without hearing one counſel of either ſide.

CAP. IX.

Amendment.

(A) In what caſe allowed or not.

March the 24th 1738. The laſt ſeal after *Hilary* term.

Anon.

Caſe 12.

After publication plaintiff cannot amend without withdrawing his replication.

IT was ſaid by *Lord Chancellor:* That after publication is paſt, there is no inſtance of a plaintiff's obtaining an order to amend his bill, without withdrawing his replication.

CAP.

CAP. X.

Anſwers, Pleas, and Demurrers.

(A) What ſhall be a good plea and well pleaded.

Hilary term 1735. *February* 8th.

Chamberlain v. *Knapp.*

Caſe 13. Lands deviſed to be ſold for payment of Debts. Bill brought by a creditor of teſtator againſt his widow, to diſcover her title to lands in her poſſeſſion.

A Will having been made for the ſale of lands for payment of debts, the preſent bill was brought by a creditor againſt the widow of the teſtator in poſſeſſion of ſome of the lands deviſed, praying a diſcovery of her title.

She pleads a ſettlement and jointure, and offers to diſcover if plaintiff will confirm it, but neither ſets out the date, nor lands contained in the ſettlement.

She pleads, that by a deed of ſettlement ſhe had a jointure of all the lands laying in a town called and that ſhe was willing to make a diſcovery, if plaintiff would confirm her jointure, not otherwiſe; the plea did not ſet out, either the date of the deed, or the particular parcel of the lands contained in it.

The plea over-ruled, for ſhe ought to have ſet forth both theſe matters.

Lord Chancellor held the plea bad, for both theſe reaſons, and that a purchaſer for a valuable conſideration would be bound to ſet forth thoſe two matters. Plea over-ruled.

February 8th 1737.

Duncalf v. *Blake.*

Caſe 14. An inſurer by his bill ſuggeſts the ſhip was loſt fraudulently, and in the charging part mentions that inſtead of proper goods, there was only wool on board; and in the interrogatory part, prays defendant may ſet out what kind of goods he had on board.

THE plaintiff ſubſcribed a policy of inſurance for a conſiderable ſum of money; the ſhip was loſt, and as ſuggeſted, fraudulently, and with a view of charging the plaintiff with the policy.

The bill ſets forth, that the ſhip, inſtead of having proper mercantile goods on board, being bound from one of the ports of *Ireland*, to one of the ports in *France*, had only wool on board: By the interrogatory part of the bill it was prayed, that the defendant might ſet out what kind of goods he had on board, what the invoices were, in what manner the ſhip was cleared, and whether ſhe had not arms on board her.

The defendant, as to ſo much of the bill as ſought a diſcovery of the particular nature and quality of the goods mentioned to be ſhipped on board the ſaid ſhip to be ſent to *France*, and what quantity, pleaded an act of parliament of 1 *Will. & Mar. That no wool ſhall be ſhipped from* Ireland, *or imported from thence to any port but* Liverpool, *and ſome others in* England; which was afterwards made perpetual by the 7 *Will. & Mar.* and by another act made the 10 & 11 *Will.* 3. it is enacted, That none *ſhall directly or indirectly export from* Ireland *into any foreign dominion any wool, and all offenders againſt this act are made liable to the forfeiture of the ſaid wool, and alſo to a forfeiture of* 500*l. for every offence.* That the value of the cargo on board the ſaid ſhip, and inſured by plaintiffs, is by the policy aſcertained at 3500*l.* by the ſum inſured thereon, and therefore it can no ways concern the plaintiffs to know the particulars of the goods; but the diſcovery thereof may occaſion ſeveral forfeitures, and the bill charging that the goods ſhipped on board, *&c.* by the defendant, were to be ſent to *Pontraffe* in *France*, which by the laws and ſtatutes of this realm is prohibited, and highly penal, and the diſcovery manifeſtly tending to draw in the defendant to accuſe himſelf; he ſubmitted, Whether he ſhould be compelled to make any other anſwer.

Defendant pleads ſeveral ſtatutes that make it penal to export wool, in bar to a diſcovery of all kind of goods on board.

The Attorney general for the plaintiff admitted, that in the charging part of the bill, nothing was mentioned to be on board but wool; but by the interrogatory part, defendant is aſked in general, What kind of goods he had on board? and defendant's plea goes in bar to a diſcovery of all kind of goods which were on board.

Lord Chancellor allowed the plea; but agreed if other kind of goods had been mentioned in the charging part, the defendant might have been obliged perhaps to have given ſome anſwer to it, but as there was not, defendant was not obliged to anſwer that interrogatory part: The only doubt he had was as to the clearing of the ſhip, and having arms on board, and that part of the bill he thought afterwards might be covered with the plea.

The plea allowed, becauſe no goods but wool mentioned in the charging part, if there had been others, defendant muſt have given ſome anſwer to it.

Agreed in this caſe, that a plea may be bad in part, and yet not ſo in the whole.

February the 19th 1738.

Deggs v. *Colebrooke.*

Vide title *Coſts.*

March the 3d 1738.

Morgan v. *Morgan.*

IT was in this caſe laid down by *Lord Chancellor* as a rule, that where a defendant pleads a decree of diſmiſſion of a former cauſe, for the ſame matters, in bar of the plaintiff's demand on his new bill,

Caſe 15.

bill, if the plaintiff does not apply to the court, that it may be referred to a Maſter to ſtate, whether there is ſuch a decree, but ſets down the cauſe upon the new bill for hearing, it is a waiver of his right of application for ſuch reference, and the court will determine it.

Auguſt 9th 1739.

Chapman v. *Turner.*

Caſe 16. The defence proper for a plea muſt be ſuch as reduces the cauſes to a particular point, and from thence creates a bar to the ſuit, and every good defence in equity is not likewiſe good as a plea.

LORD Chancellor: The defence proper for a plea muſt be ſuch as reduces the cauſe to a particular point, and from thence creates a bar to the ſuit, and is to ſave the parties expence in examination, and it is not every good defence in equity that is likewiſe good as a plea; for where the defence conſiſts of a variety of circumſtances, there is no uſe of a plea, the examination muſt ſtill be at large, and the effect of allowing ſuch a plea, will be, that the court will give their judgment on the circumſtances of the caſe, before they are made out by proof.

CAP. XI.

Apprentice.

Vide title *Maſter and Servant.*

CAP. XII.

Arreſt.

(A) Where good though on a Sunday.

December the 22d 1744.

Ex parte Kerney.

Caſe 17. 2. If a man is liable to be arreſted while under the ſummons of commiſſioners of bankrupts.

THE petitioner, who had been an aſſignee under a commiſſion againſt *Philip Shehan*, was diſcharged by order of *Lord Chancellor*, and directed to convey to new aſſignees, and to account ſeven days after he had conveyed to the new aſſignees, and paſſed his accounts; but being an incumbred perſon, he begged the commiſſioners would give him their ſummons for the next ſitting under the commiſſion; the commiſſioners told him, that as he had done

done every thing that was neceſſary in purſuance of *Lord Chancellor*'s order, it would be of no uſe to him; but however upon his importunity they did give him their ſummons.

Kerney attended on the day mentioned in the ſummons, and was examined two hours; as he was returning home, one *Lawn* a ſheriff's officer arreſted him, and notwithſtanding *Kerney* ſhewed him the commiſſioners ſummons, he damned it, and ſaid he did not regard it of a farthing, and kept him in cuſtody ſeveral hours.

The petitioner now applies to *Lord Chancellor* to be diſcharged from the arreſt, and that the officer may be cenſured for his abuſe of the commiſſioners warrant of ſummons.

Lawn the ſheriff's officer admits the arreſt in his affidavit, but denies his abuſing the ſummons.

Lord Chancellor: I think this a matter of great conſequence.

1*ſt*, Material as to commiſſioners of bankrupt in general.

2*dly*, Material with regard to the liberty of the ſubject.

3*dly*, Material in other commiſſions under the great ſeal, as of charitable uſes, commiſſions of lunacy, *&c.* for ſham arreſts may be ſet up, even by the perſons themſelves in order to prevent their attendance to be examined as witneſſes before ſuch commiſſioners.

Ordered, That *Charles Lawn* before the next day of petitions, give ſecurity to be approved of before a Maſter, for his attending *de die in diem*, to anſwer interrogatories to be exhibited concerning the contempts charged upon him in the affidavit of the petitioner, late aſſignee of *Philip Shehan*. And if *Lawn* ſhould not give ſuch ſecurity, ordered, he ſhould ſtand committed to the *Fleet* for the ſaid contempts; and if *Lawn* ſhall give ſuch ſecurity, then ordered that the petitioner do within a week after ſuch ſecurity exhibit interrogatories before the maſter, for examining *Lawn* touching the ſaid contempts, and that *Lawn* do attend the ſaid Maſter *de die in diem* for that purpoſe.

And as no precedents have been produced of like caſes before the court, of arreſts, notwithſtanding commiſſioners warrant, tho' it very probably may have happened; let the petition ſtand over till the next day of petitions, and a ſearch be made for ſuch caſes, and what the court have done upon it; and in the mean time recommended it to the counſel for the ſheriff's officer, to adviſe him to diſcharge the petitioner.

June the 2d 1749.

Ex parte Whitchurch.

HANCOCK and *Hooper*, the aſſignees of *Halliday*, a bankrupt, obtained an order for a maſter to take an account of the dealings between *Whitchurch* and the bankrupt, who reported 231 *l.* 5 *s.* 0 *d.* Caſe 18. The petitioner was arreſted on a *Sunday* by *Lord Chancellor*'s tipſtaff, under a warrant of the court for a contempt in diſobeying an order; he now prayed to be diſcharged, inſiſting his arreſt and commitment to the *Fleet* was illegal, being contrary to the ſtatute of the 29 *Char.* 2. *c.* 7. *ſ.* 6. *Lord Chancellor* doubtful at firſt, but on conſideration thought it a lawful arreſt, though on a *Sunday*.

to

to be due from him to the bankrupt; and on arguing exceptions to that report, *Lord Chancellor* ſettled the ſum at 226*l.* only, which *Whitchurch* was ordered to pay to *Halliday*'s aſſignees.

Whitchurch not paying the money purſuant to the order, on the 19th of *June* his Lordſhip granted the following warrant for apprehending him and carrying him to the *Fleet*.

" In the matter of *Edward Halliday*, a bankrupt,

" Whereas by an order dated the 28th day of *November*, made in " this matter upon the the petition of *Jonathan Hancock* and *Richard* " *Hooper*, aſſignees of *Edward Halliday* the bankrupt, it was ordered, " that *William Whitchurch ſhould ſtand committed* to the priſon of the " *Fleet*, for his contempt in the ſaid order mentioned, and that a " warrant for ſuch his commitment ſhould iſſue accordingly; theſe " are therefore in purſuance of the ſaid order to will and require you " forthwith, upon receipt hereof, to make diligent ſearch after the " body of the ſaid *William Whitchurch*, and wherever you ſhall find " him, *to arreſt and apprehend him, and to carry him to the priſon of* " *the Fleet*, there to remain till further order, *willing and requiring all* " *mayors, ſheriffs, juſtices of the peace, conſtables, headboroughs, and* " *all other his Majeſty's officers and loving ſubjects, to be aiding and* " *aſſiſting to you in the due execution of the premiſſes*, as they tender his " Majeſty's ſervice, and will anſwer the contrary hereof at their pe- " rils; and this ſhall be to you, or any of you, that ſhall ſo do the " ſame, a ſufficient warrant. Dated this 16th day of *June* 1748."

HARDWICKE C.

To *John Eyles*, Eſq; Warden of the *Fleet*, or his deputy, attending the High Court of Chancery.

By virtue of this warrant *Whitchurch* was on *Sunday* the 9th of *October* laſt, between 4 and 5 in the afternoon arreſted at *Froome* in *Somerſetſhire*, by *James Adlam*, his Lordſhip's tipſtaff, by the order and direction, and in the preſence of Mr. *Stephen Skurray*, ſollicitor for the aſſignees of *Halliday*, and by them detained at *Froome* till *Monday* morning, and then conveyed by *Adlam* to the *Fleet* priſon, where he ſtill is charged with that warrant only.

The petitioner inſiſted that being arreſted on a *Sunday*, by virtue of a warrant founded on his Lordſhip's order, *for non-payment of money only*, and not for *treaſon, felony, or breach of the peace*, it is contrary to the ſtatute of the 29th of *Charles* the ſecond, *ch.* 17. intituled, An act for the better obſervation of the Lord's day, commonly called *Sunday*, *ſec.* 6. " Provided alſo that no perſon or perſons upon the " Lord's day ſhall ſerve or execute, or cauſe to be ſerved and ex- " ecuted, any writ, proceſs, warrant, order, judgment, or decree, " except in caſes of treaſon, felony, or breach of the peace, but that " the ſervice of every ſuch writ, proceſs, warrant, order, judgment, " or decree, ſhall be void to all intents and purpoſes whatſoever."

And therefore the arreſt being illegal, inſiſted that he was illegally detained in cuſtody, and ought to be diſcharged.

Againſt the petition was read the affidavit of *James Adlam*, " who " ſwore that on the 9th of *October* laſt, being *Sunday* in the evening, " *Whitchurch* came into the yard of the *George* inn in *Froome*, where " *Adlam* was, and he thereupon told *Whitchurch* he had my Lord " Chancellor's warrant againſt him ; *to which Whitchurch immediately* " *anſwered, he knew it, and heard he was there, and came on purpoſe to* " *be taken up* ; and that he ſeveral times after, both the ſame night " and the next day, declared the ſame."

Adlam's affidavit was confirmed by two others to the ſame effect. " He likewiſe ſays he has often been told, and always apprehended " theſe warrants for contempts might be executed on a *Sunday*, and " he has himſelf done it ſeveral times, and was never complained of " before on that account." And it is agreed on all hands that a commiſſion of rebellion may be executed on a *Sunday*, though it iſſued for want of an appearance, or an anſwer only, and it does not appear to the officer by the warrant for what the commitment iſſues, as may be ſeen by the copy of the warrant.

Mr. Attorney General againſt the petition cited 6 *Mod.* 95. *Carth.* 504. and the ſame caſe in *Salk. Parker* v. *Sir William Moore* 626.

Lord Chancellor : It appears from the affidavits, that there is not any occaſion for the court to make any ſtretch in the petitioner's favour, and he was beſides endeavouring to defraud the creditors of *Halliday* by abſconding.

When this petition came on before, I was a good deal doubtful, and rather inclined to think it was a caſe within the ſtatute of the 29th of *Charles* the ſecond ; but upon looking into the matter ſince, I have in a good meaſure altered my mind, and think it a lawful arreſt, though on a *Sunday*.

But I will obſerve, firſt, as to the voluntary ſurrender of the petitioner to *Adlam* my tipſtaff.

The ſtrength of the evidence goes to his voluntary ſurrender, for the fact is poſitively ſworn to by three perſons, and denied by *Whitchurch*'s affidavit only ; and there can be no doubt but a man may, if he pleaſes, ſurrender himſelf voluntarily to my warrant on a *Sunday*.

A man may ſurrender himſelf voluntarily to any warrant upon a Sunday.

The order of commitment which has been made in this cauſe, is very different from proceſſes that iſſue to ſheriffs, *&c.* for it is, *That the party ſhould ſtand committed*, and is different too from moſt of the orders in other courts.

The order of commitment here, that the party ſhould ſtand committed, and if petitioner had been preſent when the order was pronounced, he was inſtantly a priſoner.

If this man had been preſent in court when the order was pronounced, he was inſtantly a priſoner, and the warden might have taken him away to gaol directly.

The books of practice, though I do not ſay they are of authority, yet all agree in laying it down that the party is conſidered as a priſoner from the time of the order pronounced.

This is a warrant directed *to the very gaoler* to take him and carry him to priſon, and differs from warrants of other courts, which are directed to ſheriffs and other miniſterial officers, and not directed to the gaoler ; and I do not know that this is done in any inſtance, but

where the party is conſidered as the priſoner of the gaoler from the time of the order pronounced.

Eſcape warrants are in aid of the gaoler, and command all officers, conſtables, *&c.* to aſſiſt him.

And this very warrant is drawn up in the ſame manner, and therefore alike in this reſpect, and eſcape warrants may be put in execution on a *Sunday*.

Lord Chief Juſtice *Holt* of opinion a man might be taken upon a *Sunday* on a proceſs of contempt, becauſe in the nature of a breach of the peace, and an exception out of the act of parliament.

In the caſe of Sir ——— *Cecil*, and others of the town of *Nottingham*, Caſes in King *William*'s time, 348. "The queſtion was, Whether ſerving an attachment upon a *Sunday* for a contempt was within the ſtatute againſt ſabbath-breaking? Said Lord Chief Juſtice *Holt*, Suppoſe it were a warrant to take for forgery, perjury, *&c.* ſhall they not be ſerved on a *Sunday?* And ſhall not any proceſs at the King's ſuit be ſerved on *Sunday?* Sure the Lord's Day ought not to be a ſanctuary for malefactors, and this caſe partakes of the nature of proceſs upon an indictment."

So that Lord Chief Juſtice *Holt* was inclined to think that a man might be taken upon a proceſs of contempt on *Sunday*, becauſe it was in the nature of a breach of the peace, and an exception out of the act of parliament.

Held that a man might be taken on a *Sunday* upon an attachment for non-performance of an award.

7. If a man may be taken on an attachment for non-performance of an award upon a *Sunday*, as was held by the court of Common Pleas in a caſe cited by the Attorney general, why is not a contempt for non-performance of an order of this court, equally a breach of the peace, as the non-performance of an award?

A contempt for non-performance of an order of this court equally a breach of the peace.

Lord Chancellor diſmiſſed the petition as he is not without remedy, for he may bring an *habeas corpus*, or an action of falſe impriſonment.

8. Therefore, as it ſeems to be warranted by the words of the warrant itſelf, that he is a priſoner from the time of the order pronounced, I will not diſcharge him, eſpecially as he is not without remedy; for he may bring an *habeas corpus*, or an action of falſe impriſonment, and therefore order that the petition for his diſcharge be diſmiſſed.

CAP.

CAP. XIII.

Aſſets.

Vide Title *Heir and Anceſtor*, and *Executors and Adminiſtrators.*

February the 4th 1739.

Ryall v. *Ryall.*

Caſe 19.

A. gives ſeveral legacies, and makes *B.* his executor and reſiduary legatee. *B.* receives all the aſſets, and buys lands with the money, and dies, and alſo bought the equity of redemption of another eſtate on which *A* had a mortgage. Bill brought by legatees, to be paid their legacies out of *A.*'s real and perſonal eſtate. The court directed an inquiry, whether part of the aſſets were laid out in the purchaſe of an eſtate, and if they were declared, they ought to be reſtored to teſtator's perſonal eſtate. The equity of redemption held to be aſſets.

THE teſtator gave ſeveral legacies, and made *B.* his executor and reſiduary legatee. *B.* receives all the aſſets, and buys lands with the money, and dies, and likewiſe bought the equity of redemption of another eſtate on which teſtator had a mortgage. The bill was brought by the ſeveral legatees againſt the adminiſtrator and heir at law of *B.* to be paid their legacies out of his real and perſonal eſtate.

Firſt queſtion, If the perſonal aſſets are not ſufficient, whether the legatees may not come upon the purchaſed eſtate for ſatisfaction?

Second queſtion, Whether the equity of redemption of the mortgaged eſtate bought ſince the death of the teſtator, may not be conſidered ſtill as the aſſets of the teſtator, and liable to anſwer the legacies?

For the plaintiffs was cited the caſe of *Bolney* v. *Hamilton*, before Lord *King*, *July* the 4th 1729.

For the defendant, *Kirk* v. *Webb. Prec. in Ch.* 84. and *Kinder* v. *Milward* 2 *Vern.* 440.

Lord Chancellor: Courts of Equity have been very cautious how they follow money which has been laid out in land, becauſe it has no earmark, though they have done it in ſome caſes.

The principal difficulty in theſe caſes is, with regard to the proof; for the different intereſts of the parties introduce a contrariety of evidence, and is no ſmall temptation to perjury.

But in the preſent caſe I think it is neceſſary there ſhould be an inquiry, whether part of the aſſets of the teſtator have been laid out in the purchaſe of an eſtate? Becauſe if it ſhould plainly appear that they have been ſo laid out, they ought to be reſtored to the perſonal eſtate of the teſtator.

Where an eſtate is purchaſed in the name of one, and the money paid by another, it is a truſt notwithſtanding there is no declaration in writing by the nominal purchaſer.

Suppoſing the executor had been living, and had by his anſwer owned that he had laid out part of the aſſets in ſuch purchaſe, it would

have removed the objection of fraud, and perjury, by letting in parol proof; but the perſon now before the court is only the adminiſtrator of the executor, and though he does indeed admit that credit is given to the accounts of the executor, yet this is no evidence againſt the infant heir at law, but it is ground for an inquiry into this fact, and the means of coming at this by way of reſulting truſt is excepted out of the ſtatute of frauds; if the eſtate is purchaſed in the name of one, and the money paid by another, it is a truſt notwithſtanding there is no declaration in writing by the nominal purchaſer, and upon enquiry a little matter will do to make it a charge *pro tanto*.

As to the ſecond point with regard to the equity of redemption, I think it is very clear that it muſt be conſidered as aſſets, and liable to the legacies.

CAP. XIV.

Award and Arbitrement.

(A) Parties only affected by it.
(B) For what cauſes ſet aſide.

(A) Parties only affected by it.

Eaſter term 1738.

Thompſon *v.* Noel *et al'*.

Caſe 20.

A. by articles previous to his marriage agrees to veſt 1000*l.* in truſtees, the intereſt thereof to be received by *A.* and his wife, during their lives, and afterwards to be divided between their iſſue,

FOWLER, one of the defendants, enters into articles previous to his marriage, in conſideration of 1100*l.* portion, to veſt 1000*l.* in truſtees within ſix months after his marriage, the intereſt thereof to be received by him and his wife, during their lives, and afterwards the 1000*l.* was to be equally divided between the iſſue of that marriage; and as a farther ſecurity for the performance of this agreement, gives a warrant of attorney to the truſtees to confeſs a judgment for that ſum, which is ſoon afterwards entred up: *Fowler* after that

and gives the truſtees a warrant of attorney to confeſs a judgment for that ſum which was entred up. Accordingly *A.* enters into partnerſhip with *B.* afterwards, and being indebted to the partnerſhip eſtate in more than his intereſt in that eſtate, they ſubmit the difference between them to arbitration, and part of the ſtock in trade is awarded to be lodged in the hands of a third perſon; any part to be delivered to either of the parties on making it appear, any bond or other debt due from the partnerſhip had been paid by either, the quantity to be delivered in proportion to the money paid.

enters

enters into a partnerſhip in the wine trade with one *Hamilton*, and being indebted to the partnerſhip eſtate in a larger ſum of money, than his intereſt in the partnerſhip effects, or any other property he had, could ſatisfy, the two partners ſubmit the difference between them to arbitration, and accordingly a parol award is made, that 40 pipes of wine, part of the ſtock in trade, ſhould be lodged in the hands of a third perſon, one *Hayward*; but any part thereof to be delivered to either of the partners on producing any bond, *&c.* which had been entered into on account *of the partnerſhip*, paid off by the party producing the ſame; the quantity of wine to be delivered to be in proportion to the money ſo paid off.

The 40 pipes of wine were accordingly depoſited, with the conſent of *Hamilton* and *Fowler*, in the hands of *Hayward*; afterwards a *ſcire facias* is brought on the judgment ſo confeſſed to the truſtees in the marriage articles, and a moiety of theſe 40 pipes taken in execution by a *fieri facias* as the property of *Fowler*.

The truſtees in the marriage articles bring a *ſcire facias* on the judgment confeſſed to them, and take a moiety of the depoſited ſtock in execution as the property of *A.*

The bill is now brought by *Hamilton*, who is likewiſe a ſeparate creditor of *Fowler*, and twelve other creditors on the account of the partnerſhip, to ſet aſide this execution, and to have the value of the moiety of the 40 pipes of wine appropriated to the payment of the debts of theſe creditors, ſuppoſing the pipes of wine ſpecifically bound by the award, and the execution of it, by depoſiting them in the hands of *Hayward* according to the award.

Bill by the partnerſhip creditors to ſet aſide the execution, and to have the moiety of the ſtock ſo ſeized appropriated to payment of their debts, inſiſting it was ſpecifically bound by the award, and the execution of it. The plaintiffs being no parties to the ſubmiſſion, nor privy at all to the tranſaction, nor under an obligation of abiding by the award, ought not have the benefit of it, and therefore bill is diſmiſſed.

Mr. *Fazakerley* for the plaintiff, taking it for granted the award with reſpect to the depoſit of the wine was intended as a proviſion for the creditors on the partnerſhip account, and as a ſecurity for the payment of their debts, inſiſted that every award when made was conſidered, in point of law, as the very act of the parties ſubmitting to the determination of the arbitrators, and as the agreement of the parties themſelves; and it is upon that foot an action of debt lies againſt the party on the award, for when a ſubmiſſion is made a rule of court, an attachment lies for non-performance of the award, as a breach of his own agreement, which by rule of court he had engaged to perform; and that this caſe therefore muſt be conſidered in the ſame light, as if the parties themſelves in the firſt inſtance had, without the intervention of any arbitrators, agreed to make a depoſit of theſe pipes of wine for the purpoſe mentioned in the award; that in ſuch caſe the creditors, though there might be no alteration in the property made thereby, would have an equitable lien on theſe wines ſpecifically in ſatisfaction of their debts, and as ſuch would prevail againſt any execution afterwards at the ſuit of any other perſon; that the judgment creditors here, *the truſtees*, merely as ſuch, had no intereſt in theſe wines, but that right muſt ariſe, if at all, from the *fieri facias*, which could not take place here, as there was a prior

equitable lien upon them: That indeed where goods are ſpecifically bound in equity, and a purchaſer without notice, *&c.* afterwards gains a legal right in them, having advanced his money at the time upon the credit of thoſe very goods, as ſuch purchaſer has an equal equitable lien, and the law too on his ſide, his right will prevail; but it is otherwiſe where the creditor at the time his demand firſt accrued, relied only on the perſonal ſecurity, and general credit of his debtor; there any legal right which he obtains afterwards in any of the effects of his debtor, muſt be ſubject to every ſuch truſt or equitable lien, which they were liable to in the hands of the debtor himſelf, and ſuch creditor can only ſtand in the place of his debtor; as in the caſe of bankruptcy, the aſſignees, *&c.* though perhaps equally creditors with any others (who have before obtained an equitable lien on any of the bankrupt's effects ſpecifically) and have the law on their ſide too, the property of the bankrupt's effects being veſted in the aſſignees, yet they muſt only ſtand in the place of the bankrupt, and take his effects ſubject to all thoſe equitable charges, which they were liable to in the hands of the bankrupt. *Vide Salk.* 449. *Taylor* v. *Wheeler*, and *Eq. Caſ. Abr.* 320. *Burgh* v. *Francis.*

Mr. *Noel e contra* inſiſted that the creditors had no right to bring a bill to have this award carried into execution, not being parties to the ſubmiſſion, nor concerned therein, it being a matter altogether tranſacted between *Fowler* and *Hamilton* only; and therefore as the creditors would not at all be concluded by this award, but at liberty ſtill to purſue their remedy as they thought proper, for the recovery of their debts, there was no reaſon why they ſhould have any benefit from this award, becauſe it happened to be in their favour; he relied likewiſe on the want of ſufficient evidence on the part of the plaintiffs, to prove the acquieſcence of *Fowler* in the award, or even his knowledge what the award was; and indeed the only evidence to that purpoſe was his applying to the arbitrators before the award was finally made, to let him have part of the wine to carry on his trade with (which the arbitrators would not comply with), and his agreement afterwards with *Hamilton* to have the wines depoſited in the hands of *Hayward*, but no evidence that he was preſent when the award was made, nor any other evidence that he was informed of the contents of it.

A bill will not lie to carry an award into execution where the parties to the ſubmiſſion do not acquieſce in it, nor agree afterwards to have it executed, but muſt be inforced at law

Lord Chancellor: A bill to carry an award into execution when there is no acquieſcence in it by the parties to the ſubmiſſion, or agreement by them afterwards to have it executed, would certainly not lie; but the remedy to inforce a performance of the award muſt be taken at law: It has been ſaid the evidence here of *Fowler*'s agreement to the award after it was made, was not ſufficient to found a decree on; but what he principally relied on was, that none of the now plaintiffs, the creditors, were parties to the ſubmiſſion, nor did it appear that they were ſo much as privy at all to the tranſaction; and therefore, as they were under no obligation of abiding by the award, they ought not to have the benefit of it; and in reading over the award, (which at the time of making it, was taken down in writing) he

he obſerved it was calculated only for the indemnity of *Hamilton* againſt the failure of *Fowler*, without any regard had at all to the creditors, there being no proviſion made, that the wines ſhould be ſold, or otherwiſe employed for raiſing money for the payment of debts of the plaintiffs: That though an agreement made between the two partners, and particular creditors, to appropriate a particular part of the partnerſhip effects for the payment of thoſe creditors, might create a lien on thoſe goods ſpecifically for the payment of their debts, in preference to the reſt of the creditors; yet an agreement of that kind between the partners only, would certainly not diſable any of the creditors from purſuing their remedy at law againſt the effects of the debtor, any more than if no ſuch agreement had been made.

The bill diſmiſſed.

(B) For what cauſes ſet aſide.

June the 18th 1737. Upon appeal from the Rolls.

Mary Medcalfe widow, and *William Ives*,

William Ives and *Ann* his wife by croſs bill, Plaintiffs.

Mary Medcalfe and *Richard Johnſon* and his wife, Defendants.

Caſe 21. *A.* and his wife covenant in articles before marriage, in conſideration of 2000*l.* the wife's portion, to releaſe all the right that might accrue to them out of her father's perſonal eſtate, by the cuſtom of *London*.

THE bill in this caſe was brought to have a ſpecifick performance of articles made on the marriage of the defendant, *Richard Johnſon*, whereby the ſaid defendant and his wife covenanted in conſideration of 2000*l.* the wife's marriage portion, to releaſe all the right and intereſt that might accrue to them out of her father's perſonal eſtate, by the cuſtom of the city of *London*, he being a freeman, and alſo to ſet aſide an award alledged to have been unduly obtained upon a ſubmiſſion of the controverſies between the parties, concerning the right to this orphanage part.

As to the firſt part of the caſe, the defence made for the defendant was, that the cuſtomary part being a mere poſſibility, and contingency, which might or might not happen, it could not be releaſed, and if he could, that at the time of the articles, the wife was an infant, and ſo not bound by them; beſides that the 2000*l.* was no conſideration for releaſing ſuch an intereſt, the wife's father, one *Ruſſel*, having died worth upwards of 20,000 *l.*

Lord Chancellor: Though hardſhips may happen on my determination, yet theſe are conſiderations too looſe either for a judge at law, or in this court, to lay any weight upon; and I muſt determine according to the facts, by the rules of law, and of this court: In this caſe there appeared to be a valuable conſideration for the agreement in the articles, becauſe at the time the 2000 *l.* was given, the defendant's wife was intitled to no part of the eſtate of her father, and it was given for her advancement in the world, and it is highly reaſonable

able that ſuch kind of articles ſhould be carried into execution, and that when a father is bountiful to his children in his life time, that he ſhould have his affairs ſettled to his own ſatisfaction.

The huſband is bound by his covenant, and though the wife was under age, yet it is a matter that accrues to him in the right of his wife, and he may releaſe it, and his releaſe will bind her.

As to the objection of the cuſtomary part being a poſſibility, and merely in contingency, it is of no weight, for there is no doubt but it might be releaſed in equity; but here it is a covenant which the defendant is bound by in all events, and it is no objection to ſay, the wife was under age; for though in this reſpect, if the huſband were dead, the articles would not bind her, and ſhe would by ſurvivorſhip be intitled to the cuſtomary ſhare, as a choſe in action not recovered, or received by the huſband; yet he being alive, it is a matter that accrues to him in right of his wife, and he may releaſe it, and his releaſe will bind her; and therefore it was reaſonable he ſhould perform his covenant. I found my opinion too on an old law well known in the city by the name of *Jud*'s law, whereby a huſband was authorized to agree with the father for the wife, though ſhe was under age.

The huſband's covenanting to releaſe, is an extinguiſhment of the wife's right to the orphanage part, and if ſo, leaves the eſtate of the father as if it had never been charged, and therefore muſt be conſidered as a part of his general perſonal eſtate, and not go wholly to the father's executor, as a part of the dead man's ſhare.

Upon this another queſtion aroſe, Whether the orphanage ſhare ſo to be releaſed by the defendant, ſhould fall into the dead man's part, and go wholly according to his diſpoſition of the reſidue of his eſtate, as a thing purchaſed by him; or, Whether it ſhould fall into his perſonal eſtate, and be diſtributed with it according to the cuſtom? And at firſt I inclined to think that it was in the nature of a purchaſe by the father, and ſo wholly in his power to make a diſpoſition of it by his will; but upon hearing the Attorney general to this matter, I am of opinion, that as in equity things covenanted to be done, are as things actually done, it muſt be conſidered as if the huſband had actually releaſed, and ſo is an extinguiſhment of his wife's right to the orphanage part, and being an extinguiſhment of the right, it leaves the eſtate of the father as if it had never been charged with it, and muſt therefore be conſidered as a part of his general perſonal eſtate, and not to go wholly to the executor of the father, as a part of the dead man's ſhare. Caſes cited, 1 *Vern.* 6. 2 *Vern.* 665, 666. 1 *Will.* 644, 645. 2 *Will.* 527.

Where arbitrators are deceived, or where they make their award clandeſtinely, without hearing each party, a court of juſtice will interpoſe, and avoid ſuch award.

As to the award, he decreed that it ought to be ſet aſide, in reſpect that the articles were ſhewn only to one of the arbitrators, and not to both, and he to whom they were not ſhewn, ſwore that if he had ſeen them, he believed he ſhould not have made ſuch award: His Lordſhip held therefore, that it was unfairly obtained, but agreed to the general rules in caſes of awards, that the arbitrators are judges of the parties own chuſing, and that therefore they cannot object againſt the award as an unreaſonable judgment, or as a judgment againſt law; but where, as in the preſent caſe, arbitrators are deceived, or where they make their award clandeſtinely, without hearing each party; in ſuch caſes a court of juſtice ought to interpoſe to fruſtrate and avoid ſuch awards.

In this caſe the plaintiff's bill was offered to be read as evidence for the defendant, and being objected againſt, it was ſaid, *per Lord Chancellor:* At law, the rule of evidence is, that a bill in Chancery ought not to be received in evidence, for it is taken to be the ſuggeſtions of counſel only; but in this court, it has been often allowed, and the bill was read.

Though a bill in Chancery cannot be received in evidence at law, yet in this court it may be read, and has been often allowed as evidence.

His Lordſhip reverſed the order of diſmiſſion, and declared that by the articles of the 4th of *February* 1703, the defendant *Johnſon* is to be conſidered in equity, as barred of any cuſtomary ſhare in right of his wife, or otherwiſe, of the perſonal eſtate of the teſtator *William Ruſſell.*

CAP. XV.

Bankrupt.

(A) Concerning the commiſſion and commiſſioners.
(B) Rule as to the certificate.
(C) Rule as to aſſignees.
(D) Joint and ſeparate commiſſion.
(E) Rule as to his executor, or where he is one himſelf.
(F) Rule as to landlords.
(G) Rule as to compoſition.
(H) Rule as to creditors.
(I) Contingent debts.
(K) Rule as to drawers and indorſers of bills of exchange.
(L) Where aſſignees will be charged with intereſt.
(M) Rule as to partnerſhip.
(N) Rule as to coſts.
(O) The conſtruction of the repealing clauſe in the tenth of Queen Ann.
(P) Rule as to dividends.
(Q) Commiſſion ſuperſeded.
(R) Rule as to bankrupt's attendance on aſſignees.
(S) Rule as to an apprentice under a commiſſion of bankruptcy.
(T) Rule as to diſcounting of notes.
(V) Rule as to a petitioning creditor.
(U) Rule as to notes where intereſt is not expreſſed.
(W) The conſtruction of the ſtatute of the 21 Jac. 1. c. 19. with reſpect to a bankrupt's poſſeſſion of goods after aſſignment.

(X) Rule as to copyholds under commiſſions of bankrupts.
(Y) Where aſſignees are liable to the ſame equity with the bankrupt himſelf.
(Z) What is or is not an act of bankruptcy.
(Aa) Rule as to ſales before commiſſioners.
(Bb) Rule as to examinations taken before commiſſioners.
(Cc) Who are liable to bankruptcy.
(Dd) Rule as to his allowance.
(Ee) Rule as to ſollicitors in bankrupt caſes.
(Ff) Rule as to the ſale of offices under commiſſions of bankruptcy.
(Gg) What ſhall or ſhall not be ſaid to be a bankrupt's eſtate.
(Hh) Where there is a truſt for a bankrupt's wife.
(Ii) What is a trading to make a man a bankrupt.
(Kk) Rule as to acts of parliament relating to bankrupts.
(Ll) What is or is not an election to abide under a commiſſion.
(Mm) Rule as to proſecutions againſt him for felony in not ſurrendring himſelf.
(Nn) Rule as to contingent creditors in reſpect to dividends.
(Oo) Rule as to mutual debts and credits.
(Pp) Whether during his time of privilege, he may be taken by his bail.
(Qq) Rule as to a certificate from commiſſioners to a judge.
(Rr) The effect of acquieſcence under a commiſſion.
(Sſ) Rule as to debts carrying intereſt under commiſſions of bankruptcy.
(Tt) Rule as to principals and their factors.
(Vv) Rule as to annuities under commiſſions of bankruptcy.
(Uu) Rule as to taking out a ſecond commiſſion.
(Ww) Rule as to an open account under a commiſſion of bankruptcy.
(Xx) Rule as to principal and ſurety.
(Yy) Rule as to the inſolvent debtors acts.
(Zz) Rule as to a bankrupt's future effects.
(Aaa) Rule as to a ceſſio bonorum.
(Bbb) Rule as to depoſits under a commiſſion of bankruptcy.
(Ccc) Rule as to relation under commiſſions of bankruptcy.
(Ddd) Rule as to an extent of the crown.
(Eee) Rule as to creditors aſſenting or diſſenting to a certificate.
(Fff) Bankruptcy no abatement.
(Ggg) Arreſt upon a Sunday for a contempt regular.

(A) Con-

(A) Concerning the commiſſion and commiſſioners.

March the 13th 1737.

Twiſs v. *Maſſey.*

A Father and ſon join in trade, and have a commiſſion of bankrupt awarded againſt them jointly; the bill was brought by plaintiff, ſuggeſting that he was a ſeparate creditor for the ſum demanded by the bill; the defendant pleaded his certificate, and that the debt accrued before he became bankrupt.

Caſe 22. A commiſſion of bankrupt is an action and execution in the firſt inſtance. Separate creditors may come under a joint commiſſion, and prove their debts.

The queſtion is, How far ſeparate creditors are affected by, or can act under a joint commiſſion of bankrupt? And Mr. *Brown* for the defendant cited, *ex parte Crowder*, 2 *Vern.* 706. where ſeparate creditors were allowed to come in under a joint commiſſion, but the joint effects are firſt to be applied to pay the partnerſhip debts, and then the ſeparate debts; and as to the ſeparate effects, firſt the ſeparate creditors, and afterwards the partnerſhip creditors are to be paid out of the ſame; and therefore the plaintiff might have proved his debt under the commiſſion.

Objection, That it was not affirmed in the plea, that the certificate was ſigned by four fifths in number and value.

Mr. Attorney general for the plea urged, that ſuch a particular averment was not neceſſary in this court, though it might be ſo at law, for it is to be preſumed here, till the contrary is proved, as the plea ſets forth, that the certificate had been allowed by *Lord Chancellor*.

Lord Chancellor: As to the objection of it's being a joint commiſſion, that is no objection, for it affects joint and ſeparate eſtates, becauſe it is never taken out but where both are bankrupts; a commiſſion of bankrupt is an action and execution in the firſt inſtance. Suppoſe an action againſt two partners, and judgment; ſeparate eſtates are liable to ſatisfy that judgment; ſo in caſe of bankrupts, ſeparate creditors may come in under that commiſſion, as well as joint creditors.

If a bankrupt has a certificate under a joint commiſſion, it diſcharges him from all debts, ſeparate as well as joint.

As this court marſhals demands and ſecurities, ſo joint creditors as they gave credit to the joint eſtate, have *firſt* their demand on the joint eſtate, and ſeparate creditors as they gave credit to the ſeparate eſtate, have *firſt* their demand on the ſeparate eſtate; the joint commiſſion therefore diſcharges them from *all their debts* expreſly by the act of parliment, which does not mention joint or ſeparate debts: But if the bankrupt has ſince the certificate made a new promiſe, that deſerves a conſideration, and intitles the plaintiff to a diſcovery; and therefore his Lordſhip ordered, that the plea ſtand for an anſwer.

March the 29th 1743.

Ex parte Sandon.

Caſe 23. Commiſſioners have no power of admitting ſeparate creditors to prove debts under a joint commiſſion, without the ſanction of the court.

A Petition on behalf of creditors upon the ſeparate eſtate of two partners, againſt whom a joint commiſſion is now depending, to be admitted to prove their ſeparate debts under the joint commiſſion. *Lord Chancellor* made an order accordingly, upon their bearing a proportion of the expence according to the value of the two eſtates: *Commiſſioners, he ſaid, have not a power of doing this without the ſanction of the court.*

Auguſt the 1ſt 1744.

Ex parte Simpſon the elder, *Thomas Simpſon* and *John Simpſon* the younger: In the matter of *Joſeph Browning* a bankrupt.

Caſe 24. Commiſſioners upon the day for chuſing aſſignees, are not to examine critically into the debt, but to admit creditors for what they ſwear is due to them, as they are liable to an account afterwards.

Browning did in his own name contract with the commiſſioners of the navy, to furniſh his majeſty's ſhips with ſlop cloths, but the ſame was in truſt for himſelf and the petitioners. On the 24th of *November* 1742, articles of agreement were executed by him and the petitioners, whereby all the parties were to have an equal part in the contract, *and the accounts were to be ſettled, and ſigned every ſix months:* And in caſe any of the parties ſhould die, or be rendred unable or incapable to carry it on, in his or their own right, then the ſhare of ſuch party dying or becoming incapable, ſhould be veſted in the ſurviving and capable parties, and the executor of ſuch dying or incapable parties, ſhould on requeſt make a legal aſſignment to the ſurvivors or capable parties, and they ſhould give bond for the value of his ſhare at the time of the ſettlement of the laſt half yearly account, which was to be concluſive to the executors or adminiſtrators.

Browning being indebted on the contract, and alſo largely indebted to the petitioners on their private account, made an aſſignment dated the 21ſt of *January* 1742, of his intereſt in the contract, to the petitioners, in the *firſt* place to ſatisfy ſuch ſums as he then owed or at any time after ſhould owe to the petitioners on the contract or otherwiſe, and after ſuch payment, to pay the overplus, if any, to *Browning*.

In *November* 1743, the contract ſtanding in his name, the commiſſioners of the navy, for the ſafety of the publick, directed that the petitioners ſhould be made parties to the contract, and that it ſhould be carried on in all their names; and the ſame was accordingly executed by the petitioners.

On the 6th of *January* 1743, the laſt half yearly account touching the contract was ſettled, valued, ballanced, and ſigned by

Browning and the petitioners, when it appeared that the increaſe of ſtock ariſing from profits, from the commencement to that day, amounted to 4642*l.* 3*s.* 4*d.* and that the bankrupt had received on account of the contract 28,526*l.* 16*s.* and had diſburſed 28,146*l.* 10*s.* 5*d.* ſo that he then remained debtor 380*l.* 5*s.* 7*d.* to the contract.

On the 11th of *January* 1743, *Browning* ſettled and ſigned the petitioners private account, when there appeared to be due on that account to the petitioners 4615*l.* 3*s.* 7*d.* and by the 24th of *April*, the day of his bankruptcy, there was due to them on the ſeparate account 9480*l.* and upwards.

After *Browning*'s bankruptcy the Lords of the Treaſury were pleaſed to impreſs to the petitioners to enable them to proceed with the contract 20,000*l.* to prevent any diſtreſs to the ſeamen, which was to be repaid to the Treaſurer of the Navy by defalcation out of their wages from time to time as the ſhips were paid off.

In *April* laſt a commiſſion of bankrupt iſſued againſt *Browning*, and the petitioners attended at *Guildhall* and offered to prove their debt, but the commiſſioners refuſed to admit them, inſiſting the 20,000*l.* was to be accounted for as to one fourth part to the bankrupt; which the petitioners informed them could not be done, for if credit was to be given for it on one ſide of the account, it was a debt due to the Treaſurer of the Navy on the other; ſo that it made no variation therein: However the commiſſioners thought proper to poſtpone the choice of aſſignees, *and therefore the application to the court is, that the petitioners may be admitted to prove a debt of* 9480 l. *and that the commiſſioners may proceed to the choice of aſſignees.*

Lord Chancellor: The act of the 5th of the preſent King ſays, "The "commiſſioners ſhall forthwith, after they have declared the perſon "againſt whom a commiſſion ſhall iſſue a bankrupt, appoint a time "and place for the creditors to meet, in order to chuſe an aſſignee or "aſſignees of the ſaid bankrupt's eſtate and effects."

The creditors preſent at ſuch meeting are intitled to vote, unleſs ſome material objection againſt them, and the majority in value to determine the choice, which makes it a conſiderable queſtion, whether creditors ſhall be admitted or not.

The application here is, that I will direct the commiſſioners to proceed to the choice of aſſignees: This is nothing more than what is their duty, and therefore ſuperfluous.

The croſs petition is, that I would poſtpone the demands of the petitioners, and direct the commiſſioners to chuſe aſſignees, without admitting the petitioners to vote in ſuch choice.

The petitioners by their affidavit ſwear to a balance.

But the great objection is, that this is not a compleat account, and therefore the whole ought to be taken, before the petitioners are intitled to be admitted creditors under the commiſſion.

Now as to this, the petitioners ſwear that on the partnerſhip the bankrupt was only a debtor for 380*l.* 5*s.* 7*d.* Whether the account is ſtrictly made up between them I cannot ſay, but I rather

believe not, for it is no more than reſts, or like a computation between partners in the brewhouſe trade.

But then it is ſaid, here is a ſum of 20,000*l.* paid by the government ſince the making up of this account, and that this ought to be brought into the calculation.

But I look upon it to be a loan only from the government, for it is ſtated in the memorial, that whatever ſum ſhall be advanced by the government, the treaſurer of the navy has it in his power to retain this again by way of defalcation: So that this is only in the nature of an impreſs on the part of the government, and therefore may be laid out of the caſe; and if ſo, here is a man ready to prove a debt a certain liquidated demand upon a ſtated account.

But ſay the petitioners in the croſs petition, *There are other accounts not made up, and therefore they ſhall not be allowed to prove.*

A creditor by bond, and an open account likewiſe, ſhall be admitted to prove the bond, becauſe the commiſſioners may ſtill take the account, and upon a dividend he ſhall be intitled to no more than is due to him on balance.

Suppoſe a debt due on bond, and an open account beſides, the creditor finally is to be admitted a creditor only for the balance; and yet notwithſtanding it is every day's experience that he is admitted to prove the bond debt, but ſtill the commiſſioners may take the account afterwards, and the creditor ſhall be intitled on a dividend to no more than what appears to be really due to him on the balance.

As it would be extremely hard to exclude perſons who may perhaps be the greateſt creditors, till the account is determined, which may be the work of ſeveral years; and as it may be neceſſary and convenient that aſſignees ſhould immediately be choſen, the commiſdoners therefore are not critically to examine into the debt, but to admit creditors upon their oath for what they ſwear is due to them, as they will ſtill be liable to an account afterwards.

His Lordſhip therefore ordered that the commiſſioners ſhould permit the petitioners to make proof of their debts, and that they ſhould at preſent admit them creditors for what they ſhould ſo prove, and that they ſhould proceed to the choice of aſſignees.

December the 22d 1744.

Ex parte Simpſon and others.

Caſe 25.

A creditor in all caſes of open accounts ought not to be excluded till the account is taken, becauſe then the choice of aſſignees might ariſe from a minor part in value of the creditors; but ſtill if commiſſioners have juſt grounds to doubt the debt, they do right to admit it only as a claim.

IN purſuance of the order of the firſt of *Auguſt* 1744, the petitioners attended the commiſſioners on the 24th of *Auguſt* laſt at *Guildhall*, and a depoſition was prepared for the petitioner *Thomas Simpſon*, who offered to ſwear that the ſum of 8000*l.* and upwards was then actually due to him and his partners; but two of the commiſſioners refuſed to adminiſter the oath, unleſs he would deliver up the aſſignment given by the bankrupt, dated *January* 21. 1742; whereupon the choice of aſſignees was again poſtponed by order of the commiſſioners.

And on the 5th of *December* inſtant at a meeting under the commiſſion againſt *Browning*, for the creditors to prove their debts and chuſe aſſignees, the petitioners attended and ſwore to a debt of 8000*l.* and upwards, due to them from the bankrupt upon balance of all accounts, and in their depoſition waved the aſſignment, and all benefits thereof; but notwithſtanding they had ſworn to their debt, two of the commiſſioners refuſed to allow it, or to permit the petitioners to vote for aſſignees.

And therefore they now pray that they may be admitted creditors for their debt of 8000*l.* and upwards, and to vote in the choice of aſſignees of the eſtate and effects of the ſaid bankrupt.

Lord Chancellor: The queſtion is not now whether the petitioner is to be admitted a creditor at all events for 8000*l.* but whether he is to be admitted ſo as to join in voting in the choice of aſſignees; for there are diſtinctions in the act of parliament, and after voting in the choice of aſſignees his debt is equally liable to be diſputed before the commiſſioners, or in this court, notwithſtanding it has been ſo admitted.

And this plainly appears from the clauſe in the act relating to credit, "And be it further enacted by the authority aforeſaid, that when it "ſhall appear to the commiſſioners, or the major part of them, that "there hath been mutual credit given by the bankrupt, or any other "perſon, or mutual debts between the bankrupt and any other per-"ſon, at any time before ſuch perſon became bankrupt, the com-"miſſioners, or the major part of them, or the aſſignees of ſuch "bankrupt's eſtate ſhall ſtate the account between them, and one "debt may be ſet againſt another; and what ſhall appear to be due "on either ſide, on the balance of ſuch account, and on ſetting ſuch "debts againſt one another, and no more, ſhall be claimed or paid "on either ſide reſpectively."

How does the matter reſt then? There may be in the caſe of merchants, or as this is, in a matter of contract with the government, an open account, and if there does not appear to the commiſſioners any reaſonable objection to the fairneſs of the debt, the petitioners ought to be admitted, for the aſſignees may afterwards ſettle the account, or it may be done in an adverſe way.

If it was to be taken that in all caſes of open accounts the creditor ought to be excluded till the account is taken, the choice of aſſignees might ariſe from a much *minor* part in value of the creditors, or the choice of aſſignees might be ſuſpended for ſome years from the neceſſity of a previous ſuit in this court.

But notwithſtanding this, if commiſſioners (though the creditor has made a poſitive oath) have juſt grounds to doubt the fairneſs of the debt, they do right to admit it only as a claim.

As to this particular caſe, I think the petitioners ought to be admitted to prove; the doubt ariſes upon the examination before the commiſſioners, and upon the affidavit of the bankrupt, and the great objection that there has been no account taken of the profits of the partnerſhip between the petitioners and the bankrupt, and it is ſworn

poſitively by *Browning* that he has not been paid any thing on account of the profits, nor has it ever been ſettled between them.

But I am of opinion this is not true; no ſtrict minute account has indeed been taken of profit and loſs; the ſlops that they ſend out are in the hands of agents, while fleets are abroad, and therefore no final account could be taken, and for this reaſon the articles provide, the account ſhall be taken half yearly, and that if either of the parties become bankrupt, his repreſentatives ſhall be intitled only to the profits of the laſt half year's account, and the riſque muſt be deducted as well as all other charges. This therefore does not remain as to the bankrupt an open account, for he is expreſsly by the articles to be bound by the laſt half year's account or a ſtated one.

If the petitioner was not to be admitted as a creditor, it would be laying down a rule that every account, where there is mutual credit between bankrupt and creditor, muſt *firſt* be ſettled before he can be admitted to vote in the choice of aſſignees, and would be productive of very bad conſequences.

I do therefore order the commiſſioners to admit the petitioners creditors for the ſum of 8000*l.* under the commiſſion againſt *Browning*, and that they be alſo allowed to vote in reſpect thereof in the choice of an aſſignee or aſſignees of the ſaid bankrupt's eſtate; but the ſame is to be without prejudice to any remedy that may hereafter be taken by the aſſignees who ſhall be choſen, or any of the bankrupt's creditors to controvert the petitioners debt.

January the 22d 1746.

Ex parte Parſons.

Caſe 26.

The petitioner prayed that no commiſſion of bankruptcy might be ſealed againſt him till he had been heard by counſel againſt the iſſuing thereof.

THE petitioner ſtates by his petition that he never carried on the trade of a brewer, nor any other trade whatſoever, nor did he ever ſeek or get his livelihood by buying and ſelling of any wares, goods, or merchandizes whatſoever, as people in trade uſually do; and being adviſed he is not liable to all or any of the ſtatutes made and in force concerning bankrupts, by the deſcription of a brewer or any other whatſoever: Therefore prayed that no commiſſion of bankruptcy might be ſealed againſt the petitioner, till he had an opportunity of being heard by his counſel againſt the iſſuing thereof.

Lord Chancellor ſaid he did not approve of caveats againſt commiſſions of bankruptcy from the general inconvenience, as they will give an opportunity to perſons againſt whom the commiſſion is to be taken out to make away with their effects.

Mr. *Parſons* the father, by his codicil to his will, directs Mrs. *Parſons* ſhall carry on the trade of the brewhouſe for the benefit of his ſon, till he arrives at his age of 21.

The ſon attained his age of 21 in *Auguſt* 1745.

Lord Chancellor: I ordered this attendance on the petition, becauſe I do not approve of caveats againſt commiſſions of bankrupt before they iſſue; there have been ſome few inſtances, but I hope this will

be the laſt, becauſe it will be a great inconvenience in general, as it will give an opportunity to perſons, againſt whom the commiſſion is to be taken out, to make away their effects.

His Lordſhip ordered, that the commiſſion of bankruptcy ſhould iſſue againſt the petitioner, upon the petition of *William Belchier*, and that the commiſſioners ſhould be at liberty to proceed ſo far as to decree the petitioner a bankrupt, and to make a proviſional aſſignment of his eſtate and effects, to an aſſignee to be appointed by them under the ſaid commiſſion; but the commiſſioners are not to iſſue any warrant of ſeizure againſt the petitioners effects, nor to ſummon him to ſurrender himſelf; and further ordered, that the parties proceed to a trial at law in the King's Bench, upon the following iſſue: Whether the petitioner *John Parſons*, on or before the 19th of *January* inſtant, was a trader within the true intent and meaning of the ſtatutes in force concerning bankrupts or any of them; in which iſſue *Belchier* is to be plaintiff, and the petitioner is to be defendant? When, after the trial ſhall be had, either of the parties are to be at liberty to reſort back for further directions.

November the 4th 1747.

Ex parte Thomas.

Caſe 27.

A note given before an act of bankruptcy tho' indorſed after, is a debt upon which the indorſee may take out a commiſſion of bankruptcy againſt the drawer.

THE bankrupt petitioned to ſuperſede the commiſſion againſt him, becauſe the petitioning creditor's debt aroſe only from a note that had been indorſed to him after the petitioner had committed an act of bankruptcy; but as it appeared that the note itſelf was given before any act of bankruptcy, though indorſed after, *Lord Chancellor* thought it a debt upon which the petitioning creditors might take out the commiſſion.

(B) Rule as to the certificate of a bankrupt.

Vide the caſe of Twiſs *v.* Maſſey, *under the diviſion, Concerning the Commiſſion and Commiſſioners.*

January the 22d 1741.

Ex parte Fydell.

Caſe 28.

The certificate of a bankrupt being ſtayed upon the petition of a claimant under the commiſſion, who ſuggeſted fraud and colluſion between the bankrupt and his ſon. At a meeting of the commiſſioners to examine into this matter, ſeveral new creditors came in and proved their debts; but as they did not join in a petition to ſet aſide the certificate as fraudulently obtained, the court would not delay the allowance thereof, but left the claimant to bring a bill if he thought proper.

FOUR parts in five of the petitioner's creditors in *May* 1740 ſigned the bankrupt's certificate.

But *Anthony Danſie* and *Joſeph Morſon*, who had only claimed a debt of 4000 *l.* under the commiſſion, petitioned ſome time in *De-*

cember laſt againſt the Chancellor's allowing the certificate, upon ſuggeſtion that the bankrupt by colluſion with his ſon had conveyed away an eſtate of 200 *l. per ann.* to the ſon without any conſideration. Whereupon his Lordſhip on the 22d of *December* ordered, that it ſhould be referred to the commiſſioners, to inquire into the conveyance made by the bankrupt to *Richard Fydell* his ſon, and the conſideration thereof; and likewiſe as to the ſum of 3863 *l.* mentioned in the affidavits of *Anthony Danſie* and *Joſeph Morſon*, and the diſpoſition thereof; and the bankrupt's certificate for his diſcharge under the commiſſion, was by the ſaid order referred back to the ſaid commiſſioners, who were to certify the whole to the court with all the circumſtances relating thereto; afterwards the bankrupt and his ſon were ſeverally examined before the commiſſioners concerning the matters in the order mentioned, and anſwered the ſame to the ſatisfaction of the commiſſioners, who by their certificate, dated the 15th day of *January* 1741, certified to the court, that they had reviewed the bankrupt's certificate, and that full four parts in five in number and value had ſigned the certificate.

The petitioner therefore prays that his certificate may be allowed and confirmed.

Mr. *Fydell* the petitioner's ſon, being a member of parliament, the meeting was put off till the middle of *June*, and two days before, *Joſeph Morſon* died; but at the meeting ſeveral other perſons came as creditors, who had not appeared till then, and proved debts of 20 *l.* and upwards.

Objected by the repreſentative of *Morſon*, that as he died but two days before the meeting appointed by *Lord Chancellor*'s former order; there was no perſon who had any authority to appear before the commiſſioners in ſupport of the claim of 4000 *l.* or to litigate the conſideration of the bankrupt's conveyance to the ſon, and that none of *Joſeph Morſon*'s relations had any perſonal notice of this meeting, and that as there are ſeveral new creditors, who have come in and proved their debts; the certificate already ſigned is void, as there are not now four parts in five in number and value who have ſigned.

Lord Chancellor: Upon looking into the ſtatute of the 5th of the preſent King, I am of opinion, that every thing which is neceſſary to make it a good certificate has been done in this caſe; for the commiſſioners are in the firſt place to certify, that the bankrupt has in every thing conformed himſelf to the ſeveral directions required by the ſeveral acts of parliament relating to bankruptcy, and are further to certify, that four parts in five of the creditors in number and value, *who have duly proved their debts*, before them, under this commiſſion, have ſigned; all which has been done in this caſe, in the uſual form, ſo that there is no circumſtance to diſtinguiſh it from the common caſes.

If the new creditors who proved their debts at the laſt meeting had joined in a petition to ſet aſide this certificate as fraudulently obtained, and made out their ſuggeſtions, it would have been a ſufficient ground to ſet aſide the former certificate; but as they have not

done it, and have acquieſced under it, it would be a great hardſhip upon the bankrupt, to delay him any longer, and therefore I muſt allow his certificate; but at the ſame time I will not preclude the repreſentatives of *Joſeph Morſon* from making a further inquiry by bill, if they ſhall think proper, into the conſideration of this conveyance of 200*l. per ann.* to the ſon by the bankrupt his father, that, if it ſhould turn out to be a fraudulent conveyance, in order to ſecrete part of the father's effects for his benefit, the reſidue of the eſtate after the mortgagees are ſatisfied, may be applied for the creditors at large.

November the 4th 1743.

Bromley and others, creditors of Sir *Stephen Evance*, Plaintiffs.

Goodere, ſurviving aſſignee of Sir *Stephen Evance*, and others, — — — } Defendants.

Caſe 29. Where a bankrupt's eſtate is ſufficient to pay all, with a large ſurplus, creditors whoſe debts carried intereſt, ſhall be allowed intereſt for their reſpective debts, from the time the computation of it was ſtopped by the commiſſioners, but ſuch as are creditors by bond, not beyond their penalties.

ON the 31ſt of *December* 1711. a commiſſion of bankrupt iſſued againſt Sir *Stephen Evance* who was found a bankrupt, and his perſonal eſtate was aſſigned to Mr. *Goodere* and others, to whom his real eſtate was alſo conveyed; debts to the amount of 60,000*l.* were proved under the commiſſion, and on bonds and notes 4860*l.* 13*s.* 6*d.* but intereſt was allowed by the commiſſioners only to the 31ſt of *December* 1711; the plaintiffs teſtators paid 3*d.* in the pound towards the charges of the commiſſion: By four ſeveral dividends, all the creditors received 20*s.* in the pound, and when the laſt was made, it appeared that Mr. *Gibſon* one of the aſſignees had then in his hands, 34,340*l.* 9*l.* 8*d.* and in *Michaelmas* 1738. *Mary Ward*, as one of the next of kin of Sir *Stephen Evance*, brought a bill againſt Sir *Cæſar Child* the heir at law of Sir *Stephen*, and againſt Mr. *Gibſon*, and Mr. *Goodere* for an account, and the cauſe in *November* 1739 was heard before his honour, who declared *Mary Ward* and Sir *Cæſar Child* were intitled to an equal ſhare of the ſurplus; Mr. *Gibſon* and Mr. *Goodere* the aſſignees, have at different times obtained decrees in ſeveral cauſes, whereby Sir *Stephen Evance*'s eſtate is encreaſed 30,000*l.* and upwards, and is ſufficient to pay all his debts with a large ſurplus; and in regard the plaintiffs demands by law, carry *intereſt*, and *no intereſt* has been allowed after failure of Sir *Stephen*, they pray by their bill, that the court will direct the money paid by way of contribution to be refunded, and give ſuch directions as they ſhall think proper for the payment of the intereſt due to the plaintiffs on their bonds and notes, and that what remains now in the aſſignees hands, may be retained for the plaintiffs benefit.

In *February* 1711. Sir *Stephen Evance*'s certificate was ſigned by the commiſſioners; in *March* following he died, and the 2d of *April* 1744. the certificate was confirmed by *Lord Chancellor Harcourt*.

The

The counſel for the defendant *Mary Ward* alledged, "that as ſhe "was born after the death of Sir *Stephen Evance*, the plaintiffs "ought to be put to the proof of the bonds entred into by him, "for as the teſtators and inteſtates of the plaintiffs who ſought re- "lief under the commiſſion, made no other proof of their debts "than by their oaths, the plaintiffs ſhall now be obliged to make "ſtrict legal proof.

"They inſiſted likewiſe, that as Sir *Stephen Evance* obtained his "certificate, and had been confirmed by the *Chancellor*, the debts "owing by the bankrupt antecedent were diſcharged, and the plain- "tiffs are not intitled to intereſt on ſuch debts, eſpecially as the cer- "tificate was ſigned by the teſtators and inteſtates of the plaintiffs; "but in caſe the court ſhould allow intereſt to the ſpecialty creditors, "then they contended that the ſame ſhall not be above the penalties "of their ſecurities."

Lord Chancellor: There are two demands in this caſe, one in behalf of all the creditors, to have the money paid by way of contribution, refunded out of the ſurplus of Sir *Stephen Evance*'s eſtate; and the other, that the bond creditors, and all thoſe whoſe debts carried intereſt, may be allowed intereſt for their reſpective debts, from the time the computation of it was ſtopped by the commiſſioners.

As to the firſt, It ſeems admitted by the defendants, that the contribution money ought to be refunded out of the ſurplus; the principal queſtion therefore is as to the demand of intereſt, and I think that ought to be paid likewiſe.

It came before me originally upon petition, and even then my firſt apprehenſion was, that it would bear no great doubt; but as it was inſiſted, there was no juſt foundation for the demand, and, that if I determined it that way, my determination would have been ſubject to no appeal, I choſe to have it come before me by way of bill.

But before I enter into the merits of the queſtion, I will take notice of ſome objections that have been made, in order to lay them out of the caſe.

Where bills are brought to ſettle the demands of creditors in bankrupt caſes, the rule of determination is the ſame, as if heard upon petition.

It has been objected, that this is not a proper queſtion to come on by way of bill, *for the court can have no more power on a bill, than they would have had on a petition; and that therefore it ought to have been determined upon a petition.*

It is true the rule of determination muſt be the ſame, as if it had come before me by way of petition, but yet it is equally proper, that it ſhould come by way of bill, and bills are frequently brought in caſes of bankruptcy for ſettling the demands of creditors.

Another objection is, *That the defendants, the repreſentatives of Sir* Stephen Evance *were not bound by the proof of the debts before the commiſſioners*; but I think they are bound, unleſs they can prove ſome particular objection to the debts.

The

The common proof before the commiſſioners is the oath of the creditor, which is binding, unleſs the bankrupt, or the other creditors object to it, and then it is examined, and an appeal lies from the determination of the commiſſioners to the Great Seal by petition; but if no objection is made in a reaſonable time, ſuch proof by oath is concluſive.

The proof of a debt before commiſſioners, unleſs an objection be made in a reaſonable time, is concluſive, and the bankrupt's repreſentatives are bound by it.

The next objection was made on the part of the plaintiffs to the certificate, *That not being confirmed till after Sir* Stephen Evance's *death, it is void.*

A certificate allowed in the the life-time of the bankrupt, though not confirmed by *Lord Chancellor* till after his death, is good, for the operative force of it ariſes from the conſent of the creditors, and when confirmed, it has its effect from the beginning.

Though Sir *Stephen Evance*'s certificate was not confirmed by lord *Harcourt*, till two years after his death, yet I am of opinion it is as good and valid as if confirmed in the bankrupt's life-time; for notwithſtanding the ſtatute mentions only the bankrupt, yet it extends to his repreſentatives.

On the death of the King, a commiſſion may be renewed though the bankrupt be dead, (as it has been twice in this very caſe), and if a commiſſion may be renewed againſt a bankrupt who is dead, it holds much ſtronger that a certificate may be allowed after his death; but then it is ſaid, *the allowance is in nature of a condition, and the condition not being performed, the certificate is void.* The operative force of it ariſes from the conſent of the creditors; the reaſon of allowance by the *Chancellor* is to prevent ſurprize, and is but a condition ſubſequent if you make it a condition, and when the certificate is confirmed, it has its effect from the beginning.

Having laid theſe things out of the caſe, I come now to the main queſtion, Whether creditors for debts carrying intereſt by contract, are intitled to have ſubſequent intereſt; and I think they are.

All bankrupts are conſidered in ſome degree as offenders, they are called ſo in the old acts, and all the acts are made to prevent their defeating and delaying their creditors, and it would be an extraordinary thing, that the delay of payment ſhould prevent the creditors from having intereſt out of an eſtate able to pay it, when intereſt in all caſes is given for delay of payment.

I will conſider this caſe *firſt* upon the old acts previous to the 4th and 5th of Queen *Ann*, and then upon that ſtatute.

The ſtatute of *Henry* the 8th has been ſo much altered by ſubſequent acts, that it does not deſerve any conſideration, therefore laying that out of the caſe, I will begin with the 13 *Eliz. cap.* 7.

The ſtatute of 13 Eliz. gives commiſſioners an equitable as well as a legal juriſdiction, and ſo conſtrued ever ſince; and on petitions before the Chancellor, he proceeds as in cauſes by bill, upon the rules of equity.

It is manifeſt this act intended to give the commiſſioners an equitable juriſdiction as well as a legal one, for they have full power and authority to take by their diſcretions ſuch order and direction as they ſhall think fit; and that has been the conſtruction ever ſince; and

therefore when petitions have come before the Chancellor, he has always proceeded upon the ſame rules, as he would upon cauſes coming before him upon bill, *The rules of equity.*

The next direction in the act is, what the commiſſioners ſhould do in regard to the debts; they are directed *to pay to every of the creditors a portion rate-like according to the quantity of his or their debts.* And the queſtion is, What debts are here meant? And I am of opinion it means debts due at the time of the bankruptcy, or when the commiſſion iſſued, which is the ſame; for, to prevent diſputes about the time when he becomes a bankrupt, the commiſſioners always find in general, that he was a bankrupt at the time the commiſſion iſſued; but this conſtruction muſt be confined to caſes where there is a deficiency, for it is then only the creditors are to have a portion rate-like.

The act goes on to take notice of the ſurplus, which it directs to be paid to the bankrupt; and it leaves full power to the creditor to recover the reſidue of his debt, in like manner and form, as he ſhould and might have done before the making of this act; and as before the act he muſt have brought his action for the penalty, therefore he muſt have done the ſame after the act, and at law he would have had judgment for the penalty; and if the debtor had come here for relief, he would not have had it upon any other footing than the payment of intereſt to that time.

This ſhews the ſurplus to be paid over to the bankrupt, is only the ſurplus after payment of the whole debts; for it would be vain to pay any other ſurplus, when it might have been recovered from him again by the creditors.

Thus it ſtands upon the 13th of *Eliz.* The next is the ſtatute of the firſt of *Jac.* 1. *cap.* 15. that has not much in it, but the expreſſion of *full ſatisfaction* in the clauſe which gives the bankrupt the ſurplus and is penn'd in theſe words: *That the commiſſioners ſhall make payment of the overplus of the lands,* &c. *and goods,* &c. *if any ſuch ſhall be, to the bankrupt, his executors, adminiſtrators, and aſſigns, and that the bankrupt after the* full fatisfaction *of the creditors, ſhall have full power and authority to recover and receive the reſidue and remainder of the debts to him owing.*

But the more material act is the 21ſt of *Jac.* 1. *cap.* 19. in which there is the following clauſe: *That the commiſſioners may examine upon oath,* &c. *any perſon or perſons for the finding out and diſcovery of the truth and certainty of the ſeveral debts due, and owing, to all ſuch creditors, as ſhall ſeek relief under the commiſſion, and that all and every creditor and creditors, having ſecurity for his or their ſeveral debts, by judgment, ſtatute, recognizance, ſpecialty with penalty, or without penalty, or other ſecurity, or having no ſecurity, ſhall not be relieved upon any ſuch judgment,* &c. *for any more than a rateable part of their juſt and due debts, with the other creditors of the bankrupt, without reſpect to any ſuch penalty or greater ſum contained in any ſuch judgment,* &c.

This act only meant to exclude creditors from the benefit of the penalty as *againſt creditors,* and not as againſt *the bankrupt* himſelf.

But

But then it is ſaid, the practice has been for the commiſſioners to aſcertain the debts, by computing intereſt only to the time of iſſuing the commiſſion, and that being the *cotemporanea expoſitio*, is to be relied on.

There is no direction in the act for that purpoſe, and it has been uſed only as the beſt method of ſettling the proportion among the creditors, that they might have a rate-like ſatisfaction, and is founded upon the equitable power given them by the act.

But ſtill it has been ſaid, that all creditors come under the terms of the commiſſion, which is to have intereſt no farther than the time of iſſuing the commiſſion; and if that was the rule of law, to be ſure they muſt abide by it, but there is no ſuch rule: It is ſaid creditors have advantages given them by the act, and therefore they muſt abide by the diſadvantages of it; but the advantages are very trifling, for by the 13th of *Eliz.* eſtates tail in poſſeſſion and copyholds were given to the creditors, and it is only eſtates tail in remainder that are given by the 21ſt of *Jac.* the firſt, which is a very ſlight advantage, and for which it has no where directed that they ſhould loſe a ſubſequent intereſt, and the meerly coming-in to prove his debt cannot hinder him of it.

I come now to conſider it upon the 4th and 5th of *Anne, cap.* 17. which was inſiſted upon as the ſtrength of the caſe; and the material parts to be conſidered are,

Firſt, What are made the debts?

Secondly, What is the operation of the certificate?

Thirdly, The clauſe in regard to the allowance of 5 *per cent.*?

A certificate diſcharges the perſon of the bankrupt, and his eſtate ſubſequently accrued, but not the eſtate in the hands of the aſſignees.

As to the *firſt*, I do not find the words, *Debts due before the time of the bankruptcy.* Except in the clauſe of diſcharge, ſo that they ſeem to be left the ſame as in the former act.

Conſider therefore the effect of the diſcharge, the certificate is not to operate as a diſcharge of the fund before veſted in the aſſignees, but to extend only to any remedy to be taken againſt the perſon of the bankrupt, or his future effects. It is true it will be a diſcharge of the bankrupt not only as to debts proved, but alſo as to creditors who have not come in; but that is nothing as to the preſent fund, for ſuch creditor who has not come in yet, may come in, if he has not lapſed his time, which is a queſtion between the creditors ſingly; and therefore I am of opinion it was meant to diſcharge the perſon of the bankrupt, and his eſtate ſubſequently accrued, and not the eſtate in the hands of the aſſignees.

To come then to the clauſe which directs an allowance of five *per cent.* to the bankrupt, where the effects amount to ten ſhillings in the pound, *&c.*

It is inſiſted, that the ten ſhillings in the pound is to be computed upon the debts ſtated by the commiſſioners, without regard to the ſubſequent intereſt; and ſo it is, becauſe it proceeds upon a ſuppoſition of there being a deficiency of the creditors being paid a rateable proportion.

But

But ſuppoſe there is a ſurplus, and that it does not amount to 5 *per cent.* then I think ſo much ſhould be taken out of the creditors twenty ſhillings in the pound as will make it up 5 *per cent.* But then it may be objected, that here is a caſe where the bankrupt ſhould have a ſurplus upon the debts as ſtated by the commiſſioners, without paying the ſubſequent intereſt; but if I am right in the bankrupt's being intitled to that equity, it is not the caſe, for then it comes again to the rateable proportion.

But it is ſaid there is no detention in this caſe, and that intereſt ariſes from the detention of the debt; but the law preſumes a delay in the bankrupt, and therefore it is due for that reaſon.

And ſuppoſe that from the difficulty of getting in the bankrupt's effects, and by his eſtate's carrying intereſt, there ſhould be a ſurplus, it would be abſurd to ſay the creditors ſhould not have intereſt likewiſe.

But it is objected, there will be a difficulty in forming this decree, for by this way, creditors upon ſimple contract may have a better ſatisfaction than creditors by ſpecialty, for the ſpecialty creditors cannot have more than their penalties, whereas creditors by notes carrying intereſt will have their whole intereſt; but no objection ariſes on that account, becauſe it is a frequent caſe in the diſpoſition of truſt eſtates.

Where there is mutual credit between a bankrupt and a creditor, the commiſſioners ought to ſtop intereſt on both ſides, at the time of the bankruptcy, or compute intereſt on both till the ſettling the account.

There is in this act a clauſe of mutual credit; ſuppoſe both debts carrying intereſt, and the creditor comes in late, certainly the commiſſioners ought to ſtop intereſt on both ſides at the time of the bankruptcy, or compute intereſt on both ſides till the ſettling the account; for it is abſurd to ſay they ſhould ſtop intereſt on the creditor's debt at the time of iſſuing the commiſſion, and carry on intereſt on the bankrupt's demand.

I mention this to ſhew that an equitable rule ought to be followed in giving intereſt in theſe caſes.

Upon the whole therefore I declare, " That as there is a conſider-
" able reſidue of Sir *Stephen Evance*'s eſtate above what has been di-
" vided upon the principal of the debts, and the intereſt of debts carry-
" ing intereſt down to the time of the commiſſion, the contribution
" money paid by the creditors towards charges ought to be reim-
" burſed out of his eſtate, and that all the creditors of Sir *Stephen*
" *Evance* by bonds, contracts, or notes carrying intereſt, are intitled
" to receive intereſt out of his eſtate for the principal ſums, which
" were owing at the time the commiſſion iſſued, from the day of
" its iſſuing till they receive full ſatisfaction, before any ſurplus ſhall
" be conveyed to the repreſentatives of Sir *Stephen Evance*. Let the
" maſter therefore take an account of the eſtate of Sir *Stephen Evance*,
" in the hands of the aſſignees, and alſo of the diſtribution money,
" and compute intereſt on the principal ſums which were due at the
" time of the commiſſion iſſuing, on bonds, contracts and notes car-
" rying intereſt; *but upon the bonds no intereſt beyond the penalties*
" *thereof*; and upon ſuch other contracts or notes carrying intereſt,
" the intereſt at the rate therein ſpecified, and wherein no particular
" intereſt is ſpecified, at the rate of 6 *per cent.* until reduced by act
" of

" of parliament to 5 *per cent.* and from that time at the rate of 5 *per* " *cent*'.

" I decree the effects of the bankrupt remaining in the hands of " the aſſignees, to be applied in the firſt place for the payment of the " debts of ſuch of the creditors who have not yet proved to the ſatiſ- " faction of the commiſſioners, though not diſallowed by them, and " ſhall hereafter be allowed by the maſter, till paid up equal with " the other creditors; and in the next place to pay the contribution " money, and then the creditors by bond, contracts, or notes car- " rying intereſt, from the time of iſſuing the commiſſion, *pari paſſu*, " till they receive full ſatisfaction.

" The maſter to take an account of what has been paid to ſuch " creditors by way of dividends, and what has been ſo paid, to be " applied in the firſt place to keep down the intereſt, and afterwards " in ſinking the principal; and if the reſidue of Sir *Stephen Evance*'s " perſonal eſtate ſhall be ſufficient for the purpoſes aforeſaid, then I " decree that the remaining real eſtate of Sir *Stephen Evance* be " conveyed by the aſſignees to Sir *Cæſar Child* (Sir *Steven Evance*'s " heir at law) and his heirs, and if any ſurplus is left of the perſonal " eſtate after the purpoſes aforeſaid, it is to be divided into moieties, " and one moiety to be transferred to Sir *Cæſar Child*, and the other to " *Mary Ward*; but if the perſonal eſtate be not ſufficient, I decree " that a ſufficient part of the real eſtate be ſold, and the money be " applied for the purpoſes aforeſaid, and the ſurplus (if any) be paid " to Sir *Cæſar*, and if any eſtate remain unſold, that the ſame be " conveyed to Sir *Cæſar*; if no ſurplus remain of the eſtate and ef- " fects of Sir *Steven Evance* after debts ands coſts, or if there ſhall " be a ſurplus, which ſhall not be equal to anſwer the allowances " made to bankrupts, then I reſerve the conſideration in regard to " ſuch allowances till after the maſter's report. The coſts to be paid " out of the bankrupt's eſtate."

January the 22d 1745.

Ex parte Johnſon and others.

Caſe 30.

Where 4 parts in 5 in number and value of the creditors have ſigned the certificate, the court will not ſtay it on the petition of perſons, whoſe demands on the bankrupt's eſtate depend upon an account to be taken, and where they do not ſwear to a balance in their favour.

AN application to ſtay the bankrupt's certificate, on the petition of *Johnſon* and others; four parts in five in number and value of the creditors had ſigned the certificate, and the demands of the petitioners were not liquidated, but depended upon a long account to be taken between the petitioners and the bankrupt; the bankrupt ſwears poſitively that the balance on taking the account will be in his favour; and the petitioners do not venture to ſwear that there will be any balance in their favour.

Lord Chancellor: I will not ſtay the bankrupt's certificate, but will give the petitioners leave to inſpect his books, and in taking the

account before the commiſſioners of their ſeveral demands, if they ſhall hereafter appear to have a balance, they ſhall have a liberty to come upon the bankrupt's eſtate for that balance.

March the 26th 1750.

Ex parte Williamſon, who prayed his certificate might be allowed, and a croſs petition for creditors who oppoſed it.

Caſe 31.

Lord Chancellor: WHEN this matter came before me at a former hearing, I poſtponed the certificate, from the diſlike I have to traders living in *Ireland* coming over here, and obtaining a commiſſion (by way of colluſion) againſt themſelves, in order to get clear of all their creditors; and therefore I have given a greater latitude, and a length of time, more than uſual, in order to allow an opportunity for *Iriſh* creditors, if there were any, to ſend over affidavits and proper authorities to prove debts under the commiſſion; for as they have not adopted the bankrupt acts in *Ireland*, I was willing they ſhould have full time to apprize themſelves of the nature of thoſe acts, and ſend over proper affidavits of their debts. No application has been made to ſuperſede the commiſſion, and even if there had been one, it would have failed, becauſe if a perſon carries on a trade in one kingdom belonging to the crown of *Great Britain*, and comes over to another, a commiſſion may be taken out by a creditor in the place where the bankrupt then happens to be, as he has traded to this kingdom, and contracted debts here. There are ſeveral inſtances of this kind, where perſons belonging to the plantations abroad, and which is their ſole place of reſidence, yet happening to be in *England*, have had commiſſions of bankrupt taken out againſt them here.

The bankrupt acts are not adopted in *Ireland*.

Where a perſon carries on a trade in one kingdom belonging to the crown of *Great Britain*, and comes over to another, a commiſſion may be taken out by a creditor in the place where he then happens to be, as he has traded to this kingdom and contracted debts here.

I muſt be determined by the acts of parliament in allowing the certificate of a bankrupt.

Certificates are matters of judgment, and I do not know that a *mandamus* would lie to compel an allowance; for it is diſcretionary in commiſſioners *firſt*, and afterwards in the *Lord Chancellor*, and yet it ought not to be arbitrary, either in the commiſſioners or the *Chancellor* to ſay, We will, or will not, allow a certificate; but they ought to be governed intirely by fairneſs or fraudulent behaviour in the bankrupt.

Certificates are matters of judgment, and a mandamus would not lie to compel an allowance, for it is diſcretionary in commiſſioners *firſt*, and in the *Lord Chancellor* afterwards.

Then one queſtion will be, Whether *Williamſon* has been guilty of fraudulent concealments to the prejudice of his creditors.

And another queſtion, Whether the petitioners are perſons qualified to be creditors under this commiſſion, and to aſſent or diſſent to the bankrupt's certificate.

My principal objection, when the matter of the certificate came firſt before me was, the great haſt that has appeared in ſigning the

Where a bankrupt is a trader in Ireland, ſigning his certificate in three months after the commiſſion iſſues, is too precipitate; and *Lord Chancellor* ſtopped it on this account.

certificate

certificate, in leſs than three months after the commiſſion iſſued, which I thought too precipitate as he was a trader in *Ireland*, and might be preſumed to have large debts ſtanding out againſt him there; and it appeared alſo, upon the face of his examination, that the greateſt part of his books were then in *Ireland*; ſo that he had not made ſuch a full diſcloſure or diſcovery, as to intitle him to his certificate.

The objection to the unfairneſs of the accounts is now cleared up; for conſidering the largeneſs of the petitioning creditors demand, being no leſs than 4900 *l.* it is much more accurately made up from the bankrupt's books, than is uſual in bankruptcies; for very frequently the want of correctly keeping books, is the occaſion of a perſon's bankruptcy; and it is a common ſaying in *Holland*, if a man fails, not that he is a bankrupt, but that *he kept his books ill.* If there had been creditors in *Ireland*, who had complained they had no opportunity of coming in, it would likewiſe have had weight, but there is no complaint of that ſort, and from *Auguſt* 1749, to this time, no ſuch creditor has appeared.

The laſt queſtion is, Whether the preſent petitioners are qualified to object to, and oppoſe the certificate of the bankrupt. Their firſt order to prove their debts was as long ago as the 2d of *Auguſt* 1749, and the certificate was ſtayed in the mean time, and alſo the dividend; not one of the petitioners but *Sharp* made an affidavit of a debt at the time of the application, for the others had not verified their debts upon affidavit; and therefore as they did not lay a foundation for it, I could not make an order, that they ſhould go before the commiſſioners to prove their debts, but I purpoſely ſtayed the certificate to give them time to make out their debts in proof.

Sharp when he came before the commiſſioners only claimed, and though he called himſelf a judgment creditor, did not ſo much as produce a copy of the judgment on which he had the bankrupt in execution, and if he had, it would not have done, unleſs he had likewiſe by oath verified his debt; nor ought he to have been admitted a creditor even then, unleſs he would have diſcharged him from the execution, for he muſt not come under the commiſſion, and proſecute the bankrupt at law likewiſe.

No other of the petitioners have ſo much as claimed before the commiſſioners, and unleſs a perſon proves, or ſhews a reaſonable ground for a claim, they are not within the rule for aſſenting or diſſenting.

Unleſs a perſon proves a debt, or ſhews a reaſonable ground for a claim, he is not within the rule for aſſenting or diſſenting to a certificate.

I cannot lock up certificates for ever, and deprive a man of his liberty, which the law has given him, after a full time has been allowed for inquiry, and a full time alſo for creditors coming from *Ireland*, or ſending affidavits over.

Nothing fraudulent comes out upon the inquiry, and no debt has been proved in a year and a half's time.

There-

Therefore the certificate muſt be allowed, and ordered accordingly.

The allowance of a bankrupt's certificate will not diſcharge his ſureties, but they may be proceeded againſt, notwithſtanding ſuch allowance.

N. B. It has been objected by the petitioners counſel, that the allowing the certificate will preclude them from proceeding againſt the bankrupt's ſureties, in the ſeveral ſecurities now in their hands, and therefore there ought to be a ſaving to them of their right, notwithſtanding the certificate is allowed.

Lord Chancellor ſaid, There was no occaſion for ſuch a reſtriction, for the allowing the certificate of the bankrupt will not diſcharge his ſureties.

December the 21ſt 1753.

Anon'.

Caſe 32.

An application by a creditor to ſtay the bankrupt's certificate. The comiſſion was taken out the 10th of Sept. and the certificate ſigned the 30th of Nov. following.

AN application by a perſon who is a creditor of a bankrupt, that he may be admitted to prove his debt before the commiſſioners, and to ſtay the bankrupt's certificate, and to be at liberty to aſſent or diſſent thereto.

The commiſſion was taken out but the 10th of *Sept.* laſt, and the certificate ſigned the 30th of *Nov.* following.

This precipitate proceeding is contrary to the intention of the ſtatutes of bankruptcy, which were made in favour of creditors, but too often abuſed.

Lord Chancellor: I diſapprove extremely of commiſſioners being ſo precipitate in ſigning certificates.

This appears to me to be what is commonly called a clearing commiſſion; for the aſſignees are very near relations of the bankrupt.

Such haſty proceedings invert the very intention of the acts of parliament, which were made in favour of creditors, but are too often abuſed for the ſervice of inſolvent perſons.

His Lordſhip therefore directed the certificate to be ſtayed.

November the 2d 1754.

Ex parte John de Sauſmarez, Henry Brock, Matthew de Sauſmarez: In the matter of *William Dobree* a bankrupt.

Caſe 33.

An application that the allowance of the certificate might be ſtayed.

ON the 6th of *April* laſt a commiſſion of bankruptcy iſſued againſt *William Dobree*, who was declared a bankrupt.

The petitioners, and divers others of his creditors live in *Guernſey*, and from time to time before he became a bankrupt, remitted to him ſeveral large ſums of money, in order to be inveſted in the funds in *England*, in their names.

Since the iſſuing of the commiſſion, the petitioners have diſcovered that *William Dobree* did not inveſt the money in the funds in their names, though he wrote them word from time to time

that he had ſo done, and remitted to them the intereſt as it became due.

The debts of the bankrupt amount to 81,009 *l.* and the debts of the creditors who have ſigned his certificate, to 22,904 *l.* 18 *s.* 4 *d.*

Peter Dobree, nephew of the bankrupt, proved debts under the commiſſion, amounting to 13,688 *l.* 10 *s.* 10 *d.* in different rights, part on his own account, part as executor of *Nicholas Dobree*, part as guardian of *Peter Dobree*, another part as guardian to *Rachel Cary Dobree*, another as guardian to *Mary Dobree*, another as one of the executors of *Martha Carey*, and another as father of *Judith Dobree*.

He choſe himſelf and two other perſons aſſignees, and on the 18th of *May* laſt, the very day the bankrupt finiſhed his examination, the certificate is ſigned. *Peter Dobree* ſigned the certificate in right of other perſons, four times, having proved debts in ſo many different rights, as guardian and executor to ſuch perſons.

There were but 12 of the creditors of *William Dobree*, who proved their debts under the commiſſion, beſides *Peter Dobree*, and if he ſhall be conſidered but as one creditor, there will not be four parts in five in number and value of the creditors, who have proved their debts under the ſaid commiſſion, that have ſigned the certificate: The greateſt part beſides of the bankrupt's creditors could not poſſibly prove their debts at the time appointed for his laſt examination, by reaſon that they did not know whether the money they had remitted to the bankrupt had been laid out in ſtocks in their names, or in the bankrupt's.

In 1748. *William Dobree*, the bankrupt, gave upon the marriage of his niece *Miſs de Hairland* to his nephew *Thomas Dobree* 1000 *l.* as a marriage portion, at a time when he was inſolvent.

The major part of the creditors who had ſigned the certificate were nearly related to the bankrupt.

For theſe reaſons the petitioners pray that the allowance of the bankrupt's certificate may be ſtayed.

The ſecond petition, *ex parte John de Sauſmarez*, and ſeveral other creditors of *William Dobree*, ſtates, that ſome ſhort time before the commiſſion iſſued, *Dobree* forgave two of his nephews 187 *l.* which they owed him, and transferred divers ſtocks to the amount of 6000 *l.* and upwards to ſeveral of his creditors, without their direction, in expectation of receiving favours of them in caſe a commiſſion iſſued; and prays the matter of this petition might come on to be heard at the time of the former petition, and that the bankrupt's certificate might be diſallowed.

The counſel for the petitioners inſiſted, that an executor and guardian cannot ſign a certificate.

Lord Chancellor as to this was of opinion, that executors might ſign, but that a perſon who has a debt in his own right, and another debt as executor, could not, as he apprehended, ſign a certificate in two diſtinct rights, for both are to be conſidered as his own particular debt.

A perſon who has a debt in his own right and another as executor, cannot ſign a certificate in two diſtinct capacities.

The counſel for petitioners likewiſe obſerved, that till they had ſent over to *England*, they did not find out the fraud of the bankrupt in diſpoſing of their ſtock for his own benefit, and that the aſſignees never once thought proper to appoint any meeting, from the month of *May* till *Auguſt*, ſo that theſe creditors had no opportunity of proving their debts, which amount to 35,000 *l.* and inſtead of four parts in five in number and value, there was not one fourth part had ſigned the certificate.

The clauſe in the 5th of of *George* the 2d, in which a bankrupt is excepted from the benefit of this act, who hath upon marriage of any of his children given above the value of 100 *l.* unleſs he hath ſufficient to ſatisfy all his creditors, muſt be conſtrued ſtrictly, and not extended further than children of a bankrupt.

That by giving a fortune of 1000*l.* to his niece at a time he was inſolvent, he ſeems to be within the meaning of the clauſe of the 5 *Geo.* 2. where a bankrupt is excepted from the benefit of this act, "who hath or ſhall, for or upon marriage of any of his children, "have given, advanced or paid, above the value of one hundred "pounds, unleſs he ſhall prove, by his books fairly kept, or other-"wiſe upon his oath, before the major part of the commiſſioners, "that he had at the time thereof, over and above the value ſo given, "advanced or paid, remaining in goods, wares, debts, ready money, "or other eſtate real and perſonal, ſufficient to pay and ſatisfy unto "each and every perſon, to whom he was any ways indebted, their "full and intire debts.

Mr. Attorney general for the bankrupt inſiſted, this is not within the intention of the act of parliament, and was going to give his reaſons, when *Lord Chancellor* interrupted him, by ſaying, it certainly was not; and as it was a penal clauſe, it ought to be conſtrued ſtrictly, and confined to the children of a bankrupt, and not to extend any further.

Mr. Attorney general then obſerved upon other parts of the caſe, that though the debts are conſiderable, yet the deficiency will not be ſo, for there has been a dividend already of eleven ſhillings in the pound, and that there will be enough in the whole to pay three fourths of this large ſum of 81,000 *l.*

That there is no objection to the reality of any creditor's debt who has ſigned the certificate.

That the greateſt part of the perſons in whoſe names the petition is preſented, have by attorney ſigned the bankrupt's certificate, and know nothing of this application; and particularly one *Burgeſs*, who, as appears by affidavit, is now upon a voyage to *Newfoundland*, and that upon application to his wife, for leave to make her huſband a party to the petition, ſhe poſitively refuſed to give her conſent; ſo that the certificate has been ſtayed from *Auguſt* to this time, by falſe ſuggeſtions and allegations.

The certificate being ſigned upon the ſame day with the bankrupt's laſt examination, and two thirds of the creditors living in *Guernſey*, the allowance of the certificate ſtayed for theſe reaſons.

Lord Chancellor: I ſhall not go upon any particular niceties in determining the queſtion which has been made upon theſe petitions.

The bankrupt in general ſeems to have behaved very fairly, tho' at the ſame time I cannot acquit him in the matter of the ſtock, after receiving expreſs directions from his correſpondents at *Guernſey* to purchaſe the ſtock in their names, and yet taking upon him to buy it in his own, and then writing word that he had purchaſed it in their names; but be this as it will, I muſt not be induced to make

a pre-

a precedent, which in my apprehenſion will be a reproach to the juſtice of this court.

The moſt important of the bankrupt's tranſactions, and the largeſt of his debts are in *Guernſey*, which, though part of the dominions of the crown of *Great Britain*, are at a great diſtance from hence; and yet notwithſtanding the commiſſion is taken out in *April* only, the certificate is ſigned on the 18th of *May* after.

Such precipitation in a matter of this kind is very improper.

I will put the caſe that theſe creditors in *Guernſey* had heard of this bankruptcy, ſtill they could not come in as creditors, till they had firſt directed a ſearch in the books of the reſpective companies, to ſee in what manner the ſtock was purchaſed, whether in their own names, or the bankrupt's.

The creditors who have ſigned the certificate, and have proved debts to the amount of 22,000 *l.* are in number eleven, but then only ſeven of them have ſigned for themſelves, and in their own right, for Mr. *Dobree* the nephew has ſigned four times as guardian and executor, and the debts of the *Guernſey* creditors are 35,000 *l.*

The admitting ſuch a certificate as this, would be turning the edge of the law againſt creditors in favour of bankrupts, which is not to be ſuffered in a commercial country.

All certificates formerly were referred to the judges; but the Great Seal finding this rather inconvenient, have of late taken the cognizance of it upon themſelves, and they muſt exerciſe this power in a diſcreet and equitable manner.

Formerly the judges had the cognizance of certificates, but being found inconvenient, the Great Seal has taken it to itſelf.

Lord Chancellor ſtayed the allowance of the certificate.

(C) Rule as to aſſignees.

December the 23d 1737.

In the matter of the earl of *Litchfield*, and Sir *John Williams*.

LORD *Litchfield* and Sir *John Williams* were aſſignees under a commiſſion of bankrupt; the latter entruſted one *Gurdon* the clerk of the commiſſion, to receive ſome of the effects of the bankrupt's, and to pay ſome of the debts and dividends; no fraud appeared in the aſſignees, but the clerk afterwards failing, the queſtion upon petition was, If the aſſignees ſhould make up the clerk's deficiency to the creditors? Caſe 34.

Lord Chancellor: The rules of equity in relation to neceſſary acts done by truſtees, where truſtees ſhall not be accountable for loſſes which happen from thoſe neceſſary acts, hold not as to perſons employed by the truſtees, but only to the truſtees themſelves.

The rule that truſtees ſhall not be accountable for loſſes which happen from neceſſary acts does not extend to their agents.

If an aſſignee under a commiſſion of bankrupt, employs an agent to receive money, and he imbezils it, the aſſignee will be liable to make it good to the creditors, unleſs he conſulted the body of the creditors in the appointment of the agent.

Where aſſignees under a commiſſion of bankrupt, employ an agent to receive money, or pay, and he abuſes this confidence; I will not lay it down as a general rule, but at preſent I am at a loſs to diſtinguiſh ſuch aſſignees from any other truſtee, who, if his agent deceive him, reſpondeat ſuperior to the ceſtuique truſts; ſo in the preſent caſe, as one of the aſſignees employed the clerk of the commiſſion, a perſon of very little credit, to pay dividends, who miſapplied and imbeziled the money, this aſſignee will be liable to make it good to the creditors, as he did not conſult the body of the creditors who are his ceſtuique truſts in the appointment of this agent; for, what is the chief conſideration of creditors in the choice of aſſignees? certainly the ability of the perſons, that they may be reſponſible for the ſums they may receive from the bankrupt's eſtate, by virtue of their aſſigneeſhip; but the negligence of one aſſignee ſhall not hurt another joint aſſignee, where he is not at all privy to any private and perſonal agreement entred into by his brother aſſignee; but this I cannot properly determine now: For all the court can do in a ſummary way under a commiſſion of bankrupt, is in tranſactions only between the creditors and the aſſignees, but cannot upon petition adjuſt any demands that one aſſignee may ſet up againſt another, concerning a private agreement between themſelves, independent of the reſt of the creditors.

All the court can do in a ſummary way under a commiſſion of bankrupt, is in tranſactions between the creditors and aſſignees, but will not on petition determine on private agreements between aſſignees independent of the creditors.

The money imbeziled by the clerk of the commiſſion was 1000*l.* his bill of fees and diſburſements delivered in by him before his death, was ordered to be taxed by the commiſſioners, and the reſidue to be applied towards ſatisfaction of the imbezilment, and Sir *John Williams* the repreſentative of the deceaſed aſſignee to pay in 700 *l.* or whatever the ſum may be, into the bank, to be added to the reſidue of *Gurdon*'s money after taxation, ſo as together they may be ſufficient to make up the imbezilment of *Gurdon*.

November the 30th 1739.

Anon' at the Rolls.

Caſe 35.

THE queſtion before the court, Whether new aſſignees under a commiſſion of bankrupt upon the death or removal of the former, ſhall, on filing a ſupplemental bill, be intitled to the benefit of the proceedings in a ſuit begun in the time of the firſt aſſignees, or muſt begin again by originall bill.

Where aſſignees of a bankrupt die, or are diſcharged, and others are put in their room, they cannot revive, but muſt bring a ſupplemental bill, to intitle themſelves to the benefit of proceedings in a former ſuit.

Maſter of the Rolls: In the caſe of abatements, if you can, you muſt revive; but in the caſe of aſſignees of bankrupts, where ſome die, or ſome are diſcharged, and others by order of court are put in their room, there is no privity between the bankrupt and the aſſignees, or at leaſt but an artificial one, and therefore they cannot re-

vive; and it would be hard, if there have been pleadings, examinations, *&c.* in a former ſuit, that the new truſtees ſhould not have the benefit of them by a ſupplemental bill.

Suppoſe the court, upon the death or diſcharge of aſſignees of bankrupts, ſhould ſay that they all muſt go for nothing, and you muſt begin again by original ſuit, why then all the charges and expences in the former ſuit are abſolutely thrown away; but in the preſent method, though you cannot come againſt the repreſentative of the former aſſignee, yet by a ſupplemental bill you will have the bankrupt's eſtate liable at all events to anſwer the coſts.

I will put a caſe that comes very near this, and ſhews the reaſonableneſs of my preſent determination. Suppoſe an eſtate has been in controverſy for 20 years in this court, and during the ſuit it is purchaſed, the purchaſer on filing his ſupplemental bill comes into the court *pro bono & malo*, and ſhall be liable to all the coſts in the proceedings, from the beginning to the end of the ſuit. *For theſe reaſons his honour was of opinion, that the new aſſignees ſhall have the benefit of the former proceedings, in the ſuit commenced by the old aſſignees.*

A purchaſer pendente lite, on filing a ſupplemental bill, is liable to all the coſts from the beginning to the end of the ſuit.

December the 14th 1739.

Primroſe v. *Bromley*, Executor of *Mead.*

Caſe 36.

THERE was a decree in another cauſe that all creditors, as well thoſe who were parties to the bill, as otherwiſe, ſhall come before the maſter to prove their debts againſt the eſtate of *Mead*; among the reſt there appeared before the maſter, *Moore*, the ſurviving aſſignee of one *Barker*, a bankrupt, and claimed as a debt ſuch money as *Mead* had received as joint aſſignee with *Moore*, under the commiſſion againſt *Barker*.

Where an aſſignee dies before he has accounted for what he has received, and leaves no perſonal aſſets, the creditors have a lien upon his real eſtate.

In the deed of aſſignment, *Moore*, *Mead*, and another aſſignee of *Barker*, covenanted *for themſelves, their heirs, executors and adminiſtrators, to account for ſuch money as they or either of them ſhall receive, to the commiſſioners.* *Mead* before his death got in very large ſums of money from the bankrupt's eſtate, and is dead inſolvent.

The queſtion before the maſter was, Whether the commiſſioners under this aſſignment are to be conſidered as ſimple contract creditors only; and it came now before the court upon exceptions to this part of his report.

Lord Chancellor: I am of opinion that the commiſſioners ought to be conſidered as ſpecialty creditors, becauſe the aſſignees executed a counterpart of the aſſignment to them, and the agreement, being under hand and ſeal, makes it in the nature of a ſpecialty debt; and, as they are conſidered in this light, though *Mead* is dead without any perſonal aſſets, yet they may come upon his real eſtate.

The words of the aſſignment, *to account for ſuch money as they or either of them ſhall receive*, muſt be ſo conſtrued, as that the aſſignees

Aſſignees are mere truſtees, and each ſeparately anſwerable only for what they receive.

may be jointly and ſeverally bound, ſo that they are to be conſidered in this court as mere truſtees, and each ſeparately anſwerable only, for what they receive, and it would be of dangerous conſequence to hold them otherwiſe.

Where a joint obligor dies, his repreſentative ſhall be charged *pari paſſu* with the ſurviving obligor in the payment of the bond.

There was a caſe which I determined in this court, where there were two perſons jointly bound in a bond, one of the obligors died; and to be ſure, at law, it might have been put in ſuit againſt the ſurvivor, but as I thought it extremely hard, I decreed the repreſentative of the co-obligor ſhould be charged *pari paſſu* with the ſurviving obligor in the payment of the bond.

Proper to inſert the words *jointly and ſeverally* in aſſignments under commiſſions of bankrupts.

Though the form in the aſſignment under this commiſſion of bankrupt is the common and uſual one, yet I think it very proper that the words *jointly and ſeverally* ſhould be inſerted for the future, for the ſafety and ſecurity of each reſpective aſſignee.

October the 22d 1741.

Ex parte Lane.

Caſe 37.

Where aſſignees do not divide a bankrupt's effects in a proper time, but are making a private advantage to themſelves, the court will charge them with intereſt.

WOOD, an alehouſe-keeper in *Holborne*, became a bankrupt in the year 1729, and a commiſſion being taken out againſt him at that time, *Fitchet* and *Kirk* were duly choſen aſſignees, one the landlord, and the other the brewer to the alehouſe. In order to continue the trade, they put one *Wadelowe* into the houſe, and allowed him to make uſe of the bankrupt's goods upon giving a bond for 100*l.* the value ſet upon them by the appraiſer under the commiſſion. *Wadelowe* was made a reſponſible man till the year 1738, and then abſconded.

Lord Chancellor: Where the effects of a bankrupt are ſo inconſiderable that no one creditor may think it worth while to call upon aſſignees for a dividend, yet if they neglect to make a dividend in a proper time, and are making a private advantage to themſelves of the bankrupt's effects, I ſhall always charge ſuch aſſignees with intereſt.

His Lordſhip ordered Kirk, *and the executrix of* Fitchet, *to account, in moieties, for the value of the goods, according to the appraiſement, and to pay intereſt for them at the rate of* 4 per cent. *to be computed from a twelvemonth after the execution of the aſſignment.*

April the 1ſt 1742.

Ex Parte White.

Caſe 38.

An aſſignee cannot ſtop a perſon's ſhare in a dividend, on account of his own private debt owing to him from that perſon.

THE petitioner who had proved her debt under the commiſſion, petitions againſt the aſſignees to be paid her ſhare of a dividend that had been made of the bankrupt's eſtate.

One of the aſſignees inſiſted that he had a right to ſtop her ſhare of the dividend, becauſe ſhe is indebted to him for a quantity of coals delivered to a third perſon, which the petitioner promiſed to pay.

Lord Chancellor: I will not allow an aſſignee who is an officer of this court, and an officer of the commiſſion, to ſtop a perſon's ſhare in the dividend on account of his own private debt, which is owing to him from that perſon; he has his remedy at law, and ought not to blend his own private affairs with the commiſſion to which he is only a truſtee.

Auguſt the 13th 1742.

Ex parte Whitchurch.

Caſe 39.

Creditors cannot give a general power to aſſignees to proſecute ſuits, or ſubmit matters to arbitration, at their own diſcretion, but there muſt be a meeting of creditors, upon a notice given in the London Gazette to conſider of each particular ſuit, or caſe for arbitration.

WHERE only four creditors were preſent at a meeting, to conſider whether they ſhould carry on a ſuit againſt a debtor to the bankrupt's eſtate, they gave the aſſignees a general power by a writing ſigned for that purpoſe, to proſecute ſuch ſuits as they in their diſcretion ſhould think fit.

Lord Chancellor: There is no colour to ſay that creditors under a commiſſion of bankrupt, can give ſuch a general authority, by virtue of the clauſe under the act of parliament of the 5th of *George* the ſecond; but aſſignees muſt have a meeting of creditors, upon notice given for that purpoſe in the *London Gazette*, to conſider of each particular ſuit, or each particular caſe for arbitration, before they can proceed in them; and therefore I declare that the power here given by the creditors to the aſſignees, is not ſuch a one as is warranted by act of parliament, and do order that the aſſignees be reſtrained from bringing any ſuit for the future, till they have a proper authority from the majority of the creditors at a meeting according to the ſtatute.

Commiſſioners may order a dividend to be advertiſed, if they think it proper for aſſignees to make one.

The aſſignees in this commiſſion having refuſed to make a dividend, his Lordſhip ordered, they ſhould attend the commiſſioners at a ſitting appointed for that purpoſe, and that if the commiſſioners thought it proper for the aſſignees to make a dividend, that it ſhould be advertized accordingly.

Auguſt the 1ſt 1744.

Ex parte Gregnier.

Caſe 40.

The court will not ſet aſide the choice of aſſignees, becauſe ſome of the creditors live beyond ſea, and had no opportunity of voting.

THE application to the court was for new aſſignees, upon a ſuggeſtion in the petition that the time was too ſhort, which the commiſſioners had appointed for the choice of aſſignees, the perſon having been found a bankrupt only on the 21ſt of *May*, and the ſitting for the choice of aſſignees was on the firſt of *June*; that the debts proved at the time of the choice amounted only to 2075*l.* and the petitioners living abroad could not, in ſo ſhort a time, ſend over letters of attorney

attorney to vote in the choice, though their demands upon the bankrupt's eſtate will not be leſs than 11,000 *l.* that the aſſignee already choſen is a hatter, and not to be ſuppoſed converſant in foreign affairs, in which the bankrupt's concerns chiefly lie.

For the petitioner, the caſe *ex parte Anderſon* 1724. was cited, which was heard by Lord *Macclesfield* upon petition, who ordered a new choice of aſſignees, on a ſuggeſtion that a great number of creditors could not poſſibly be preſent at the firſt choice.

Lord Chancellor: The words of the act of the 5th of *George* the ſecond are, "The commiſſioners ſhall forthwith, after they have declared the perſon, againſt whom the commiſſion ſhall iſſue, a bankrupt, cauſe notice thereof to be given in the *London Gazette*, and ſhall appoint a time and place for the creditors to meet, in order to chuſe an aſſignee or aſſignees of the bankrupt's eſtate and effects."

So that they are immediately to appoint a time and place for the choice of aſſignees, becauſe it may be neceſſary to take care of the bankrupt's eſtate and effects; and I muſt not lay it down as a rule, that, becauſe ſome of the creditors are abroad, and beyond ſea, therefore I muſt at all events give them an opportunity of voting in the choice, and direct the creditors to proceed to a new choice.

Aſſignees ought not to be removed, unleſs it is ſhewn that they are not perſons of ſubſtance or integrity.

If this was to prevail, the choice muſt be poſtponed to a great length of time, which would be directly contrary to the act of parliament; and therefore the true rule is, that the aſſignees ought to be continued, unleſs the petitioners can ſhew there is ſome objection with regard to the ſubſtance or integrity of the perſon who is choſen aſſignee; but to do what is prayed by the petition, would be adding to the expence, by making two choices of aſſignees inſtead of one.

No precedent to be found of an order for creditors to proceed to a ſecond choice, upon a bare ſuggeſtion that ſome live remote from London, or are out of England.

I deſired that precedents might be ſearched to ſee if they could find any caſe where it had been ordered that creditors ſhould proceed to a ſecond choice, upon a ſuggeſtion, merely, that ſome of them live remote from *London*, or are out of *England*; but no ſuch caſe is to be found, and beſides it would be a dangerous rule, and therefore I am of opinion that the petition muſt be diſmiſſed, and the aſſignee continued who is already choſen.

December the 22d 1744.

Ex parte Kerney.

Vide Title *Arreſt.*

November the 6th 1745.

Walker and others *verſ.* Burrows.

Caſe 41.

THE plaintiffs aſſignees were under a commiſſion of bankruptcy againſt the father of the defendant, who in 1739 conveyed all his ſhop-goods, *&c.* by bill of ſale to the defendant his ſon, and in 1740 becomes a bankrupt. In the year 1718 he, after marriage, conveyed to truſtees his real eſtate, in conſideration of five ſhillings, and other valuable conſiderations, in truſt for himſelf for life, to his wife for life, then to his eldeſt ſon if he ſurvived his father and mother, and ſo to the next ſon, *&c.*

B. in 1718 after marriage conveys his real eſtate to truſtees, in conſideration of five ſhillings and other valuable conſiderations, in truſt for himſelf for life, to his wife for life, then to his eldeſt ſon if he ſurvived his father and mother, and ſo to the next ſon, &c. *B.* afterwards became bankrupt.

The bill brought to ſet aſide the bill of ſale as fraudulent, and that the deed of 1718 might be either ſet aſide as void, or truſtees decreed to convey to aſſignees under the commiſſion againſt *Burrows* the father.

The counſel for the plaintiff inſiſted, that the deed of 1718 was void as againſt creditors, being voluntary, and after marriage, by virtue of the ſtatute of the 13th of *Eliz.* or if not under that ſtatute, yet void under the 21ſt of *James* the firſt, *ch.* 15. relating to bankrupts.

Lord Chancellor: As to the firſt part of the caſe, there is not a foundation to ſet aſide the aſſignment of houſhold goods, becauſe it was many months before the bankruptcy, and the conſideration of the aſſignment proved, and alſo followed by the poſſeſſion of the ſon.

This is a conveyance which falls directly within the clauſe of the firſt of James the firſt, cap. 15. and therefore truſtees decreed to convey to the plaintiffs the aſſignees under the commiſſion againſt *B.*

With reſpect to the ſettlement by leaſe and releaſe in 1718, made after marriage in conſideration of five ſhillings, and other valuable conſiderations, there are two points;

Firſt, A general point, which it is inſiſted ariſes upon the conſtruction of the ſtatute of the 13th of *Eliz. cap.* 5. againſt fraudulent deeds.

Secondly, Upon the clauſe in the ſtatute of the 21ſt of *James* 1.

As to the firſt, That ſtatute is not ſufficient to prevail againſt the ſettlement.

It has been ſaid all voluntary ſettlements are void againſt creditors, equally the ſame as they are againſt ſubſequent purchaſers, under the ſtatute of the 27th of *Eliz. cap.* 4.

But this will not hold, for there is always a diſtinction upon the two ſtatutes: 'Tis neceſſary on the 13th of *Eliz.* to prove at the making of the ſettlement the perſon conveying was indebted at the time, or immediately after the execution of the deed, or otherwiſe it would be attended with bad conſequences, becauſe the ſtatute extends to goods and chattels, and ſuch a conſtruction would defeat every proviſion for children and families, though the father was not indebted at the time.

Neceſſary to prove on the ſtatute of the 13th of Eliz. that at the making of the ſettlement the perſon conveying was indebted at the time of the execution of the deed.

Recital of the act: " For the avoiding and aboliſhing of feigned, " covinous, and fraudulent teſtaments, gifts, grants, alienations, con- " veyances, bonds, ſuits, judgments, and executions, as well of lands " and tenements as of goods and chattels, which feoffments, *&c.* " have been and are deviſed, *&c. to the end, purpoſe, and intent*

" to delay, hinder, or defraud creditors and others of their juſt and " lawful actions, ſuits, debts, *&c.* And it is enacted, that all and " every feoffment, gift, grant, alienation, bargain, and conveyance " of lands, *&c.* which are made for any *intent or purpoſe* before de- " clared and expreſſed, ſhall be deemed and taken to be clearly and " utterly void, fruſtrate, and of none effect."

Upon this ſtatute, there is no other deſcription of the intent of the conveyance, in the *enacting clauſe*, but by reference only to the *preamble*, *the intent before declared and expreſſed.*

So that unleſs the conveyance in 1718 was made for that purpoſe, it will not be void: Now here is no proof *Burrows* the father was indebted at the time or ſoon after, ſo as to collect from thence the intention to be fraudulent, in order to defeat creditors; for as Mr. Attorney General ſaid, if he had been indebted at that time, it would have run on ſo as to take in all ſubſequent creditors.

Where a man has died indebted, who in his life-time made a voluntary ſettlement, upon application to this court to make it ſubject to his debts as real aſſets, the court have always denied it, unleſs you ſhew he was indebted at the time the conveyance was executed.

Upon the ſtatute of the 27th of Eliz. ſubſequent purchaſers ſhall prevail to ſet aſide a ſettlement that is voluntary, and not for a valuable conſideration.

But upon the ſtatute of the 27th of *Eliz.* which relates to purchaſers, there indeed a ſettlement is clearly void if voluntary, that is not for a valuable conſideration, and the ſubſequent purchaſers ſhall prevail to ſet aſide ſuch ſettlement; but this can only be applied to the caſe of ſubſequent purchaſers, and therefore a plain diſtinction between the two ſtatutes.

Aſſignees ſtand in the place of a bankrupt, and are bound by all acts fairly done by him.

The aſſignees under the commiſſion ſtand only in the place of the bankrupt, and are bound by all acts fairly done by him, notwithſtanding they gain the legal eſtate; and this proves that aſſignees of bankrupts are not conſidered as purchaſers of the legal eſtate for a valuable conſideration for every purpoſe.

The conſideration in a deed of 5 s. and other valuable conſiderations, does not oblige the court to hold it to be for a valuable conſideration.

It has been ſaid, I muſt at this time take the deed in 1718 to be for a valuable conſideration, becauſe expreſſed to be for five ſhillings, and other valuable conſiderations.

But the conſideration of five ſhillings, and other valuable conſiderations, does not oblige the court to hold it, at all events, to be for a valuable conſideration, and can at moſt only let the defendant into proof that there were other valuable conſiderations.

And therefore as to this part of the caſe the truſtees under the deed muſt convey to the aſſignees under the commiſſion, for it falls directly within the clauſe of the firſt of *James* the 1ſt, *cap.* 15.

" That if any perſon, which hereafter is or ſhall be a bankrupt, " ſhall convey or procure, or cauſe to be conveyed to any of his " children, or other perſon or perſons, any manors, lands, *&c.* or " transfer his debts into other mens names, except the ſame ſhall be " purchaſed, conveyed, or transferred for or upon marriage of any of " his children, both the parties married being of the years of con- " ſent, or ſome valuable conſideration, it ſhall be in the power and

" authority

" authority of the commiſſioners, to bargain, ſell, grant, convey, " demiſe, or otherwiſe to diſpoſe thereof, in as ample manner, as if " the ſaid bankrupt had been actually ſeized or poſſeſſed thereof."

His Lordſhip directed the truſtees of the deed of 1718 to convey to the aſſignees, under the commiſſion againſt *Burrows*, the father of the defendant.

July the 3d 1746.

Drury v. *Man*, ſurviving aſſignee of *Johnſon* a bankrupt.

Case 42. An aſſignee under a commiſſion of bankruptcy, muſt ſurrender a copyhold to a purchaſer, notwithſtanding the lord may exact two fines, for no perſon can make a common law conveyance of a copyhold.

Johnſon being poſſeſſed of a *copyhold* eſtate, in *Nov.* 1736. had a commiſſion of bankruptcy taken out againſt him, and the commiſſioners by bargain and ſale convey the copyhold to the defendant and another, as aſſignees under the commiſſion, and their heirs who entred and received the profits.

The plaintiff entred into an agreement in writing, for the purchaſe of the copyhold, with an agent of the defendant, who, on behalf of *Man*, agrees that he, as aſſignee, ſhall within two months by bargain and ſale convey and aſſure to the plaintiff and his heirs the copyhold eſtate, and make a good title thereto as the plaintiff's counſel ſhould adviſe; the plaintiff paid one ſhilling in earneſt, and agreed to pay, upon the conveyance being made, 449 *l.* 19 *s.* 0 *d.* more.

Diſputes ariſing between the plaintiff and defendant relating to the manner, and by what deeds the copyhold eſtate ſhould be conveyed to the plaintiff by defendant; it was agreed that a caſe ſhould be ſtated, and laid before counſel for an opinion, what ſort of conveyance defendant ought lawfully and with ſafety to a purchaſer to make; the counſel was of opinion, that the defendant ought to be admitted tenant of the copyhold, and afterwards to ſurrender the ſame to the plaintiff, upon which ſurrender the plaintiff was to be admitted, and that a conveyance by indenture of bargain and ſale as propoſed by the defendant, would not be proper, or a fit conveyance for plaintiff to reſt upon.

The bill therefore is brought for carrying the agreement into execution, and that the defendant may be compelled to convey, or procure the copyhold premiſſes to be ſurrendred to the plaintiff.

The defendant inſiſts that a ſurrender is not neceſſary, for that he had ſtated a caſe as to the method of conveying the copyhold eſtates to the attorney general, who was of opinion, that there is no occaſion for the aſſignee firſt to be admitted, and then to ſurrender to the vendee, and ſubmits to convey to the uſe of plaintiff and his heirs by bargain and ſale, but hopes he ſhall not be compelled to be admitted and then to ſurrender to plaintiff, as it would be a great expence, and inſiſts plaintiff will be ſafe under ſuch conveyance.

Lord Chancellor: I am opinion that the aſſignee under the commiſſion muſt ſurrender the copyhold to the plaintiff, though it is very

hard the lord ſhould exact two fines, but no perſon can make a common law conveyance of a copyhold; it muſt be by ſurrender; the commiſſioners by the 13 *Eliz. cap.* 7. have no intereſt in bankrupt's lands, but only a power to convey, and at firſt commiſſioners made ſale to the creditors, but that was found inconvenient; therefore they made general aſſignments to truſtees to diſtribute the whole.

An aſſignee under a commiſſion of bankruptcy of a copyhold eſtate, is a vendee within the 13 *Eliz. cap.* 7. and not the purchaſer from the aſſignee of ſuch eſtate.

The queſtion is, Whether the general aſſignee is a vendee within the act of parliament of the 13 *Eliz.* and I am of opinion he is: What would be the conſequence if he was not ſo? Why, the aſſignee might continue in poſſeſſion for years before he makes a ſale, and yet by an expreſs proviſion in the act, he is reſtrained from receiving the profits, till he has compounded with the lord: If the purchaſer under the aſſignee, was conſidered as the vendee within the ſtatute, the aſſignee of a debt, who takes from the commiſſioners, could not ſue for the debt; therefore the aſſignee only can be conſidered as the vendee.

Decreed, the defendant to ſurrender the copyhold eſtate to the plaintiff.

Commiſſioners ought to except copyholds out of a deed of aſſignment of the bankrupt's eſtate, becauſe it will ſave the expence of two fines to the lord, as they may convey to the purchaſer thereof in the firſt inſtance by bargain and ſale.

Lord Chancellor recommended it to commiſſioners of bankrupts for the future, to except copyholds out of the deed of aſſignment of the bankrupt's eſtate, becauſe it would ſave the expence of two fines; for the commiſſioners, where the creditors could meet with a purchaſer of the copyhold, might convey to him in the firſt inſtance; and though there may be occaſion ſometimes for temporary aſſignments for the better preſerving the bankrupt's eſtate, yet commiſſioners are not obliged by the clauſe in the 5th of the preſent King, relating to temporary aſſignments, to appoint an aſſignee of the whole eſtate, becauſe the words are in the disjunctive, *immediately to appoint one or more aſſignee or aſſignees of the eſtate or effects or any part thereof.*

No prejudice will accrue to creditors by leaving out copyhold eſtates in a temporary aſſignment, for an extent of the crown will not affect it.

And beſides, by leaving out the copyhold eſtate of a bankrupt in a temporary aſſignment, the creditors will run no riſque with regard to the crown, for an extent will not affect it; ſo that in all reſpects it will be adviſeable to omit them in ſubſequent aſſignments.

Several things in the bankrupt laws which want reformation.

He ſaid there were ſeveral things in the bankrupt laws, which wanted reformation, and whenever the legiſlature is applied to, it would be very proper they ſhould remedy this inconvenience with regard to copyhold eſtates likewiſe.

July the 31ſt 1749.

Grey v. *Kentiſh.*

Vide title *Baron and Feme, under the diviſion, Rule as to a Poſſibility of the Wife.*

April the 4th 1749.

Ex parte Newton, and others, in the matter of *Reeves*'s bankruptcy.

Caſe 43. Where an aſſignee becomes bankrupt, and is removed, his aſſignees as well as himſelf, muſt join with the commiſſioners in executing an aſſignment to the new aſſignees.

TIMBREL, an aſſignee under a commiſſion of bankrupt againſt *Reeves*, became a bankrupt himſelf afterwards, and thereupon *Newton* and other creditors under *Reeves*'s commiſſion apply by petition to *Lord Chancellor* to remove him, on account of his own bankruptcy, from being an aſſignee under *Reeves*'s commiſſion, and that they may be at liberty to proceed to a new choice.

Lord Chancellor granted the petition, and was of opinion, that not only *Timbrel*, but his aſſignees muſt join with the commiſſioners in executing an aſſignment to the new aſſignees under the commiſſion againſt *Reeves*; and the order was drawn up accordingly.

(D) Joint and ſeparate commiſſion.

After *Hilary* term 1736. In Lincoln's Inn hall.

Beaſley v. *Beaſley.*

Caſe 44.

LORD Chancellor: Where there is a joint commiſſion againſt two partners, they muſt be each found bankrupt, and though one of them ſhould die, the commiſſion may ſtill go on; but if one of the joint traders be dead, at the time of taking out the commiſſion, it abates, and is abſolutely void.

Auguſt the 14th 1742.

Ex parte Turner.

Caſe 45.

LORD Chancellor in this petition laid it down for a rule, That where there is a joint and ſeparate commiſſion, a creditor under the joint commiſſion may come under the ſeparate, and aſſent or diſſent to the certificate of the bankrupt under the ſeparate commiſſion.

March the 29th 1743.

Ex parte Sandon.

Vide under the diviſion, Commiſſion and Commiſſioners.

December the 23d 1742.

Ex parte Baudier.

Caſe 46. Separate creditors may come in under a joint commiſſion and prove their debts, but where there are two perſons who have been partners, and yet the commiſſions are taken out againſt them as ſeparate traders, there creditors upon the joint eſtate, cannot prove their debts under each commiſſion.

A Separate commiſſion taken out againſt each of two perſons who had traded in partnerſhip, which was diſſolved before their bankruptcy; the joint creditors petition to be admitted to prove their joint debts under each of their commiſſions.

Lord Chancellor: Where there is a joint commiſſion taken out againſt partners, ſeparate creditors may come in under ſuch a commiſſion and prove their debts, and joint creditors ſhall be ſatisfied out of the joint eſtate, and ſeparate creditors out of the ſeparate eſtate, becauſe the aſſignment in that caſe is of the whole eſtate.

But where there are two perſons who have been partners, and yet the commiſſions are taken out againſt them as ſeparate traders, there creditors upon the joint eſtate cannot be admitted to prove their joint debts under each commiſſion, for they have an equitable right, in caſe there ſhould be any ſurplus of the eſtates of the two bankrupts, after the ſeparate creditors are ſatisfied.

Nor do I think it proper to appoint a receiver on behalf of the joint creditors, to get in the joint effects of the bankrupt, but they muſt proceed in the common courſe, by taking out a joint commiſſion.

January the 22d 1745.

Ex parte Bond and *Hill.*

Caſe 47. A joint commiſſion of bankruptcy taken out againſt two perſons, and a ſeparate commiſſion againſt one, a creditor upon their joint and ſeveral bond, is not intitled to have a full ſatisfaction out of both eſtates at the ſame time, but muſt make his election upon which of the eſtates he will come, in the firſt place. Such creditor ſhall have time to look into the accounts of the bankrupts joint and ſeparate eſtate, before he makes his election.

A Joint commiſſion of bankruptcy was taken out againſt *Hiley* and *Rogers*, and a ſeparate one againſt *Hiley*; the bankrupts became jointly and ſeverally bound to the petitioner *Bond* in 400 *l.* and to the petitioner *Hill* in 300 *l.* they prove their debts under the joint commiſſion, and receive a dividend of 11 *s.* 6 *d.* and apply now to be let in as creditors upon the ſeparate eſtate, equally with the reſt of the ſeparate creditors, in order to receive a dividend there likewiſe.

Lord Chancellor: The queſtion is, Whether a creditor upon a joint and ſeveral bond is intitled to prove the debt under both commiſſions at the ſame time.

I had ſome doubt the laſt day of petitions, but upon ſearching, I find it has been determined, where there is a creditor on bond againſt two perſons jointly and ſeverally, and both become bankrupt, he is intitled to receive a ſatisfaction out of the joint eſtate, and if the joint eſtate falls ſhort, he is for the reſidue intitled to a ſatisfaction out of the ſeparate eſtate: But then the court will put him to his election, and if he elects to come under the joint eſtate, he will, with reſpect to a ſatisfaction for the reſidue, be poſtponed to all the creditors of the ſeparate eſtate.

There are three caſes in which this has been determined.

Ex parte Parminter and others, *December* the 24th 1736.

Lord *Talbot*, in that caſe, declared as the two bankrupts *Lavington* and *Paul* were jointly and ſeverally bound, the petitioners the bond creditors were not intitled to have a full ſatisfaction out of both at the ſame time, and ordered them to make ſuch election before they received any further dividend.

The ſecond caſe on the petition of *Elizabeth Abingdon* and others, *March* the 29th 1737.

There the petitioners were creditors of both bankrupts, by bond joint and ſeveral.

A declaration was made in that caſe, that the petitioners were not intitled to a ſatisfaction equally with other creditors of the joint eſtate, or with other creditors of the ſeparate at the ſame time, but ordered to make an election, and if they elected to come upon the joint eſtate, then not to come upon the ſeparate eſtate, till the other creditors upon the ſeparate eſtate had been firſt paid.

The third caſe in the bankruptcy of *Lomax* and *Aſhworth*, on the petition *ex parte Banks*, *Auguſt* the 6th 1740. The ſame declaration of the court in this caſe as the former.

I ſhall only add to my order in the preſent, more than in the former caſes, that the petitioners ſhall have time to look into the accounts of the bankrupts joint and ſeparate eſtates, and ſee which would be moſt beneficial for them to come upon, in the firſt place.

It was objected upon the laſt day of petitions, that this would be contrary to proceedings at law, upon a joint and ſeveral bond, where the creditor may proceed againſt both obligors at the ſame time, till his debt is fully ſatisfied, and to be ſure it is ſo at law; but in bankrupt caſes, this court directs an equality of ſatisfaction.

Conſider it on the footing of a joint eſtate firſt; joint creditors are intitled to a ſatisfaction out of the joint eſtate, before ſeparate creditors, but then they have no right to come upon the ſeparate eſtate for the remainder of their debts, till after ſeparate creditors are ſatisfied.

What would be the conſequence, if the petitioners ſhould be admitted to come on both eſtates at the ſame time? Why, then theſe creditors would draw ſo much out of the ſeparate eſtate, as would be

be a prejudice to other joint creditors, who have an equal right to come upon the ſeparate eſtate with themſelves, and by that means I ſhould give the petitioners a preference to other creditors, when the act of parliament and the equity of this court incline that all perſons ſhould have an equal ſatisfaction, and not one more than another.

The petition diſmiſſed.

January the 21ſt 1745.

Ex parte Edwards.

Caſe 48. Doubtful whether a creditor under a ſeparate commiſſion againſt *A.* and debtor to a joint commiſſion againſt *A.* and *B.* can ſet off the debt he owes the latter, by his demand againſt the former.

THE petitioner being a creditor under a ſeparate commiſſion againſt *A.* and debtor to a joint commiſſion againſt *A.* and *B.* petitioned that the action brought by the aſſignees for the debt he owed to the joint commiſſion might be ſtaid, and that his demand upon the ſeparate eſtate might be allowed, as a ſet-off againſt the debt he owed the joint eſtate, eſpecially as the ſame perſons are aſſignees under both commiſſions.

Lord Chancellor: I doubt whether this debt could be ſet off under the ſtatute relating to mutual debts, becauſe different perſons are concerned in one debt and in the other, and in diſtinct rights; but as the petitioner's caſe appears to be a hard one, I will refer it to the commiſſioners of the bankrupts, to ſee how much petitioner owed to the joint eſtate, and how much was owing to him from the ſeparate eſtate, and to certify the ſame to me, and let the action brought by the aſſignees be ſtayed, and in the mean time all further conſideration reſerved till the commiſſioners have certified.

(E) Rule as to his executor, or Where he is one himſelf.

April the 30th 1740.

Ex parte Goodwin.

Caſe 49. Executor of a bankrupt, unleſs the commiſſion againſt his teſtator be ſuperſeded, cannot take out one for a debt due to the teſtator.

THE executor of a bankrupt, unleſs the commiſſion againſt his teſtator has been ſuperſeded, cannot take out a commiſſion of a bankrupt for a debt due to the teſtator, for ſuch debt veſted in his aſſignees, and conſequently the executor not intitled at law, to be the petitioning creditor.

Where

Where a commiſſion is ſuperſeded, merely becauſe there was a defect in form, as to the petitioning creditor, but no manner of doubt as to the act of bankruptcy; the coſts of the *ſuperſedeas* ſhall be allowed only, otherwiſe if the act of bankruptcy had been fully proved.

Petitioning creditor ſhall pay coſts of *ſuperſedeas* only, where a commiſſion is ſuperſeded merely for a defect in form.

March the 31ſt 1742.

Ex parte Ellis and others: In the matter of *William Winſmore* a bankrupt.

William Ellis and *Sarah Hodgekins* are bond creditors of *Philip Hughes*, who made his will, and appointed *Thomas Beetenſon* and *William Winſmore* executors, who jointly proved the will, but *Beetenſon* died before he had poſſeſſed any of the aſſets of *Hughes*, *Winſmore* received part of *Hughes*'s effects, to the amount of 300 *l.* afterwards a commiſſion of bankruptcy iſſued againſt him, and he was found a bankrupt.

Caſe 50. Where aſſignees have poſſeſſed themſelves of effects which belonged to the bankrupt, as executor only, the court upon an application of the teſtator's creditors, will for the ſecuring his effects, appoint a receiver, to whom the aſſignees ſhall account for ſo much as they have got in of the teſtator's eſtate.

The petitioners applied themſelves to *Winſmore*'s aſſignees, to get in the effects of *Philip Hughes*, that they might reſpectively be paid what is due to them on their bonds; but the aſſignees inſiſting that the petitioners ought not to receive the full ſatisfaction out of the effects, but ought to come in with the other creditors of *Winſmore*, and receive an equal dividend with them: It is therefore prayed, that it may be referred to the commiſſioners, to inquire what ſpecifick effects of *Philip Hughes* remain unreceived, and that the ſame may be got in, and the petitioners paid what is reſpectively due to them before any diſtribution is made amongſt *Winſmore*'s creditors.

Lord Chancellor: I cannot make ſuch order as is prayed by the petition, becauſe *Hughes*'s debts muſt be paid in a courſe of adminiſtration, and it does not appear to me, but there may be debts of a higher nature.

But then the queſtion will be, Whether I ought to direct the aſſignees to deliver over *Hughes*'s effects to *Winſmore*, who, though he is a ſurviving executor, yet being a bankrupt, may not be quite ſo proper a perſon to be truſted.

Indeed as he acts *in auter droit*, being a bankrupt, does not take away the right of executorſhip, and therefore, ſtrictly he may be the proper hand to receive it; but however, in ſuch a caſe I ought to ſecure the effects of the the teſtator, and therefore I will appoint a receiver, to whom the aſſignees of this commiſſion ſhall account for ſo much as they have got in of *Hughes*'s teſtator's aſſets.

His Lordſhip referred it to a Maſter, to inquire what part of Philip Hughes*'s effects hath come to the hands of* Winſmore*'s aſſignees, or which remain unreceived by* William Winſmore *the ſurviving executor, and that the Maſter ſhould appoint a receiver of the effects of* Philip Hughes *the teſtator which are unreceived, and that the aſſignees of* Winſmore *do deliver over to ſuch receiver, ſuch part of the teſtator's effects as ſhall be found to have been received by them, or to be in their*

hands in ſpecie, and ordered, that the petitioners be paid their reſpective debts and coſts of this application, out of ſuch effects of Philip Hughes *the teſtator, in a courſe of adminiſtration.*

Auguſt the 6th 1743.

Ex parte Nutt.

Caſe 51. An executor's ſelling off the ſtock of his teſtator, tho' it conſiſts of wines, and he buys ſome others to mix with and fine them, will not make him a bankrupt, otherwiſe if he buys wines intire and ſells them intire to his cuſtomers.

LORD Chancellor: If a perſon that is a trader, makes another an executor, who only diſpoſes of the ſtock of his teſtator, it will not make the executor a trader, and liable to a commiſſion of bankruptcy; and even if an executor, as in the preſent caſe, is the repreſentative of a wine cooper, and finds it neceſſary to buy wines to refine the ſtock left by the teſtator, it will not make him a trader; but here it is ſworn the executrix bought wines herſelf, and ſold them to the cuſtomers intire; ſo that it is not true, that ſhe only bought wines to mix and improve the teſtator's.

Where a perſon againſt whom a commiſſion is taken out, has ſurrendred himſelf, and acquieſced a year and half ſince the taking out thereof, the court will not direct an iſſue to try the bankruptcy, but leave him to an action at law.

I am of opinion likewiſe, the act of bankruptcy is plain, but if it had been doubtful, would not have directed an iſſue, where there has been ſuch a length of time as a year and a half ſince the taking out of the commiſſion, and where the petitioner has acquieſced the whole time, ſurrendred herſelf as a bankrupt to the commiſſioners, has been examined before them, and upon her own examination, ſtrong circumſtances of bankruptcy have appeared; but if ſhe is really no bankrupt, ſhe is not left without remedy, for ſhe may bring an action of trover againſt the aſſignee.

Auguſt the 3d 1749.

Ex parte Butler aſſignee of *Richardſon.*

Vide under the diviſion, Rule as to the ſale of offices under a commiſſion of bankrupt.

(F) Rule as to landlords.

April the 30th 1740.

Caſe 52. Where a bankrupt's goods are ſold by an aſſignee, a landlord can only come in for his rent *pro rata* with the other creditors.

Anon'.

LORD Chancellor: A landlord may diſtrain for his rent upon a bankrupt's goods, either before or after the aſſignment under the commiſſion; but if he neglects to do it, and ſuffers them to be ſold by the aſſignees, he can only come in upon an average with the reſt of the creditors.

A mort-

A mortgagee of a bankrupt's eſtate, though he pays the arrears of rent, that is due to the bankrupt's landlord, unleſs he applies to the court for an order that he may ſtand in the place of the landlord, in conſideration of his paying the arrears of rent, ſhall not be preferred to the creditors under the commiſſion.

A mortgagee who has paid the arrears of rent on a bankrupt's eſtate, unleſs he has an order to ſtand in the landlord's place, ſhall not be preferred to the creditors under the commiſſion.

March the 31ſt 1742.

Ex parte Deſcharmes.

Caſe 53.

THE petitioner was the landlord of the bankrupt, and now prefers his petition to *Lord Chancellor* to be paid by the aſſignees under the commiſſion, the rent that was in arrear all the time the commiſſion was taken out.

If the landlord of a bankrupt ſuffers his aſſignees to ſell off his goods, he is not intitled to his whole rent, but muſt come in *pro ratâ* with other creditors under the commiſſion.

It appeared in evidence, that the whole eſtate and effects of the bankrupt were poſſeſſed by the aſſignees, duly choſen under the commiſſion, and ſold by them ſeven years ago by virtue of the aſſignment.

Mr. *Murray*, the counſel for the petitioner, inſiſted that he being the landlord is intitled to his whole rent, and is not obliged to come in *pro ratâ* with the reſt of the creditors.

Lord Chancellor: The landlord's demand is too ſtale, and having loſt his remedy by diſtreſs, as there are no goods upon the premiſſes, he can now be conſidered only as a common creditor, and muſt come in *pro ratâ*.

April the 4th 1739.

Ex parte Plummer.

Caſe 54.

THE queſtion was, Whether after a commiſſion of bankrupt taken out, and the meſſenger in poſſeſſion, the landlord ſhould diſtrain the goods upon the premiſſes, and ſo be ſatisfied his entire debt, or whether he ſhould come in *pro ratâ* with the reſt of the creditors under the commiſſion.

A landlord may diſtrain for his whole rent even after aſſignment or ſale by the aſſignees, if goods are not removed.

Lord Chancellor: If any goods remain on the premiſſes, they are liable to the diſtreſs of the landlord, and he may diſtrain them for his intire debt, even after aſſignment or ſale by the aſſignees, if the goods are not removed; and this is the reaſon, becauſe no proviſion is made in the caſe of bankruptcy in the ſtatute, which gives the landlord a year's rent on executions.

Before aſſignment the property remains in the bankrupt, (and the commiſſioners have only a power) though the aſſignment has a retroſpection ſo as to avoid any meſne acts done by the bankrupt.

Aſſignment has a retroſpect ſo as to avoid any meſne acts done by the bankrupt.

The rent here is a year and a quarter, and I am of opinion that the landlord is intitled to diſtrain the goods remaining on the premiſſes for his whole rent, notwithſtanding the commiſſion of bankruptcy

ruptcy and the proceedings thereon. There was a cafe before the Lords Commiſſioners of the Great Seal, where the landlord, though he had made no diſtreſs, yet was conſidered to be within the equity of the ſtatute, which gives him a year's rent upon executions; a commiſſion of bankrupt being an execution in the firſt inſtance.

The two following caſes were cited: *Ex parte Jacques, Dec.* 14 1730. *The landlord diſtrained, when the meſſenger under the commiſſion of bankrupt was in poſſeſſion before the aſſignment; afterwards the aſſignees were choſen, and petitioned* Lord Chancellor King *to have the goods reſtored, but the petition was diſmiſſed.*

Ex parte Dillon, February 27 1733. *The aſſignees of the bankrupt were in poſſeſſion, and the landlord diſtrained; upon the application of the aſſignees to* Lord Chancellor *to be relieved, and the goods to be redelivered, his Lordſhip confirmed the right of the landlord to diſtrain, and diſmiſſed the petition.*

April the 11th 1747.

Ex parte Grove.

Caſe 55.

Commiſſion againſt *A.* who owed *B.* 12 years rent. *B.* proves the debt under the commiſſion, the aſſignees ſell the goods of *A.* to the petitioner who lives in *A.*'s houſe.

A Commiſſion iſſued againſt *A.* who was a tenant of *B.*'s, and owed him twelve years rent. *B.* the landlord comes in and proves his debt under the commiſſion, and the aſſignees ſold the whole goods to *Grove* the petitioner, who lived in the tenant's houſe; the landlord, three years after proving of his debt, diſtrains upon thoſe goods, as being ſtill upon the premiſſes.

The queſtion was, whether proving it as a debt under the commiſſion, and ſwearing he has no ſecurity, is not a waiver of his right to the goods as a landlord?

B. 3 years after proving his debt, diſtrains on thoſe goods as being ſtill upon the premiſſes. The vendee of the goods is intitled to them, and the proceedings of *B.* upon his replevin reſtrained and confined to his remedy under the commiſſion.

Notwithſtanding a commiſſion, and the meſſenger is in poſſeſſion of the goods, the landlord may diſtrain for the rent, even after an aſſignment if the goods are on the premiſſes.

Lord Chancellor: The iſſuing of a commiſſion againſt a tenant, and the meſſenger's poſſeſſion of the goods of the tenant, does not hinder the landlord from diſtraining for rent; for this is not ſuch a *cuſtodia legis* as an execution is, and there too the law allows the landlord a year's rent.

The aſſignment of the commiſſioners of the bankrupt's eſtate and effects, is only changing the property of the goods, and while upon the premiſſes they are ſtill liable.

The fact that creates the difficulty is, the landlord's coming in under the commiſſion.

A man who has a debt may come in and prove his debt, and afterwards he may bring an action at law, and the court will not abſolutely ſtop him from bringing an action, but put him to his election, and even then allow him to aſſent or diſſent to the certificate.

A landlord is conſidered in a higher degree than a common creditor, and it would be hard to preclude him from diſtraining where there are goods on the premiſſes, and therefore he muſt be put to his election to waive his proof, or his diſtreſs.

But the difficulty lies here, every creditor is to ſwear whether he has a ſecurity or not; if he has a ſecurity, and inſiſts upon proving, he muſt deliver up the ſecurity for the benefit of the creditors at large, be they mortgages or pledges; but this ſeems to be a new caſe, becauſe this is a legal lien which the landlord has, and not upon the ſame footing with common ſecurities; and the only queſtion is, Whether his proving it as a debt, and ſwearing he has no ſecurity, is not a waiver of the diſtreſs?

Lord Chancellor directed it to ſtand over till the next day of petitions, as thinking it a doubtful caſe, and on that day ſaid he was far from being clear that the landlord was barred of his diſtreſs; for there have been inſtances, where a common creditor, even after he has received a dividend under a commiſſion, has been allowed, upon refunding that dividend, to bring an action at law for his debt; and as a landlord's is a more favourable caſe than a common creditor's, he ordered it to ſtand over again for further conſideration.

A creditor, after he has received a dividend under a commiſſion, will be allowed to bring an action at law for his debt, upon his refunding that dividend.

On the 8th of *May* 1747. this petition came on again, and his Lordſhip then declared that the vendee of the goods under the aſſignee is intitled to the goods, and ordered, that the proceedings of *William King*, the landlord, upon the replevin ſhould be reſtrained, and confined him to his remedy under the commiſſion.

(G) Rule as to compoſitions.

November the 6th 1740.

Spurret v. *Spiller.*

Caſe 56.

THE plaintiff in this cauſe being upon an agreement with his creditors in general, for a compoſition of ſix ſhillings in the pound, the defendant, one of the creditors, would not conſent to it, unleſs the plaintiff would give him a bond for the reſidue of his debt over and above his ſhare of the compoſition.

A. being upon an agreement for a compoſition, gives one of his creditors, who would not conſent to it otherwiſe, a bond for the reſidue, over and above his compoſition; ſuch a contract, though not void by the expreſs words of the 5th of George the ſecond, ſeems to be within the reaſon and deſign of the act.

The plaintiff, in order to extricate himſelf out of his difficulties, did give a bond to *A.* in truſt for the defendant.

The compoſition money has been paid to the reſt of the creditors, and likewiſe to the defendant, who has brought an action on his bond in the name of the truſtee, and notice of trial is given for the 14th inſtant.

Mr. *Charles Clarke* moved for an injunction to ſtay proceedings at law, till the hearing of the cauſe in this court.

Lord Chancellor: Take the injunction upon giving judgment, and a releaſe of errors, it being a caſe very proper to be conſidered; for ſuppoſe a creditor upon a commiſſion of bankruptcy taken out, enters into

into a private agreement with the bankrupt to ſign his certificate, upon his promiſe or contract to pay this creditor's whole debt, in conſideration of his ſigning the certificate, there is no doubt but ſuch a contract would have been void by the expreſs words of the ſtatute of the 5th of the preſent King.

The queſtion is, Whether ſuch an agreement as in the preſent caſe, though clearly out of the act of parliament, is not within the reaſon and deſign of the act, and the very miſchief that is expreſsly condemned by it, and endeavoured to be remedied? For this is not only prejudicial to the bankrupt, but may be hurtful to the creditors in general, becauſe a perſon who has a compoſition on foot may (by entring into a contract to pay the whole debt to one or more obſtinate creditors, as a conſideration of their promiſing not to appear, or not to oppoſe the compoſition) deceive the bulk of the creditors, who imagine the debts ſtanding out againſt his eſtate are not ſo numerous as in fact they are.

(H) Rule as to creditors.

Auguſt the 6th 1740.

Ex parte Banks.

Caſe 57. A bond creditor, to whom the partners were jointly and ſeverally bound, may make his election to come againſt the joint, or ſeparate eſtate, but not againſt both, except for the deficiency, and after the other creditors are paid.

A Joint commiſſion only taken out againſt two partners; the petitioner a bond creditor to whom the bankrupts were jointly and ſeverally bound, he may make his election to come upon the joint, or ſeparate eſtate; if upon the former, he cannot come upon the latter (and ſo *vice verſâ*) for the ſurplus of the debt, till the creditors of the ſeparate eſtate are firſt ſerved.

Lord Chancellor founded his order upon this reaſoning, becauſe the bond creditors might have brought a ſeparate action at law againſt each of them, and might have had likewiſe ſeparate executions, but could not have levied his debt upon both the eſtates at the ſame time, but only for the deficiency, where one eſtate was not ſufficient to ſatisfy the whole.

April the 20th 1741.

Cooper and others *verſ.* Pepys and others.

Caſe 58. Where a meeting of creditors is properly advertiſed, and ſome do not think proper to come, the majority in value who are preſent have a right to bind thoſe who are abſent.

WILLIAM REEVES gave notes payable to *Moſes Andrees* to the amount of 4500 *l.* *Andrees* indorſes them over to ſeveral perſons, and then goes beyond ſea, with the greateſt part of his effects, and becomes a bankrupt; the indorſees come upon *Reeves*, the drawer for the money due upon the notes, who being unable to pay them, becomes a bankrupt likewiſe.

The

The aſſignees under *Reeves*'s commiſſion (of whom two were note creditors) give notice purſuant to the act of the 5th of *George* the ſecond, that there would be a meeting of the creditors under *Reeves*'s commiſſion, in order to accept of a compoſition from the agents of *Andrees*.

Several of *Reeves*'s creditors met accordingly, and it was agreed to accept 6*s*. in the pound for the debts due on thoſe notes, and to execute a releaſe to *Andrees* upon thoſe terms; and a proper authority in writing, ſigned by all the creditors preſent, was given to the defendants the aſſignees to compound with *Andrees*, who on the 5th of *September* 1735. executed a releaſe accordingly to *Moſes Andrees* on payment of the compoſition aforeſaid.

The plaintiffs who are creditors at large of *William Reeves*, in leſs than four months after the iſſuing of the commiſſion of bankruptcy againſt him, prefer a bill in Chancery, to which the aſſignees are made defendants, ſuggeſting it was a fraud in them to agree to this compoſition, and that they conſulted nothing but their own private intereſt, as being creditors by indorſement of ſome of *Andrees*'s notes.

Lord Chancellor: I do not ſee any thing fraudulent in the conduct of the aſſignees, for they have done every thing which the act of parliament preſcribes on meetings for a compoſition of debts, and if ſome of the creditors do not think proper to come, 'tis their own fault, and thoſe who are preſent have a right to bind the whole, if the majority in value at the meeting are of opinion to ſign the compoſition.

But with reſpect to the bill itſelf, ſo far as relates to the aſſignees of *Reeves*, I diſapprove of it extremely, becauſe it is an attempt to make the court judges in what manner the eſtate and effects of a bankrupt ſhould be diſtributed, before the expiration of 4 months from the date of the commiſſion, whereas the act allows the aſſignees a complete 4 months from the iſſuing of the commiſſion to make a dividend; ſo that it is abſolutely changing the method chalked out by the act, and ought to meet with the utmoſt diſcouragement.

His Lordſhip therefore ordered the bill to ſtand diſmiſſed as againſt the aſſignees of *Reeves*, with coſts to be taxed.

A doubt aroſe, whether the creditors who had accepted a compoſition of ſix ſhillings in the pound for their demands on *Andrees*, might notwithſtanding prove their whole debt in the commiſſion againſt *Reeves*? At firſt *Lord Chancellor* ſeemed to think they might ſtill prove their whole debt, but upon looking into two caſes in 2 *Wms.* 89 *, the firſt, *ex parte Ryſwicke*, before *Lord Chancellor Macclesfield*; the

Where drawer and indorſer of notes are both become bankrupt, and the creditors have received a dividend of 6*s*. under the commiſſion againſt the indorſer, they can only prove the remaining 14*s*. under the commiſſion againſt the drawer.

* *Ex parte Ryſwicke*, 2 *Wms.* 89. *A.* drew a bill payable to *B.* on *C.* in *Holland*, for 100*l*. *C.* accepts it, afterwards *A.* and *C.* become bankrupts, and *B.* receives 40*l*. of the bill out of *C.*'s effects, after which he wanted to come in as a creditor for the whole 100*l*. out of *A.*'s effects. *B.* permitted to come in as a creditor for 60*l*. and the maſter directed to ſee whether the other 40*l*. was paid out of *A.*'s effects in *C.*'s hands, or out of *C.*'s own effects; if the latter, then *C.* is a creditor for this 40*l*. alſo, but if out of *A.*'s effects, then 40*l*. of the 100*l*. is paid off.

ſecond †, *ex parte Lefebere* 407. before *Lord Chancellor King*, he altered his opinion, and was very clear that the 6*s.* muſt go in diſcharge of ſo much of the debt, and that they could only prove the remaining 14*s.* under *Reeves*'s commiſſion.

Auguſt the 13th 1742.

Ex parte Whitchurch.

Vide under the Diviſion, Rule as to Aſſignees.

Auguſt the 1ſt 1744.

Ex parte Simpſon and others.

Vide under the Diviſion, Commiſſion and Commiſſioners.

December the 22d 1744.

Ex parte Simpſon and others.

Vide under the ſame Diviſion.

October the 26th 1745.

Ex parte Kirk.

Caſe 59. *B.* a creditor under a commiſſion for 79 *l.* draws on the aſſignees for that ſum, payable to *K* or order, out of *B*'s ſhare of the dividend to be made, aſſignee accepts it by parol, but before any dividend becomes a bankrupt himſelf. *K.* intitled to the whole 79 *l.* and not obliged to come in *pro ratâ* only, under the commiſſion againſt the aſſignee.

A Creditor under a commiſſion of bankruptcy againſt *Ovie*, being indebted to the petitioner in 79 *l.* drew a note on the aſſignee of the commiſſion as follows: *Pray pay to Kirk or order the ſum of* 79 l. *out of my ſhare of the dividend hereafter to be made under the commiſſion againſt Ovie.*

The aſſignee accepts it by parol, but before any dividend he becomes a bankrupt himſelf; the creditors under his commiſſion inſiſt, that *Kirk* ought to come in *pro rata* only, for that it was not a legal acceptance.

† *Ex parte Lefebere*, 2 *Wms.* 407. *A.* gives a promiſſory note for 200 *l.* payable to *B.* or order. *B.* indorſes it to *C.* who indorſes it to *D.* *A. B.* and *C.* become bankrupts, and *D.* receives 5*s.* in the pound on a dividend made by the aſſignees of *A.* *D.* ſhall come in as creditor for 150 *l.* only out of *B.*'s effects.

Lord

Lord Chancellor: Though this is not a legal bill of exchange at law, yet it is good in equity, the petitioner having paid a valuable conſideration for it, and it was a lien upon the effects of *Ovie* as ſoon as they came to the aſſignee's hands, and is like the caſe of a bond aſſigned by a perſon before he becomes a bankrupt, which is a good aſſignment in equity, and the aſſignee thereof is intitled to retain the bond againſt the creditors under the commiſſion.

His Lordſhip directed the 79 *l.* to be paid to the petitioner.

March the 13th 1737.

Twiſs v. *Maſſey.*

Vide under the diviſion, Commiſſion and Commiſſioners.

June the 4th 1746.

Ex parte Botterill.

Caſe 60.

THE bankrupt borrowed 100*l.* upon bond of the petitioner, a near relation; the petioner had arreſted him on this bond, and charged him with execution, and had another demand for a year's rent.

Where a bankrupt is in execution for one debt, and the judgment creditor has another againſt him of a diſtinct nature, he may prove this under the commiſſion, notwithſtanding he refuſes to waive his execution upon the other.

The petitioner would not waive his execution upon the bond debt, and yet offered to prove the debt for rent under the commiſſion; but the commiſſioners refuſed to admit him, unleſs he would waive his execution.

Upon this he petitions to be admitted a creditor for the rent.

Lord Chancellor: I think it a hard caſe upon the bankrupt, but as the debts are intirely diſtinct, I think he ſhould be allowed to prove, notwithſtanding he refuſes to waive his execution.

But upon looking into the petitioner's affidavit, and finding it defective, as he did not ſwear to the time when the bankrupt commenced tenant, he diſmiſſed the petition, and ſaid at the ſame time, that he was ſatisfied this debt was an after-thought, and trump'd up merely to perſecute the bankrupt by keeping him in gaol, and therefore recommended it to the petitioner's attorney to make it up, and releaſe the bankrupt from his confinement.

December the 20th 1750.

Ex parte Wildman.

Caſe 61.

Lord Chancellor: The preſent petitioner was creditor of a bankrupt, who had given him bills of exchange on *Vanvillen*, and others in who gave him beſides bills of exchange on merchants in *Holland*, that made themſelves liable

The petitioner creditor of a bankrupt, by acceptance.

Holland, who made themſelves liable by accepting them, and afterwards failed and compounded with their creditors.

So that the petitioner had two perſonal ſecurities.

Conſider it in the common caſe, abſtracted from the caſes of bankrupts.

An obligee may have ſeveral actions againſt each obligor, but ſhall not levy more than one ſatisfaction for his debt.

Suppoſe ſeveral obligors, the obligee may have ſeveral actions againſt them all, ſeveral judgments too, and ſeveral executions; but he ſhall not levy more than *one* ſatisfaction for his debt; if he does, courts of law will ſtep in. The ſame in bills of exchange, actions, *&c.* lie againſt drawer and all the indorſers, but only *one* ſatisfaction for the debt.

A creditor is intitled to come under a commiſſion of bankrupt againſt all the obligors, drawers of notes, &c. till he is compleatly ſatisfied.

So under commiſſions of bankruptcy, the creditor is intitled to come under the commiſſion againſt all the obligors, drawers, *&c.* and this is not a preference given to ſuch a creditor, but a benefit he is intitled to at law, upon all his ſecurities, till he is compleatly ſatisfied. There are two perſons at ſtake for this debt, one of them a bankrupt, and the other has made a compoſition of 10*s.* in the pound.

Petitioner admitted under the commiſſion for his whole debt, and before a dividend receives 2*s.* 6*d.* in the pound, under a compoſition of the acceptors of the bills.

The petitioner had received nothing under the compoſition at the time he proved his debt under the commiſſion of bankruptcy, and therefore admitted a creditor for the whole.

But before a dividend he receives two ſhillings and ſixpence in the pound under the compoſition of the acceptors of the bills.

The commiſſioners in the commiſſion of bankruptcy direct he ſhall be paid his dividend, after deducting what he had received on the bills of exchange.

The aſſignees inſiſt, he ſhall be paid a dividend on the ſum left only, after deducting the two ſhillings and ſixpence.

The aſſignees ſay he ſhall be paid a dividend only on the ſum left after deducting the two ſhillings and ſixpence.

But this would be taking away from a man the double ſecurity he had, and which he may make uſe of in law and equity, till he is ſatisfied his whole debt.

But as the compoſition was not paid till after the debt proved, he ſhall receive a dividend on the whole ſum.

As this compoſition was not paid him till after his debt proved, he ſhall receive a dividend on the whole debt, and ſhall account hereafter for what he has received, or ſhall receive on the bills of exchange; and this will not be any prejudice to the eſtate, for if he receives more from thoſe bills of exchange than will anſwer twenty ſhillings in the pound, he ſhall account to the aſſignees for ſuch ſurplus.

Ordered therefore the petitioner to be let in to a dividend on his whole debt *pro ratâ* with the other creditors.

Vide ante, p. 106.

Mr. *Clark* for the aſſignees cited the caſe of *Cooper verſus Pepys*, to ſhew that the court would not admit a perſon who had received a dividend

dividend of ſix ſhillings againſt the drawer, to prove more than the remaining fourteen ſhillings as a creditor under the commiſſion againſt the indorſee.

Lord Chancellor ſaid, this differed from that caſe, becauſe the creditor there had received the benefit before he had attempted to prove his debt againſt the indorſee under the commiſſion.

March the 28th 1751.

Ex parte Child: In the matter of *Cuff* a bankrupt.

Caſe 62. *Cuff* had been for ſeveral years a collector of the land tax for the pariſh of St. *Dunſtans* in the *Weſt*, and at the iſſuing of the commiſſion owed upon the ballance 928 *l.* 11 *s.* to the chamberlain of *London.*

THE petitioner prays, he may for himſelf and the reſt of the pariſhioners of St. *Dunſtans* in the *Weſt*, be admitted a creditor, under the commiſſion againſt *John Cuff* a bankrupt, for the ſum of 869 *l.* 8 *s.* 1 *d.* the ballance of the money had and received by *John Cuff* from the ſaid pariſhioners.

An inhabitant of the pariſh admitted a creditor, and allowed to prove for himſelf and the reſt of the pariſhioners.

The bankrupt was duly appointed collector of a re-aſſeſſment of the land tax for 1747. for the firſt diviſion of the ſaid pariſh, and ſince of the whole land tax for years 1748, 1749, and 1750. and as ſuch received of the ſeveral inhabitants for the land tax and window duties ſeveral ſums of money, amounting in the whole to 3391 *l.* 10 *s.* and hath only paid to the chamberlain of *London* 2522 *l.* 1 *s.* 11 *d.* which left the ballance aforeſaid.

Mr. *Green* for the petitioning creditor ſaid, the only doubt was, Whether the commiſſioners according to the form of depoſitions of debts could ſuffer one inhabitant to ſwear, that neither he or any other of the inhabitants had received any ſecurity or ſatisfaction.

Lord Chancellor thought in this caſe, one inhabitant might prove for himſelf and the reſt of the pariſhioners, and ordered it accordingly, becauſe he might ſwear that neither he, or the reſt of the pariſhioners to his knowledge or belief had received any ſecurity or ſatisfaction.

November the 2d 1754.

Ex parte Peachy.

Caſe 63. Where a perſon ſtays till a bankrupt and the aſſignees are dead, and 15 years after the date of the commiſſion, applies to be admitted a creditor, the court on theſe circumſtances, and in conſideration of the length of time, will diſmiſs the petition.

A Commiſſion of bankruptcy taken out in 1739. the bankrupt dead, and the aſſignee alſo dead, and now at the diſtance of

15 years, the petitioner applies to prove a debt which depends upon an account ſaid to be ſettled between him and the bankrupt.

What the petitioner attempts to prove is over and above his debt for rent. Upon the 26th of *December* 1739. the goods being on the premiſſes he made a diſtreſs for rent, the bankrupt was the only perſon who knew what was received under the diſtreſs, and it was admitted by the petitioner himſelf it exceeded the appraiſement; and the bankrupt being dead, it was inſiſted by the counſel for the creditors, that this is an unfavourable application, eſpecially as it reſts upon the oath of the petitioner, that he was a ſtranger to the dividend made under this commiſſion till 1745, and taking into conſideration likewiſe, the great length of time ſince the ſuing of the commiſſion.

Lord Chancellor: The queſtion is, Whether there is ſufficient diſcloſed in this caſe to warrant me in making an extraordinary order to admit the petitioner a creditor under this commiſſion.

The court, to be ſure, is very liberal in admitting perſons to dividends, but the preſent application ſeems to be of a very unreaſonable nature.

The commiſſion iſſued as long ago as the 9th of *February* 1739: the account made up between the petitioner and the bankrupt the 13th of *December* before, which ſhews they were very amicable then, and yet upon the 26th of the ſame month, the petitioner is ſo adverſe as to take a diſtreſs. This is very extraordinary, the arrears of rent for 13 years amounted to 400 *l.* levies upon the diſtreſs 260 *l.* being about five eighths of the ballance of the account; his ignorance is not of the commiſſion, but of the dividend only; lies by for fifteen years without taking one ſtep, and after the bankrupt is dead, and the aſſignee, who might give ſome account of this tranſaction, is likewiſe dead, applies to be admitted as a creditor; ſo that taking it altogether, it ſtands upon very ſuſpicious circumſtances.

The creditors under the commiſſion will not receive above nine ſhillings in the pound, the petitioner has had under the diſtreſs a large ſum, of which he has been making intereſt, and is much better off than any other creditor.

Upon all the circumſtances of the caſe, I am of opinion he ought not to be admitted a creditor; and therefore let the petition be diſmiſſed.

(I) Contingent debts.

December the 23d 1740.

Ex parte Elizabeth Greenaway: In the matter of *Edward Greenaway* a bankrupt.

Caſe 64. Petitioner's huſband before marriage gave her father a bond in the penalty of 600 *l.* conditioned for the payment of 300 *l.* to her in caſe ſhe

EDWARD Greenaway previous to his marriage with the petitioner *gave his bond to the petitioner's father in the penalty of* 600 *l. in truſt, that if the marriage ſhould take effect, and the petitioner ſhould ſurvive* Edward Greenaway, *and if he ſhould before his death by will or otherwiſe give or leave the petitioner* 300 *l. in goods or other perſonal or real eſtate, ſo as the ſame ſhould be paid by his executors or aſſigns immediately after his death to the petitioner, without any claim by any perſon or perſons whatſoever, then the bond was to be void.*

ſurvived him; he has a commiſſion of bankruptcy taken out againſt him, and dies in ten days after. The court thinking it a doubtful caſe, whether ſhe ſhould or ſhould not be admitted a creditor, did not give an abſolute opinion; but on aſſignees conſenting ſhe ſhould come under the commiſſion for 150 *l.* ordered her a dividend accordingly.

In *May* 1731. the marriage was had between *Edward Greenaway* and the petitioner, and on the 17th of *September* laſt a commiſſion of bankruptcy iſſued againſt *Edward Greenaway*, whereupon he was declared a bankrupt, and on the 28th of *September* following, the bankrupt died inſolvent, before any diſtribution of his eſtate, and the petitioner has ſince duly proved the bond before the commiſſioners, but the aſſignees refuſe to make any dividend to the petitioner.

She therefore prays, as the huſband made no other proviſion for her in his life-time, that ſhe may be let in to receive her dividend, out of the bankrupt's eſtate and effects in equal degree with the other creditors.

The counſel for the petitioner inſiſted, that though it was a contingent debt, yet the foundation of it was the bond, and therefore notwithſtanding the contingency has happened ſince the bankruptcy, yet the wife was intitled to prove the debt, as well as any other creditor.

The Attorney general who was counſel for the aſſignees, inſiſted the petitioner is not within the ſtatute of the 7 *Geo.* 1. *cap.* 31. as it is not a debt that will at all events become due at a future day, and uncertain whether it can ever take place, and relied upon the caſe of *Tully* v. *Sparks*, 2 L. *Raym.* 546. where, it being likewiſe uncertain whether the bond in that caſe would ever become due or not, being not to take place except upon two contingencies, which had not both happened at the time of the act of bankruptcy committed, it was impoſſible to make ſuch abatement of the five *per cent.* as the act directs, and therefore the court of King's Bench unanimouſly held the bond was not within that act.

The ſtatute of 7 *Geo.* 1. *cap.* 31. extends only to creditors at a future day certain, and not to debts on meer contingencies which have not happened at the time of the act of bankruptcy committed.

Lord Chancellor: The queſtion is, Whether this is not a debt become due before the eſtate is diſtributed, and it would be the hardeſt caſe in the world, if ſuch a perſon ſhould not be admitted a creditor before the eſtate is divided away.

The penalty in an obligation is *debitum in præſenti*, and the condition only ſuſpends it, ſo that it is looked upon as a debt from the time of the execution of the bond.

There are great variety of determinations in the books, and therefore I deſire that one counſel of a ſide may ſpeak to it, on the next day of petitions, unleſs the creditors at a meeting for this purpoſe, will agree to give a ſum of money to this poor woman, in lieu of her ſhare upon the dividend of the bankrupt's effects.

The petition was ſet down again in the paper of petitions of the 24th of *January* 1740. when it appeared that the reſt of the creditors, ſince the hearing of the petition before *Chriſtmas*, had come to an agreement, to let in the wife of the bankrupt as a creditor for 150*l.* half of the bond debt only, and that it was acquieſced under by the petitioner.

All the caſes ſince *Tully* v. *Sparks*, 2 L. *Raym.* 546. have been determined againſt a contingent intereſt.

Lord Chancellor: I am very glad you have compromiſed it, for it is a matter attended with great difficulties, and there has not been one caſe ſince *Tully* and *Sparks* in the court of King's Bench, but what has been determined expreſly againſt a contingent intereſt.

The diſtinction taken in this court has been between a truſt for the wife, and a bond abſolutely given to the wife herſelf before marriage upon a contingency of her ſurviving the huſband: This is materially different from a truſt, becauſe there a perſon who comes for equity muſt do equity, as in the caſe of *Holland* v. *Culliford*, 2 Vern. 662.

The moſt material caſe to the preſent purpoſe is, *ex parte Caſwell, ex parte Cazald, ex parte Bateman*, 2 Will. 497. *There a trader on marriage gives a bond to a truſtee to ſecure a thouſand pound to a wife, if ſhe ſurvived him; the trader becomes a bankrupt; this debt not to be allowed; nor any reſervation to be made for it; nor ſhall it ſtop the diſtribution, in regard it may never be a debt: But if the contingency happen before the bankrupt's eſtate be fully diſtributed, ſuch creditor ſhall come in under the commiſſion.*

His Lordſhip, without giving any opinion abſolutely, one way or the other, *ordered the petitioner to be admitted a creditor under the commiſſion, for the ſum of* 150*l.* (the aſſignees conſenting thereto in court) *in full of her demand mentioned in the petition, and that ſhe ſhould be paid a dividend in reſpect thereof, in equal proportion with the other creditors of the bankrupt.*

October the 20th 1744.

Ex Parte Groome.

Case 65.

A husband by articles previous to marriage, covenants to leave his wife 600 *l.* in case she survives him; he becomes a bankrupt, and dies before any dividend made, the wife, as the law now stands, cannot be admitted a creditor under a commission against the husband.

ON articles previous to the marriage of the petitioner, the husband covenants to leave his wife 600 *l.* on the contingency of surviving him; a commission of bankruptcy is taken out against the husband, who dies before any dividend is made: The petitioner attempted to prove the 600 *l.* as a debt before the commissioners, but they refused her, and therefore applies now by petition to be admitted a creditor for the 600 *l.*

Mr. Solicitor general for the petitioner cited 2 *Will.* 497. intitled *ex parte Caswell*, &c. to shew, that though the debt was contingent, when the obligor became a bankrupt; yet if the contingency happen before the distribution made, then such contingent creditor should come in for his debt; so if such contingency had happened before the second dividend made, the creditor should come in also for his proportion thereof, though after the first dividend.

Mr. *Talbot* of the same side stated, that the petitioner married in 1742. and brought 600 *l.* fortune; the husband soon after becomes a bankrupt, and her money has contributed to satisfy his creditors: Insisted this is a debt arising on a consideration prior to the act of bankruptcy, and as the husband is now dead, the debt may be said to have a relation to the day of the contract.

Mr. Attorney general for the assignees insisted, that under the act of parliament of the 13 *Eliz. cap.* 7. no person can be intitled to a distribution but who is a creditor at the time of the commission issued, and the commissioners are thereby directed "*to order the same for* "*true satisfaction and payment of the said creditors.*"

The statute of the 5th of *George* the 2d *cap.* 30. in a clause relating to certificates, says, "That such bankrupt, who after obtain- "ing thereof shall be taken in execution or detained in prison on "account of any debts *due or owing before he became a bankrupt*, shall "be discharged out of custody on such execution, *&c.*"

But if the construction of this act should be that the bankrupt is liable to contingent debts that become due *after* the bankruptcy, and then he is not discharged, such a construction would intirely overturn this act of parliament.

The judges were of opinion, in a case upon the construction of the old acts of parliament relating to bankrupts, that a creditor whose debt was contracted before, but did not become due till the act of bankruptcy committed, could not take out a commission; but on an appeal afterwards to the house of Lords, it was there determined otherwise.

He cited the case *ex parte Smith*, the 23d of *January* 1741. in which a contingent creditor, who applied to be admitted to prove

his debt, was denied by the court, and another caſe, *ex parte King*, *January* 1742. where it was alſo denied.

Mr. Solicitor general in his reply ſaid, that theſe two caſes were not abſolutely determined, and there is no one caſe where lord *King*'s diſtinction *ex parte Caſwell* has been controverted.

He inſiſted that the caſes make no diſtinction between a bond and a covenant, and that there is no clauſe in any act of parliament which confines the diſtribution to creditors only at the time of the bankruptcy committed, or excludes creditors whoſe contingent debts take place before diſtribution.

Before the ſtatute of the 7 *Geo.* 1. *cap.* 31. he ſaid, there was no doubt at all but the creditor might come in when the debt became payable, but the only doubt was, Whether they might come in before; therefore to remedy this inconvenience *of the effects being divided away before ſuch creditor could come in*, the act enables them to prove their ſeveral ſecurities before they become payable.

Lord Chancellor ordered it to ſtand over till this day, that he might give his opinion at the ſame time upon another contingent caſe *ex parte Wincheſter*, which came on two days after the caſe *ex parte Groome*.

The ſtate of the caſe *ex parte Wincheſter*.

Previous to the marriage of the petitioner with *Elizabeth Grant*, daughter of the bankrupt, " by an Indenture dated the 2d of *July* " 1739. made between the petitioner of the one part, and *John* " *Grant* the bankrupt, and *Elizabeth* the petitioner's wife of the " other part, reciting the then intended marriage between the pe- " titioner and *Elizabeth*, and that *John Grant* had before the exe- " cution of the indenture paid the petitioner 500 *l.* and by a bond " dated the ſame day ſecured 1000 *l.* more to be paid to the peti- " tioner, his executors, adminiſtrators and aſſigns, within 12 months " after the death of the ſurvivor of *John Grant* and *Barbara* his wife, " together with intereſt for the ſame at 4 *l. per cent. per. ann.* by " equal half yearly payments, which 500 *l.* then paid, and 1000 *l.* " ſecured to be paid, was declared to be in full for the wife's por- " tion: It was agreed, and the petitioner covenanted with *John* " *Grant*, that the petitioner's heirs, executors or adminiſtrators " ſhould, within one month after the petitioner's death, pay to " *John Grant*, his executors or adminiſtrators, the ſum of 2000 *l.* " to be placed out at intereſt for the petitioner's wife, and the iſſue " of the marriage; and it was alſo agreed, that the 2000 *l.* and the " 1000 *l.* when due, ſhould be placed out at intereſt in the names of " two truſtees, in truſt after the death of the ſurvivor of petitioner " and his wife, to diſtribute the 3000 *l.* among the children in " ſuch proportions as the petitioner and his wife ſhould direct, " and for want of ſuch direction, in truſt to divide the ſame be- " tween ſuch children equally, and in caſe there was no iſſue of the " marriage, to pay 1000 *l.* part of the 3000 *l.* to ſuch perſons as " the petitioner's wife ſhould appoint, and for want of ſuch ap- " pointment, to the petitioner, his heirs, executors or adminiſtrators.

The marriage was accordingly had between the petitioner and *Elizabeth Grant*, and there was iſſue of the marriage living three children. *John Grant regularly paid the intereſt of the bond to the 25th of December laſt*, but no payment had been ſince made, and the condition of the bond was broken by the non-payment of the intereſt, which became due to the petitioner on *Midſummer* day.

In *April* laſt a commiſſion of bankruptcy iſſued againſt *John Grant*, and he was thereon declared a bankrupt, and aſſignees choſen, but no dividend yet made of the bankrupt's eſtate, and the petitioner has applied to the commiſſioners to be admitted a creditor for the ſaid ſum of 1000*l.* but ſuch ſum not being payable till after the death of *John Grant*, and *Barbara* his wife, the commiſſioners refuſed to admit the petitioner a creditor; and therefore he preferred his petition *to be admitted a creditor for the principal ſum of* 1000l. *and that the dividends thereof might be laid out in the purchaſe of South Sea annuities, for the benefit of the petitioner, his wife and children; and alſo prays to be admitted a creditor under the commiſſion for* 20l. *being the half year's intereſt due on the bond at Midſummer laſt.*

Lord Chancellor: Theſe are ſometimes caſes of value; more often caſes of hardſhip and compaſſion. It were to be wiſhed that they were provided for by act of parliament, and I hope ſome gentleman who hears me, will conſider how to rectify this by ſome future ſtatute.

There have been a great many caſes in this court upon this point; ſome where a huſband before a marriage has contracted with truſtees for the wife, to pay a ſum of money in his life-time for her benefit, *if ſhe ſurvives*, and if ſhe dies, for children; and if no children, for the benefit of the huſband.

There have been other caſes where the time of payment does not ariſe, till the contingency takes effect after the death of the huſband.

And there have been other caſes, where the father of the wife has entered into a covenant to pay a ſum of money after the death of *himſelf and his wife*, and intereſt in the mean time, which is the preſent caſe, *ex parte Wincheſter*, and other caſes like that, *ex parte Groome*.

They will fall under very different conſiderations, and I will give my opinion upon all of them.

If a huſband becomes a bankrupt after a breach of payment to truſtees, they have always been admitted creditors upon equitable terms, and the court has taken care that the intereſt of the money ſhall be paid to the creditors under the commiſſion, during the life of the huſband, and the principal ſecured to the wife, in caſe ſhe ſurvives her huſband.

If judgment had been given at law by the huſband for this ſum, tis a debt notwithſtanding the defeazance, and the truſtees would have been admitted as creditors, though the terms of the bond itſelf be otherwiſe.

As to *Wincheſter*'s caſe, *where the father of the wife has given a bond to the huſband to pay him the principal ſum of* 1000l. *after the death of himſelf and his wife, and intereſt at* 4 per cent. *by half yearly payments in the mean time.* Upon what terms ſhall the party be relieved againſt

the penalty? Why upon paying what is in conſcience due out of the eſtate.

Here was clearly a breach of the condition of this bond before the bankruptcy, for the half year's intereſt was become due at *Chriſtmas*, but not paid till the 10th of *January*, and therefore not being paid at the day, the penalty was forfeited at law.

It has been ſaid, it turns upon the act for the amendment of the law the 4th and 5th of *Q. Anne*, *cap.* 16. *ſec.* 12. "That when an "action of debt is brought upon any bond, which hath a condition or "defeazance to make void the ſame upon payment of a leſſer ſum, "*at a day or place certain*, if the obligor, his heirs, executors, or "adminiſtrators, have before the action brought paid the principal "and intereſt due, though ſuch payment was not made ſtrictly ac- "cording to the condition or defeazance, yet it may be pleaded in "bar, and ſhall be as effectual as if the money had been paid at "the day and place according to the condition, and had been ſo "pleaded."

Before this act of parliament, the bond was forfeited if not paid at the day. *At a day or place certain*, are material words: This is a new defence, and a new plea given by the act of parliament; and therefore the common way of pleading is, that all intereſt was paid before action brought.

But this is not a bond with a defeazance for the payment of a leſſer ſum at a day certain, for here the principal is to be paid at an uncertain time; for it is to be paid within a twelve-month after the death of the ſurvivor of father and mother. It is not therefore a bond within the deſcription of the ſtatute, nor did the act of parliament intend to comprehend bonds of this nature.

A bond payable at inſtallments, the obligee upon breach of payment at the firſt inſtallment, gets judgment on the whole penalty; on payment of the money due and coſts, even a court of law will relieve the obligor.

For ſuppoſe a bond payable at inſtallments, the obligee gets judgment on the whole penalty, upon a breach of payment at the firſt inſtallment; why, even a court of law would in ſuch caſe act equitably, for upon the obligor's applying to the court there, and offering to pay the money due at the inſtallment, and agreeing to let the judgment ſtand as a ſecurity for the reſt, they will relieve the party, on payment of the money then due and coſts.

If this caſe is not within the act of parliament, then it comes within the conſtruction of the other two heads of caſes, and Mr. *Wincheſter* ought to be admitted a creditor.

On the 4th ſet of caſes, which is *Groome*'s, I am of opinion (though I am ſorry I muſt go on ſuch niceties) that he cannot be admitted a creditor; in all the other caſes here was a remedy at law before ſuch time as the act of bankruptcy was committed, or commiſſion taken out, but here there was not.

The caſe *ex parte Caſwell, &c.* was an *obiter* opinion of Lord King's only, and not the caſe in judgment.

As to the caſe that has been mentioned, *ex parte Caſwell, &c.* 'tis barely an opinion of Lord *King*, and not the caſe in judgment; but he did *obiter* declare his opinion only. My Lord *Talbot* afterwards doubted of Lord *King*'s opinion; and in a caſe before me ſince, I have differed from him intirely, and ſee no occaſion to alter my opinion.

The queſtion turns on the new act of parliament of the 5th of *George* the ſecond, *cap.* 30. *ſec.* 7. I think that the privilege of creditors to come in, and bankrupts to be diſcharged from debts, is coextenſive and commenſurate, and very equitable: for it would otherwiſe make an inequality among the creditors, for a creditor, whoſe debt was due before the taking out of the commiſſion, ſhall perhaps have no more than 5*s.* in the pound, and this creditor, whoſe debt was not due till a ſecond diſtribution, ſhall come in for as much as the other creditor, and likewiſe have a remedy open to him for the reſt againſt the bankrupt.

For the words of the 5th of *George* the ſecond are, And every ſuch bankrupt ſhall be diſcharged from ſuch debts *as ſhall be due and owing* at the time of the bankruptcy; ſo that this would be a glaring injuſtice againſt the creditors at the time of the commiſſion taken out.

Commiſſioners very rightly declare a man a bankrupt only before iſſuing the commiſſion, without ſpecifying any preciſe time.

The clauſe relating to mutual credit, *ſec.* 28. ſhews plainly the act intended to confine it to creditors at the time of the commiſſion, "That where it ſhall appear to the commiſſioners that there hath "been mutual credit given by the bankrupt and any other perſon, "or mutual debts between the bankrupt and any other perſon, *at any "time before ſuch perſon became bankrupt*, the commiſſioners, *&c.* "ſhall ſtate the account between them, *&c.*"

I will put this caſe: Suppoſe a debt due from Mr. *Groome* to the bankrupt before his bankruptcy, and that the bankrupt owed him a debt on bond upon a contingency that took place after the bankruptcy, and before the final dividend, would it not be a great hardſhip upon the reſt that ſuch creditor ſhould be at liberty to ſet off?

A. a debtor to a bankrupt before his bankruptcy, and creditor to him upon a contingency, that takes place after the bankruptcy, ſhall not be at liberty to ſet off under the clauſe relating to mutual credit.

To go a ſtep further. By the ſtatute of the 7th of *George* the firſt, *cap.* 31. it is enacted as follows, that "All and every perſon or "perſons, who now are or ſhall become bankrupts, ſhall be diſ- "charged of and from all and every ſuch bond, note, *&c.* and "ſhall have the benefit of the ſtatutes now in force againſt bank- "rupts in like manner to all intents and purpoſes, as if ſuch ſum of "money had been due and payable before the time of his becoming "bankrupt."

In *Tully v. Sparks*, *Lord Raymond*, 2*d vol.* 1546, there were two contingencies, and as both had not happened at the time of the act of bankruptcy, it being uncertain whether the bond would ever become due or not, it was impoſſible to make ſuch abatement of 5 *per cent.* as the act directs, and therefore the court of King's Bench were of opinion the bond was not within the act of the 7th of *George* the firſt.

There is no ſuch thing as drawing a line between the contingency not happening before the bankruptcy, and yet happening before the time of diſtribution: This would not only be a hardſhip on the bankrupt, but on the reſt of the creditors whoſe debts were actually due, but would have given the contingent creditor a ſuperior privilege, by leaving it open to him to recover the remainder of the debt againſt the bankrupt.

The

The caſe of *Groome* may have hardſhips, and I am ſorry for it; but as the law now ſtands, I cannot determine otherwiſe. I hope however, as I ſaid before, ſome gentleman will think of a clauſe by way of amendment to this laſt bankrupt act, which may remedy and ſettle this for the future.

The petition of *Groome* was diſmiſſed.

And with regard to Mr. *Wincheſter*, his Lordſhip ordered, *that the petitioner be at liberty to prove his debt of* 1000 l. *and that he be admitted a creditor under the commiſſion for what he ſhall ſo prove, and be paid out of the bankrupt's eſtate a dividend in reſpect thereof, rateably with the other creditors of the bankrupt.*

December the 23d 1751.

Ex parte Elizabeth Michell.

Caſe 66.

B. M. in purſuance of articles before marriage with the petitioner, executed a bond to *T. M.* and *W. R.* truſtees under the articles, in the penalty of 1000 *l.* conditioned to be void if the heirs, &c. of *B. M.* ſhould pay to *T. M.* and *W. R.* 500 *l.* within three months next after the death of *B. M.* for the uſe of the petitioner; or in caſe ſhe ſhould not ſurvive, to the uſe of her child or children, if any.

BENJAMIN MICHELL, in purſuance of articles before his marriage with petitioner, did on the 27th of *January* in the 12th year of the late King, execute a bond to *Thomas Michell* and *William Rous*, the truſtees under the articles in the penalty of 1000 *l.* conditioned to be void if the heirs, *&c.* of *Benjamin Michell* ſhould pay to *Thomas Michell* and *William Rous* 500 *l.* within three months next after the death of *Benjamin Michell* for the uſe of the petitioner, in caſe ſhe ſhould outlive her huſband, or in caſe ſhe ſhould not ſurvive him, to the uſe of her child or children, if any.

A commiſſion of bankruptcy iſſues againſt *B. M.* who dies on the firſt of *April* 1749: on the 28th of the ſame month a dividend is made of 9 *s.* in the pound.

A commiſſion of bankruptcy iſſued againſt *Benjamin Michell* who lived ſome time after, and died on the firſt of *April* 1749. On the 28th of *April* 1749, a dividend of nine ſhillings in the pound was directed to be made of *Michell*'s eſtate.

The commiſſioners would not admit the petitioner a creditor without an order of the court.

The petitioner prays to be paid a proportionable dividend.

She petitioned to be admitted a creditor, and to be paid out of the money remaining in aſſignees hands, a dividend, in proportion to what hath been already paid to other creditors.

Lord Chancellor mentioned the caſe *ex parte Caſwell, &c.* 2 *P. Wms.* 497. *a.* 499. where Lord Chancellor *King* upon ſuch a contingent debt directed, as huſband died before a dividend, the wife to be admitted to prove it; and the caſe *ex parte Greenaway* before himſelf, where on his ordering it to ſtand over to give aſſignees and creditors an opportunity of compromiſing it with the wife, they admitted her a creditor for 150 *l.* half her demand.

Vide ante.

The

The aſſignees being ſerved here with notice, and no counſel attending for them, his Lordſhip directed he ſhould be admitted a creditor, and to a dividend of nine ſhillings, *not being oppoſed.*

Aſſignees being ſerved with notice, and no counſel attending for them, directed ſhe ſhould be admitted a creditor, and receive a dividend of 9*s.* in the pound, *not being oppoſed.*

His Lordſhip declared, that if there had been a judgment, he ſhould have thought this would have made it an immediate debt, and ſhe would have been intitled to come in as a claimant before the death of the huſband, and aſſignees muſt then have retained ſufficient in their hands on a dividend day, to anſwer a proportionable dividend to the petitioner when the event happened, in the ſame manner as in the caſe of obligees *in reſpondentia*, or bottomry bond, or perſons on policies of inſurance, under an act of parliament of the 19th of *George* the ſecond, where it cannot be known whether a loſs has happened or not.

If there had been a judgment, it would have made it an immediate debt, and ſhe would have been intitled to have come in as a claimant before her huſband's death, and the aſſignees muſt then have retained ſufficient on a dividend day, to anſwer a proportionable dividend to the petitioner when the event happened.

January the 22d 1752.

Lord Chancellor had ſome doubt after he had pronounced the order laſt day of petitions, and therefore would not ſuffer the ſecretary to draw up the order, though not defended.

Upon a ſearch at the bankrupt office, there was found the caſe *ex parte Greenaway*, and the four caſes which came on together upon contingencies, by the order of Lord *Hardwicke*, who ſaid that Lord *King*'s was an *obiter* opinion as to a wife's being admitted to a dividend; that Lord *Talbot* doubted of it, and that he himſelf alſo doubted of it; and in a caſe *ex parte Groome*, in *December* 1741, was of opinion the creditor could not be admitted, and founded his opinion on *Tully verſ. Sparks* in the court of King's Bench; and therefore in this caſe of *Michell* he declared that he was very unwilling to make a precedent, though this appeared to be a very hard caſe. The only difference between *Groome* and this, is that *Groome*'s caſe was upon contract, but this upon bond; and unleſs you can make it *debitum in præſenti ſolvendum in futuro*, which will be difficult to do, the petitioner will not be intitled to prove it. In thoſe caſes where he had let in ſuch creditors, a judgment was given at the time, which is an immediate debt at law, and ſuſpended only in equity upon the defeazance. His Lordſhip ordered it to ſtand over till next day of petitions, and in the mean time recommended it to the aſſignees to compromiſe with the petitioner.

Lord Chancellor *King*'s being an *obiter* opinion as to a wife's being admitted to a dividend, and Lord *Talbot* doubting of it, and Lord *Hardwicke* in a caſe *ex parte Groome, December* 1741, refuſing to admit ſuch a perſon creditor, his Lordſhip would not ſuffer the ſecretary to draw up the order pronounced at a former day of petitions, tho' not defended, but recommended it to the aſſignees to compromiſe it with the petitioner.

(K) Rule as to drawers and indorsors of bills of exchange.

December the 23d 1743.

Ex parte Walton, and others; in the matter of *William Winſmore*, a bankrupt.

Caſe 67.

W. draws bills of exchange on *H.* who had no effects of *W.* in his hands, they are tranſmitted to *R.* and Co. and indorſed over by them to ſeveral perſons; the aſſignees of *R.* and Co. muſt be admitted as creditors under *W.*'s commiſſion for ſo much as they have paid to the indorſees of *W.*'s bills of exchange, under *R.* and Co.'s commiſſion.

Aaron Richardſon and *Edward Stephens*, on the 25th of *June* 1740. entered into co-partnerſhip, which was to be carried on in *London*, in the names of *Richardſon and Company*; and it was alſo agreed, that *Stephens* ſhould be at liberty to carry on a ſeparate trade at *Briſtol*, on his own account, and for his own benefit.

On the 16th of *March* 1740, a joint commiſſion of bankruptcy iſſued againſt *Aaron Richardſon* and *Edward Stephens*, and the petitioners were choſen aſſignees.

In *December* and *January* 1740. *William Winſmore* drew ſeveral bills of exchange on *Richardſon* and company, payable to *Harper* or order, for different ſums, amounting to 2500*l.* which bills were accepted by *Richardſon* and company for *Winſmore*'s ſole account, on his undertaking to ſend them money or effects, to pay and ſatisfy theſe bills before they fell due; but he did not keep his promiſe.

Winſmore, in *January* and *February* 1740. drew ſeveral other bills of exchange on *Harris*, (who was his agent in *London*) ſome of which were payable to *Harper*, and others to *Edward Stephens* or order, for different ſums, amounting to 2060*l.* which laſt bills were remitted to *Richardſon* and company by *Stephens*, on his own private account, in order to enable them to diſcharge bills of exchange, which *Stephens* had, on his ſeparate account, in order to ſerve *Winſmore* drawn on *Richardſon* and company, and *Richardſon* and company negotiated the ſaid bills as *Stephens* directed; and ſeveral of them, to the amount of 1565*l.* being drawn by *Winſmore* on *Harris*, *Richardſon* and company indorſed the ſame, not doubting but *Winſmore* or *Harris* would have taken care the ſame were punctually paid when they fell due, but inſtead thereof, *Winſmore* ſtopped payment, and never remitted *Richardſon* and company any money or effects to pay the ſaid bills, or any of them.

On the 29th of *April* 1742. before any dividend was made of *Winſmore*'s eſtate, the petitioners, as aſſignees of *Richardſon* and company, exhibited their claim under his commiſſion for 2500*l.* the amount of the bills accepted, and for 475*l.* part of the bills which had been indorſed by them the ſaid *Richardſon* and company for account of *Winſmore*, which were all the bills that had been proved under the commiſſion againſt *Richardſon* and company; and the commiſſioners admitted the claim under the commiſſion againſt *Winſmore*.

A dividend of two ſhillings and nine-pence in the pound was afterwards ordered to be made to *Winſmore*'s creditors who had proved their

their debts, and alſo a reſervation to anſwer a like dividend on the petitioner's claim, when they ſhould make the ſame.

On the 29th day of *July* 1742. a dividend of five ſhillings in the pound, was made amongſt the creditors of *Richardſon* and company, and the petitioners had paid the dividend of five ſhillings to great part of the bearers of the ſaid bills, and were ready to pay the ſame to the reſt, after a deduction out of their debts to the amount of the two ſhillings and nine pence in the pound, divided under *Winſmore*'s commiſſion. The dividend of five ſhillings in the pound, in the bankruptcy of *Richardſon* and company, on the ſaid bills, amounted to 744*l.* and therefore the petitioners the aſſignees of that commiſſion pray, that they may be admitted creditors under the commiſſion againſt *Winſmore*, for the ſum of 744*l.* the amount of the dividend of five ſhillings in the pound, and for all ſuch future ſums as ſhould be paid out of the eſtate of *Richardſon* and company, in reſpect of the ſaid bills, and likewiſe for all ſuch other bills drawn by *Winſmore*, or by his order and direction, and accepted and indorſed by *Richardſon* and company, without conſideration or value, which ſhould hereafter be proved under the commiſſion againſt them, and that the aſſignees of *Winſmore*'s eſtate might be ordered to pay the petitioners the ſaid dividend of two ſhillings and nine pence in the pound, and all future dividends rateably with the other creditors, for the ſums before mentioned for the benefit of the petitioners, and the reſt of the creditors of *Richardſon* and company.

Lord Chancellor: The queſtion is, Whether the aſſignees of *Richardſon* and company, the indorſors of theſe bills of exchange, are intitled to come in under *Winſmore*'s commiſſion, for ſo much as the indorſees of *Richardſon* and company have received under the commiſſion againſt *Richardſon* and company.

Winſmore ſwears that in *January* and *February* 1740. he drew ſeveral bills of exchange on *Harris* his agent in *London*, amounting to 2060*l.* or thereabouts, which bills were tranſmitted by *Stephens* on his own private account to *Richardſon* and company, and indorſed over by them to ſeveral perſons.

The doubt with me was, whether *Harris* had any effects of *Winſmore*'s in his hands, for if he had, there would have been no pretence that the indorſors ſhould come in againſt *Winſmore*'s eſtate.

In bills of exchange, there is a double contract, the firſt between the principal debtor and creditor, and alſo an implied contract, that the principal debtor will indemnify the ſurety, ſo that if the creditor the indorſee comes upon the ſurety the indorſor, the indorſor or his aſſignees may come in againſt the original or principal debtor.

Thus it ſtands between principal and ſurety, and is likewiſe the caſe, where an indorſor is barely a ſurety, and no conſideration is paid by the original drawer.

A. draws a bill on *B.* who has effects of *A.*'s in his hands, afterwards it is negotiated and indorſed over; this will not make the indorſors only in the nature of ſureties to *A.* but every indorſor will be conſidered a new original drawer.

But put another caſe; *A.* draws a bill upon *B.* who has effects of *A.*'s in his hands, afterwards his bill is negotiated and indorſed over; there is no ſuretyſhip in this caſe, for *A.* did not draw it upon *B.* as a ſurety, but as having effects of *A.* in his hands, by which he was obliged to anſwer the draught of *A.* and therefore the indorſing it over to others will not make the indorſors only in the nature of ſureties to *A.* but every indorſor will be conſidered as a new original drawer.

But here *Harris* appears to have had no effects of *Winſmore*'s in his hands, and therefore accepted it merely to give credit to *Winſmore as a ſurety*, and conſequently the aſſignees of *Richardſon* and company muſt be admitted as creditors under *Winſmore*'s commiſſion for ſo much as they have paid under *Richardſon*'s commiſſion to the indorſees of *Winſmore*'s bills of exchange.

His Lordſhip therefore ordered, that the petitioners the aſſignees of *Richardſon* and company be admitted to come in as creditors under *Winſmore*'s commiſſion for 744 *l.* and that they be paid a dividend out of his eſtate in reſpect thereof rateably with the other creditors, and that in all future dividends the petitioners be paid in reſpect of the ſaid ſum of 744 *l.* rateably in equal proportion with the other creditors of *Winſmore* ſeeking relief under that commiſſion, in truſt for themſelves and the ſeveral other joint creditors of *Richardſon* and company.

November the 4th 1743.

Ex parte Byas.

Caſe 68. *D.* being indebted to *M. K.* in 71 *l.* gave him the following note; *I promiſe to pay to* M. K. *the ſum of* 71 l. *witneſs my hand*, Aug. 28th 1734. *E. D.* *M. K.* being indebted to petitioner in 92 *l.* 19 *s.* 0 *d.* delivers *E. D.*'s note to him that he might receive the money in part of his debt. and took the following receipt, *Received* 20 Dec. 1734. *a bill for* 71 l. *which when paid will be on account per* Thomas Byas. *M. K.* becomes a bankrupt, but not having indorſed or aſſigned the note to petitioner, the aſſignees apply to *D.*'s ſolicitor and receive of him the 71 *l.*

MRS. *Devereux* being indebted to *Martin Kankell* in 71 *l.* for goods ſold on the 28th of *Auguſt* 1734. gave him the following note; *I promiſe to pay to* Martin Kankell *at queen* Caroline's *head in* Taviſtock ſtreet Covent Garden, *the ſum of ſeventy-one pounds, witneſs my hand*, Auguſt 28th 1734. *E. Devereux.*

Martin Kankell being indebted to the petitioner in 92 *l.* 19 *s.* delivered to him Mrs. *Devereux*'s note, that the petitioner might receive the money due thereon in part of his debt, and took of the petitioner a receipt for the ſame in the words following; *Received* 20th Dec. 1734. *a bill for* 71 l. *which when paid will be on account per* Thomas Byas.

The aſſignees of *K.*'s eſtate ought to be conſidered as truſtees for the petitioner with reſpect to the ſum of 71 *l.* and ordered to pay him the money accordingly.

The 19th of *March* 1734. a commiſſion of bankruptcy iſſued againſt *Martin Kankell*, Mrs. *Devereux* died in 1735. and by her will charged all her eſtate real and perſonal with the payment of her debts.

Kankell not having indorſed or aſſigned the ſaid note to the petitioner, the aſſignees applied to Mrs. *Deveruex*'s ſolicitor, and received the 71 *l.* of him on giving ſecurity to indemnify him againſt the petitioner's claim, who had the note in his cuſtody and poſſeſſion.

The petitioner proved his whole debt of 92 *l.* 19 *s.* under *Kankell*'s commiſſion, but at the ſame time inſiſted on having the benefit of the note, and that the aſſignees ought not to have received the 71 *l.* and that the ſame having been ſo received by them in prejudice to the petitioner, ought to be paid over to him, and therefore prays that the aſſignees of *Kankell*'s eſtate may out of the money now in their hands, pay to the petitioner the 71 *l.* which they received for the money due on Mrs. *Devereux*'s note.

Lord Chancellor: I am of opinion that the aſſignees of *Kankell*'s eſtate under the commiſſion, ought to be conſidered as truſtees for the petitioner, with reſpect to the ſum of 71 *l.* which they received on account of the note given by Mrs. *Devereux* in the petition, and do order the aſſignees to pay forthwith the 71 *l.* to the petitioner according to the prayer of his petition.

October the 26th 1745.

Ex parte Kirk.

Vide under the diviſion, Rule as to Creditors.

June the 4th 1746.

Ex parte Thompſon.

Caſe 69.

A. gives a note payable to *B.* two months from the date for 100 *l. B.* indorſes it over to *C.* but allows a diſcount of 9 *per cent.* he proves it under a commiſſion againſt *A.* for the whole ſum, but commiſſioners finding out this fact afterwards, ſtopt his dividend.

A. Gives a note of his hand payable to *B.* two months from the date for 100 *l.* who gave no conſideration. *B.* indorſes it over to the petitioner, but allows a diſcount of a guinea and a half, being at the rate of 9 *l. per cent.* when the note became due, the petitioner takes a joint bond from the drawer and indorſor for the 100 *l.* though he paid only 98 *l.* 8 *s.* 6 *d.* the commiſſioners had admitted him as a creditor under a commiſſion againſt the drawer, but finding out this fact afterwards, they ordered his dividend to be ſtopped.

He now petitions *Lord Chancellor* to be admitted to his ſhare of the dividend.

Lord Chancellor rejected his petition and ordered an iſſue to try whether the bond was uſurious.

Lord Chancellor would not direct him to be admitted to the dividend, but ordered an iſſue to try whether the bond was uſurious before Lord Chief Juſtice *Willes*.

November the 4th 1747.

Ex parte Thomas.

Caſe 70. A note given before an act of bankruptcy, tho' indorſed after, is a debt upon which the indorſee may take out a commiſſion of bankruptcy againſt the drawer.

THE bankrupt petitioned to ſuperſede the commiſſion againſt himſelf, becauſe the petitioning creditor's debt aroſe only from a note that had been indorſed to him after the petitioner had committed an act of bankruptcy; but as it appeared, that the note itſelf was given before any act of bankruptcy, though indorſed after, *Lord Chancellor* thought it a debt upon which the petitioning creditor might take out the commiſſion.

November the 25th 1749.

Billon v. *Hyde* and *Michell.*

Caſe 71. The plaintiff and one *Michell* had various tranſactions together, principally negotiating bills of exchange from 1742. to the 8th of *June* 1743. and on the 18th of *April* 1743. *Michell* committed a private act of bankruptcy; the ſums paid by *Michell* for theſe tranſactions to the plaintiff, amounted to 3000 *l.*

LORD Chancellor: This bill is to have an allowance for 712 *l.* out of a ſum of 3000 *l.* which has been recovered in an action at law, by the defendants the aſſignees of *Michell* the bankrupt againſt the plaintiff.

The caſe is, That Mr. *Michell*, who was a merchant, had long dealings with the plaintiff before the 18th *April* 1743. when he committed an act of bankruptcy, which the plaintiff inſiſted was a private act of bankruptcy, and that for ſome time after Mr. *Michell* appeared in publick in all places where merchants reſort, without ſuſpicion of his being a bankrupt.

The dealings between Mr. *Michell* and the plaintiff, as it appears in the cauſe, commenced in 1742. and continued after the 18th of *April* 1743. up to the 8th of *June* following, and the commiſſion of bankruptcy was dated the 30th of *November* 1743.

The tranſactions between them from the 18th of *April* 1743. to the 8th of *June* following were of various ſorts, but appear to be fair ones, and were principally in negotiating bills of exchange upon which the plaintiff advanced to Mr. *Michell* money to a conſiderable amount.

Several ſums were alſo paid by the plaintiff to Mr. *Michell* during this ſpace of time; ſome paid to Mr. *Michell*'s own hand, ſome to his order, ſome by way of loan, and other ſums by way of money laid out for his uſe, for præmiums on inſurances for his benefit, and for duties on goods imported by him, which ſums amounted to 712 *l.*

It appeared that the ſums of money paid at different times by Mr. *Michell* to the plaintiff for and on account of theſe ſeveral tranſactions, amounted in the whole to 3000 *l.*

The

The aſſignees under the commiſſion finding theſe ſums were paid by Mr. *Michell* after the act of bankruptcy committed by him, they brought their action againſt the plaintiff for ſuch money had and received to their uſe, and recovered a verdict againſt him for that money.

The aſſignees bring an action againſt *Billon* for ſo much had and received to their uſe, and recovered a verdict againſt him for 3000 *l.*

Mr. *Billon*, the plaintiff here, but defendant at law, inſiſted on the trial to have the ſum of 712 *l.* allowed him as paid to and for the bankrupt, and it not being allowed, is the reaſon of his bringing this bill.

Billon inſiſted on the trial to have 712 *l.* allowed him as paid to and for the bankrupt, but being refuſed, brings his preſent bill for it.

There are two conſiderations.

Firſt, Whether the plaintiff is intitled to this allowance?

Secondly, If he is intitled, Whether he has purſued a proper remedy, or whether this court is concluded by the verdict?

And theſe queſtions muſt depend upon the nature of the demand of the aſſignee againſt him, and the nature of the remedy he has purſued.

The plaintiff intitled to have this allowance, and the verdict not concluſive upon him, becauſe it is matter of contract, and of account, and therefore a proper ſubject for the juriſdiction of this court.

As to the nature of the demand of the aſſignees, which is founded upon *the relation* of the act of bankruptcy, it is as hard a caſe as any in the law, as this *relation* may go a great way back, and overreach all tranſactions without regard to their being fair or fraudulent.

It holds in ſales of goods, and payment of money, and it overturns not only contracts, but acts upon record, and legal acts, as judgments and executions executed; where theſe acts happen after the act of bankruptcy committed.

It is ſaid fictions of law ſhall not enure to the prejudice of any body, but are invented to ſupport rights, and to be ſure that is the rule; but this caſe is taken out of another general rule, which has been adhered to for the ſake of publick utility; *viz.* that it is better a private miſchief ſhould enſue, than a general inconvenience. *Lex citius vult tolerare privatum damnum, quam publicum malum.* 1 Inſt. 152. b.

But ſince trade has increaſed, the miſchiefs and inconveniencies have multiplied, and therefore the late act of the 19 *Geo.* 2. was made; and this caſe is within the recital of that act, and one of the principal caſes provided for by it, is the negotiation of bills of exchange.

And though the plaintiff may not bring himſelf ſtrictly within the act, yet he is within the meaning of it, and the court will go as far as it can in ſupport of it.

Secondly, As to the remedy purſued by the plaintiff.

It is inſiſted by the aſſignees, he ought not to have a remedy here againſt them, for that they recovered at law by their own ſtrength; and, as he failed there, he ought not to be aſſiſted here: But it does not appear in what ſhape the ſet-off was offered at the trial, and I am apt to believe it was only offered in mitigation of damages.

I think from the nature of the demand againſt him, he is intitled to have this allowance in ſome ſhape or other.

It appears new to me, to permit aſſignees to maintain an action of *indebitatus aſſumpſit* for money paid by a bankrupt to another perſon after a ſecret act of bankruptcy: I always thought aſſignees were obliged to bring an action of *tort*, either trover, or treſpaſs, and the Lord Chief Juſtice *Holt*, *Parker*, and *Raymond* were of that opinion.

I remember Lord Chief Juſtice *Parker* declared in a cauſe at *Guildhall*, the 4 *Geo.* 1. that he knew no caſe where a man might not maintain an *aſſumpſit* for money wrongfully taken from him, except two, *viz.* for money won at play, and for money paid by a bankrupt *bona fide* to a creditor after an act of bankruptcy committed. And in caſes where trover has been brought by aſſignees under a commiſſion of bankruptcy, the courts have lean'd againſt a ſtrict conſtruction of the bankrupt acts, to the prejudice of a fair creditor. *Vide* 3 *Lev.* 58, 59, *Rider* v. *Fowle* on a ſpecial verdict.

To raiſe an *aſſumpſit*, the aſſignees muſt maintain either in fact or by *relation* a contract, and here the contract upon which the *aſſumpſit* is maintained, is by the interpoſition of the bankrupt; and therefore I think he ought to be conſidered as the factor of the aſſignees; and if they will take this method, and affirm the contract done by the bankrupt, they muſt take him as their factor in all acts done fairly and without deceit. *Wilſon* v. *Boulter*, *Raym.*

Upon the authority of that caſe, I think this is a favourable action for the plaintiff to have ſuch allowance, becauſe it makes the aſſignees affirm the contract of the bankrupt, and am of opinion, that the verdict at law, which has not allowed it, is not concluſive upon the plaintiff, becauſe it is a matter of contract and of account, and conſequently a proper ſubject for the juriſdiction of this court, and the plaintiff ought to be allowed, by the interpoſition of this court, ſo much as in juſtice he ought to have; and I recommend it to the aſſignees to allow the ſum of 712 *l.* to the plaintiff.

February the 24th 1752.

Richardſon and *Gibbons*, aſſignees of *Alexander Wilſon* a bankrupt, —— —— —— } Plaintiffs.

Bradſhaw, *Taylor*, and *Wilſon*, —— —— Defendants.

Caſe 72.

Drawing and redrawing bills of exchange for large ſums, and a continuation of it is a trafficking in exchange, and a trading which will make a man liable to a commiſſion of bankrupt, though a loſs enſues to the bankrupt by ſo doing.

A Trial in the court of King's Bench before a ſpecial jury for the county of *Middleſex*, upon the following iſſues out of the court of Chancery, directed by lord *Hardwicke*.

1*ſt*, If *Wilſon* was a trader or a banker within the meaning of the acts of parliament relating to bankrupts.

2*dly*, If he had committed any act of bankruptcy within the ſaid ſtatutes.

With regard to the firſt it was proved, that *Wilſon* who was agent to ſeveral regiments from the year 1745, to 1751, drew upon Capt. *Johnſon*, who was likewiſe an agent in *Dublin*, by bills to the amount of 281,000 *l.* and upwards, and that *Johnſon* redrew to the

amount of 290,000 *l.* and upwards on *Wilſon*, but there was no commiſſion money allowed on either ſide.

It was proved in the cauſe by Mr. *Porter*, Mr. *Linch*, Mr. *Mathias*, Mr. *Teſſier*, and others, conſiderable merchants in the city of *London*, that drawing and redrawing bills of exchange for ſuch large ſums, and a continuation of it, is a trafficking in exchange, and a trading, which in their apprehenſion would make a man liable to a commiſſion of bankruptcy, though no commiſſion money had been allowed on either ſide, and notwithſtanding a loſs enſued by theſe tranſactions to the bankrupt.

The evidence of Mr. *Wilſon*'s being a banker, was, that he kept a clerk who was in the nature of a caſhier, to receive and pay money, and that for ſeveral years together, officers and their widows, and other perſons, not belonging to regiments, paid money into *Wilſon*'s hands, and the caſhier gave accountable notes for the ſame, and theſe perſons drew from time to time upon *Wilſon* for ſuch ſums, payable either to bearer or order, as they thought proper, but the books were not kept in the ſame manner as bankers do, and it appeared in proof, that if *Wilſon* received any large ſum, he paid it into the ſhop of his own bankers, Meſſrs. *Drummonds*, and from the year 1740. to 1751. paid 30,000 *l.* a month into the ſaid ſhop, and that he only had in caſh by him about 3 or 400 *l.* to anſwer any ſmall draughts; but that for large ones he gave the perſons draughts upon Meſſrs. *Drummonds*.

The jury before they delivered their verdict, aſked Lord Chief Juſtice *Lee*, Whether ſuch drawing and redrawing as aforeſaid, was in point of law a trading?

Lord Chief Juſtice *Lee* ſaid, it was not ſo much a point of law, as a fact to be determined by them on the uſage and opinion of merchants, and that if they paid any credit to the merchants who had been examined, and were men of character, this was a trading; accordingly a verdict was given for the plaintiffs. The jury on the firſt iſſue finding *Wilſon* a trader generally within the bankrupt acts: And on the ſecond iſſue finding him a bankrupt within the ſaid acts.

December the 21ſt 1752.

Ex parte Marſhall and others.

Caſe 73. *G.* drew a great number of bills payable to *V.* and *A.* upon *H.* who had no effects of *G.*'s in his hands, but accepted them for the honour of the drawer. *G.* becomes a bankrupt, and *H.* by means of the great ſums he paid on account of ſuch acceptance, becomes bankrupt likewiſe.

The bill-holders prove under both commiſſions, and receive dividends, but not ſufficient to pay 20 *s.* in the pound.

The aſſignees of *H.* pray to ſtand in the place of the bill-holders *pro tanto*, as they had received under *H.*'s commiſſion againſt the eſtate of *Garway*.

MR. *Garway* of *Worceſter* drew a great number of bills, payable to *Vere* and *Aſgill*, upon *Hatton*, who had no effects of *Gar-*

way's in his hands, but however accepted the bills for the honour of the drawer.

Garway becomes a bankrupt, and *Hatton* by means of the great ſums he paid on account of ſuch acceptance as before mentioned, becomes bankrupt likewiſe.

The bill-holders prove under both commiſſions, and receive dividends, but not ſufficient to pay 20 *s.* in the pound: And in *April* laſt upon a former day of petitions, *Marſhall &c.* the aſſignees of *Hatton* preferred a petition to *Lord Chancellor*, and prayed to ſtand in the place of the bill-holders *pro tanto*, as they had received under *Hatton*'s commiſſion againſt the eſtate of *Garway*; *Hatton*, as was inſiſted by the petitioner's counſel, being to be conſidered as a ſurety for the debt, and *Garway* a principal; and *Lord Chancellor* at the former hearing made an order accordingly; but it being ſtrongly objected by the counſel for *Garway*'s creditors, that this would be charging *Garway*'s eſtate doubly, directed the petition to ſtand over; and on its coming on again this day, his Lordſhip ordered, that the petitioners as aſſignees of *Hatton*, ſhould ſtand in the place of the bill-holders *pro tanto*, as *Hatton*'s eſtate had paid on account of his acceptance of the ſaid bills, but ſhould not be intitled to any dividend from *Garway*'s eſtate, till the bill-holders had received a full ſatisfaction for their debts; and if the ſurplus of *Garway*'s eſtate, after the bill-holders were fully ſatisfied, ſhould not be ſufficient to anſwer what *Hatton* had paid as the acceptor of *Garway*'s bills, then his Lordſhip declared that nothing in this order ſhould prejudice any right the petitioners might have by action againſt the perſon of *Garway* for the reſidue of their demand, *notwithſtanding* Garway *has had his certificate*; for his Lordſhip ſaid, it ſeemed to him, as if *Hatton*'s demand did not properly ariſe till after the iſſuing of the commiſſion againſt *Garway*; becauſe, though there is an implied contract between drawer and acceptor, yet there is no breach on the part of drawer till after his bankruptcy, and conſequently *Hatton* is not a creditor under the commiſſion, becauſe his debt is ſubſequent to it; nor does he fall under the deſcription of perſons in the 7 *Geo.* 1. who may ſue out commiſſions, though their debts are payable at a future day. There *debitum in præſenti ſolvendum in futuro*, but here it was *contingent* whether it would ever be a debt, as *Garway* might not have failed.

His Lordſhip ordered they ſhould be admitted *pro tanto*, as *H.*'s eſtate had paid on account of his acceptance of the ſaid bills, but not to receive any dividend from *G.*'s eſtate, till the *bill-holders* had received a full ſatisfaction for their debts.

The counſel for the petitioners mentioned the caſe *ex parte Walton*, Dec. 23d 1743. in the matter of *Winſmore*'s bankruptcy, where as he ſtated it, *Lord Chancellor* made an order, that the aſſignees under the commiſſion againſt the acceptor, ſhould come under the commiſſion againſt *Winſmore* the drawer *pro tanto*, as the acceptor had paid on account of ſuch bills, and to receive a dividend rateably with the reſt of the creditors.

Lord Chancellor ſaid, that the order alluded to in *Winſmore*'s bankruptcy was not as ſtated, nor was it applicable to this caſe, but that ſuppoſing the two caſes to be ſomething ſimilar, he thought the directions

rections he had now given under the preſent petition, were the juſtice of the caſe; and therefore had ordered accordingly.

June the 21ſt 1753.

Ex parte Marſhall and others: In the matter of *Hatton* a bankrupt.

Caſe 74. *Watkin* of *Briſtol* had large dealings with *G.* of *Worceſter*, who had *Hatton* now a bankrupt, for his correſpondent in *London*. It was agreed between *G.* and *Hatton* that the latter ſhould anſwer all draughts that *Watkin* ſhould draw upon him on account of *G.* *Watkin* draws accordingly upon *Hatton* for 4000 *l.* who accepts it, *though he had no effects of G.'s in his hands*; the payee on the acceptor's non payment, applies to *the drawer* who pays it. *Watkins* applies to be admitted a creditor upon the commiſſion againſt *Hatton*.

The agreement between *Garway* and *Hatton* puts the latter to all intents in the ſame ſituation as *G.* himſelf, and therefore *though he had no effects in his hands at the time*, he has by his agreement made himſelf liable, and *Watkin* has a right to come in as a creditor under the commiſſion againſt *Hatton*.

WATKIN a merchant at *Briſtol* had large dealings with Mr. alderman *Garway* of *Worceſter*, who had *Hatton* now a bankrupt, for his correſpondent in *London*, and it was agreed between *Garway* and *Hatton*, that the latter ſhould anſwer all draughts that *Watkin* ſhould draw upon him on account of *Garway*; *Watkin* draws accordingly on *Hatton* for 4000*l.* who accepts it, tho' he had no effects of *Garway*'s in his hands at the time: The payee of this draught, upon the acceptor's non-payment, applies to the drawer who pays it. *Watkin* applied to be admitted a creditor under the commiſſion againſt *Hatton*, the acceptor of the draughts, and is admitted by the commiſſioners.

The aſſignees of *Hatton* petition now againſt this admiſſion of *Watkin*, as *Hatton* had no effects of *Garway*'s in his hands.

Lord Chancellor: I will conſider it firſt as it ſtands between *Watkin* and *Hatton:* If payee receive the money comprized in the draught of *Watkin*, he may bring an action againſt *Hatton* in the name of the payee, who will be conſidered as a truſtee for the drawer, or he may bring an action in his own name againſt *Hatton*, if he had effects of *Watkin* at the time of the acceptance ſufficient to anſwer the draught; but if he had not effects, but only honoured the draught, ſuch action cannot be maintained; or if in this caſe *Hatton* had paid it, inſtead of being a debtor to *Watkin*, he would have been indebted to *Hatton pro tanto*; and ſo it was determined in the houſe of Lords, a writ of error from the court of King's Bench.

But conſider it now as it ſtands between *Garway*, *Watkin*, and *Hatton: Watkin* appears at the time he drew on *Hatton*, to have had effects in *Garway*'s hands of more value than the amount of this draught, and as there was ſuch an agreement as I have before mentioned between *Garway* and *Hatton*, the latter is to all intents and purpoſes juſt in the ſame ſituation as *Garway* himſelf; and therefore though he had no effects in his hands at the time, has by his agreement made himſelf liable.

The

The ſame rule will hold therefore under a commiſſion of bankruptcy as in an action at law, and upon theſe circumſtances, *Watkin* has a right to come in as a creditor under the commiſſion againſt *Hatton*, and therefore the petition of the aſſignees muſt be diſmiſſed.

(L) Where aſſignees will be charged with intereſt.

October the 22d 1741.

Ex parte Lane.

Vide under the diviſion, Rule as to Aſſignees.

(M) Rule as to partnerſhip.

After *Hilary* term 1736.

Beaſley v. *Beaſley.*

Vide under the diviſion, Joint and ſeparate Commiſſion.

Auguſt the 6th 1740.

Ex parte Banks.

Vide under the diviſion, Rule as to Creditors.

March the 29th 1743.

Ex parte Voguel and others.

Caſe 75.

A ſeparate commiſſion taken out againſt perſons formerly partners, the joint creditors upon an application to the court are left at liberty, to bring their bill for any demand on account of the partnerſhip againſt the aſſignees of the ſeparate eſtate, who are directed to ſell the whole effects, and depoſit the money in the bank, but to make no dividend till the ſuit is determined: The joint creditors to prove their debts under the commiſſion in the mean time without prejudice.

A Separate commiſſion had been taken out againſt perſons who were formerly partners; the petitioners being joint creditors pray by their petition, that the joint effects ſeized under the ſeparate commiſſion may be divided in the firſt place among the joint creditors.

The Attorney General, counſel for the petitioners, inſiſted they muſt have ſome way of ſecuring the joint effects, that they may not be imbeziled by the creditors under the ſeparate commiſſion.

Lord

Lord Chancellor: I leave the petitioners at their liberty to bring a bill for relief for any demand in their petition, or any other demand on account of the partnerſhip, againſt the aſſignees of the ſeparate eſtate, before the laſt day of next *Eaſter* term.

And I direct the aſſignees under the ſeparate commiſſion, to proceed to a ſale of the whole effects ſeized under the commiſſion, and to depoſit the money ariſing from the ſame in the bank in the name of the aſſignees, but to make no dividend till the ſuit is determined; and in the mean time let the joint creditors be at liberty to come in under the ſeparate commiſſion, and prove their debts without prejudice.

Auguſt the 2d 1744.

Ex parte Criſp, in the matter of his bankruptcy.

Caſe 76.

A commiſſion may iſſue againſt one partner of 3 for a joint debt though an action cannot be maintained againſt one, without joining the other two parties.

IN 1742. the petitioner *Burnaby*, and *Barbut*, became copartners, and were jointly concerned in erecting an amphitheatre at *Ranelagh*, and in making and laying out gardens for the entertainment of the public; and the copartnerſhip was to continue upon the foot of the ſaid undertaking for a certain term of years, yet ſubſiſting, upon and under certain covenants, proviſoes and agreements, contained in a certain deed or inſtrument duly executed by the petitioner *Burnaby*, and *Barbut*. The amphitheatre being erected, and the gardens laid out according to the ſcheme, the premiſſes were afterwards provided and furniſhed with all things uſeful and neceſſary to make the undertaking compleat, and on that account many large ſums of money were laid out, and debts contracted with the different workmen and tradeſmen.

Some difference afterwards aroſe between the petitioner *Burnaby*, and *Barbut*, who endeavoured to diſpoſſeſs the petitioner of his eſtate and intereſt in the undertaking, and to get the management thereof wholly into their own hands; and in order thereto, a commiſſion of bankruptcy on the firſt of *February* 1742. iſſued againſt the petitioner alone, upon the petition of *William Perritt*, whoſe debt had been contracted on account of the undertaking, and was due from the petitioner *Burnaby* and *Barbut* jointly, and as partners, and not from the petitioner alone.

By an order made the 18th of *February* 1742. upon a former petition, it was ordered that the commiſſioners ſhould execute a proviſional aſſignment of the petitioner's eſtate and effects, and that the parties ſhould proceed to a trial at law in the court of Common Pleas, in an action of trover, to be brought by the petitioner againſt the proviſional aſſignee.

On the 9th of *June* 1743. the action was tried before Lord Chief Juſtice *Wiles*, when his Lordſhip declared that the petitioner had committed an act of bankruptcy; but it appearing that the debt upon which the commiſſion was taken out was due from the partnerſhip, his Lordſhip doubted whether the commiſſion iſſued regularly, and directed a verdict to be found for the petitioner, ſubject to the opinion

of the court of Common Pleas: and on the 5th of *May* 1744, after hearing counſel on the matter reſerved, the court of Common Pleas pronounced judgment, and declared the commiſſion iſſued regularly.

The commiſſioners afterwards proceeded in the execution thereof, and ſeveral debts, amounting to 3065*l.* 19*s.* 11*d.* ½, were proved under the commiſſion, and all of them, except 47*l.* 3*s.* 4*d.* were the debts due from the partnerſhip.

Since the commiſſion iſſued, *Burnaby* and *Barbut*, by the perception of the profits of the undertaking, received much more than would ſatisfy all the joint creditors, all of whom ſince proving their debts under the commiſſion, had received from *Burnaby* and *Barbutt* either a ſatisfaction, or undeniable ſecurity for the ſame.

The petitioner offers to pay into the bank of *England* ſuch a ſum as the court ſhall think proper, on being allowed a reaſonable time for the doing thereof, in ſatisfaction of the debts ſo proved under the commiſſion.

And therefore prays that it may be referred to a maſter to ſee what the proviſional, and other aſſignees had received of the petitioners joint and ſeparate eſtate; and how, and to whom, and for what the ſame, or any part thereof, have been diſpoſed of and applied; and after juſt allowances made, that they might aſſign to the petitioner ſuch part of his eſtate and effects as ſhould appear to remain in their hands; and that the Maſter might alſo inquire which of the creditors had received any ſatisfaction or ſecurity, and from whom, for the debts ſo by them reſpectively proved under the commiſſion: And that in caſe any of them who had received ſecurities for their debts ſhould elect to receive ſatisfaction out of the money he now offered to pay into the bank, ſuch ſecurities might be aſſigned to the petitioner, or to perſons whom he ſhould appoint, in order to recover the money due thereon; and that upon payment or making ſatisfaction to the ſeveral creditors, who had proved their debts under the com-commiſſion, the ſame might be ſuperſeded.

Lord Chancellor: I do not blame Mr. *Criſp* the petitioner for not applying ſooner to the court for a *ſuperſedeas*, becauſe by a former order, a trial with regard to the bankruptcy being directed, it was neceſſary that trial ſhould be had firſt.

When this caſe came originally before me, I thought it a pretty new one; a commiſſion of bankruptcy taken out againſt one partner for a partnerſhip debt, without joining the other partners in the commiſſion, and therefore directed a trial of the bankruptcy before Lord Chief Juſtice *Willes*.

Whatever doubts I might have before, it is now eſtabliſhed to be law, on the unanimous opinion of the court of Common Pleas, that a *commiſſion of bankruptcy* may iſſue againſt one partner only for a joint debt; though to be ſure *in an action at law againſt one partner*, it could not be maintained unleſs the other two are joined in it.

The commiſſioners have certified that this is a proper time to ſuperſede the commiſſion, and that the circumſtances are likewiſe proper for doing it.

But

But ſuppoſe the majority of creditors preſent at any meeting may have ſaid, We deſire you will certify that the commiſſion ought to be ſuperſeded, and one creditor has declared he ſhall be able to prove in a few days, and deſired a delay; the court would certainly in that caſe refuſe to ſuperſede the commiſſion, and give ſuch creditor an opportunity of proving the debt, in the firſt place, or otherwiſe the bankrupt may remove into a foreign country, and ſuch creditors who were under any incapacity of proving before, from particular circumſtances loſe their debts.

Though a majority of creditors agree to certify that a commiſſion ought to be ſuperſeded at a meeting for that purpoſe, yet if one creditor ſays, I ſhall be able to prove in a few days, do not certify yet, the court will not ſuperſede, till ſuch creditor has an opportunity of proving his debt.

In the preſent caſe *Burnaby* and *Barbutt*, the two other partners, ſuggeſt that they are creditors for a large ſum, and intend to prove their debts under the commiſſion, and therefore oppoſe the commiſſion's being ſuperſeded.

But admitting they are creditors they run no hazard, for I do not find Mr. *Criſp* has much more effects than his ſhare in the partnerſhip, and they have the whole partnerſhip effects in their hands, and therefore I lay no ſtreſs upon their objection to the *ſuperſedeas*.

But at the ſame time I do not think it right to direct, as the petitioner deſires, that the ſecurities given by the other two partners to the creditors who have proved debts under the commiſſion, ſhould be aſſigned to the bankrupt. Indeed where there is a principal and ſurety, and ſurety pays off the debt, he is intitled to have an aſſignment of the ſecurity, in order to enable him to obtain ſatisfaction for what he has paid over and above his own ſhare; but it will be extremely hard if I ſhould order a ſecurity given by *Burnaby* and *Barbutt* ſolely and ſeparately to the creditors for the payment of their debts, to be aſſigned to *Criſp*, and therefore I will give ſuch directions as will effectually anſwer the intent of all parties.

Where there is a principal and ſurety, and ſurety pays off the debt, he is intitled to have an aſſignment of the ſecurity, to enable him to obtain ſatisfaction for what he has paid above his own ſhare.

His Lordſhip ordered that upon the petitioner's paying within one kalendar month from the date hereof, to all the creditors who have already proved their debts under the ſaid commiſſion, the whole of their reſpective debts ſo proved by them under the commiſſion, and the coſts of the commiſſion and of the proceedings at law, the commiſſion be thereupon ſuperſeded: And he alſo ordered that the ſeveral creditors of the petitioner, who have proved their debts under the commiſſion, do aſſign the ſeveral ſecurities that have been given to them by any of the partners, for their reſpective demands proved under the commiſſion, to a truſtee or truſtees to be appointed by the commiſſioners, in truſt to ſecure to the petitioner, and any other of the partners ſo much money, as he or they have reſpectively paid or ſhall pay towards the diſcharge of ſuch debts, over and above their reſpective juſt portions thereof; and ordered that the aſſignees under the commiſſion do re-aſſign to the petitioner all his eſtate and effects which have been aſſigned to them, and that they come to an account before the commiſſioners, for the eſtate and effects of the petitioner come to their hands, and that they pay to the petitioner the balance which upon ſuch account to be taken ſhall appear to be remaining in their hands. But if the petitioner ſhall make default in making the ſeveral payments, within the time before limited, his Lordſhip in that caſe

ordered that the commiſſioners be at liberty, and do thereafter proceed in the execution of the commiſſion.

December the 23d 1742.

Ex parte Baudier.

Vide under the Diviſion, Joint and ſeparate Commiſſion.

January the 22d 1745.

Ex parte Bond and Hill.

Vide under the ſame Diviſion.

Junuary the 20th 1746.

Ex parte Titner.

Caſe 77.

H. a ſilkman, and *F.* a dealer in coals, are partners in both trades.

HAYCOCK, a ſilkman, entered into partnerſhip with *Francis*, a dealer in coals, to be mutually partners in both trades.

They afterwards diſſolve the partnerſhip, and *F.* gives *H.* a releaſe of all demands, and took upon him the payment of the debts due from the coal trade, and *H.* the debts from the ſilk trade, and the reſpective debts are aſſigned accordingly.

Some years afterwards they agreed to diſſolve the partnerſhip, and at the time of the diſſolution, upon the balancing of accounts, *Francis* gives *Haycock* a releaſe of all demands, and took upon him the payment of debts due from the coal trade, and *Haycock* the payment of the debts from the ſilk trade, and the reſpective debts were aſſigned accordingly.

H. dies, and a commiſſion is taken out againſt *F.* and the meſſenger attempting to ſeize the effects of *H.* in the hands of his repreſentative, is oppoſed, and turned out of poſſeſſion.

Haycock died, and ſoon after his death a commiſſion of bankruptcy was taken out againſt *Francis*, and by virtue of a warrant of ſeizure the meſſenger under the commiſſion attempted to ſeize the effects of *Haycock* in the hands of his repreſentative, who oppoſed the meſſenger, and turned him out of poſſeſſion.

The aſſignee petitions, complaining of the force upon the meſſenger.

A petition was preferred by the aſſignee of *Francis*, complaining of this force upon the meſſenger.

2

Lord

Lord Chancellor was of opinion, that by virtue of the releaſe from *Francis* to *Haycock*, the whole property of the ſilk trade from the diſſolution of the partnerſhip veſted in *Haycock*, and that the aſſignee could ſtand in no better light than *Francis* himſelf, who had relinquiſhed all his claim, and therefore that the goods of *Haycock* ought not to have been ſeized at all under the commiſſion againſt *Francis*.

By the releaſe of *F.* to *H.* the whole property of the ſilk trade veſted in *H.* and the aſſignees of *F.* ſtanding in no better light than the bankrupt, the goods of *H.* ought not to have been ſeized under the commiſſion againſt *F.*

But though the taking of theſe goods by the meſſenger was illegal, yet the turning him out of poſſeſſion by force cannot be juſtified, for the owner of the goods ought to have aſſerted his right by a due courſe of law; however, the evidence on the part of the petitioner was ſo ſlight, that it does not by any means ſupport the charge, and therefore his Lordſhip diſmiſſed the petition with coſts.

Petition diſmiſſed with coſts.

December the 21ſt 1752.

In the matter of the *Simpſons*, bankrupts.

JOHN Simpſon the elder, and *Thomas Simpſon* his couſin, were partners for a ſpecial purpoſe. Caſe 78.

John the elder, *Thomas*, and *John* the younger, were alſo partners.

A commiſſion was taken out againſt *John* the elder and *Thomas*.

John the elder afterwards died.

A ſecond commiſſion was then taken out againſt *John* the younger, and *Thomas*.

Afterwards *Thomas* died.

A ſeparate commiſſion was now taken out againſt *John* the younger.

The preſent petition was preſented on behalf of the aſſignees under the ſecond commiſſion to ſuperſede the ſeparate commiſſion, as ſeparate creditors may by order come in, and prove their debts under the former commiſſion.

Mr. Sollicitor general for the petitioning creditor in the ſeparate commiſſion, cited *ex parte Rollinſon*, 4th of *February* 1735. to ſhew, notwithſtanding a joint commiſſion is depending, that ſeparate creditors might take out a ſeparate commiſſion.

The caſe cited was as follows: *Rollinſon* was a bond creditor of *A.* and *B.* A joint commiſſion was taken out againſt them, and alſo two ſeparate commiſſions; *Rollinſon* proved his debt under the joint commiſſion, and afterwards petitioned to be admitted a creditor under each of the ſeparate commiſſions. Lord *Talbot* would not grant the petition, becauſe it would break in upon the rule of equality amongſt creditors under commiſſions of bankruptcy eſtabliſhed in this court, but gave the petitioner a fortnight to make his election whether he would come under the joint, or the ſeparate commiſſion, and would not ſuperſede the ſeparate commiſſion.

Formerly where there were ſeveral partners, the cuſtom was to take out ſeparate commiſſions againſt each partner, as well as a joint commiſſion; but this being of late thought a very unreaſonable practice, and occaſioning great confuſion with regard to bankrupts effects, has been diſcountenanced, and the court keep only one commiſſion on foot, and direct diſtinct accounts to be kept of the ſeveral eſtates.

Lord Chancellor: Formerly, where there were ſeveral partners, they uſed to take out ſeparate commiſſions againſt each partner, as well as a joint commiſſion.

This practice being of late thought a very unreaſonable one, as occaſioning great confuſion with regard to bankrupts effects, has been diſcountenanced. The preſent caſe is, one ſurviving partner of three perſons, the joint effects veſt him in in law, and under this commiſſion may be properly diſtributed.

A creditor by bond upon the partnerſhip, after a joint commiſſion is depending, takes out a ſeparate commiſſion againſt *John Simpſon* the younger; ſo that now here are two commiſſions againſt the ſame perſon, which will create endleſs confuſion, and ſeems to me to be only a ſtruggle for the aſſigneeſhip and the clerkſhip, for there is no doubt but this particular creditor may have a ſatisfaction under the firſt commiſſion.

His Lordſhip therefore ordered the laſt commiſſion to be ſuperſeded, and by conſent of the aſſignees the firſt was ſuperſeded likewiſe; and the creditors in general were ordered to come to a new choice of aſſignees under the ſecond, the now only ſubſiſting commiſſion.

His Lordſhip alſo gave directions that there ſhould be diſtinct accounts kept of the ſeveral eſtates, and reſerved the diſpoſition of the effects for the conſideration of the court.

Where there is a joint commiſſion, ſeparate creditors ought not to take out a ſeparate one, but apply to be admitted to prove their debts under the joint, as being a means of ſaving expence to the creditors.

By this opinion of *Lord Chancellor*, it ſhould ſeem for the future, that where there is a joint commiſſion depending, ſeparate creditors ought not to take out a ſeparate commiſſion, but apply for an order to be admitted to come in, and prove their debts under the joint commiſſion, as being a means of ſaving an expence to the creditors.

Upon application of joint creditors to be admitted to prove their debts under a *ſeparate* commiſſion, his Lordſhip ordered it *proviſionally*, that they ſhould be admitted creditors, and aſſent or diſſent to the bankrupt's certificate, becauſe it would otherwiſe clear him of the debts of joint creditors, as well as ſeparate.

N. B. His Lordſhip had formerly, upon an application of joint creditors to be admitted to prove their debts under a ſeparate commiſſion, ordered it proviſionally, that they ſhould be admitted creditors, and aſſent or diſſent to the bankrupt's certificate, becauſe the certificate otherwiſe would clear him of the debts of joint creditors as well as ſeparate.

Vide ante, the caſe *ex parte Baudier*, *December* the 23d 1742. which ſeems to vary from the preſent caſe.

(N) Rule as to coſts.

Mich. term 1739. At the Rolls.

Anon.

Vide under the diviſion, Rule as to Aſſignees.

April the 30th 1740.

Ex Parte Goodwin.

Vide under the diviſion, Rule as to his Executor, or where he is one himſelf.

March the 31ſt 1742.

Ex parte Smith.

Caſe 79.

If a whole petition is recited in an affidavit of ſervice, the court will make the attorney who drew it, pay the coſts out of his own pocket.

IN an affidavit of ſervice upon the aſſignee, who was petitioned againſt to be diſplaced, in order to ſwell up the expence, the whole petition verbatim was recited in the affidavit.

Lord Chancellor: I by no means like this practice, and it is what attorneys in the country are very apt to fall into; but if they make a cuſtom of it, I ſhall for the future, order the coſts of the affidavit to come out of their own pockets.

Auguſt the 13th 1742.

Ex parte Whitchurch.

Vide under the diviſion, Rule as to Aſſignees.

February the 3d 1753.

Ex parte Gulſton: In the matter of *William Gulſton* a bankrupt.

Caſe 80.

Vide caſe An iſſue had been before directed to try the bankruptcy of *G.* and found him no bankrupt, agreeable to the judges directions, a commiſſion of bankruptcy is proceeding at law in the firſt inſtance, and if coſts are given there, it will follow of courſe in the proceedings before this court.

THE iſſue directed by *Lord Chancellor* to try the bankruptcy of the petitioner, was accordingly tried before Lord Chief Juſtice *Lee* at *Guildhall*, who certified that the jury have found *Gulſton* no bankrupt, agreeable to the judge's directions. Application was made on the part of *Gulſton* to ſuperſede the commiſſion, and that *Dale* the petitioning creditor might pay the coſts in equity, as well as at law.

Lord Chancellor: I am of opinion that coſts here in this caſe, are a conſequence of the verdict at law, and that a creditor is not wantonly to take out a commiſſion againſt a debtor, unleſs it is upon a plain and expreſs act of bankruptcy, eſpecially when *Dale* had a more natural remedy, for he might have proceeded againſt *Gulſton* in *Barbadoes* for his debt, as the law is open there; and this is quite a different caſe from a common ſuit in equity by bill, where it begins firſt in this court, and is a ſingle proceeding only; but taking out a commiſſion of bankruptcy is a proceeding at law in the firſt inſtance, and all that is done afterwards is conſequential, and if coſts

are

are given at law, it will follow of courſe in the proceedings before this court.

His Lordſhip ordered, that the commiſſion be ſuperſeded, and that a writ of *ſuperſedeas* do iſſue for that purpoſe, the expence whereof to be paid by *Dale* the creditor, who ſued out the commiſſion; and his Lordſhip further ordered, that it be referred to Maſter *Montague* to tax the petitioner *William Gulſton* his coſts at law, and of the ſeveral applications to this court in this matter, which coſts when taxed, *George Dale* the petitioning creditor was thereby directed to pay to the petitioner *William Gulſton*.

Auguſt the 10th 1754.

Anon'.

Caſe 81. Coſts accrued by proteſting bills before a commiſſion iſſues, may be proved, but no part of the coſts ariſen afterwards.

THE queſtion in this petition, Whether the coſts and charges accrued by the proteſting bills after a commiſſion of bankruptcy iſſued, can be proved?

Mr. Attorney general for the bill creditors inſiſted, that as the notes were accepted by the bankrupt, though proteſted after the commiſſion iſſued, yet as the proteſting was a conſequence of the party's accepting not paying the bills, they may by relation be conſidered as one intire tranſaction, and conſequently the petitioners were intitled to prove the coſts and charges thereof under the commiſſion.

Lord Chancellor aſked ſome of the commiſſioners who happened to be then preſent in court, Whether, if a perſon has a verdict for a debt, and is proſecuting to a judgment, or has recovered damages in an action, and is going on to execute a writ of inquiry, but before either of them is compleated, a commiſſion of bankruptcy is taken out againſt the defendant, the coſts and charges of ſuch proſecuting to a judgment, or ſuch aſſeſſment of damages on a writ of inquiry have been allowed to be proved under a commiſſion.

The court being informed, that it was the conſtant practice of commiſſioners to refuſe ſuch coſts being proved, his Lordſhip made the following order, that the coſts of the proteſts ariſen before the commiſſion ſhould be proved by the petitioners, but no part of the coſts ariſen afterwards.

(O) The conſtruction of the repealing clauſe in the 10th of Queen Anne.

April the 2d 1742.

Ex parte Burchall: In the matter of *Robert Burchall* a bankrupt.

Caſe 82.

The ſtatute of the 10th Q. *Ann. c.* 15. repeals only that part of the ſtatute of the 21 *Jac.* 1. *c.* 19. which conſtitutes a bankrupt, but not the deſcription of the trade or occupation of the perſon againſt whom the commiſſion iſſues.

THE petitioner was bred a *Money Scrivener*, and had uſed the trade or profeſſion of a *Money Scrivener* for ten years, and now preferred a petition, by way of caveat, and prayed to be heard before a commiſſion of bankruptcy iſſued againſt him, inſiſting, that as a *Scrivener* he was not liable to be a bankrupt, for that though by the ſtatute of 21 *Jac.* 1. *cap.* 19. a *Scrivener* was included in the deſcription of a bankrupt; yet this deſcription among ſome others was repealed by the ſtatute of the 10 *Ann. cap.* 15. which was not a temporary, but an abſolute repeal, nor reſtored by any ſubſequent act.

The clauſe is as follows.

" Whereas by an act made in the 21 *Jac.* 1. it is amongſt other " things enacted, That all and every perſon and perſons, uſing or " that ſhould uſe the trade of merchandize by way of bargaining, " *&c.* in groſs, or by retail, or ſeeking his or her living by buying " and ſelling, *or that ſhould uſe the trade and profeſſion of a* Scrivener, " *receiving other mens monies or eſtate into his truſt or cuſtody*, who at " any time after the end of the ſaid ſeſſion of parliament, be- " ing indebted to any perſon or perſons in the ſum of 100*l.* or more, " ſhould not pay or otherwiſe compound for the ſame within ſix " months next after the ſame ſhould grow due, and the debtor be " arreſted for the ſame, or within ſix months after an original writ " ſued out to recover the ſaid debt, and notice thereof given unto " him, or left in writing, *&c.* or being arreſted for the ſum of one " hundred pounds or more of juſt debts ſhould, at any time after " ſuch arreſt, procure his enlargement by putting in common or " hired bail, ſhould be accounted and adjudged a bankrupt to all in- " tents and purpoſes; and in the caſes of arreſt or getting forth by " common or hired bail from the time of his or her ſaid firſt arreſt: " And whereas it is found by experience, that many and great miſ- " chiefs and inconveniencies have happened, eſpecially of late to " trade and credit in general, by reaſon of the ſaid deſcriptions of a " bankrupt: For remedy thereof for the future, Be it enacted, That " the ſaid act, and alſo all and every other act and acts of parliament " whatſoever, ſo far as they relate to the ſaid deſcriptions of a bank- " rupt, be repealed and made void, and that no perſons within the " ſaid deſcriptions, or any of them, ſhall for or by reaſon of the

" ſame be taken and adjudged to be within the ſtatute or ſtatutes " of bankrupt whatſoever."

Lord Chancellor: My doubt is, whether the 10th of Queen *Ann* intended any more than to repeal ſome part of the ſtatute of 21 *Jac.* 1. which conſtitutes an act of bankruptcy; and not the deſcription of the trade, or occupation, of the perſon againſt whom a commiſſion iſſues.

Mr. *Brown* the counſel for the petitioner inſiſted, that the ſtatute of Queen *Ann* repeals the additional deſcription of a trader in the 21 *Jac.* 1. which is not in the precedent acts, and that the deſcription of a *Scrivener* is in this act only.

Now all the bankrupt acts have the deſcription of uſing the trade of merchandize, and getting his living *by buying and ſelling*, and if Mr. *Brown*'s conſtruction ſhould prevail, the deſcription of a bankrupt, by the expreſſion of *buying and ſelling is as much repealed as the other.*

The ſtatute of the 21 *Jac.* 1. has ſuperadded *a Scrivener*, and this is merely an addition to the quality of the trade or profeſſion of the perſon who ſhall be a bankrupt; one of the deſcriptions to conſtitute a bankruptcy under this act, is ſuing out an original writ, *&c.* another an arreſt, and procuring common or hired bail, *&c.* theſe being found inconvenient, gave riſe to the clauſe of the 10th of Queen *Ann.*

Conſider how much is recited by this ſtatute, not the whole deſcription of a bankrupt, or the general or common qualifications of the perſon of a bankrupt, or his buying and ſelling, *&c.* if ſuch a conſtruction was right as has been contended, then all the other acts of parliament would be repealed.

It is only *particular acts of bankruptcy*, which are made void, and not the qualification of the perſon; and I have no doubt myſelf, but the conſtruction I have put upon this repealing ſtatute, is the proper and only ſafe conſtruction.

His Lordſhip ordered, that the petitioning creditor be at liberty to ſue out a commiſſion of bankruptcy againſt *Burchall*, and in caſe the major part of the commiſſioners ſhould thereon declare him to be a bankrupt within the intent and meaning of the ſeveral ſtatutes concerning bankrupts, then he directed the commiſſioners to execute a proviſional aſſignment of *Burchall*'s eſtate and effects, to an aſſignee appointed by them under the commiſſion, and alſo directed an iſſue to try whether he was a bankrupt within the true intent and meaning of the ſeveral acts concerning bankrupts, at or before the iſſuing of the commiſſion, the petitioning creditor to be the plaintiff, and the iſſues to be tried the next term before Lord Chief Juſtice *Willes.*

A *Scrivener* is comprehended in the words, *bankers, brokers,* and *factors*, in the ſtatute of the 5 *Geo.* 2. *c.* 30. *ſ.* 39. and petitioner being one, the court ordered the commiſſioners ſhould proceed in the exeution of the commiſſion.

The Chancellor inclined to think that a *Scrivener* is implied in the following clauſe of the 5 *Geo.* 2. " And whereas perſons dealing " as bankers, brokers, and factors, are frequently intruſted with

" great

" great ſums of money, and with goods and effects of very great va-
" lue belonging to other perſons; It is hereby further enacted, That
" ſuch bankers, brokers, and factors, ſhall be, and are hereby de-
" clared to be ſubject and liable to this and other the ſtatutes made
" concerning bankrupts." But his Lordſhip did not give a poſitive opinion as to this point, and ordered all further directions to be adjourned over till the next day of petitions.

The next day his Lordſhip, upon conſidering the clauſe, declared he was clearly of opinion a *Scrivener* was within the meaning thereof, and comprehended in the words, *bankers brokers* and *factors*, and therefore directed ſo much of the order as related to the iſſue for trying the bankruptcy, to be ſtruck out.

Upon the 8th of *May* 1742. there was a petition *ex parte Burchall* and *Tribe*, when *his Lordſhip ordered, that the commiſſioners ſhould proceed in the execution of the commiſſion*, and the other petitioner *Thomas Tribe*, being preſent in court, that had *Burchall* in execution at his ſuit, and acquainting his Lordſhip, that he now elected to ſeek relief for his debt under the commiſſion againſt *Burchall*, and being alſo the petitioning creditor, *his Lordſhip ordered* Tribe *forthwith to diſcharge* Burchall *out of the* Marſhalſea.

(P) Rule as to dividends.

October the 22d 1741.

Ex parte Lane.

Vide under the diviſion, Rule as to Aſſignees being charged with intereſt.

October the 26th 1745.

Ex parte Kirk.

Vide under the diviſion, Drawers and Indorſers of Bills, &c.

February the 2d 1748.

Ex parte Stiles and Pickart.

Vide under the diviſion, Rule as to Allowance to Bankrupts.

(Q) Commiſſion ſuperſeded.

April the 30th 1740.

Ex parte Goodwin.

Vide under the diviſion, Rule as to his Executor, or where he is one himſelf.

February the 3d 1743.

Ex parte Gulſton.

Vide under the diviſion, Rule as to Coſts.

Auguſt the 2d 1744.

Ex parte Criſp.

Vide under the diviſion, Rule as to Partnerſhip.

December the 22d 1749.

Ex parte Gayter.

Caſe 83.

On ſuperſeding a commiſſion, the court may either direct an inquiry before a Maſter of the damages ſuſtained by the bankrupt, or a *quantum damnificatus* upon an iſſue at law, and after damages are ſettled, may, for the better recovery thereof, order ſuch bond to be aſſigned.

MR. *Gayter* was the petitioning creditor in a commiſſion of bankruptcy againſt *A.* but not being able to prove *A.* a bankrupt at the time the commiſſion iſſued, it was ſuperſeded; and on a former day of petitions, *Lord Chancellor*, upon the application of *A.* made an order for aſſigning the bond to *A.* given by the petitioning creditor to his Lordſhip, at the time of ſuing out the commiſſion.

The preſent application is to diſcharge that order, or at leaſt to ſuſpend any action upon the bond, 'till the damages ſuſtained by *A.* were inquired into.

The conſideration of the plaintiff's debt on which he ſued out the commiſſion, was of a very extraordinary nature, 25 *per cent.* being charged for money pretended to be advanced, and fifteen guineas for a premium, and other exorbitancies.

Lord Chancellor ſaid it was in the breaſt of the court, where the bankruptcy was a doubtful caſe, and the commiſſion ſuperſeded, either to direct an inquiry before a maſter of the damages ſuſtained by the bankrupt, or a *quantum damnificatus* upon an iſſue at law, and after the damages are ſettled, the court might, for the better recovery thereof,

order ſuch bond to be aſſigned; but the preſent caſe was attended with ſuch flagrant circumſtances, that he would not by a previous enquiry into the damages ſuſtained by *A.* prevent him from ſeeking an immediate ſatisfaction, and therefore diſmiſſed the petition.

March the 28th 1751.

Ex parte Leaverland.

Caſe 84.

After two dividends the creditors releaſe the bankrupt of all further demands, he petitions to ſuperſede the commiſſion, and for liberty to collect in the debts ſtill due to the eſtate. The bankrupt admitted to ſtand in the place of the aſſignees to get in the remainder of the debts; but his Lordſhip would not ſuperſede the commiſſion for his ſake, as it would intirely defeat his certificate.

THE petitioner was a bankrupt in 1724. divided upon two dividends ſix ſhillings in the pound, had his certificate in 1728. and on paying the creditors two ſhillings and ſix-pence more in the pound, they by deed releaſed him of all further demands.

A petition by the bankrupt to ſuperſede commiſſion, and as there are other debts due to the eſtate not got in by the aſſignees, he prays that he may be impowered to collect them in.

Lord Chancellor ſaid it was imprudently prayed by the petitioner, for ſuperſeding the commiſſion will intirely defeat the certificate, and therefore varied his order from the prayer of the petition, by directing that he ſhould ſtand in the place of the aſſignees to get in the remainder of the debts, on giving a proper indemnity to the aſſignees, that they may not be called to an account for ſuch money ſo received; but would not ſuperſede the commiſſion for the ſake of the bankrupt.

June the 21ſt 1753.

Ex parte Deſanthuns.

Caſe 85.

After a commiſſion of bankruptcy has been proceeded upon in the uſual manner, and all the creditors have acquieſced in it, and the whole compleatly finiſhed, the court will not ſuperſede it, though the act of bankruptcy committed, before the petitioning creditor's debt aroſe, is of a doubtful nature.

ALL the creditors, but two, under a commiſſion againſt *Penton*, petition to ſuperſede it, upon a ſuggeſtion that the debt of the petitioning creditor was not contracted till after the bankruptcy committed.

The commiſſion was taken out in 1751. and there was no pretence that the petitioning creditor's debt was not a juſt one, and *Penton* therefore was declared a bankrupt by the commiſſioners. The commiſſion was proceeded upon in the uſual manner, all the creditors acquieſced in it, and the whole was compleatly finiſhed.

The act of bankruptcy pretended to be committed was a ſecret one in 1750. *a denying himſelf* when creditors called upon him, though at home: The perſons who aſked for him were three in number, one was paid afterwards the very day he called, the other the next day, the third the beginning of *September*, and did not call till the latter end of the *Auguſt* before.

Every one of the perſons traded with him as before, and what is ſtill more material, *Penton* appeared for months together as publickly as before, and from the nature of his employment was more viſible than

ordinary, becauſe he kept a garden and houſe of entertainment, after the manner of *Vauxhall.*

The petitioner had a judgment againſt the bankrupt upon a debt for goods ſold.

The bankrupt between *June* 1750 and *Auguſt* 1751. contracted a new debt for wine with the petitioning creditor; he then took out execution, and entered upon the garden, *&c.* but the goods taken in execution were not ſufficient to pay him by 250 *l.*

In *October* 1751. a commiſſion of bankruptcy was taken out againſt *Penton*, and the petitioner proved his remaining debt of 250 *l.* under it.

The aſſignees brought an action againſt the petitioner to recover back the goods taken in execution, and upon the evidence of one *Roſe*, *Penton* appearing to have committed an act of bankruptcy before the petitioning creditor's debt was contracted, it would have defeated the commiſſion itſelf of courſe, and the plaintiffs therefore choſe to ſubmit to a nonſuit.

Lord Chancellor: This ſeems to be a contrivance from the beginning to the end to exclude ſome creditors, whoſe debts were contracted after an act of bankruptcy committed; and as it was in the plaintiffs own breaſt whether they would ſubmit to a nonſuit or not, this is not a ſufficient determination of the bankruptcy: And therefore I will not ſuperſede the commiſſion, eſpecially when the act of bankruptcy pretended to be committed before the petitioning creditor's debt aroſe, is of ſuch a doubtful nature.

Auguſt the 14th 1742.

Ex parte Sydebotham.

Caſe 86.

A commiſſion ſuperſeded, becauſe it iſſued againſt an infant.

IN *April* laſt a commiſſion of bankruptcy iſſued againſt the petitioner, and he was declared a bankrupt; but at the time of the iſſuing of the commiſſion, and of preferring this petition, he was an infant under the age of 21 years, and therefore inſiſted by his counſel, that he is not to be deemed a bankrupt, within the true meaning of the ſtatutes in force againſt bankrupts, and that for this reaſon the commiſſion ought to be ſuperſeded, and that a writ of *ſuperſedeas* ſhould be directed for that purpoſe at the expence of *Alice Williamſon*, the creditor on whoſe petition the commiſſion iſſued.

Lord Chancellor: The petition muſt be allowed, for notwithſtanding Lord *Macclesfield* held in the caſe of one *Whitlock*, that an infant might be a bankrupt, yet it has been determined otherwiſe ſince.

His Lordſhip ordered that the commiſſion be ſuperſeded, and that a writ of *ſuperſedeas* ſhould iſſue for that purpoſe.

Auguſt the 3d 1751.

Ex parte Hylliard.

A Petition to ſuperſede the commiſſion on a ſuggeſtion that Mr. *Alſworth*'s debt was not of ſuch a nature, as intitled him under the bankrupt acts to ſue out a commiſſion. Mr. *Alſworth* treated with the petitioner for the purchaſe of the equity of redemption of his eſtate, which was in mortgage to one Mr. *Field*. Four hundred pounds was the price ſettled for the purchaſe, articles were ſigned, and Mr. *Alſworth* paid *Hylliard* 251 *l.* 1 *s.* to clear off the mortgage, and was to pay him 150*l.* more on the execution of the conveyances.

Caſe 87.

A. treated with the petitioner, againſt whom a commiſſion of bankruptcy hath been awarded for the purchaſe of the equity of redemption of his eſtate, in mortgage to *F.* 400 *l.* agreed for the purchaſe, articles ſigned, and *A.* pays 251 *l.* 1 *s.* to clear off the mortgage, and was to pay 150*l.* more on the execution of conveyances.

Hylliard refuſed to compleat the purchaſe, or to pay off the mortgage.

On petitioner's refuſing to compleat the purchaſe, or pay the mortgagee, *A.* brought an action againſt the petitioner, who is carried to gaol, where he lay two months, and upon this declared a bankrupt.

On this Mr. *Alſworth* brought an action for 251 *l.* 1 *s.* againſt *Hylliard*, who was carried to gaol, where he lay two months; and thereupon Mr. *Alſworth* takes out a commiſſion of bankruptcy, and *Hylliard* is declared a bankrupt on this act of bankruptcy.

Mr. *Evans* for the petitioner inſiſted, that this was not ſuch a debt as is within the meaning of the bankrupt acts.

Petitioner applies now to ſuperſede the commiſſion, on a ſuggeſtion that *A.*'s debt is not of ſuch a nature as intitles him to ſue out a commiſſion.

That an *indebitatus aſſumpſit* could not be maintained, for the 250*l.* was a breach of truſt only, and not a debt.

Mr. *Clark*, who was counſel on the other ſide, inſiſted it was a debt, and money had and received to the bankrupt's uſe, and an action therefore maintainable as for his debt.

Mr. *Evans* in the reply urged, that there was no pretence that the 150*l.* or one penny thereof was ever tendered to *Hillyard*, but was told that he muſt either repay the 251 *l.* 1 *s.* or go to gaol.

No one creditor appeared under the commiſſion; by that means Mr. *Alſworth* has, by virtue of chuſing himſelf aſſignee, got into his poſſeſſion all *Hylliard*'s effects, although 'tis ſworn he does not owe any perſon beſides a farthing.

Lord Chancellor: I doubt extremely whether a commiſſion could be taken out on ſuch a contract, for the remedy ſhould have been a bill for performance of the contract, and no action could in ſtrictneſs of law be maintained.

His Lordſhip doubted whether *A.* could take out a commiſſion on ſuch a contract, for the remedy ought to have been a bill for performance of the contract, and no action could be maintained; but ſaid if it ſtood ſimply on this, he would not have ſuperſeded the commiſſion, but left the bankrupt to try the bankruptcy at law. But as *A.* has, ſince the iſſuing of the commiſſion, taken an aſſignment of the mortgage, he would not ſuffer him to proceed in the commiſſion; for as ſtanding in the place of the mortgagee, he may hold till redeemed, and likewiſe compel a performance of the contract, or petitioner to refund the 251 *l.* 1 *s.*

But if it ſtood ſimply upon this footing I ſhould not have ſuperſeded the commiſſion, but left the bankrupt to an action at law to try the bankruptcy.

But as it comes out now that Mr. *Alſworth* has ſince the iſſuing of the commiſſion taken an aſſignment of this very mortgage, I will not ſuffer the commiſſion to go on; for as ſtanding in the place of the mortgagee, he may hold till redeemed, and likewiſe compel a performance of the contract, or *Hylliard* to refund the 251 *l.* 1 *s.*

The receipt given by *Hylliard*, is nothing but an acknowledgment of receiving 251 *l.* 1 *s.* in part of the purchaſe money.

No action in this caſe could be maintained, and therefore the very foundation for the commiſſion failed; and Mr. *Alſworth* has, by taking an aſſignment of the mortgage, got the ſecurity of the mortgage for the money he has paid.

The affidavits on both ſides ſwear, that the petitioning creditor ſaid, either pay me back the money, or convey to me the equity of redemption, and not a word of the petitioning creditor's offering to pay the 150 *l.* the remainder of the purchaſe money.

The commiſſion therefore muſt be ſuperſeded, and the petitioning creditor pay the coſts; for any expreſſions of *Hylliard*'s, that he was able to live in gaol, or any where elſe, and ſuch like, proceeded from this ill uſage, and will not forfeit his coſts.

(R) Rule as to bankrupt's attendance on aſſignees.

Caſe 88.

The attendance of a bankrupt on the aſſignees to aſſiſt them in making out the accounts of his eſtate, ſeems to be confined by the 5th of the preſent King to the 42 days, or the enlarged time at moſt; but if the aſſignees will undertake for the creditors under the commiſſion, that they ſhall not arreſt him, the court will order him to attend, notwithſtanding any riſque he may run from his creditors at large.

June the 22d 1742.

Ex parte Turner.

THE aſſignee under a commiſſion of bankruptcy gave notice in writing to the bankrupt to attend him in order to explain ſeveral matters relating to his eſtate after the 42 days were expired (during which time, by the 5th of the preſent King, he is to be free from all arreſts, reſtraints, or impriſonment,) and before the certificate was ſigned.

The bankrupt would not attend upon any other terms than ſigning his certificate, and the application to the court is founded upon this, that the bankrupt had refuſed to attend, contrary to the act of parliament made in the 5th of the preſent King.

Lord Chancellor: Notwithſtanding the 5th of the preſent King has theſe general words, "That all and every ſuch bankrupt or "bankrupts not in priſon or cuſtody, ſhall, *at all times* after ſuch "ſurrender as aforeſaid, be at liberty, and is, and are hereby re-"quired to attend ſuch aſſignee or aſſignees upon every reaſonable "notice in writing for that purpoſe, given by ſuch aſſignee or aſ-"ſignees unto ſuch bankrupts, or left for him, her, or them, at his,

" her, or their houſe or place of abode, in order to aſſiſt, and ſhall aſ-
" ſiſt ſuch aſſignee or aſſignees, in making out the accounts of the ſaid
" bankrupts eſtate and effects." Yet the ſubſequent clauſe (which is in theſe words, " That all and every bankrupt or bankrupts having ſur-
" rendered, ſhall at all ſeaſonable times before the expiration of the
" 42 days, or ſuch further time as ſhall be allowed to ſuch bank-
" rupts, to finiſh their examination, be at liberty to inſpect their
" books, *&c.* in preſence of ſuch aſſignee or aſſignees, or ſome per-
" ſon to be appointed by ſuch aſſignee or aſſignees for that pur-
" poſe, and to take and bring with him for his aſſiſtance, ſuch per-
" ſons as he ſhall think fit, not exceeding two perſons at any one
" time, and to make out ſuch extracts and copies from thence as he
" ſhall think fit, the better to enable him to make a full and true
" diſcovery and diſcloſure of his eſtate and effects; and in order
" thereto the ſaid bankrupt or bankrupts ſhall be free from all ar-
" reſts, reſtraint, or impriſonment of any of his, her, or their creditors
" in coming to ſurrender, and from the actual ſurrender of ſuch
" bankrupt to the commiſſioners, *for and during the ſaid forty-two*
" *days, or ſuch further time as ſhall be allowed to ſuch bankrupt or*
" *bankrupts, for finiſhing his examination,*") ſeems to confine it to the 42 days, or the enlarged time at moſt, and therefore the bankrupt's protection from arreſts, *&c.* can extend no further.

The Chancellor aſked the petitioner's counſel, if their client would conſent to indemnify the bankrupt from arreſts, but he refuſing to do it, his Lordſhip propoſed that he as aſſignee ſhould only undertake for the creditors who have ſought relief under the commiſſion, that they would not arreſt him, and if ſo, he would order the bankrupt to attend, for he ſaid, he ſhould not pay any regard to the danger the bankrupt might run, from his creditors at large.

This petition, at the requeſt of the petitioner, was ordered to ſtand over till the next day of petitions, that he may endeavour, in the mean time, to get the reſt of the creditors under the commiſſion, to conſent to theſe terms.

Upon the whole, *Lord Chancellor* ſaid, That the clauſes in the act of parliament, relating to this matter, are very darkly and obſcurely penned, ariſing chiefly from the words *forty two days* being thrown into the latter clauſe.

(S) Rule as to an apprentice under a commiſſion of bankruptcy.

Caſe 89. An apprentice where his maſter becomes a bankrupt, ſhall come in as a creditor only upon the remaining ſum, after deducting for the time he lived with the bankrupt.

January the 22d 1745.

Ex parte Sandby.

THE petitioner on the 10th of *January* 1744. was put apprentice to *Ward* a *Bookſeller* at *York*, and the ſum of eighty pounds was given with the petitioner as an apprentice for ſeven years. In *July*

July following, a commiſſion of bankrupt was taken out againſt *Ward*, and being declared a bankrupt, aſſignees were choſen who ſell off the bankrupt's effects, and he is now the ſuperviſor of the preſs to the purchaſer, and become incapable of performing his part of the contract, nor is the petitioner able to raiſe any money to put him out apprentice to another maſter, and the commiſſion being a recent one, probably no dividend may be made in a year, or year and half; ſo that all this time will be loſt to the petitioner.

Upon theſe circumſtances the petitioner prayed, that on deducting 10 *l.* out of the 80 *l.* for his board with the bankrupt during the ſix months he lived with him, that the aſſignees might be ordered to pay him the ſum of 70 *l.* out of the effects of the bankrupt already come to their hands, and not oblige him to prove it as a debt under the commiſſion.

Lord Chancellor was doubtful at firſt, and ſeemed inclined to grant the petition, but upon ordering the ſecretary of bankrupts to ſearch for precedents, and two being produced in Lord Chancellor *King*'s time, and two in Lord Chancellor *Talbot*'s, where they directed an apprentice ſhould come in as a creditor only, (after deducting for the time he lived with the bankrupt), upon the remaining ſum, his Lordſhip was pleaſed to make the ſame order, and that the petitioner ſhould be admitted a creditor for 70 *l.* only.

(Γ) Rule as to diſcounting of notes.

June the 4th 1746.

Ex parte Thompſon.

Vide under the diviſion, Rule as to Drawers and Indorſors of Bills of Exchange.

Auguſt the 13th 1746.

Ex parte Marlar, and others.

Caſe 90. A perſon who takes no more for the diſcount of notes than at the rate of 5 *per cent. per ann.* ſhall prove the whole amount of thoſe notes, under a commiſſion of bankrupt againſt the drawer, without being obliged to deduct what he received of the indorſor for the diſcount.

THE petitioners being poſſeſſed of ſeveral promiſſory notes under the hand of *Thomas Setcole*, payable to *William Dover* or order 6 months after date, and indorſed by him to the petitioners, amounting together to the ſum of 957 *l.* 17 *s.* 0 *d.* which *Dover* diſcounted with the petitioners, and received the full value, after deducting 5 *per cent.* for the diſcount. On the 18th of *April* 1745. a commiſſion of bankruptcy iſſued againſt the ſaid *Thomas Setcole*, and

he was found a bankrupt, and *Marlar* attended at *Guildhall*, in order to prove the ſaid debt upon the ſeveral notes, but having received the ſum of 11 *l.* 5 *s.* 10 *d.* for the diſcount, the commiſſioners obliged him to deduct the ſame out of the ſum of 957 *l.* 17 *s.* 0 *d.* and the commiſſioners alſo refuſed to let the petitioner prove the ſum of 8 *l.* 6 *s.* 1½ *d.* being the intereſt of the ſaid reſpective notes, when they reſpectively became due ſince the iſſuing of the ſaid commiſſion; and therefore the petitioners pray, that they may be admitted creditors for the ſaid ſeveral ſums of 11 *l.* 5 *s.* 10 *d.* and 8 *l.* 6 *s.* 1½ *d.*

The counſel for *Marlar* inſiſted the commiſſioners ought to have admitted him in both theſe reſpects, for the whole money contained in the notes, and likewiſe to be allowed intereſt on the notes.

Lord Chancellor: I am of opinion that the petitioner is intitled to the firſt part of his petition, as he ſwears he took no more for the diſcount of the notes, than at the rate of 5 *per cent. per ann.* and ordered accordingly.

But as the commiſſioners have eſtabliſhed it as a rule, that note-creditors have no right to prove intereſt upon them, unleſs it is expreſſed in the body of the notes; I will not break in upon this rule. Even at law, where notes are for value received, and intereſt is not expreſſed, the jury do not give the plaintiff, in an action upon the notes, intereſt for them, but by way of damages only.

Commiſſioners of bankrupts cannot award damages, and therefore the rule they have eſtabliſhed is a very reaſonable one, and the petition as to this muſt be diſmiſſed, but ordered him to be admitted a creditor for the ſaid ſum of 11 *l.* 5 *s.* 10 *d.*

The rule eſtabliſhed by commiſſioners of bankrupts, that *note*-creditors cannot prove intereſt upon them, unleſs expreſſed in the body thereof, is a reaſonable one, and the court will not break thro' it.

(V) Rule as to a petitioning creditor.

April the 30th 1740.

Ex parte Goodwin.

Vide under the diviſion, Rule as to his Executor, or where he is one himſelf.

Auguſt the 6th 1743.

Ex parte Wilſon: In the matter of *John Wilſon* a bankrupt.

Caſe 91.

The clerk of the commiſſion cauſed the bankrupt to be arreſted at the ſuit of *J.* the petitioning creditor and aſſignee, in the ſheriff's court of *London* for 80 *l.* and alſo cauſes another action to be brought in *B. R.* for the ſame ſum, and kept him in cuſtody till *J.* had an opportunity of arreſting him on the King's Bench action, and afterwards charges him with another action, at the ſuit of one *Waſs*; bankrupt applies to be diſcharged from both actions. *J.* and *W.* directed reſpectively to diſcharge him out of cuſtody of the Marſhal, as the ſame attorney was concerned in both actions.

THE petitioner ſtates by his petition, that in *May* laſt a commiſſion of bankruptcy iſſued againſt him upon the petition of *Nathan James* and others, upon which he was declared a bankrupt, and his eſtate and effects were aſſigned to *Nathan James*, and others, and in *April* laſt a commiſſion of lunacy iſſued againſt *James*, and he was found a lunatick; and notwithſtanding he is one of the petitioning creditors and an aſſignee, Mr. *Fenwick*, the clerk of the commiſſion, cauſed the petitioner, on the 16th of *June* laſt, to be arreſted in the ſheriff's court of *London* for 80*l.* at the ſuit of *James*, and afterwards cauſed another action for the ſame ſum to be brought in the court of King's Bench, and kept him in cuſtody from four o'clock in the afternoon of the 16th of *June* until eleven o'clock the next morning, till *Fenwick* had an opportunity to arreſt him on the King's Bench action; which being done, he withdrew the action in the Sheriff's court, and the petitioner was detained in cuſtody upon the latter action, and was alſo charged the ſame day with another action, at the ſuit of one Mr. *Waſs*, by *Fenwick* as his attorney, which the petitioner apprehends was contrived by *Fenwick* purely to oppreſs him, and therefore prays that he may be diſcharged out of the cuſtody of the Marſhal of the King's Bench upon the two actions.

Mr. Sollicitor General, on behalf of the bankrupt *John Wilſon*, inſiſted, that the arreſt at the ſuit of *James*, as he was a petitioning creditor, is irregular; and being therefore under an improper arreſt, *Wilſon* ought to be diſcharged, not only from this ſuit, but from *Waſs*'s likewiſe.

The counſel for *Waſs* read affidavits to ſhew, that the bankrupt has been guilty of perjury in ſwearing, that part of his eſtate was in mortgage for 500 *l.* when in fact it was a groſs fraud carried on between the bankrupt and the mortgagee, and hoped therefore he ſhould not be diſcharged, even ſuppoſing there is ſome irregularity in the proceedings, as they ſhall never be able to catch him again, if once diſcharged.

A petitioning creditor cannot arreſt a bankrupt, becauſe a commiſſion of bankrupt is both an action and an execution in the firſt inſtance.

Lord Chancellor: As to the behaviour of the bankrupt, it is a collateral fact, and has nothing to do with the preſent queſtion, and would come more properly before me upon a petition to diſallow his certificate: The affidavit beſides is not poſitive, but uncertain; and if more certain, would not do. This court will not ſuffer a petitioning creditor to arreſt a bankrupt, and for this reaſon, becauſe that a commiſſion of bankruptcy is conſidered both as an action and an execution in the firſt inſtance; and after the petitioning creditor has laid hold of all the bankrupt's effects, it would be a great abſurdity for the ſame perſon to be permitted to arreſt him likewiſe. It is too material in this

caſe,

caſe, that the whole is done by the ſame agent, and extremely probable that *Fenwick* arreſted the bankrupt in the name of *James*, merely to found the arreſt at the ſuit of *Waſs*.

Even at law where there is an irregular arreſt, and an advantage is taken of the irregularity, to charge him in cuſtody alſo at the ſuit of another perſon, the courts of law will diſcharge him from both.

So likewiſe in this court, where advantage is taken of the injury and oppreſſion a perſon lies under by an improper arreſt, to charge him in cuſtody, though for a juſt debt, this court will diſcharge him from both.

His Lordſhip therefore ordered that *Nathan James*, and *Samuel Waſs* do reſpectively conſent to the petitioner's immediate diſcharge out of the cuſtody of the Marſhal of the *King's Bench* priſon, at their reſpective ſuits, and that they reſpectively execute proper authorities to the Marſhal for that purpoſe. And ordered that *James* ſhould pay to the petitioner the coſts which the petitioner hath been put to by reaſon of the arreſt at his ſuit, which he directed to be taxed by a Maſter.

December the 23d 1743.

Ex parte Ward.

Caſe 92.

A petitioning creditor determines his election by taking out the commiſſion, and cannot ſue the bankrupt at law, though for a debt diſtinct from what he proved.

Where perſons refuſe to prove debts under a commiſſion, the barely being aſſignees will not determine their election, but they may ſtill ſue the bankrupt at law.

AN application to the *Lord Chancellor* to diſcharge the bankrupt now in the *Fleet*, at the ſuit of the petitioning creditor and the aſſignees, as they have determined their election by coming under the commiſſion.

The petitioning creditor inſiſted, that the debt upon which he founded his petition for the commiſſion, was upon two notes only from the bankrupt, and that he has ſued him upon a third and diſtinct note of hand.

The aſſignees inſiſted that they had full liberty to ſue the bankrupt at law, notwithſtanding they are aſſignees under his commiſſion, and creditors before his bankruptcy, becauſe the majority in value of the creditors had choſen them as aſſignees, notwithſtanding they had refuſed to prove any debt under the commiſſion.

Lord Chancellor: The petition muſt be allowed as againſt the petitioning creditor, for he has determined his election by taking out the commiſſion, and the affidavit on ſuing out the commiſſion is general; nor does it mention the particulars by which a bankrupt becomes indebted.

But there is no foundation to grant what the petition prays with regard to the aſſignees, for notwithſtanding they are creditors of the bankrupt, yet as they refuſed to prove their debts under the commiſſion, the barely being aſſignees, by an appointment of the majority in value of the creditors, will not determine their election; for they can only be conſidered as creditors at large, ſince they have not proved any debt.

Auguſt the 7th 1746.

Ex parte Lewes.

Caſe 93. A petitioning creditor has not the ſame election as a common creditor; for if he was to elect to proceed at law, it would ſuperſede the commiſſion.

LORD Chancellor: A petitioning creditor cannot keep the bankrupt in gaol, becauſe he has no election, as a common creditor has; for if he was to elect to proceed at law, the commiſſion muſt of courſe be ſuperſeded, which would affect thoſe creditors who have proved debts under the commiſſion.

Auguſt the 3d 1751.

Ex parte Hylliard.

Vide under the diviſion, Commiſſion ſuperſeded.

(U) Rule as to notes where intereſt is not expreſſed.

Auguſt the 13th 1746.

Ex parte Marlar and others.

Vide under the diviſion, Rule as to diſcounting of Notes.

(W) The conſtruction of the ſtatute of the 21ſt of Jac. 1. cap. 19. With reſpect to bankrupt's poſſeſſion of goods after aſſignment.

December the 5th 1740.

Bourne & al. aſſignees of *Peele* a bankrupt *v. Dodſon.*

Caſe 94. Aſſignment of a ſhip at ſea for a valuable conſideration may be good againſt aſſignees of bankrupts, no poſſeſſion is taken thereof; but if goods at land, otherwiſe.

JOHN Peele was for ſeveral years a merchant, and being in 1731 poſſeſſed of two ſhips, the *Diggs* and *Molly*, ſent the ſame loaded with cargoes in his own name, and conſigned to his correſpondents in *Virginia* or *Maryland*, for return whereof they were to bring back cargoes of tobacco; 514 hogſheads of the ſaid cargoes being conſigned to *Peele* in his own right. He upon their arrival poſſeſſed himſelf of the ſame, and entered them at the cuſtom-houſe in his own name, and gave his bond for payment of the duties, and lodged the tobaccoes in his

his own warehouſes, and kept the keys, and ſold and diſpoſed thereof in his own name, and as his property.

On the 14th of *February* 1735. *Peele* failed, and a commiſſion of bankruptcy iſſued againſt him; *Bourne* and others were choſen aſſignees, and at the time of the bankruptcy *Peele* being in poſſeſſion of the ſaid two ſhips, and all the cargo that was unſold, they were ſeized under the commiſſion; but the defendant inſiſted he had a right to the ſaid ſhips, and to the bankrupt's effects in *Virginia* and *Maryland*, for that he had lent *Peele* conſiderable ſums, and that on the 30th of *May* 1734. there was due to him 10,500 *l.* and to ſecure the payment thereof *Peele* had by indenture of bargain and ſale that very day aſſigned to him the ſaid two ſhips, with their tackle and appurtenants, and all other his eſtate and effects in *Virginia* and *Maryland*, and alſo ſeveral goods ſent to *Maryland* on board the ſaid ſhips, and alſo to all the tobacco and effects to be by them brought back from *Virginia* and *Maryland* in return for the goods ſent, ſubject to be void on payment of the 10,500 *l.* to the defendant, and therefore claimed all the ſaid effects.

The money received from the bankrupt's eſtate was, by agreement between the plaintiffs and the defendant, paid into the bank, till it appeared to whom the ſame juſtly belonged; and the ſhips were likewiſe ſold, and the money ariſing from the ſale paid into the bank, in the names of the plaintiffs and the defendant *Dodſon*.

The plaintiffs counſel inſiſted that as *Dodſon* did ſuffer *Peele* to continue in poſſeſſion of the goods, it was a fraud on the perſons who dealt with *Peele*, and that the aſſignment ought to be ſet aſide, and the defendant come in only as a creditor under the commiſſion, for ſo much as he ſhall be able to prove, and receive a dividend *pro ratâ* only with the reſt of the creditors.

They alſo argued, that a mortgagee of goods, though he has advanced the full value for them, and the day of payment is paſt, yet if he ſuffers the goods ſtill to continue in the poſſeſſion of the mortgagor is equally a fraud, as the letting goods lie in a vendor's hands after he has made a bill of ſale, or an abſolute conveyance of them, and then afterwards becomes a bankrupt, and by conſidering the caſe in this light, they endeavoured to bring it within the 10th and 11th clauſes of the ſtatute of the 21ſt of *Jac.* the firſt, *cap.* 19.

" And for that it often falls out, that many perſons before they " become bankrupts, do convey their goods to other men upon good " conſideration, yet ſtill do keep the ſame, and are reputed the own- " ers thereof, and diſpoſe the ſame as their own:

" Be it enacted, that if at any time hereafter any perſon or per- " ſons ſhall become bankrupt, and at any ſuch time as they ſhall be- " come bankrupt, ſhall, by the conſent and permiſſion *of the true* " *owner and proprietary*, have in their poſſeſſion, order and diſpoſi- " tion, any goods or chattels whereof they ſhall be reputed owners, " and take upon them the ſale, alteration, or diſpoſition as owners, " that in every ſuch caſe the ſaid commiſſioners, or the greater part " of them, ſhall have power to ſell and diſpoſe the ſame, to and for

"the benefit of the creditors which ſhall ſeek relief by the ſaid com-
"miſſion, as fully as any other part of the eſtate of the bankrupt."

The defendant's counſel gave it as a reaſon why *Dodſon* choſe rather the goods ſhould ſtill continue in the bankrupt's cuſtody, notwithſtanding he had a ſufficient lien upon them, That he did not care to ſubject himſelf to an account, if he had taken the goods mortgaged into his own cuſtody.

Lord Chancellor: This is a caſe of a good deal of conſequence, and not without ſome difficulties.

The firſt queſtion is, As to the aſſignment of ſome ſhips and their cargoes by way of ſecurity for a large ſum of money, 10,500 *l.* ſaid to be lent at different times by the defendant *Dodſon* to *Peele*, and whether the property of the ſhips and cargoes paſſed thereby?

The ſecond queſtion, Whether Mr. *Dodſon* is intitled to retain two bank notes delivered to him by *Peele* the bankrupt of 400 *l.* each?

With regard to the aſſignment, it is objected, that it is fraudulent, and did not paſs the property of the goods to the defendant *Dodſon*; for the plaintiffs inſiſt this was an aſſignment of goods without any poſſeſſion, and therefore if aſſignor becomes a bankrupt afterwards, that by virtue of the clauſes in the ſtatute of 21 *Jac.* 1. the commiſſioners may ſell them for the benefit of the creditors in general.

The fact is, The greateſt part of *Peele*'s effects at the time of the aſſignment were beyond ſea; now, it would be very detrimental to trade, as it would deter merchants from lending money, if, notwithſtanding they ſhould advance a large ſum by way of mortgage, the property is not altered, but ſubject to mortgagor's creditors under a commiſſion of bankruptcy, unleſs the ſhips return before the commiſſion is taken out, and the effects are in the actual poſſeſſion of mortgagees.

As to the conſtruction of the clauſes in the ſtatute of the 21 *Jac.* it is a point of very great conſequence, and I do not remember in this court, or while I ſat in another, that the conſtruction of theſe clauſes were ever made a point in any caſe.

As to the general caſe, Where bills of ſale are made of goods, and the purchaſer ſuffers the bankrupt to continue in poſſeſſion, it is plainly within the letter of the ſtatute, but I do not think this can be conſtrued to extend to a bare loan of money upon the goods by way of mortgage, for the words in the clauſe are, goods ſold *for a valuable conſideration*, and *valuable conſideration* is moſt properly applicable to an abſolute ſale.

Pawnee has only a ſpecial property in goods if not redeemed within the time.

In the caſe of pawns, which is ſomething like the preſent, the pawnee has only a ſpecial property in them, in caſe they ſhall not be redeemed within the time required.

According to the original agreement, the defendant *Dodſon* was not immediately to take poſſeſſion of the ſhips and cargoes, but at a future day, and if the bankrupt had not a right from the time of the agreement, to exerciſe ſuch a power over them as he before had, but was now become ſubject to the mortgage, then this caſe is not within the clauſe of the ſtatute.

There

There is nothing more common than aſſignments of ſhips which are out upon their ſeveral voyages, as a ſecurity for money, and yet the aſſignee does not look upon it, that he has any property, but the aſſignor directs the maſter of the ſhips as to the voyage, and every thing neceſſary; and if contracts of this kind had been conſidered as falling within theſe clauſes, this caſe muſt have happened frequently, and would not have been the firſt time of its being made a point in the courts in *Weſtminſter-hall.*

Theſe clauſes have never been thought of, till the caſe of *Stephens* v. *Sole*, before *Lord Chancellor* Talbot, *July* the 6th 1736. *There a perſon, owner of three hoys belonging to the river* Thames, *mortgaged them, and after he had ſo done, was ſuffered by the mortgagee to make uſe of them in the ſame manner as before for three years together, and appeared to all intents the viſible owner, and perſons lent him money upon the credit of his being the owner*, and therefore a very ſtrong caſe; and lord *Talbot*, upon theſe particular circumſtances, adjudged it to be within this ſtatute; but as this is only one authority, it would not be at all proper for me to determine a caſe of ſuch great conſequence to trade, without thoroughly conſidering it; for if it is a void aſſignment, it is void at law, and then I ſhall not take upon me in equity, abſolutely to decide a matter which is properly triable at law.

An owner of hoys mortgages them, and after ſo doing, is ſuffered by the mortgagee to uſe them for three years together, and has money lent him upon the credit of being the owner, they are liable to be ſold under a commiſſion of bankrupt.

On the other hand, it would certainly be of bad conſequence, if I ſhould determine this caſe not to be within the clauſes of the ſtatute of the 21 *Jac.* becauſe it muſt neceſſarily open a door to fraud, for traders then might borrow money to the full value of the goods, and though the mortgagee ſuffers them to lie in the hands of the mortgagor, the lender will notwithſtanding ſecure the property to himſelf, to the prejudice of all the reſt of the creditors.

All that remains is, Whether Mr. *Dodſon* is intitled to retain two bank notes delivered to him by *Peele* the bankrupt, of 400 *l.* each.

Now it is certain, though the act of parliament of the 1 *Jac.* 1. has provided an indemnity for debtors to a bankrupt who pay their money to him without notice of the bankruptcy, yet that ſtatute does not indemnify a creditor of a bankrupt, unleſs it appears that he had no notice of the bankruptcy at the time of receiving his money.

Where a creditor of a bankrupt has received money of him, and an action is brought by the aſſignees to recover back ſuch money; they muſt prove ſuch creditor had notice of the bankruptcy, when he received the ſame.

The courts of law have conſidered this latter caſe as a hard one, and always held the aſſignees to a ſtrict proof of notice.

The next queſtion will be, In what manner it ſhall be tried? If the aſſignees in this caſe bring an action as for goods had and received to the bankrupt's uſe, the courts at law will nonſuit them, becauſe the property was certainly out of the bankrupt, as they were trans-

Where goods are delivered to a creditor after notice of an act of bankruptcy, the proper action for the aſſignees is trover, becauſe there is a *tort* in detaining, though he came rightfully to the poſſeſſion of the goods.

ferred for a juſt debt, and therefore the proper action would be trover, becauſe here is a *tort* in detaining of the goods (though he came rightfully to the poſſeſſion of them), as they were delivered to *Dodſon* after notice of an act of bankruptcy, for from that time they became the property of the general creditors.

But if I direct the whole to be tried in trover, it will create a difficulty as to the two bank notes, and therefore it will be better to try it upon a feigned iſſue.

His Lordſhip then directed the two following iſſues.

Firſt, *Whether the defendant* John Peele *became bankrupt on the* 14*th of* February 1734. *or on any other, and what day?*

Secondly, *Whether at the time of* Peele's *becoming a bankrupt, the two ſhips,* Diggs *and* Molly, *and the goods in the aſſignment of the* 30*th of* May 1734. *or any and which of them were the ſhips, goods, and chattels, of the defendant* Dodſon; *and if found that* Peele *became bankrupt any other time than that mentioned in the iſſue, the ſame to be indorſed on the* poſtea, *and all further directions reſerved till after trial.*

N. B. The parties afterwards compromiſed it, and the iſſue was never tried.

Auguſt the 1ſt 1744.

Ex parte Marſh.

Caſe 95.

Marriage without a portion is itſelf a conſideration for an agreement.

MR. *Marſh* a *Mercer* died poſſeſſed of goods to the amount of 2000 *l.* and upwards, ſometime after his death, his widow married her huſband's journeyman, but before the marriage articles were entred into, reciting that ſhe was intitled to an eſtate of the value of 600 *l.* and upwards, and alſo reciting that he had taken the money and given a bond for ſecuring the ſum of 600 *l.* to truſtees for her ſeparate uſe, and that ſhe ſhould have the power to diſpoſe thereof as ſhe ſhould think fit by deed or will, and being alſo in poſſeſſion of ſome plate belonging to her firſt huſband, ſhe had a further power by the articles to ſell it, and to pay the money ariſing from the ſale, into the hands of the ſame truſtees for the uſe of her children by her firſt huſband.

The wife is dead, but before her death executes a deed, and appoints the 600 *l.* and alſo the plate, for the uſe of her children, to be equally divided between them.

The ſecond huſband is become a bankrupt, and the children of the firſt applied to the commiſſioners to be admitted creditors for the 600 *l.* and to have the plate delivered up to them.

The commiſſioners refuſed, upon the ſuggeſtion of the bankrupt, that he was drawn in, and deceived in the opinion he had of his wife's fortune before the marriage.

The application now on behalf of the children that the plate may be delivered up by the aſſignees, and that they may be admitted creditors for the 600 *l.*

Lord

Lord Chancellor: Here is a man, of the trade of a mercer, leaves a ſtock and goods to a conſiderable value.

This ought to have been divided according to the ſtatute of diſtributions, one third to the wife, and two thirds to the children, the wife poſſeſſes the whole; on her ſecond marriage, in order to provide for the children of the firſt, ſhe and her huſband enter into articles to ſecure 600*l.* for her ſeparate uſe, *&c.* as before ſtated.

This is in conſideration of the marriage, and of the fortune ſhe brought; and unleſs ſome fraud appears, it muſt have its effect.

No doubt but this is a contract for a valuable conſideration, but then it is inſiſted on, that this man (who was the journeyman to the firſt huſband, and muſt be preſumed to know what were Mr. *Marſh*'s effects) was deceived in the opinion he had of Mr. *Marſh*'s circumſtances, and ſaid by the aſſignees counſel, that if he was defrauded, this is a ground to relieve the bankrupt, and the creditors have a right to ſtand in his place.

All marriage agreements differ from other agreements, for theſe do not ariſe from the conſideration of a portion only, but on account of the marriage.

A man thinks fit to marry a ſingle woman or a widow, and imagines ſhe has ſuch a fortune, and perhaps on a ſtrict account, or by ſome defective debts, it ſhould fall ſhort, it would be very miſchievous to ſet aſide marriage agreements for this reaſon.

A woman's fortune falling ſhort of the huſband's expectations, is no reaſon for ſetting aſide a marriage agreement.

No inventory delivered in to the eccleſiaſtical court by Mrs. *Marſh*, as adminiſtratrix to her firſt huſband, which ought to have been done, as the children were intitled to two thirds. The ſecond huſband and his wife poſſeſs themſelves of all the ſtock and goods of her firſt huſband, and never make or deliver in any inventory at all, nor did they make up any account by which the children could have what they were intitled to.

If this came before the court in a cauſe, would they ſet aſide a marriage agreement on ſuch circumſtances? They certainly would not.

The plate depends upon another point.

If this was the plate of the firſt huſband, and came into the poſſeſſion of the adminiſtratrix, or into the hands of the perſon marrying that adminiſtratrix, this certainly is not within the meaning of the ſtatute of the 21 of *Jac.* 1. *(which ſays that all goods in the poſſeſſion of a bankrupt, whereby he gains a general credit, ſhall be liable to his creditors)* becauſe here the adminiſtratrix had them in *auter droit*, and the huſband could have them in no better right, and therefore not at all liable to the debts of the ſecond huſband; for the meaning of the ſtatute (if it is poſſible to put any meaning upon ſome clauſes of this ſtatute, which are very darkly penn'd) is only with regard to goods the bankrupt has *in his own right.*

The clauſe in the 21 *Jac.* 1. which ſays, *that all goods in the poſſeſſion of a bankrupt, whereby he gains a general credit, ſhall be liable to his creditors*, relates to goods the bankrupt has in his own right only.

His Lordſhip therefore directed the children of the firſt huſband to be admitted creditors under Marſh's *commiſſion for the* 600 l. *and the plate to be delivered up to them.*

October the 22d 1746.

Brown, aſſignee of *Roger Williams* a bankrupt, v. *Heathcote* and *Martyn*.

Caſe 96.

R. W. and his partner gave a bond to *H.* for 1200*l.* and the ſame day by deed aſſigned to *H.* or order, the goods in two ſhips then at ſea, and alſo 13 bills of lading, and policies of inſurance, containing the ſaid goods as a collateral ſecurity; the latter indorſed to *H.* the former not.

ROGER Williams, and his partner *Jeremiah Wilder*, gave a bond to the defendant *Heathcote* for 1200*l.* and on the ſame day executed a deed of aſſignment, by which it was agreed, if default ſhould be made in payment of the money advanced by *Heathcote*, *Williams* and *Wilder* ſhould make over to the defendant *Heathcote* or order, the goods in the two ſhips *Samuel and Molly*, and *Ann Billander*, together with the bills of lading, which might be the proceed of the returns of the ſaid goods and cargo for any port in *England*, and that ſhould be conſigned to *Williams* and *Wilder*, and that they ſhould put *Heathcote* in poſſeſſion thereof; and they alſo covenanted that after receiving advice from beyond ſea of any goods, that they would acquaint the defendant *Heathcote* with it, and impower him to diſpoſe of the ſame, and keep the money ariſing from thence in ſatisfaction of his bond, and if there ſhould be any overplus, to pay it to *Williams*.

The bill brought by the aſſignee of *R. W.* now a bankrupt, for theſe goods, inſiſting that *R. W.* acted as the viſible owner of the ſhip and cargo, being not put into the poſſeſſion of *H.* and therefore the plaintiff intitled thereto for the benefit of the creditors at large. The court of opinion that every thing which could ſhew a right to the ſhip and cargo being delivered over to *H. R. W.* could no longer be ſaid to have the *order and diſpoſition* of them, and therefore not within the meaning of the 21 *Jac. cap.* 19. and conſequently *H.* has a right to retain the ſhip and cargo, till the principal ſum of 1200*l.* and intereſt is ſatisfied.

Roger Williams did accordingly aſſign over to the defendant *Heathcote* 13 *bills of lading*, and ſeveral *policies of inſurance*, containing the goods in the ſhip *Samuel and Molly*, as a collateral ſecurity for the ſum of 1200*l.* the latter were indorſed to the defendant *Heathcote*, but the former were not.

At the time of theſe tranſactions between *Williams* and *Heathcote*, the ſhip was at ſea in a voyage to *Guinea*.

The bill is brought for theſe goods by the plaintiff as the aſſignee of *Roger Williams*, who is now become a bankrupt.

The aſſignment to *Heathcote* bears date the 10th of *January* 1736.

The ſhip *Samuel and Molly* came home the 19th of *July* 1738.

The commiſſion of bankruptcy againſt *Williams* iſſued the 27th of *October* 1738.

Roger Williams was found a bankrupt as far back as *November* 1737.

A ſeparate commiſſion of bankruptcy has been alſo taken out againſt *Jeremiah Wilder*.

The counſel for the plaintiff inſiſted, that this aſſignment to *Heathcote* will not bind the creditors under the commiſſion, as *Roger Williams* the aſſignor acted ſtill as the viſible owner, for the ſhip and cargo were not put into the poſſeſſion of *Heathcote*; and therefore the plaintiff as the aſſignee under the commiſſion of bankruptcy againſt *Williams*,

Williams, is intitled to the cargo for the benefit of the creditors at large.

For the plaintiff was cited the caſe of *Bourne*, aſſignee of *Peele* a bankrupt *v. Dodſon*, the 4th of *December* 1740. and of *Ryal* v. *Stevens*, *March* the 10th 1743, and the caſe of *Stevens* v. *Sole*, before Lord *Talbot*, who was of opinion that an aſſignment of barges by a perſon, who, notwithſtanding ſuch aſſignment, kept poſſeſſion of theſe barges, and worked them, was a fraud on his creditors at large, and therefore decreed the barges to be the property of thoſe creditors, and lawfully ſeized under the commiſſion againſt the aſſignor.

A. being indebted to *B.* aſſigns over barges to *B.* who ſuffers *A.* to keep the poſſeſſion, this is a fraud on the creditors at large, and the barges may be ſeized under a commiſſion of bankruptcy taken out afterwards againſt *A. Vide* caſe

Mr. *Noel* for the defendant *Heathcote*.

At the time of the aſſignment the ſhips were actually ſailed and gone abroad, and therefore the delivery of the ſhips and cargoes to the defendant *Heathcote* was impoſſible. In the caſe of *Bourne v. Dodſon*, your Lordſhip doubted whether the ſtatute of the 21 *Jac.* 1. *cap.* 19. extended to a mortgage of goods, and was rather inclined to think the act confined it to an abſolute ſale.

The caſe of *Ryal* v. *Stevens* was an aſſignment of a brewhouſe and utenſils here in *England*; ſo that the poſſeſſion there was capable of being delivered, and conſequently different from the preſent.

Stevens v. *Sole* is alſo different, for the barges were actually worked in the river *Thames*, and therefore the poſſeſſion of them might likewiſe have been delivered.

He further inſiſted this was an actual aſſignment, the policies of inſurance being indorſed to the defendant *Heathcote*.

Mr. *Wilbraham* of the ſame ſide argued,

That ſuch a contract as the defendant made with *Williams* was a perfect and compleat ſale, without the delivery of the goods.

That if it was not a legal aſſignment, yet the defendant had an equitable lien upon the goods, by virtue thereof, and had a right to retain them againſt the plaintiff as an aſſignee under the commiſſion of bankrupt againſt *Williams*; and in ſupport of this cited *Taylor* v. *Wheeler*, 2 *Vern.* 564.

Lord Chancellor: In the extent in which this caſe has been argued at the bar, it is a queſtion of very great conſequence.

But I would obſerve in the firſt place, this is a caſe which has come ſeldom before the court, and much ſtronger in favour of the defendant than ſuch caſes generally are.

For the common caſes are, where the creditor has pretended to ſet up a demand for an old debt, and the perſon owing has at that time been in declining circumſtances; and this creditor, in order to gain a preference, has procured an aſſignment of goods from the debtor, who ſoon after becomes a bankrupt; yet even in ſome of theſe caſes, if the creditor appears to be a *bona fide* one, he has prevailed, though the court leans ſtrongly againſt ſuch a creditor in favour of the creditors at large.

Here the bond to the defendant *Heathcote*, and the aſſignment, bear date the ſame day; therefore this caſe ſtands clear of any colour of fraud, with a view to gain to himſelf a preference to other creditors.

I mention this to ſhew in how much more favourable a light this defendant ſtands than in the common caſes.

The caſe of *Jacobs* v. *Shepherd*, that was originally heard before Sir *Joſeph Jekyll*, was an aſſignment of goods, which at the time of the aſſignment were actually beyond ſea, and yet Sir *Joſeph* ſet it aſide, as the borrower was then in failing circumſtances; but Lord Chancellor *King* upon an appeal reverſed the decree at the Rolls.

Where there is an aſſignment of an outward bound cargo, it is a compleat contract, tho' the cargo is not delivered to the aſſignee.

I will firſt conſider the caſe on general rules both of law and equity.

It has been inſiſted by the plaintiff's counſel, that this aſſignment to *Heathcote* is no legal bill of ſale, or legal aſſignment to him of theſe goods.

And it muſt be admitted, as to the homeward bound cargo, it is no legal aſſignment.

But it has been carried ſtill further by the plaintiff's counſel, for they have likewiſe inſiſted the aſſignment does not amount to a bill of ſale of the outward bound cargo, for want of a delivery of the goods themſelves to the defendant *Heathcote*.

I am of opinion that a delivery in this particular inſtance was not abſolutely neceſſary to make it a compleat contract; as in the caſe of a horſe ſold in a market overt, if the buyer pays the money for him, he may maintain an action againſt the ſeller, without ſhewing a delivery of the horſe. It is true, the want of a delivery is often an objection, and a material one, but how? Why as a badge of fraud; for where a ſubſequent creditor has taken the goods in execution, a prior creditor muſt ſhew a delivery, as in *Twine*'s caſe, 3 *Co.* 80.

Indorſing bills of ſale does not amount to an aſſignment, unleſs the goods are directed to be delivered to the aſſignee.

But it has been alſo inſiſted on the part of the plaintiff, that there are no proper words of aſſignment in the deed; I am ſo far of opinion with the plaintiff, that what has been done in this caſe does not amount to a ſufficient legal ſale. Even if there had been an indorſement of the bills of lading, it is no actual aſſignment, unleſs the goods were directed to be delivered to the aſſignee.

Aſſignees under commiſſions of bankruptcy take ſubject to all equitable liens againſt the bankrupt himſelf.

But then the queſtion will come to this, Whether the defendant *Heathcote* hath not a ſufficient lien upon the goods in point of equity? For it has been truly ſaid, that aſſignees under a commiſſion of bankruptcy muſt take ſubject to all equitable liens againſt the bankrupt himſelf. The caſe of *Taylor* v. *Wheeler* is exactly in point, 2 *Vern.* 564.

Aſſignments of choſes in action for a valuable conſideration, are good againſt creditors under a commiſſion of bankruptcy.

In the caſe of *Cock* v. *Goodfellow*, *Trin.* term the 8th of *Geo.* 1. Lord *Macclesfield* was of the ſame opinion. The ground the court goes upon is this; that aſſignees of bankrupts, though they are truſtees for creditors, yet ſtand in the place of the bankrupts, and they can take in no better manner than he could; therefore aſſignments of choſes in action for a valuable conſideration have been held good againſt ſuch aſſignees.

If this is an aſſignment, therefore for a valuable conſideration it will prevail in equity in favour of the defendant *Heathcote*. It is very true, the deed is not an actual aſſignment, but yet there is ſufficient upon

on the face of it to ſhew, that *Heathcote* had a charge and lien upon the goods, by virtue of the loan of the 1200 *l.*

The policies of inſurance have been indorſed to him, though the bills of lading and invoices have not.

I will firſt conſider the caſe on general rules of equity.

Suppoſe *Roger Williams* had declared only by the deed, that though he kept the poſſeſſion of theſe goods, they ſhould ſtill remain as a collateral ſecurity to the defendant *Heathcote*, it would have been an equitable lien.

It has been further objected by the plaintiff's counſel, that all this was executory only, and no lien gained till the goods came home.

This is by no means a neceſſary conſequence from the clauſes in the deed, and beſides there is one clauſe which expreſly enables *Heathcote* to ſell and diſpoſe of ſuch effects, and keep the money ariſing thereby in ſatisfaction of his bond, upon returning the overplus to *Williams*.

Therefore taking into conſideration the whole of this deed, it amounts to an equitable lien upon theſe goods, as a covenant to execute a power is conſidered as done. *Vide* Lord *Coventry*'s caſe. And I am of opinion, as this appears to be a fair tranſaction, and money actually paid, and not an old creditor endeavouring to get an undue preference, that it ought to be ſupported in equity.

I ſhall, in the ſecond place, conſider what has been urged by plaintiff's counſel upon the clauſes in the 21 *Jac. cap.* 19. that theſe goods, by virtue of that ſtatute, are veſted in the aſſignees of the bankrupt, for want of the delivery of them to the defendant *Heathcote* by *Roger Williams*, and that the defendant can only come in as a creditor under the commiſſion, and is not intitled to retain them till his whole 1200 *l.* is ſatisfied.

It has been inſiſted, that as there was no indorſement of the bills of lading and invoice to the defendant *Heathcote*, they were left under the ſole direction and diſpoſition of the bankrupt; and therefore are ſubject to the clauſes in the act of parliament.

If this doctrine ſhould prevail, it would be attended with the moſt miſchievous conſequence.

There has been no determination upon theſe clauſes, ſo that according to the rule in reſpect to laws in other countries, they might be ſaid to be gone into deſuetude.

Such a conſtruction would bind up property, ſo that it would be a great detriment to trade, and commerce in general.

I do not think theſe clauſes were ever meant to extend to mortgages or pledges for money or goods, becauſe it is impoſſible in an aſſignment of goods beyond ſea, that they can be delivered over to the aſſignee.

" If any perſon ſhall become bankrupt, and at ſuch time, as they Clauſe of the
" ſhall ſo become bankrupt, ſhall by the conſent and permiſſion *of* ſtatute in queſ-
" *the true owner and proprietary*, have in their *poſſeſſion, order, and* tion.
" *diſpoſition*, any goods whereof they ſhall be *reputed owners*, and take
" upon them the ſale, alteration, or diſpoſition as owners, that in
" every ſuch caſe the ſaid commiſſioners ſhall have power to ſell and
" diſpoſe

" diſpoſe the ſame to, and for the benefit of the creditors, which " ſhall ſeek relief by the ſaid commiſſion, as fully as any other part " of the eſtate of the bankrupt."

The act does not confine it merely to having the goods left in *their poſſeſſion*, but alſo the order and diſpoſition thereof, which is explained by the words that follow, " *whereof they ſhall be reputed owners.*"

To apply this to the preſent caſe.

With regard to the ſhip, there is no colour to ſay it was ſo left in *Williams*'s poſſeſſion, as that he could take upon him *the order and diſpoſition thereof.*

Conſider it in the other reſpects.

The bills of lading and invoice were delivered by *Williams* to *Heathcote*, ſo that every thing which could ſhew a right to the goods was delivered over to *Heathcote*; then how could *Williams* be ſaid to have the order and diſpoſition of them?

I am of opinion therefore upon the whole, that this is not within the meaning of the act of parliament of the 21 *Jac.* 1. without entring into the nicety of the words *true owner and proprietary*, and I do agree with Mr. *Wilbraham*, that in this court the mortgagors as having much the largeſt ſhare in the eſtate, are conſidered as *owners* and having the property in it; and for that reaſon mortgages are not within the intention of this act.

Let it be referred to the Maſter, to take an account of what is due to the defendant, for the ſum of 1150 *l.* part of the ſum of 1200 *l.* mentioned in the condition of the bond dated the 10th of *January* 1736. and in the indenture of the ſame date, and alſo for the ſum of 25 *l.* afterwards advanced by him, upon an inſurance of the goods mentioned in the ſaid indenture, together with intereſt for the ſame, at the rate of 5 *per cent. per ann.* and the defendants *Heathcote* and *Martin* are to come to an account before the Maſter for the goods and effects, part of the cargoes of the two ſhips called the *Samuel and Molly* and *Ann Billander*, and the produce of the ſaid ſhips, and what ſhall be coming on the ſaid account of the ſaid goods and effects, and alſo the produce of the ſaid ſhips is to be applied in the firſt place, in payment of what ſhall be found due to the defendant *Heathcote* for his principal, intereſt and coſts, and to the defendant *Martin* for his coſts; but in caſe the money that ſhall be coming on the ſaid account of goods and effects, and alſo of the produce of the ſaid ſhips, ſhall not be ſufficient to pay unto the ſaid defendant, what ſhall be found due to him for principal, intereſt and coſts as aforeſaid, then the ſaid defendant *Heathcote* is to be at liberty to come in for the reſidue, as a creditor under the reſpective commiſſions awarded againſt the ſaid *Roger Williams* and *Jeremiah Wilder*, and to receive a dividend in reſpect thereof, in proportion with the other creditors.

January the 27th 1749.

Sir *Matthew Ryall* and others, aſſignees of *William Harveſt* a bankrupt, —— —— } Plaintiffs.

Rolle executor of *Jonathan Stevens*, and others, Defendants.

LORD *Hardwicke Chancellor*, aſſiſted by *Sir* William Lee *Lord Chief Juſtice of the court of King's Bench*, *Sir* Thomas Parker *Lord Chief Baron of the court of Exchequer*, *and Sir* Thomas Burnet *one of the juſtices of the court of Common Pleas.*

Mr. Juſtice *Burnet*: *William Harveſt* a trader within the bankrupt acts, being indebted to *Benjamin* and *Joſeph Tomkins*, did by indenture of the 2d of *June* 1732. demiſe his houſe, brewhouſe, and outhouſes, and coppers and utenſils fixt, or belonging to the brewhouſe, for a term of 500 years, redeemable upon payment of 1500 *l.* and intereſt.

On the 15th of *October* 1736. *Harveſt* entred into partnerſhip with *Jonathan Stevens* deceaſed, to whom *Rolle* the defendant was executor, and the utenſils and ſtock in trade were appraiſed at 14000*l.* and *Harveſt conveyed* one moiety thereof to *Stevens*; they carried on the trade jointly till the 26th of *June* 1740. when *Harveſt* became a bankrupt.

On the 24th of *December* 1736. *Harveſt* in conſideration of 4000*l.* did, by way of ſecuring the ſame, aſſign over his moiety of the utenſils and ſtock in trade to one *Potter* in truſt for *Stevens*, and there was a clauſe in that mortgage to ſecure any ſums that ſhould be afterwards lent.

Sir *Thomas Reynell* having entred into two bonds as a ſurety for *Harveſt*, he on the 10th of *December* 1737. in conſideration of 1000*l.* aſſigned one ſeventh of his moiety of the partnerſhip ſtock, *&c.* to Sir *Thomas Reynell*, with a defeazance to be void upon his indemnifying him againſt the bonds: The houſe and brewhouſe, with the outhouſes had been mortgaged to the *Tomkins's* in 1725. for ſecuring 1200*l.* and in 1731. this mortgage was aſſigned over to one *Baugh*, who in *November* 1736. reconveyed all the utenſils to *William Harveſt* the bankrupt.

By indentures of leaſe and releaſe bearing date the 6th and 7th of *September* 1738. *Baugh* in conſideration of the principal money, by the direction of *Harveſt*, aſſigned over his mortgage to *Stevens*, and *Harveſt* aſſigned over a moiety of the utenſils, as a collateral ſecurity; upon this mortgage 2355*l.* is due, *ſo that it is plain, that this mortgage will be preferred, as to the real eſtate, to the* Tomkins's *but their mortgage will be preferred as to the collateral ſecurity of the utenſils:* The laſt mortgage is of *William Harveſt* to his ſon *George*, dated the 6th of *March* 1738-9. of one ſeventh part of his ſtock, *&c.* for 1000*l.*

Caſe 97. Upon the conſtruction of 21 *Jac. cap.* 19. *ſec.* 11. determined by Lord Chancellor, that if a perſon advances money upon a conditional ſale of goods, and does not inſiſt upon a delivery thereof, he confides in the credit of the vendor, and not on any real or particular ſecurity, and ought to come in under a commiſſion of bankruptcy againſt the vendor, as much as any other perſon that places a confidence in the bankrupt perſonally.

The queſtion is, Whether all, or any, and which of theſe mortgages will be intitled to reſort to the utenſils, *&c.* for a ſatisfaction, or whether they muſt come in under the commiſſion? And it depends upon this, Whether theſe mortgagees, or any, and which of them, did not ſo permit the bankrupt to continue in poſſeſſion, as to be within the expreſs words of the ſtatute of the 21 *Jac.* 1. *cap.* 19? I will conſider this queſtion in three lights.

Firſt, The nature of a mortgage or conditional ſale of ſpecifick goods or things in poſſeſſion, (of which there might have been an actual delivery), where the bankrupt is ſuffered to continue in poſſeſſion till his bankruptcy, and whether there is any difference betwixt ſuch a mortgage, when made to a ſtranger, or when made to a partner?

Secondly, The nature of three of theſe mortgages to ſtrangers, as ſales partly of things in poſſeſſion, as utenſils, *&c.* and partly of choſes in action, as debts and profits in trade.

Thirdly, Whether there will be any difference as to the general rule, betwixt ſuch a mortgage made to a partner, and made to a ſtranger.

Although the preſent queſtion muſt be determined upon the conſtruction of the ſtatute of the 21 *Jac.* 1. yet it is neceſſary to conſider the conditional creditors as to their debts before that ſtatute; but it is previouſly neceſſary to clear the caſe of arguments drawn from the nature of pawns, which are foreign to the preſent queſtion.

It is contended that pawns among the *Romans* required a delivery, but that mortgages did not.

As to the *Roman* law, there was an authority cited from *Juſt. Inſt. lib.* 4. *tit.* 6. *ſec.* 7. *Nam pignoris appellatione eam proprie rem contineri dicimus, quæ ſimul etiam traditur creditori, maxime ſi mobilis ſit; at eam, quæ ſine traditione nuda conventione tenetur, proprie hypothecæ appellatione contineri dicimus.* If this paſſage ſtood alone, it might go a great way to prove what it was cited for: But when I produce authorities to ſhew that *Pignus* is as valid without a delivery as with one, it muſt be allowed that theſe paſſages have been ſo interpreted, that *Pignus* can only be of goods capable of delivery, and *hypotheca* of goods not capable of delivery. *Domat. l.* 1. *c.* 1. *ſ.* 1. *Wood, lib.* 3. *cap.* 2. *p.* 219. *Dig.* 50. *t.* 16.

Delivery is then not of the eſſence of a pawn in the *Roman* law; and other countries adopting the *Roman* law have corrected this, that if a pawn be not delivered, it ſhall not effect a purchaſer for a valuable conſideration: But if this had been the true diſtinction, it would have no influence unleſs the *Roman hypotheca* and an *Engliſh* mortgage were of the ſame nature, which they are not; for an *hypotheca* gave only a lien and no property, with a right to be ſatisfied on failure of the condition; a mortgage with us, is an immediate conveyance with a power to redeem, and gives a legal property.

If a man gives an *hypotheca* or *pignus* with a condition, that if the money is not paid at a day, the pawnee ſhall enjoy the goods at ſuch a price, that is not in the nature of a pawn, but a ſale. *Juſt. Cod. l.* 4.

l. 4. *t.* 54. *ſ.* 2. *Si fundum parentes tui ea lege vendiderunt:* [*ut*] *ſive ipſi, ſive hæredes eorum emptori pretium quandocunque, vel intra certa tempora obtuliſſent, reſtitueretur; teque parato ſatisfacere conditioni dictæ, hæres emptori non paret, ut contractus fides ſervetur, actio preſcriptis verbis, vel ex vendito tibi dabitur: habita ratione eorum, quæ poſt oblatam ex pacto quantitatem ex eo fundo adverſarium pervenerunt.* This is the deſcription of an *Engliſh* mortgage in the *Roman* law, and as to the ſale of moveables, *Cod. l.* 4. *t.* 54. *ſ.* 7. *Si à te comparavit is, cujus meminiſti, & convenit, ut ſi intra certum tempus ſoluta fuerit data quantitas, ſit res inempta, remitti hanc conventionem reſcripto noſtro non jure petis. Sed ſi ſe ſubtrahat ut jure dominii eandem rem retineat: denunciationis et obſignationis depoſitioniſque remedio contra fraudem potes juri tuo conſulere.*

All that can be argued from the *Roman* law with regard to pawns will be foreign to the queſtion, and ſo will what may be argued from the *Engliſh* law with regard to pawns, for delivery is of the eſſence of an *Engliſh* pawn, 5 *H.* 7. 1. *Bro. Title Pledges, pl.* 20. *Title Treſpaſs, pl.* 271. and 2 *R. Rep.* 429. and no authority contradicts theſe reſolutions.

2 *Leon.* 30. and *Yelv.* 164. are both caſes not of pawns but of bailments to a third perſon, to ſell for the uſe of creditors: And it is true, that in theſe caſes, the creditor will have an intereſt in the performance of the contract, and may ſue the baillee.

There is ſcarce any book that treats upon pawns, but conſiders them as in the poſſeſſion of the pawnee; as where it is debated whether a pawn may be uſed; and the difference laid down between a pawn and a diſtreſs is, that a diſtreſs may not be uſed, becauſe the party in that caſe comes into poſſeſſion by act of law, and in the other by the act of the party. *Owen* 124. 2 *Raym.* 917. *Salk.* 522. *Coggs* and *Bernard.*

The diſtinction between mortgages and pawns is laid down in *Noy* 137. and in *Cro. Jac.* 245. 1. *There is a difference between mortgaging of lands and pledging of goods*; for the mortgagee has an abſolute intereſt in the land, whereas the other has but a ſpecial property in the goods to detain them for his ſecurity. *Per Fleming* Ch. J. *et al'*, Sir *John Ratcliffe* verſ. *Davies.*

2. *Yelverton* 178. The delivery is nothing but the bare cuſtody, and it is not like to a mortgage; for then he that has intereſt ought to have the money, but in the caſe of a pledge, it is only a ſpecial property in him that takes it, and the general property continues in the firſt owner, upon tender of the money ſecured by the pawn, by the pawner, the property, notwithſtanding the refuſal, is reduced conſtantly to the pawner without claim. S. C. 2 *Bulſt.* 30.

The next queſtion to be conſidered, will be in relation to the condition of creditors where the debtor continues in poſſeſſion of the goods mortgaged: This was fraudulent at common law, and the 13 *Eliz. cap.* 5. *ſec.* 1, 2. provides againſt it, *that it ſhall be void.* There is no diſtinction whether the ſale be abſolute or conditional: Courts of equity and juries are to conſider upon the whole evidence whether the conveyance was made with a view to defraud or not.

This act does not extend to conveyances upon good conſideration, unleſs the circumſtances have the appearance of a deſign to deceive creditors; but where the goods or deeds have been left with the vendor ſo notoriouſly, as that there could be no deſign to defraud, this has never been looked upon as fraudulent.

Twine's caſe, 3 *Co.* 80. is a leading caſe upon fraud on this act; the tranſaction there was held fraudulent, though upon good conſideration, for that it was not *bonâ fide*, becauſe the vendor was left in poſſeſſion, and traded upon the credit of the goods ſold: It is hard to aſſign a reaſon why a buyer ſhould leave goods in the hands of the ſeller, unleſs to give him a falſe appearance of circumſtances and credit.

It was inſiſted, that there were ſeveral caſes that had made a diſtinction as to the poſſeſſion, after a conditional ſale, betwixt ſuch conditional and an abſolute conveyance of lands and goods.

I will ſhew that the caſe of lands is not applicable.

2 *Bulſt.* 226. 1 *Ro. Rep.* 3. reſolved, That the grantor's poſſeſſion of the land was not fraudulent; but lord *Coke* ſaid, That if the grantor had continued in poſſeſſion of the original leaſe, that would have made it fraudulent.

Poſſeſſion can be no otherwiſe a badge of fraud, than as it is calculated to deceive creditors: As to the poſſeſſion of goods, I have no way of coming to the knowledge of the owner, but by ſeeing who is in poſſeſſion of them; but the poſſeſſion of land is of a different nature, for a man may be in poſſeſſion of lands, as a tenant at will, as a mortgagor is, to the mortgagee, before the condition broken.

A purchaſer may call for the title deeds, and need not be deceived unleſs he will: But this is not the caſe of goods, where they are left in the poſſeſſion of the ſeller: A ſecond mortgagee ſhall never be compelled to diſcover his title, 3 *Will.* 218. becauſe the firſt mortgagee has contributed to draw him in by leaving his title deeds in the mortgagor's hands.

There may be a caſe as in *Eq. Caſ. Abr.* 321. *pl.* 7. where leaving title deeds with the mortgagor will not be conſtrued as a badge of fraud, on account of the particular circumſtances.

A caſe was cited *Pr. Ch.* 285. There a ſupercargo having ſhipped goods of his own, borrowed money at 40 *per cent.* and made a bill of ſale of the goods to the plaintiff; the goods were carried and ſold abroad; and upon a queſtion betwixt the particular vendee of theſe goods, and a judgment creditor of the vendor's, Lord *Cowper* decreed in favour of the vendee; he took no diſtinction betwixt conditional and abſolute ſales, but founded his determination upon the fairneſs of the tranſactions; his words are, "That here was no poſ-" ſeſſion calculated to acquire a falſe credit," which is a plain declaration, that a poſſeſſion ſo calculated as to acquire a falſe credit, would have made the tranſaction void. There is a further ſaying in the report, that it is true, in caſe of a bankrupt, ſuch keeping in poſſeſſion after a ſale, will make the ſale void.

This muſt mean ſuch poſſeſſion as would give a falſe credit, and all that is laid down there is, that a poſſeſſion to acquire a falſe credit, would make ſuch a tranſaction void, otherwiſe not.

Maggot and *Wills*, 1 *Raym.* 286. and caſes in the time of King *William* the third, 159. From both theſe reports it appears, that the caſe was ſo defectively ſtated, that the court could form no judgment upon it, but ſent it back again for a new trial, and the *dictum* of Lord Chief Juſtice *Holt* is againſt the caſe, for which it was cited; no notice of the ſtatutes of bankrupts was taken in the whole caſe; but *Holt* takes it up, upon the fraud, and gives it as his opinion, that it was not fraudulent, and it is very clear, that it was not the diſtinction betwixt a conditional and abſolute ſale which weighed with him at all. He diſtinguiſhes betwixt a bill of ſale to a landlord, and to any other creditor; ſo that it was his opinion, that it was not fraudulent in the caſe of a landlord. From all theſe caſes it appears, that upon the conſtruction of the ſtatute of the 13th of *Eliz.* there is no room to make a diſtinction betwixt conditional and abſolute ſales of goods, if made to defraud creditors, but a court or jury are left to conſider of this from the circumſtances of the caſe.

The legiſlature have thought neceſſary to deſcribe what goods were a bankrupt's or not, and for this purpoſe the 21ſt of *Jac.* 1. was made, and by that act the 10th ſection, which is the preamble to the 11th ſection, though it is printed with the former ſection, by miſtake, ſays, " And for that it often falls out that many perſons, before they " become bankrupts, do convey their goods to other men upon good " conſideration, yet ſtill do keep the ſame, and are reputed the own- " ers thereof, and diſpoſe the ſame as their own."

Now merely conſidering things in poſſeſſion, the miſchief was, that theſe perſons, before the act, made over their goods, and yet were ſuffered to continue in poſſeſſion, as if the goods were ſtill their own; and this was the thing intended to be remedied, and there is no diſtinction made here between abſolute and conditional ſales.

Then conſider the enacting clauſe.

" Be it enacted, that if at any time hereafter any perſon or perſons " ſhall become bankrupt, and at ſuch time as they ſhall ſo become " bankrupt, ſhall by the conſent and permiſſion of *the true owner and* " *proprietary* have in their poſſeſſion, order, and diſpoſition, any " goods or chattels whereof they ſhall be reputed owners, and take " upon them the ſale, alteration, or diſpoſition as owners, that in every " ſuch caſe the ſaid commiſſioners ſhall have power to ſell and diſ- " poſe the ſame, as fully as any other part of the bankrupt's eſtate."

It is not to be doubted but as the preamble makes no diſtinction betwixt abſolute and conditional ſales, ſo the enacting clauſe will take in the one as well as the other.

The only thing contended for is, whether the mortgagee ſhall be conſidered as the *true owner*, or the mortgagor, and there is no doubt the conditional vendee is *the true owner or proprietary*, and there is no reaſon to make a diſtinction between an abſolute and conditional

vendee, but by confounding the difference betwixt pawns and mortgages.

There might ſome doubt ariſe, if this was the caſe of a pawn, as in the caſe 3 *Bulſtrode* 17. but it cannot be doubted in the caſe of a mortgage, for it is an immediate ſale to the mortgagee; and though the mortgagor may buy it again, or redeem by favour of a court of equity, yet till then, the vendee is the abſolute proprietor.

On a pawn, the pawn is compleat by a delivery; but on a conditional or abſolute ſale, the ſale is compleat by the contract, and the party is intitled to a delivery of the goods as ſoon as he has paid the price. *Salk.* 113. *Dyer* 20, 203.

If therefore a conditional vendee pays money, and does not inſiſt upon a delivery of the goods, he confides in the credit of the vendor, and not in any real or particular ſecurity, and ought to come in, under the commiſſion, as much as any other perſon that places a confidence in the bankrupt, and not in any other ſecurity.

As there is no authority to warrant a diſtinction betwixt abſolute and conditional ſales, ſo there is a caſe that deſtroys it. *Stevens* v. *Sole* in *Chanc. Trin.* 1736. a trader within the ſtatute having poſſeſſion of a leaſehold eſtate, aſſigned it, and made a bill of ſale of three hoys redeemable. In *May* 1731. he became a bankrupt, the defendants were the aſſignees, and the plaintiff brought a bill to be paid his principal, *&c.* or to foreclоſe; and it was admitted that the leaſehold was inſufficient to pay the plaintiff, but as to the hoys, it was inſiſted that as the bankrupt had continued in poſſeſſion of them, they were liable to the commiſſion.

Lord *Talbot* decreed upon this admiſſion, that there ſhould be a foreclоſure as to the leaſehold, and that the plaintiff ſhould be admitted under the commiſſion, for ſo much of his debt as the leaſehold would not ſatisfy; and decreed that the money ariſing by the ſale of the hoys ſhould be applied to the payment of the creditors under the commiſſion.

But it was inſiſted, that there has been a ſubſequent caſe contrary to this, *Bourne*, aſſignee of *Peele* v. *Dodſon*, *Dec.* 4. 1740. in Chancery. It is ſufficient to ſay there was in that caſe no judicial determination. *Lord Chancellor* did then conſider the inconveniencies that might ariſe, if it ſhould be held that ſhips at ſea, of which no poſſeſſion could be delivered till their return, ſhould be ſubject to a bankruptcy.

There was another caſe before Lord *Hardwicke*, *October* 22. 1746. *Brown* v. *Heathcote*. *Williams* and *Wilder*, partners, indebted to *Heathcote* in 1200 *l.* aſſigned their ſhips to him, and delivered over the charterparty, invoice, *&c.* *Williams* became a bankrupt, and the ſhips came home, and it was contended that as here was no delivery of the poſſeſſion, it was within the ſtatutes; but Lord *Hardwicke* was of a contrary opinion, as every evidence of ownerſhip was delivered over to the aſſignee, and all means were uſed to obtain an actual delivery as ſoon as the ſhips came home; and that the ſtatute was deſigned againſt thoſe only, who had neglected ſome act to put themſelves

ſelves in poſſeſſion of the goods conveyed, and by that means had led other people into a deceit; that there could be no *conſent or diſſent*, as to the poſſeſſion of ſhips at ſea, and ſo not within the words of the act, nor within the reaſon of it, which was to hinder perſons from gaining a falſe credit, for here the owners had delivered over every evidence of ownerſhip, and could not prove by any other means that they were owners.

I ſhould think that the delivering over of the muniments was a delivery of the ſhip, as the delivery of the keys of a warehouſe is a delivery of the goods in it.

Now to apply this to the two mortgages.

That of *Tompkins* in 1723.

And that of *Stevens* in 1738.

Theſe mortgages are of a leaſe with fixtures and moveable goods; as to the fixtures, no body can remove them till the mortgage is ſatisfied, for though a leſſee may remove fixtures during his term, yet if he leaſes his whole term, he cannot, any more than a leſſor during the term, and a ſheriff may take them in execution. *Salk.* 368. *Poole's caſe.*

As to the utenſils *not fixed*, they will come under the ſame conſideration as goods granted without a delivery of poſſeſſion.

A leaſe of an houſe with moveables, is only a gift of the utenſils during the term. *Spencer's caſe* 5 *Co.* 16, 17. 1 *And.* 4. *Dy.* 212. *b.*

2. As to the fixtures, we need not conſider them with regard to the mortgage in 1738. becauſe they will be exempted by the firſt mortgage; but as to the utenſils *not fixed*, they will ſtand in the ſame condition as others.

A partner is poſſeſſed *per Mie & per Tout*, and therefore no actual delivery can be made to him; but the offence againſt the ſtatute is permitting one to continue in poſſeſſion, when he has ſold all the goods to another, who is thereby intitled to the poſſeſſion of the entirety; and *Stevens* permitting *Harveſt* to continue as half owner of them, is the caſe mentioned in the ſtatute.

As to the mortgages of 1-ſeventh ſhare of the bankrupt's moiety of the parnerſhip ſtock, *&c.* in trade, before I go into the conſideration of this I will conſider the caſe of an aſſignment of a mere *choſe in action.*

The ſimpleſt caſe is of a bond; ſuch *choſe in action* is aſſignable in equity, and not at common law. The reaſon is, becauſe the aſſignor can furniſh the aſſignee with all the means of reducing it into poſſeſſion, for he can let him ſue in his name; why therefore is not the means of reducing any thing into poſſeſſion as neceſſary, as the delivery of the thing itſelf in the other caſe? Suppoſe a trader aſſigns over a bond, and the aſſignee permits him to keep the bond in his poſſeſſion, why ſhould not that be within the miſchief of the ſtatute?

A bond debt is a chattel, though ſome doubt has been made of this; but the doubt ariſes from hence, not that they are not chattels, in their nature, but that they are not grantable to a common perſon; but

but if they were granted to the King, they would paſs as chattels. *Bro. Prerogative* 40. 3 *Inſt.* 55.

12 *Co.* 1. *Ford* and *Sheldon*'s caſe, the reſolution there is, that perſonal actions are as well included within the word goods, as goods in poſſeſſion; therefore if a bond is a chattel, and the aſſignment is a conveyance of it, the bond being left in the hands of the aſſignor, is in his poſſeſſion, and he may aſſign it to a ſecond aſſignee, or may ſhew it to any creditor, as an evidence of ſo much money owing to him, and deceive him by it. And as he can have it by no other means, but by the conſent of the *true owner* in equity, he may thank himſelf for it.

In mortgages of lands poſſeſſion need not be delivered, but the title deeds muſt; and ſo ſhould the deeds and ſecurities of *choſes in action*. It is ſaid that a debt in trade is a mere choſe in action, and will paſs by an aſſignment even the day before the aſſignor becomes a bankrupt, as in the caſe of *Small* and *Oudley*, 2 *Wms.* 427. Mr. Juſtice *Burnet* ſtated this caſe and the reaſon of the judgment.

An obſervation was made, that this was an aſſignment of a ſhare in another man's trade, and not in his own; and the only reaſon of it might be, that here he could give no poſſeſſion. And a ſtreſs was laid upon this.

Every man in his own trade is in poſſeſſion of the choſes in action that ariſe from his own goods, and can put another in poſſeſſion either by giving him the ſecurities, or by admitting him a partner for ſuch a ſhare. And it is no uncommon thing to argue againſt aſſignees of a bankrupt from the nature of the goods, in reſpect to the choſes in action ariſing out of them, and alſo in reſpect to the new goods or profits. And if this kind of argument will prevail againſt them, it ought to prevail in their favour.

Suppoſe goods are conſigned to a factor who ſells them, and breaks, the merchant for the money muſt come in as a creditor under the commiſſion; but if the money is laid out in other goods, theſe goods will not be ſubject to the bankruptcy. 1 *Salk.* 160. Suppoſe, inſtead of ſelling the goods for ready money, he ſells for money payable at a future day, and breaks before the day, if the aſſignees receive the money, it will be for the uſe of the merchant. Or ſuppoſe that the factor had taken notes for the goods, if his aſſignees receive the money upon theſe notes, it will be to the merchant's uſe. This was determined in the court of Common Pleas. *Salmon* and *Scott*, *Hil.* 16 *G.* 2.

By parity of reaſon the rule will hold here, that as the ſpecifick goods, by being left in the bankrupt's poſſeſſion, would be ſubject to the commiſſion, ſo muſt the profits be in choſes in action, ariſing from theſe goods; and therefore theſe *mortgagees* can come in only as general creditors.

As to the laſt point, with regard to the aſſignment of *Harveſt*'s whole moiety of the partnerſhip ſtock in trade to *Potter*, in truſt for *Stevens* the other partner, it will either fall under the conſideration of an aſſignment to *Potter*, as a diſtinct perſon, or of an aſſignment

directly to *Stevens*: And the conſidering it in either of theſe lights will not vary the determination of the caſe; for conſidered as an aſſignment to *Potter*, it is difficult to ſay, why *Harveſt* after he had conveyed over all his ſhare of the partnerſhip trade, ſhould continue ſtill acting as the owner of it, unleſs it was done to acquire a deluſive credit; and conſidered as an aſſignment to *Stevens*, his permitting *Harveſt* to continue in poſſeſſion with him, will be conſtrued as a fraud againſt other perſons. I apprehend that *Stevens* was *the true owner* of this moiety, and has permitted the bankrupt to continue in poſſeſſion of it, as if he was the true owner, and that *Harveſt* has taken upon himſelf the diſpoſition of this moiety as the owner thereof, and that this comes within the words, miſchief, and intent of the ſtatute of the 21 *Jac.* 1. And if it was not to be ſo conſtrued, what a door would it open to frauds?

But it is inſiſted, that partners in tranſactions with each other have the partnerſhip ſtock for a ſecurity, but not more, or otherwiſe than in the caſe of ſtrangers, for whether a partner or a ſtranger lends money to the partnerſhip they are to be firſt ſatisfied out of the partnerſhip ſtock. 2 *Ch. Rep.* 117. *Com' Craven & al' con. Knight & al'* 34 *Car.* 2. 2 *Vern.* 293, and 706. and 3 *Will.* 180. which is as ſtrong as any negative caſe can be; he then ſtated the caſe, and ſaid there the executor inſiſted upon a right to retain as executor, but not as partner.

It may be ſaid, that it will be laying trade under great reſtraint, if a trader cannot mortgage his goods or ſtock without quitting trade: and to be ſure caſes may occur, in which there may be an inconvenience, but the inconveniences on the other ſide ſtrike me more ſtrongly.

A man ought to quit his trade, when he has no ſtock to carry it on; for if it is once eſtabliſhed, that the friends of a ſinking man may ſecure themſelves by mortgages, upon every thing that he has, without running any riſque, commiſſions of bankruptcy will be very uſeleſs things.

I muſt therefore conclude, that theſe mortgages of goods, *&c.* capable of a *delivery*, will be liable to the commiſſion by force of the ſtatute of 21 *Jac.* 1.

Sir *Thomas Parker* Lord Chief Baron, made four queſtions.

1*ſt*, Whether any mortgage or ſale upon condition, is within the ſtatute of the 21 *Jac.* 1?

2*dly*, Whether mortgages or ſales upon condition of ſpecifick chattels, are within the ſtatute?

3*dly*, Whether mortgages, *&c.* of particular parts or ſhares of trade, are within the ſtatute?

4*thly*, Whether the mortgage of *Harveſt's moiety to Potter*, is within the ſtatute?

He laid the caſes of pawns and hypothecation out of the queſtion.

Fraudulent deeds, he ſaid, might be avoided at common law.

By the 13 *Eliz. cap.* 5. they are alſo made void, with a proviſo that this does not extend to conveyances made upon good conſideration and *bonâ fide*.

He cited *Twine*'s caſe to ſhew, that the tranſaction there was not *bonâ fide*.

He then read the preamble to the clauſe, and the enacting clauſe of the 21 *Jac.* 1.

This clauſe, though it does not ſpeak of fraud, was intended to prevent that falſe credit which is the deſtruction of trade, and meant to give a further benefit to the creditors of a bankrupt, than was given to them by the 13 *Eliz. cap.* 7.

It extends to conditional as well as abſolute conveyances, or elſe a bankrupt might mortgage for almoſt the whole value.

The principal difficulty upon this caſe, ariſes upon the words of the ſtatute, by the conſent and permiſſion of *the true owner*, and it is inſiſted that they are only applicable to abſolute, and not to conditional ſales, becauſe a mortgagor having a right to redeem, is conſidered as the true owner.

But the words are put in oppoſition to the falſe and pretended ownerſhip, the bankrupt appearing to have the true ownerſhip of the goods by *the poſſeſſion*, and if a contrary conſtruction was to take place, it would be fatal.

This was determined in *Stevens* v. *Soale*, the 5th of *July* 1736.

The ſecond queſtion is, Whether mortgages (or ſales upon condition) of ſpecifick chattels, are within this clauſe?

It is allowed to be out of the queſtion, that the ſtock mortgaged underwent changes, for there is no doubt, but the produce is ſubject to the mortgage of the ſtock itſelf.

1*ſt*, It may be a queſtion, Whether the bankrupt's goods only, or the goods of other perſons left with him for ſafe cuſtody, or ſale, are within this clauſe?

2*dly*, Whether any, and which of the goods are within this clauſe?

The enacting clauſe ſpeaks of any goods, the preamble ſpeaks only of the bankrupt's own goods.

It is laid down 1 *Jo.* 163. *Palmer* 485. on the conſtruction of the ſtatute of the 13 *Eliz.* That the preamble ſhall not reſtrain the enacting clauſe.

But I take it to be agreed, that if the not reſtraining the generality of the enacting clauſe will be attended with an inconvenience, the preamble ſhall reſtrain it: And this is the caſe here, for otherwiſe merchants could not correſpond or carry on their buſineſs without great danger, and great difficulty.

The caſe of *L'Apoſtre* v. *Le Plaiſtrier*, 2 *Will.* 318. was rightly determined, I have my account of it from a ſhort note of Sir *Edward Northey*'s.

So in the caſe of *Godfrey* v. *Furzo*, 3 *Will.* 185. where Lord *King* took this difference; when a merchant abroad, conſigns to *B.* a merchant in *London* for the uſe of *B.* and draws on *B.* for the goods, though the money is not paid, the property veſts, and they are the goods of *B.* the merchant here, and liable to his debts; but where

goods are conſigned to a factor, as a ſervant, no property veſts in him, nor will the goods be liable to his bankruptcy.

Ex parte Marſh, 1ſt of *Auguſt* 1744. a bankrupt received 600 *l.* in money, goods, and pieces of plate, the property of his wife, and by deed before marriage, agreed that the ſame ſhould be ſecured to truſtees, for her ſeparate uſe, as if ſhe was a widow, and he gave a bond and warrant of attorney to confeſs judgment, and conveyed the plate to truſtees in truſt for the benefit of the children by the former huſband, and the wife appointed it by her will accordingly.

It was ordered, that the children the petitioners ſhould be admitted to come in under the commiſſion for the 600*l.* and that the plate in the cuſtody of the bankrupt ſhould be delivered to them; for that the money, having no ear-mark, could not be followed, but the plate might.

In *Copeman* v. *Gallant*, 1 *Will.* 314. I muſt own that Lord Chancellor *Cowper* exploded the notion of the preamble's governing the enacting clauſe, and went upon another reaſon, which was, that the aſſignment was with an honeſt intent, and to pay the debts of the aſſignor. I have great honour for lord *Cowper*, but though I approve of the decree; I cannot ſubſcribe to the reaſons of it; for notwithſtanding an honeſt intent will intitle a perſon to all due regard, yet an honeſt intent cannot take a caſe out of the clauſe of the ſtatute.

Suppoſe a perſon acted by commiſſion only, could there be any pretence to ſay, that perſons who advance their money, do advance it upon the credit of *his* ſtock, for to him the credit is given? So where a perſon acts partly upon his own ſtock, and partly as a factor.

2*dly*, Whether any, and which of the goods mentioned are within the clauſe; and whether any, and what poſſeſſion is required to be delivered.

The goods are, utenſils, hops, malt, fixtures to the freehold, and ſtock in trade.

As to the fixtures, they are like trees, *Hob. p.* 173. Lord Chief Juſtice *Hobart* ſays, that by the grant of the trees, by a tenant in fee ſimple, they are abſolutely paſſed away from the grantor and his heirs, and veſted in the grantee, and go to his executors and adminiſtrators, being, in the underſtanding of the law, divided, as chattels from the freehold, and the grantee hath power incident to, and implied from the grant, to fell them when he will, without any other licence.

Owen 49. An action is maintainable there, for the trees were reunited to the land by the purchaſe of the inheritance.

To apply this, the fixtures had been ſeveral times mortgaged diſtinctly from the freehold, but were all reveſted and reunited after that, and there was no occaſion to deliver them, but they would well paſs by the mortgage of the freehold to the *Tomkinss*.

I admit the caſe in *Salk.* 368. *Poole*'s caſe, where it is laid down that theſe things may be taken in execution, but I think a diſtinction is to be made, for here they could not be removed *by Harveſt*, or taken

taken in execution, by reaſon of the mortgagee's intereſt. And therefore I think the coppers and fixtures are liable to the *Tompkins's* mortgage.

With regard to the utenſils, *&c. not fixt.*

Where goods mortgaged are capable of an actual delivery, there ought to be an actual delivery; but if they cannot be delivered at the time of the contract, it will be ſufficient, if the mortgagee has the documents and muniments delivered to him in order to reduce them into poſſeſſion.

The delivery of a key, is the delivery of the poſſeſſion, according to the Civil law. *Dig.* 41. *t.* 1. *l.* 9. *p.* 5. *Vide Domat.* And the caſe of *Brown* v. *Heathcote*, mentioned by Mr. Juſtice *Burnet*, turns upon this principle.

It is objected, that the undivided ſhare of the ſtock, *&c.* in trade, will not admit of a ſeparate property, and ſeparate poſſeſſion, and therefore that the poſſeſſion of the mortgagor is the poſſeſſion of the mortgagee.

It is true that partners have a joint ſtock, but their poſſeſſion is ſeveral, and the intereſt is to ſome purpoſes ſeveral; as if a ſheriff ſeizes a joint ſtock for a ſeparate debt, he cannot ſell the whole. 2 *Mod.* 279. 1 *Show.* 173. *Salk.* 392. *Heydon* v. *Heydon.*

I will now conſider the caſes cited for the defendants. 1 *Raym.* 286. *Maggot* v. *Mills.* The clauſe of the ſtatute of the 21 *Jac.* 1. was not conſidered in this caſe, and one would imagine from Lord Chief Juſtice *Holt*'s expreſſion, that if the ſale there had been made to any other perſon than the landlord, it would have been fraudulent?

1 *Raym.* 724. *Cole* and *Davies*, this caſe admits of the ſame obſervation as the other, and I have ſome doubt, whether it was not compounded with a truſt. And beſides, the caſe was not within the 21 *Jac.* 1. becauſe the ſale was by the ſheriff, and not by the party, ſo that he did not take upon him the ſale, and diſpoſition as *owner.*

Small v. *Oudley*, 2 *Will.* 427. In this caſe the Maſter of the Rolls diſtinguiſhed betwixt a man's own trade and the trade of another perſon, and the reaſon of that was, becauſe the bankrupt was not in poſſeſſion, and could not deliver the goods, and unleſs they could paſs by aſſignment, they could not paſs at all.

Bucknal v. *Royſton*, *Pr. ch.* 285. Was a bill of ſale of the produce of a cargo going to ſea, and it depended ſolely on the law of merchants, for there was no bankruptcy in that caſe, and Lord *Cowper* ſays, that in the caſe of a bankrupt, ſuch keeping poſſeſſion after a ſale, will make the ſale void againſt creditors, ſo that this is an authority rather againſt the defendants, than for them.

In the preſent caſe, the poſſeſſion of the goods was not delivered, though capable of delivery, and the bankrupt had the evidence of the partnerſhip in his hands, and acted as *owner*, and the mortgage was a ſecret to every body but the parties; ſo that all the circum-

ſtances mentioned in the act concur to bring this caſe within it, and conſequently I think theſe are things liable to the bankruptcy.

The third queſtion is, Whether ſales or mortgages, on condition, of particular parts or ſhares of trade, and the produce of trade are within this clauſe.

I ſhall confine myſelf here to *things in action*, as ſuch mortgages are like ſo much of the balance mortgaged.

It is objected that this clauſe does not extend to things in action, becauſe it ſpeaks only of things in the poſſeſſion of the bankrupt at the time of the mortgage.

But chattels comprehend things in action. *Slade's caſe*, 4 *Co.* 95. *a.* Things in action are goods and chattels in a perſon attainted. *Litt. Rep.* 86. 12 *Co.* 1.

If goods and chattels will comprehend *things in action*, in the conſtruction of any act of parliament, they ought much more to do ſo in this, for otherwiſe a trader might cheat his creditors by aſſigning over ſuch things; and this is inforced by the firſt clauſe of the act, where it is provided, that every thing ſhall be conſtrued moſt beneficially for the creditors.

It is further objected, that things in action are not aſſignable but in equity, and do not admit of a delivery.

If a bond is aſſigned, the bond muſt be delivered, and notice muſt be given to the debtor; but in aſſignments of book debts, notice alone is ſufficient, becauſe there can be no delivery; and ſuch acts are equal to a delivery of goods which are capable of delivery.

Domat. l. 1. *t.* 2. *ſ.* 2. *par.* 9. ſays, Things incorporeal, ſuch as debts, cannot properly be delivered. This is to ſhew the nature of aſſignments of debts by notice to the debtor.

This clauſe therefore extends to *things in action*, and all has not been done that might have been done by the aſſignee to veſt the right of them in himſelf, and to take away from the bankrupt the power and diſpoſition of them, for no notice has been given to the debtors.

The fourth queſtion is, Whether the mortgage of *William Harveſt*'s moiety of the partnerſhip ſtock and trade be within this clauſe? And this is the moſt difficult queſtion.

It is objected that though *Potter* did not take poſſeſſion, yet he was merely a nominee for *Stevens*, and that *Stevens* being partner before, was in poſſeſſion as partner *per Mie et per Tout*.

But the queſtion ſtill remains, Whether when *Stevens* became intitled to the whole ſtock, he ſhould not have taken the ſole poſſeſſion excluſive of *Harveſt*, in order to take the mortgage out of the ſtatute? And I think he ought to have taken poſſeſſion of the whole.

For according to the fact in this caſe, *Harveſt* at the time of his bankruptcy continued, and appeared to be, in poſſeſſion of one moiety of the partnerſhip ſtock, *&c.* by the conſent of *Stevens*.

But it is ſaid that the law will conſtrue *Stevens* to be in poſſeſſion, according to his right.

There is no reaſon for ſuch a conſtruction, as *Stevens* ſuffered *Harveſt* to continue to act inconſiſtently with his right.

Another difficulty is, that the partnerſhip ſtock is in the firſt place liable to the partnerſhip account, according to the authority of the caſe of *Pyke* verſ. *Crofts*, 3 *Wms.* 180. and that this is no more than applying the partnerſhip fund, which was to pay the partnerſhip creditors, to the uſe of a partner who has made them a ſatisfaction another way; as where one of the partners is charged with more than he ought to be, equity gives him a lien on the partnerſhip ſtock to reimburſe himſelf.

But this is not applicable to the preſent caſe, becauſe *Harveſt* did not borrow any of the partnerſhip money, or imbezil any of the partnerſhip effects; nor was the tranſaction a partnerſhip tranſaction, or the money lent upon the partnerſhip account. And this principle of equity has never been extended to private loans, but it has always been confined to partnerſhip tranſactions, and I think it proper it ſhould be ſo confined.

Lord Chief Juſtice Lee: I agree with Mr. Juſtice *Burnet*, that theſe ſecurities are to be conſidered as mortgages, and I ſhall conſider them in that light.

At common law it was left to the jury to conſider, whether conveyances of this ſort were fraudulent againſt creditors or not.

This caſe muſt be determined upon the ſtatute of the 21ſt of *James* the 1ſt. The 13th of *Eliz.* is only declaratory of the common law, and as all the caſes upon that ſtatute have been fully anſwered by the Chief Baron and Mr. Juſtice *Burnet*, I ſhall ſay nothing more upon theſe caſes, or upon that ſtatute, but ſhall confine myſelf to the 21ſt of *Jac.* 1. becauſe I think that there the line is drawn, and the *certi fines* are to be found there.

The queſtion will be,

1ſt, Whether the mortgagee is not the true owner to whom there ſhould have been a delivery?

2dly, Whether the debts and choſes in action ſhould not have been delivered as far as they were capable of delivery?

3dly, Whether *Stevens* has had ſuch a poſſeſſion, as will exempt him from being conſidered as an owner, by whoſe conſent the bankrupt has had goods and chattels in his poſſeſſion, and taken upon him the diſpoſition thereof?

By goods and chattels I mean ſuch as were fixed to the freehold, and might be ſevered when the mortgage was ſatisfied.

The general preamble to this ſtatute ſays, that ſeveral defects had been found in the former ſtatute, and that one of them was in the power given to the commiſſioners for the diſcovery and diſtributing of the bankrupt's eſtate. The particular preamble to this clauſe recites, "That perſons before they become bankrupts do convey their "goods to other men upon good conſideration, yet ſtill do keep the "ſame, and are reputed *the owners* thereof, and diſpoſe the ſame as "their own."

The

The clauſe now in queſtion is the proviſion againſt this miſchief, and every word is to be conſidered; this caſe is within the preamble, for the bankrupt has conveyed the goods to the mortgagee; and as this falls within the words of the preamble, there is no occaſion to give any opinion whether the preamble is to reſtrain the enacting clauſe or not. By the 13 *Eliz. cap.* 5. there was an expreſs proviſo, that it was not to extend to conveyances *bonâ fide*; and this was the difficulty for the commiſſioners to diſcover.

I apprehend that the direction there given, that if any perſon ſhall become a bankrupt, and have in his poſſeſſion goods, *&c. was* to remedy the inconvenience that aroſe in injuries upon the former ſtatute, whether the ſale was *bonâ fide* or not, by making the reputed ownerſhip of the bankrupt, the real ownerſhip in him for the benefit of his creditors, becauſe if *the true owner* ſuffers the bankrupt to become the reputed owner, he deprives himſelf of the benefit of his conveyance, and the bankrupt having gained a credit by his means, and hurt his other creditors, he ſhall be in no better condition than they are.

Is the mortgagee then the true owner?

The 21 *Jac.* 1. *ſec.* 13. deſcribes the mortgage in theſe words: "If any perſon that becomes a bankrupt ſhall convey or aſſure, *&c.* "any lands, tenements, hereditaments, goods, chattels, or other "eſtate, unto any perſon upon condition or power of redemption at "a day to come, by payment of money or otherwiſe."

This is the deſcription that the ſtatute has made of a mortgage, not only of land, but of goods upon condition. *Co. Lit.* 210. *a.* If a man makes a feoffment in fee, upon condition that the feoffee ſhall pay the feoffor, his heirs or aſſigns, 20*l.* at ſuch a day, and before the day the feoffor makes his executors and dies, the feoffee may pay the ſame either to the heir or the executors, for the executors are his aſſignees in law to this intent.

But if a man make a feoffment in fee, upon condition that if the feoffor pay to the feoffee, his heirs or aſſigns 20*l.* before ſuch a feaſt, and before the feaſt the feoffee maketh his executors and dieth, the feoffor ought to pay the money to the heir and not to the executors; for the executors in this caſe are no aſſignees in law, and the reaſon of this difference is given in the book, that the feoffor hath but a bare condition, and no eſtate in the land which he can aſſign over; but in the other caſe the feoffee hath an eſtate in the land that he may aſſign over, which is in other words ſaying, that the mortgagee is the owner, and has the intereſt in him; and 2 *Cro.* 244. cited by Mr. Juſtice *Burnet*, as to the difference between a pawn and a mortgage, goes to the ſame matter.

The difference taken betwixt conditional and abſolute ſales, and the caſes thereon, have been obſerved upon already. I ſhall only mention one of them. *Stone* and *Graſton*, 2 *Bulſt.* 206. That caſe was a condition upon a future conſideration. The words of Lord *Coke* which are relied upon are, that the poſſeſſion of the mortgagor was

not

not fraudulent, but if it had been an abſolute conveyance, it would have been fraudulent.

I look upon this caſe to have been determined intirely upon the ſtatute of 13 *Eliz. cap.* 5. and the common law, the plan of which ſtatute differs from that of the 21 *Jac.* 1. It is againſt fraudulent conveyances, with a proviſo in favour of conveyances *bonâ fide*, whereas the act of the 21 *Jac.* 1. ſuppoſes a fair conveyance, but deprives the party of any preference, becauſe he does not give proper notice of his conveyance, and it ſeems to me that the caſes upon this ſtatute are more like the caſes that may happen upon the regiſtring acts, where a perſon does not regiſter, and ſo loſes the priority of the ſecurity: So here the donee is not to ſuffer the donor to continue in ſuch a poſſeſſion, as is preſcribed againſt by the act. And though the caſe cited is not material to the point in queſtion, yet I think nothing of what was ſaid in that caſe, eſtabliſhes a difference betwixt a conditional and abſolute ſale, yet it is material, that a mortgagor who continues in poſſeſſion, is before the condition broken tenant at will to the mortgagee, which ſhews that the mortgagee muſt be conſidered as the true owner of the land.

As to the other caſes cited to eſtabliſh this difference betwixt conditional and abſolute ſales, I ſhall not go over them again, becauſe they have been fully anſwered.

Stevens v. *Sole*, 5th *July* 1736. is a caſe in point on a mortgage of a perſonal thing, and lord *Cowper*'s ſaying in the other caſe is an authority upon this queſtion, though upon another point; for he ſays in *Bucknall* and *Royſton*, *Pr. ch.* 287. That "ſuch a keeping poſ-"ſeſſion after a ſale as is deſcribed by the 21 *Jac.* 1. which is a poſ-"ſeſſion with the liberty of the diſpoſing the goods as his own, "would make the bankrupt's ſale void againſt his creditors by the "ſtatute: This caſe therefore muſt be conſidered as an authority to "the ſame purpoſe with that determined by lord *Talbot*, and both "determine the queſtion with regard to ſpecifick goods.

I am of opinion, it will be the ſame as to the ſhares of the partnerſhip ſtock, partly in poſſeſſion, and partly in action, and as to all choſes in action, as debts capable of being aſſigned in a court of equity, ſome books indeed as *Swynb. p.* 498. edition the 6th, ſeem to countenance an opinion that goods do not include bonds, *&c.* For notwithſtanding he ſays, that by *goods* the civil law underſtands not only things in poſſeſſion, but alſo things for which a lawful action may be had; yet in the ſame page he lays it down, that by the laws of this realm, the word goods is otherwiſe underſtood, and never includes things which are of the nature of freehold, nor things in action, as a debt upon a promiſe, or obligation, ſo *Calye*'s caſe, 8 *Co.* 32. carries ſome appearance of the like opinion, where it is ſaid, That an innkeeper is anſwerable for the loſs of a bond, being obliged to keep the goods and *chattels* of his gueſt, for though it is there ſaid, that goods and chattels do not properly comprehend charters and evidences concerning a freehold, or inheritance, or obligations, or other deeds or ſpecialties being things in action, and yet, in this caſe, the writ againſt

an hoſtler or innkeeper is expounded to extend to them: I apprehend that theſe opinions were grounded upon the notion, that choſes in action did not paſs even by ſtatute, any more than they were grantable by a bargain and ſale, *&c.* but there are ſo many authorities to contradict them, that I take that point to be ſettled.

A corporation cannot take a recognizance or obligation in their publick capacity, becauſe they cannot take a chattel. *Catalla* comprehends a right of action, and is the only word in the ſtatute to give this right. 12 *Co. p.* 1. *b. Ford* and *Sheldon*'s caſe. This point was in queſtion, Whether choſes in action come under the word goods, and it is there ſaid, that perſonal actions are as well included within this word *goods*, in an act of parliament, as goods in poſſeſſion.

If *goods and chattels* in the ſtatute, includes choſes in action, all things ariſing from the ſale of the joint ſtock, are ſubject to the aſſignees, as they follow the nature of the goods themſelves, and Mr. Juſtice *Burnet* has cited caſes to ſhew that they are ſo, where the thing can be diſcovered.

Swynb. 506. 6th edition, is upon the ſame foundation: If a man deviſes his moveable goods to *B.* and his immoveable to *C.* upon a queſtion how the debts ſhall go? he ſays, thoſe debts which did ariſe by occaſion of the things moveable, and for recovery whereof there lies an action perſonal, belong to that perſon to whom the teſtator did bequeath his moveable goods; which ſhews that the produce of the goods were of the ſame nature with the goods themſelves.

As to *Stevens*'s mortgage, it being made to *Potter* in truſt for *Stevens*, it is to be conſidered as a mortgage to *Stevens*, and as to the objection that *Stevens* being in poſſeſſion, wanted no new poſſeſſion to be delivered, the anſwer has been given, *That Harveſt* had the poſſeſſion with the conſent of *the true owner*, which he ought not to have had.

Croft v. *Pyke*, 3 *Will.* 180. is the caſe that was called a negative one.

Though this has been no where determined; yet one may uſe a citation from a Civil law book, not as an authority upon which a judgment is to be founded, as it has not been received here, but as the opinion of learned men, and for this ſaying he cited *Blackborough* and *Davis* from a manuſcript note, where Lord Chief Juſtice *Holt* advances the ſame thing. I ſhall therefore mention *Domat. lib. fo.* 155. where he ſays, debts owing by the partnerſhip and their other charges, are to be born out of the common ſtock, otherwiſe as to the money borrowed by a partner which has not been applied to the common ſtock.

I mention this to prove that the partnerſhip ſtock is no further ſubject to debts from one partner to another, than as the money has been applied to the partnerſhip trade.

Upon the whole, the ſtatute is the rule to be followed in this caſe, the intent of it was to prevent bankrupts from acquiring a falſe credit, and to puniſh acceſſories by the loſs of the priority of their

debts; whether this was a wiſe proviſion or not, is not for us now to determine, it muſt be followed as long as the act continues in force.

Lord *Hardwicke* Chancellor: This is a queſtion of great conſequence, I will endeavour to reduce the grounds I go upon to ſome general heads.

1*ſt*, Whether any mortgage or conditional diſpoſition or conveyance of any goods and chattels is within the 21 *Jac.* 1. *c.* 19. *ſ.* 10, 11.

2*dly*, If any is, Whether the preſent mortgages, and which of them are ſo?

3*dly*, Whether the mortgagee of the moiety of the partnerſhip's ſtock, *&c.* is within the act?

1*ſt*, Whether any mortgages, or conditional conveyances of goods, are within the act?

Under this general queſtion, I ſhall not enter into a particular diſquiſition of the two points made at the bar.

1*ſt*, If the enacting clauſe extends to all goods in the cuſtody of the bankrupt, whether his own originally or not, or whether it is to be reſtrained by the preamble, to goods only, that were originally the bankrupt's.

Or, 2*dly*, Whether choſes in action are within the clauſe?

For as to the firſt, the Chief Baron has entred ſo far into the conſtruction of it, as not to leave any room for doubt: however let the conſtruction be what it will, the preſent caſe, as to this point, is within the act, becauſe it is not diſputed but that all the goods here in queſtion, were originally the bankrupt's, and were mortgaged by him.

But ſtill in this reſpect I ſhall not ſcruple to declare that I am ſtrongly inclined to be of opinion with Lord Chief Juſtice *Holt*, and my Lord Chief Baron, that this clauſe is to be reſtrained by the preamble, and differ from Lord *Cowper* in the caſe of *Copeman* v. *Gallant*, 1 *Will.* 314.

As to the other point, it has been fully cleared up, that *choſes in action* are properly within the deſcription of goods and chattels in this clauſe.

But I will add one argument: It is that the conſtruction which has been put upon this clauſe is ſupported by the next immediate precedent clauſe in the act, it relates to bankrupts, who by fraud make themſelves accomptants to the King to defeat their creditors, where there is a power given to the commiſſioners, to diſpoſe of all lands, tenements, hereditaments, goods, chattles, and debts of the bankrupt ſo extended, to and for the uſe of the creditors, and yet when it comes to the proviſion, it reſts intirely upon the words *lands*, *tenements*, *goods and chattels*, and was deſigned to comprehend all kind of *perſonal property*, whether in poſſeſſion *or action only*.

In 12 *Co. Ford* and *Sheldon*'s caſe, it is laid down, that in an act of parliament the words *goods and chattels* take in choſes in action, and the contrary opinion ſeems to have ariſen upon queſtions on grants, and bargains and ſales, by which they could not paſs, but an act of parliament which may paſs any thing, will take in the whole.

The aim of the legiſlature in all ſtatutes concerning bankrupts was, that the creditors ſhould have an equal proportion of the bankrupts effects as far as poſſible.

And it was intended that this act ſhould be conſtrued beneficially for the general creditors, and it is ſo declared in an unuſual manner in the firſt clauſe of the act.

The general view of the proviſion now under conſideration, was to prevent traders from gaining a deluſive credit from a falſe appearance of their circumſtances, to the miſleading and deceit of thoſe who ſhould trade with them, and the legiſlature thought they had done this by ſubjecting all things remaining in the poſſeſſion of the bankrupt, to the creditors under the commiſſion, becauſe where the vendee leaves the goods bought in the poſſeſſion of the bankrupt, he confides as much in the general credit of the bankrupt, as that creditor who has taken only a bond or note.

The general view of the proviſion now in queſtion, to prevent traders from gaining a deluſive credit, from a falſe appearance of their circumſtances.

In ſuch caſes, the bankrupt had it in his power to ſell all the goods the next hour, and the vendee or aſſignee could not claim them from the buyer, but could only have a perſonal remedy againſt the bankrupt.

All this holds as well in the caſe of conditional, as of abſolute ſales, and if the court ſhould make a different determination, it would be contrary to the caſe of *Stevens* v. *Sole*, determined by Lord *Talbot*, and to *Buckland* v. *Royſton*, by Lord *Cowper*, and to the implied opinion of the laſt in *Copeman* v. *Gallant*.

The ſtatute of the 21 *Jac.* 1. *c.* 19. extends to conditional as well as abſolute ſales.

I chuſe to forbear obſerving upon the words of the clauſe, becauſe that has been done already.

The legiſlature has explained it's ſenſe by putting the words *true owner*, in oppoſition to *the reputed owner*.

The 2d queſtion is, Whether any, and which of the mortgages are within the ſtatute?

According to the authority of the caſes which have been mentioned the mortgages of the 10th *Dec.* 1737. and of the 6th and 7th of *Sept.* 1738. and ſo much of the aſſignment to *Stevens*, as relates to the utenſils not fixt to the freehold, and alſo the mortgage of the 6th of *March* 1738. are within the ſtatute, and made void by it.

A ſhare of the partnerſhip trade, *&c.* mortgaged to a partner, muſt be delivered, or it is a deluſive credit, and falls within the ſtatute of the 21 *Jac.* 1. *c.* 19.

If it was to be laid down, that a ſhare of the partnerſhip trade, *&c.* mortgaged to a partner, is not neceſſary to be delivered, it would let in all the inconveniencies which were to be prevented by this ſtatute.

As

The provisions in the 21 *Jac.* 1. *c.* 19. *sec.* 11. with respect to legal interests, must be followed as to equitable ones; *choses in action* therefore within the meaning of the act, and are included in the words *goods and chattels.*

As to choses in action, equity ought to follow the law; if it does not, infinite mischief would follow. It is easy to turn a legal into an equitable interest, and if parliamentary provisions as to a legal interest were not to be followed as to equitable interests, it would defeat the act. Thus upon the popish acts, tho' penal, the considerations and rules are the same in equity as at law.

It was said, that the mortgages to *Potter* for the benefit of *Stevens*, must be considered as a mortgage to *Stevens*, and it may be generally right to consider it so; though yet as a judge in equity, I am inclined to carry it farther than the judges at common law have done; for whatever interest passed of the personal things, passed in law to *Potter*; and if the case had been at common law, a court of law would not have taken any notice of the trust for *Stevens*, and then by the statute this assignment had been void at law against *the commissioners*, and a court of equity would never set it up here.

And therefore I make a difference betwixt such things as being assignable only in equity, gave no title to *Potter* at law; for as to these the mortgage is to be considered as being made directly to *Stevens*, but as to those things, in which an interest passed at common law to *Potter*, I think *Potter* is to be considered as having the legal property.

How far partnership stock is liable to the debts of partners in the first place.

As to the question, whether partnership stock is to be first liable to the debts of the partners, it was never carried further than to debts contracted relative to the partnership, either after the bankruptcy, or death of one of the parties.

Where one partner lends money to another generally, and it is not entered in the partnership books, he does not gain a specific lien upon the share of the borrower.

Where a partner lends money to another generally, and it is not entered in the partnership books, it is said he gains a specifick lien upon the share of the borrower, and shall be preferred to separate creditors; but I find no foundation for this, after a bankruptcy, nor after the death of a partner, where his effects have become subject to the rule of distributing assets. What equity there may be between partners themselves, on settling an account, is another thing.

Crofts vers. *Fyke* 3 *Wms.* 150. is as strong a negative case to this purpose as can be; all that was contended for there, being that he might retain as executor.

If it should be determined that one partner should gain a specifick lien, by lending money to the other upon the partnership stock, it would open a door to great fraud, and give a shock to this act, which is made on purpose to prevent a false and delusive credit.

I will take notice of one thing mentioned by Mr. Justice *Burnet*, and the Chief Justice.

It has been said in this cause, that great mischief might arise to trade and credit from making securities of this kind void, because it might prevent persons from using their credit in trade, and that they will not be able to make a security, without exposing their circumstances to the world, which may hurt their credit.

On the other side it has been argued, that a delusive credit is still of more dangerous consequence.

I will not ſay but ſome inconveniencies may ariſe on each part; but I agree with the Chief Juſtice, that as it is a law, it muſt be adhered to, and we cannot depart from it. If any inconvenience does ariſe, it is for the conſideration of the legiſlature whether it ought to be allowed or not.

But this I will ſay, that very great inconveniencies may ariſe by giving an opportunity to people to make ſuch ſecurities, and yet appear to the world as if they had the ownerſhip of all thoſe goods of which they are in poſſeſſion, when perhaps they have not one ſhilling of the property in them.

And further I will venture to ſay, that it was the deſign of the act of parliament to prevent this; for the act was made in the ſimplicity of former times, long before thoſe large and airy notions of credit prevailed, which have been ſince introduced.

This act is a law, and I concur with my Lords the Judges in the opinion that they have given, and the conſtruction that they have put upon it; and do therefore determine that theſe mortgages and ſecurities are not a lien upon the bankrupt's eſtate.

February the 4th 1749.

THE cauſe coming on again for directions, and a queſtion ariſing, whether a debt could be ſet off within the proviſion of the ſtatutes of bankrupts?

Lord Chancellor ſaid, that under the act of the 5th of *George* the ſecond, perſons might ſet off debts, as that act extended to all mutual debts, though independant of, and not relative to the mutual credit between the bankrupt and other perſons in the courſe of trade, and though the debts were of ſuch a nature as could not be brought into a general account.

A perſon may ſet off a debt under the bankrupt acts, though not relative to the mutual credit between him and the bankrupt.

December the 23d 1748.

On the petition of *Richard Flyn* and *Richard Field*, merchants, in the bankruptcy of *Hugh Mathews*.

THE petitioners being at *Liverpool* the beginning of *July* laſt, and purpoſing to be concerned together in purchaſing plantation tar, they found on enquiry a quantity thereof to the amount of

Caſe 98.

One *Mathews* ſold to the petitioners two-thirds of 500 barrels of tar, at the rate of 9 *s. per* barrel, and the other third he agreed ſhould be conſigned to petitioners for ſale at his riſque, and on his own account, and that he ſhould be at the charge of cartage and porterage, and ſhipping off the whole, and *Mathews* accordingly cauſed the tar to be put into a warehouſe of his own, for the purpoſes of the agreement: Petitioners at the ſame time paid *Mathews* in *London* bills 150 *l.* the amount of two-thirds, and *Mathews* made them out a bill of parcels. *Mathews* afterwards becomes a bankrupt, and the aſſignees take poſſeſſion of the tar, as they found it remaining in his warehouſe. This is not within the intent of the 21 of *Jac.* 1. *ch.* 19. which meant to guard againſt leaving goods in the *poſſeſſion, order, and diſpoſition of bankrupts*, but here was only a mere temporary cuſtody, till the petitioners had an opportunity of ſhipping it off to *Ireland*. The petitioners intitled to two-thirds of the tar, and the aſſignees ordered to deliver the ſame accordingly.

500 barrels lying on the quay of *Liverpool*, which *Hugh Mathews*, a merchant of that town, had then imported for ſale; whereupon the petitioners and *Mathews* came to an agreement together on the 8th of *July*, whereby *Mathews* ſold to the petitioners two-thirds of 500 barrels of the ſaid tar at the rate of 9*s. per* barrel, and the other third he agreed ſhould go and be conſigned to the petitioners for ſale at his riſque, on his own account, and that he ſhould be at the charge of cartage and porterage, and ſhipping off the ſaid 500 barrels of tar, and that the petitioners ſhould ſell his ſhare of tar free from charges of commiſſion.

And it was further agreed that the ſaid tar ſhould be removed from the quay, and lodged in a warehouſe until the petitioners ſhould give orders for the ſhipping the ſame off as opportunity offered, they having none at that time; *and accordingly* Mathews *cauſed the ſaid tar to be put into a warehouſe or cellar of his own, for the purpoſes of the ſaid agreement.*

The petitioners at the ſame time paid *Mathews* in *London* bills for 150*l.* being the amount of the value of the ſaid two-thirds of the ſaid tar agreed for, and *Mathews* alſo at the ſame time made out and delivered the petitioners a bill of parcels of the ſaid tar, in the words and figures following: *Liverpool*, 8*th* July 1748, *Meſſrs.* Richard Flynn *and* Richard *Field*, *bought of* Hugh Mathews *two-thirds of* 500 *barrels of plantation tar*, *at* 9s. *per barrel*, *the whole amount* 225l. *the whole to be ſold by ſaid gentlemen for account as follows*, *two-thirds their account* 150l. *one-third* Hugh Mathews's *account* 75l. Hugh Mathews *to bear charges of cartage and porterage in ſending off*, *then received bills on* London *amount* 150l. *when paid is in full of their part*, *per* Hugh Mathews.

Mathews the beginning of *Auguſt* laſt became a bankrupt, and the aſſignees under the commiſſion iſſued againſt him, have taken poſſeſſion of the ſaid tar as they found it remaining in his warehouſe, and being doubtful whether they can deliver the ſame with ſafety to themſelves, to the petitioners, the aſſignees and *Flyn* and *Field* have agreed to be determined by *Lord Chancellor* on petition, which came on now before his Lordſhip for directions.

The queſtion aroſe on the following clauſes of the 21 of *Jac.* 1. *Ch.* 19.

" *For that it often falls out that many perſons before they become* " *bankrupts, do convey their goods to other men upon good conſideration,* " *yet ſtill do keep the ſame, and are reputed the owners thereof, and diſ-* " *poſe the ſame as their own*;

" Be it enacted, that if at any time hereafter any perſon or perſons " ſhall become bankrupt, and at ſuch time as they ſhall ſo become " bankrupt *ſhall by the conſent and permiſſion of the true owner and* " *proprietary have in their poſſeſſion, order and diſpoſition*, any goods " or chattels, *whereof they ſhall be reputed owners*, and take upon them " the ſale, alteration, or diſpoſition as owners, the commiſſioners " ſhall have power *to ſell and diſpoſe the ſame* for the benefit of the " creditors, which ſhall ſeek relief by the ſaid commiſſion, as fully " as any other part of the eſtate of the bankrupt."

Mr. *Wilbraham* for *the aſſignees.*

There are two ſorts of perſons affected by this clauſe.

1. Perſons who are purchaſers of goods, though for a good conſideration, or *true owners* of goods, and who yet leave them in the hands of the bankrupt.

2*dly*, The creditors of bankrupts.

The intent of this law was to prevent perſons intruſting traders with the poſſeſſion of goods where they have not the property; poſſeſſion gives a ſpecies of property, and a poſſeſſory property is a good property againſt wrong doers. The poſſeſſion always creates a preſumption of abſolute property, it makes a man the viſible owner, this ſpecious ownerſhip creates a credit, and draws in innocent perſons to give credit upon the faith of appearances; if they are falſe appearances, they are drawn in to give credit to that which has no reality, but is merely fictitious.

This act of parliament intends to remedy that inconvenience by preventing this practice, and in order thereto impoſes a penalty upon ſuch practice, whether it ariſes from deſign or inadvertency.

Lord Chancellor: I think this caſe is not within the intent of the act of parliament, which meant to guard againſt leaving goods in the *poſſeſſion, order, and diſpoſition of bankrupts*; but here it was merely a temporary cuſtody, becauſe the petitioners, the buyers of the tar, had not an opportunity of ſelling it by ſhipping it off immediately to *Ireland.*

It cannot with any propriety be ſaid the tar was *in the order, diſpoſition, or power of the bankrupt*, and therefore not within the act of parliament.

Upon the foot of the agreement between the petitioners and *Mathews*, this is to be conſidered as an undivided property, of which they were tenants in common; there muſt be a poſſeſſion of thoſe goods in one or other of them, and the poſſeſſion of one is the poſſeſſion of all, and therefore the petitioners are intitled to two-thirds of the tar, and the aſſignees muſt deliver up the ſame to the petitioners.

(X) Rule as to copyholds under a commiſſion of bankrupts.

July the 3d 1746.

Drury v. *Man*, ſurviving aſſignee of *Johnſon*, a bankrupt.

Vide under the diviſion, Rule as to Aſſignees.

(Y) Where

(Y) Where aſſignees are liable to the ſame equity with the bankrupt.

October the 25th 1744.

Brown v. *Jones* and others.

Caſe 99.

Though the court will favour creditors, yet it muſt be, where they have a ſuperior right to other perſons.

THE bill in this caſe was brought by the aſſignee under a commiſſion of bankruptcy againſt *Roger Williams*, to have a real eſtate belonging to the bankrupt ſold.

The queſtions in this cauſe aroſe upon a ſettlement made by the bankrupt of this eſtate upon his wife and children after marriage.

The Attorney general for the plaintiff ſtated the ſettlement to be made on the 8th of *Auguſt* 1732. between *Roger Williams* and his wife, and *Richard Blencoe*, and the defendant *Brown*, and another perſon as truſtees, recited to be in conſideration of a marriage already had, and the ſum of 1000 *l.* paid as a marriage portion to *Williams* by *Blencoe*, who was brother to his wife, and for ſettling a jointure, and conveyed to the truſtees to the ſeveral uſes following: To *Roger Williams* for life, and from and after the determination of that eſtate to the truſtees to preſerve contingent uſes during *Roger Williams*'s life, and from and after his deceaſe, to *Elizabeth* the wife for her jointure, and after the deceaſe of huſband and wife to the uſe of the truſtees for and during 99 years, on ſuch truſts as herein and hereafter expreſſed, and after the determination of that eſtate, to the firſt and other ſons in tail male.

There was no declaration of the uſes of the term of 99 years, nor any receipt indorſed on the back of the ſettlement; and as there was no declaration of the truſt of the 99 years term, he inſiſted the reſulting uſe or truſt will revert to the huſband who gave it, and therefore will enure for the benefit of the creditors of the huſband.

Mr. *Brown* of the ſame ſide.

The circumſtances of fraud in this caſe are very ſtrong, the ſettlement was not made till ten years after marriage; *Roger Williams* the huſband never thought of this deed or mentioned it on his laſt examination, which is very ſuſpicious, and looks like a plank laid hold of to ſave them from ſhipwreck.

Mr. Sollicitor general for the defendants, the wife and children.

Roger Williams was no trader in 1732. and the act of bankruptcy was not till ſix years afterwards.

If it was a mere voluntary ſettlement, perhaps it could not be ſupported againſt the creditors; but there are many agreements, after marriage, which may be ſupported as fair, and for valuable conſideration. *Scott* v. *Ball*, 2 *Lev.* 70. A queſtion between purchaſers and the iſſue of the marriage, whether an agreement after marriage was for a good and valuable conſideration? Lord Chief Juſtice *Hale* ſaid,

the court in family agreements do not nicely eſtimate the value of the eſtates, but only whether it is a fair and honeſt agreement.

The facts in the preſent caſe are ſhortly theſe, *Roger Williams* was ſeized of this eſtate in 1722, had only 150*l.* with his wife at that time, and no ſettlement then made; Mr. *Blencoe* her brother applied to *Roger Williams* to make a proviſion for his ſiſter; *Roger Williams* ſaid he would not do it for nothing, on which *Blencoe* agreed to advance 1000*l.* the 24th of *June* 1732. a receipt was given under the hand of *Roger Williams* to *Pottinghal* an attorney in the following words: *Received of my brother* Richard Blencoe, *the ſum of* 600 l. *by the hands of Mr.* Pottinghal, *in conſideration of the ſettlement to be made upon my wife.* The ſettlement was executed in *Auguſt* after: *Richard Blencoe* died the *October* following, and therefore the remaining 400*l.* was never paid.

There being no receipt indorſed, is ſo far from being a circumſtance of fraud, that it ſhews the fairneſs, becauſe as the whole 1000*l.* was not paid, they could not properly indorſe it.

In anſwer to the objection of the ninety-nine years term having no declaration of truſt, it muſt be conſidered as if the huſband was contending. All the uſes ſhew it to be a marriage agreement; the limitation indeed is to truſtees generally, but is declared to be for ſuch a truſt as is therein after expreſſed.

The term is to ſtand no further than it ſhall be thereafter declared, and the very nature of the agreement ſhews, that it cannot reſult for the benefit of the huſband, and it is demonſtration to a court of equity, that it could never be intended that the uſes of this term ſhould be for his benefit, becauſe it would make the limitation to the ſons of no value: There is no doubt then but the parties meant it as a proviſion for younger children, and the want of the formal deed, a leaſe for a year, not material.

Mr. Attorney general's reply: The fact proved is, that this ſum of 600*l.* was in conſideration of a ſettlement to be made; it is pretty extraordinary that this ſum ſhould be paid three months before the ſettlement executed.

To make this a conſideration, it is incumbent upon them to ſhew it was the money of the brother, but it is expreſſed to be in conſideration of 1000*l.* in hand paid for the marriage portion, but not ſaid to be paid by the brother Mr. *Blencoe*; neither has he ſigned the deed; now if he was a party contracting on his own account, could it be thought he would not have ſigned the deed?

It does not appear that this was a portion which could not be received without coming into a court of equity; therefore it is hard to ſay, that this is ſuch a conſideration, that the creditors of the huſband ſhall not have a ſale of the eſtate without eſtabliſhing the proviſion for the wife: This is not a ſettlement to be carried into execution, therefore the court muſt take it on the very terms on which it ſtands.

Lord Chancellor: This caſe is made out to my ſatisfaction. Tho' the court will favour creditors as much as they can, it muſt be where they have a ſuperior right to other perſons.

The queſtions in the cauſe are,

1ſt, Whether the deed is to be conſidered as a valid ſettlement?

2dly, If it be, Whether the creditors can claim any benefit under the ſettlement.

Now as to the firſt: It depends upon *the conſideration*, for it muſt be agreed; if the bankrupt has made a ſettlement without *conſideration*, it is not good. This is a queſtion of fact, and is ſufficiently proved to ſatisfy me.

A ſettlement after marriage good if it be upon payment of money as a portion, or a new additional ſum, or even *an agreement* to pay money, if afterwards paid.

It is admitted, if a ſettlement is made before marriage, though without a portion, it would be good, for marriage itſelf is a conſideration, and it is equally good if made after marriage, provided it be upon payment of money as a portion, or a new additional ſum of money, or even an agreement to pay money, if the money be afterwards paid purſuant to the agreement; this is allowed both in law and equity, to be ſufficient to make it a good and valuable ſettlement.

The receipt *Roger Williams* gave for the 600 *l.* makes it very clear it was the money of *Blencoe* the wife's brother, for the words are *in conſideration of my making her a jointure, or marriage ſettlement.*

It has been objected, that this is a recital only, under the hand of a bankrupt, and therefore ſuſpicious; but to take off the ſuſpicion, the ſon of *Pottinghal* ſwears, he ſaw this receipt in his father's hands in 1732, ſix years before *Roger Willliams*'s bankruptcy.

Another objection is, that the 600 *l.* being paid before the ſettlement made, therefore it cannot be deemed as the conſideration of the ſettlement.

A conſideration executed, is as good to ſupport a ſettlement, as it is at law to ſupport an *aſſumpſit*, to pay money at a future time.

It is further objected, that it does not appear on the face of the receipt, that it was the brother's money, but might be the wife's, and conſequently a choſe in action of the wife's, which the huſband might have recovered in poſſeſſion.

Suppoſing it had been ſo, if it had been in the hands of the brother, and the ſiſter had been married indiſcreetly, and the brother holds his hand, till the huſband makes a proviſion, it was honeſtly done, and is no more than what the court would have done, and will equally ſupport it, as if a bill had been brought againſt the huſband to make a proviſion for his wife.

The creditors ſtand only in the place of the huſband, and the ſtatute of the 1 *Jac.* 1. *cap.* 15. was made to put creditors under a commiſſion of bankruptcy in the ſame condition with creditors under the ſtatutes of the 13 and 27 *Eliz.*

It has alſo been objected, that this is a defective ſettlement at law for want of the leaſe for a year.

But notwithſtanding the court will aid creditors againſt defective or fraudulent conveyances, and without conſideration, and voluntary ſettlements, yet if they have no remedy at law, but muſt come into equity, this court will make them do equity, which brings it to the caſe of *Taylor* v. *Wheeler*, 2 *Vern.* 564 *.

Where creditors can have no remedy at law, but muſt come into equity, this court will make them do equity.

The ſame equity will ariſe in the caſe of a conveyance by leaſe and releaſe, the leaſe being loſt, does not at all concern the ſubſtance of the caſe, and a conſideration being proved, though the leaſe is miſſing, yet the releaſe will amount to a covenant to ſtand ſeized: The ſettlement therefore muſt ſtand.

Though in a conveyance by leaſe and releaſe, the leaſe is miſſing, yet if a conſideration be proved, it will amount to a covenant to ſtand ſeized.

The ſecond queſtion is, If it be a valid ſettlement, whether the creditors can claim any benefit under the ſettlement.

The aſſignee can claim no more benefit than *Roger Williams* himſelf, which is the profits of this real eſtate, for the life of the bankrupt.

The only queſtion then is on the term of 99 years.

After the limitation to the wife for her jointure, then the ſettlement goes on and limits it to the uſe of truſtees, their executors, *&c.* for the term of 99 years for ſuch uſes as herein and hereafter expreſſed.

It has been objected by the plaintiff's counſel, as here is no declaration of the truſts of the term, that it is a reſulting truſt for the huſband, and as undiſpoſed of, in law and equity, reſults to the donor in the ſettlement.

In the caſe of voluntary ſettlements and wills, if there is no declaration of the truſt of a term, it reſults to the donor; otherwiſe where it is a ſettlement for a valuable conſideration, and in the nature of a contract for the benefit of a wife, and of the iſſue.

It has been determined ſo, in the caſe of voluntary ſettlements and wills: But then the queſtion will turn upon this, Whether it is not a ſettlement for valuable conſideration, and in the nature of a contract for the benefit of the wife for her jointure, and a proviſion for the benefit of the iſſue, which in this caſe it certainly is, and therefore as to this, the aſſignee can be in no better condition than the bankrupt himſelf.

A limitation in a ſettlement to a huſband for life to truſtees to preſerve, *&c.* to the wife for life for her jointure, and after the deceaſe of both, to truſtees for 99 years on ſuch truſts as hereafter expreſſed, and after the determination of that eſtate, to the firſt and every other ſon in tail. No declaration of the uſes of the term. The court always takes agreements of this kind according to the nature of the agreement, and therefore conſider it only as a truſt term to attend the inheritance according to the limitations in this ſettlement.

The court always takes agreements of this kind according to the nature of the agreement itſelf; the limitation to the ſons after this term would not be worth half a crown, if the plaintiff's objection ſhould prevail, which would overturn and defeat the uſes of this ſettlement, and therefore if the huſband had been the plaintiff in the cauſe, the court would have conſidered it as a truſt term only to attend the inheritance according to the limitations in this ſettlement.

* *A.* mortgages copyhold land to *B.* but the ſurrender not being preſented within the time limited by the cuſtom, became void. Afterwards *A.* becomes bankrupt. On a bill by *B.* againſt the aſſignees, the defective ſurrender was made good.

In the caſe of *Uvedale* v. *Halfpenny*, before Sir *Joſeph Jeykell*, 2 *Will.* 151. *the truſtees to preſerve the contingent remainders were placed after a limitation of an eſtate tail to the ſon*, and yet he decreed the ſettlement to be rectified without any evidence of the fact, or intention of parties as to the placing of the limitations.

The preſent is a thing of the ſame kind, in the reaſoning of it, beſides the words themſelves will warrant that conſtruction: On the whole, the plaintiff is intitled only to the intereſt the huſband has in the eſtate, which is but for his life; and decreed accordingly.

November the 6th 1745.

Walker and others v. *Burrows.*

Vide under the diviſion, Rule as to Aſſignees.

July the 31ſt 1749.

Grey v. *Kentiſh.*

Vide title *Baron and Feme, under the diviſion, Rule as to a poſſibility of the Wife.*

January the 22d 1753.

Ex parte Coyſegame.

Caſe 100. A bond given to *A.* in truſt to ſecure the payment of an annuity of 40*l.* during the joint lives of Sir *Edward Smith*, and petitioner the bankrupt's wife; ſhe delivers up the bond upon his laſt examination; ſhe applies to the court, and prays the aſſignee may deliver the bond to her truſtee, and that the arrears of the annuity and all future payments may be made to her.

THE petitioner in 1751. married *Coyſegame*, who is now a bankrupt, and at the time of his laſt examination, he delivered up with the reſt of his eſtate a bond which was given to *A.* in truſt to ſecure the payment of an annuity of 40 *l.* a year to the petitioner, during the joint lives of Sir *Edward Smith* and the petitioner.

She brought a portion of 500 *l.* to the bankrupt in marriage, and has nothing to ſubſiſt upon but this annuity, and prays by her petition, that the aſſignees may deliver the bond to her truſtee, and that the arrears of her annuity, and all future payments may be made to her.

Lord Chancellor ordered it accordingly.

Lord Chancellor ordered accordingly, conſidering the creditors as ſtanding in the place of the huſband, and not intitled any more than he would have been, in caſe he was no bankrupt, to the annuity, without making a proviſion for her.

For the aſſignees under the commiſſion it was inſiſted, that notwithſtanding the huſband and wife muſt have brought the action in the name of the truſtee of the bond for the annuity; yet according to the opinion in *Miles* v. *Williams et ux.* 1 *Will.* 255. where a bond was made to *A.* in truſt for *B.* who becomes a bankrupt; the aſſignees may bring the action in their own name, though *B.* muſt have brought it in the name of his truſtee, and this ſhews that in point of law they are conſidered as having the abſolute property for the benefit of the creditors.

Where a bond is given to a truſtee for the benefit of a wife, and huſband becomes a bankrupt, the aſſignees cannot bring an action, for by the 1 *Jac.* 1. aſſignees can only have the like remedy to recover a debt, as the bankrupt himſelf might have had, the word party in the act being meant of the bankrupt,

But *Lord Chancellor* ſaid, he did not remember there was any precedent for ſuch an action by aſſignees, where a bond was given to a truſtee for the wife's benefit, and not to herſelf: And as this opinion in 1 *Will.* was not upon the principal point in the caſe, but *obiter* only, his Lordſhip denied it to be law, and thought clearly by the manner of wording the clauſe, relating to the commiſſioners power of aſſignment of a bankrupt's effects, 1 *Jac.* 1. that aſſignees can only have the like remedy to recover a debt as the bankrupt himſelf might have had; the words, *as the party himſelf might have had*, in the concluſion of that clauſe, appearing to him to be meant of the bankrupt. And therefore ordered the bond to be delivered by the aſſignees to the petitioner, and the arrears and future payments of the annuity to be paid to her, for her ſeparate uſe.

The *obiter* opinion in *Miles* v. *Williams* and his wife, 1 *Will.* 255. denied by *Lord Chancellor* to be law.

(Z) What is, or is not an act of bankruptcy.

June the 11th 1743.

In the matter of *William Gulſton* a bankrupt; upon the petition of *William Gulſton*, and a croſs petition of *George Dale* and others.

Caſe 101.

MR. *Gulſton* reſiding in the iſland of *Barbadoes*, on the 20th of *May* laſt preferred his petition to *Lord Chancellor*, thereby ſtating, that he being a merchant in *London* traded to *Barbadoes*, and other places, and having ſome years ago a conſiderable real eſtate deviſed to him in the iſland of *Barbadoes*, did ſoon after he had taken poſſeſſion thereof, put the ſame under the management of an agent there, for his greater convenience of reſorting to this kingdom, and carrying on his trade and buſineſs here: That in 1737. he reſided in this kingdom, and negotiated his buſineſs in a publick manner as a

Where there is a doubt of the bankruptcy, and the bankrupt is out of the kingdom, the court will not ſuperſede the commiſſion upon petition, but ſend it to trial: But where the bankrupt is at home, the court will ſend it back to the commiſſioners, to conſider, if on evidence they can declare him a bankrupt or not.

merchant, and never committed any act of bankruptcy, but finding that he was much impoſed upon in the management of his eſtate at *Barbadoes*, he therefore, in order to make the moſt thereof, determined to remove thither with his family ſome time about the latter end of the year 1737. and his intention and determination of ſo doing was well known to all perſons with whom the petitioner had any dealings, and was concealed from none of them, and particularly was well known to *George Dale*, who had ſeveral dealings with the petitioner, and was with him almoſt every day, and ſometimes oftner, for ſix weeks, or two months before the time of the petitioner's ſo going abroad, and who had ſeveral goods packed up at the houſe of the petitioner, to be ſent abroad with him: That the petitioner did in *March* 1737. go over with his family to the iſland of *Barbadoes*, and had ever ſince reſided there for the better management and improvement of his eſtate: That he had remitted to *George Dale* divers conſiderable ſums of money to the amount of between three and four hundred pounds; and notwithſtanding this, *Dale* on the 21ſt of *February* laſt procured a commiſſion of bankruptcy to be ſealed againſt *Gulſton*; but ſeveral witneſſes having been examined before the commiſſioners, they were of opinion, that they ought not to declare him a bankrupt, and therefore the preſent application is, that the commiſſion may be ſuperſeded.

The evidence to prove him a bankrupt before the commiſſioners was a porter, who ſwore that at the time *Gulſton* went abroad, he ordered him to deny him to two different creditors, *Shipſton* and another, and was conveying off his effects on ſhipboard: *Shipſton* being alſo examined before them, ſwore that at the time of *Gulſton*'s going to *Barbadoes* he was very well apprized of his intention to leave the kingdom; that he ſaw him ſeveral times, and that *Gulſton* never refuſed to ſee him when he aſked for him.

It appeared by affidavits, that *Dale* was with *Gulſton* a great many times before he went abroad, and was privy to it.

Mr. *Chute* who was counſel for *Gulſton*, ſubmitted it to the court, that if *Dale* had thought him a bankrupt at that time, he would certainly have applied for a commiſſion then; but inſtead of doing that, he has ſince received four or five hundred pounds in diſcharge of his debt, and without any ſcruple applied it for that purpoſe, and now after five years acquieſcence is attempting to make *Gulſton* a bankrupt.

Mr. *Chute* inſiſted therefore upon all theſe circumſtances, that the commiſſion ſhould be ſuperſeded, or at leaſt that an iſſue ſhould be directed to try the bankruptcy.

He relied on a caſe mentioned in *Wrenche*'s caſe, *Cro. Eliz.* 13. " There a proceſs iſſued againſt *J. S.* to arreſt him, who kept his " houſe to ſave himſelf from arreſt, but afterwards went to the " market, and to other places, and when he heard again of a new " proceſs out againſt him, he kept his houſe a ſecond time, but af- " terwards went at large: The queſtion was, if he was within the " ſtatutes of bankruptcy; and all the court held he was not, be-

" cauſe he uſed to go at large, and it might be that his policy would " not prevent the ſerving of the proceſs, for he might be met withal " unwittingly."

Mr. *Hume Campbell* of the ſame ſide cited *Hopkins* v. *Ellis*, *Salk.* 110. " Where it was held by *Holt* Chief Juſtice, that if *H.* commits a plain " act of bankruptcy, as keeping houſe, *&c.* though he after goes " abroad, and is a great dealer, yet that will not purge the firſt act of " bankruptcy, but he will ſtill remain a bankrupt." But if the act was not plain but doubtful, then going abroad and dealing, *&c.* will be an evidence to explain the intent of the firſt act; for if it was not done to defraud creditors, and keep out of the way, it will not be an act of bankruptcy within the ſtatute. Alſo if after a plain act of bankruptcy he pays off or compounds with all his creditors, he is become a new man.

Mr. Attorney general for the croſs petition;

Mr. *Dale*'s debt was originally 6000 *l.* and amounts now to 5500 *l.* ſome time in the year 1737. *Gulſton* ordered himſelf to be denied to his creditors, and not only that, but left the kingdom and went abroad.

The creditors, imagining that ſomething beneficial might turn out, have waited all this time, in hopes Mr. *Gulſton* might be enabled to pay them; but concluding now that by ſtaying they may make bad worſe, have agreed to take out a commiſſion of bankruptcy.

There are two ſorts of bankruptcy deſcribed under the ſtatute of the 13th of *Eliz. ch.* 7. and the 1ſt of *Jac. ch.* 15. *A beginning to keep his houſe, or a departing from his dwelling houſe, to the intent or purpoſe to defraud or hinder any of his creditors of the juſt debt or duty of ſuch creditor or creditors, or whereby his creditors may be defeated or delayed for the recovery of their juſt and true debts.*

Lord Chancellor: In conſideration of Mr. *Gulſton*'s being out of the kingdom, I think it very proper to direct an iſſue to try if he was a bankrupt before the taking out of the commiſſion. If he had been in *England*, I ſhould have been of opinion to refer it back to the commiſſioners, to conſider upon the evidence before them, whether they would declare him a bankrupt.

His Lordſhip ordered, that the petitioners do forthwith proceed to a trial at law in the court of King's Bench in *London*, on the following iſſue: Whether at and before the iſſuing of the commiſſion of bankruptcy againſt *William Gulſton*, he was a bankrupt within the true intent and meaning of the ſeveral ſtatutes made and now in force concerning bankrupts? And ordered that Mr. *Gulſton* ſhould be at liberty from time to time to inſpect the commiſſioners proceedings, and to take copies or extracts thereof as he ſhall think proper, and after the trial ſhall be had, any of the parties are to be at liberty to apply to his Lordſhip for further directions.

March the 28th 1747. Laſt ſeal after H. T.

Lingood v. *Eade.*

Caſe 102. A Motion was this day made on behalf of *Lingood* for a new trial, on a ſuggeſtion that the bankruptcy was found intirely upon the evidence of *Vaughan*, an attorney, who gave a quite contrary teſtimony from what he had done on a former trial in the court of Common Pleas.

Lord Chancellor: Lord Chief Juſtice *Lee* has informed me that the evidence of *Lingood*'s bankruptcy was very ſtrong, and did not depend on Mr. *Vaughan* only, and that the jury found him a bankrupt without going from the bar; and as I am thoroughly ſatisfied with the account the Chief Juſtice has given me, I ſhall deny the motion.

Abſconding to avoid an attachment upon an award for non delivery of goods purſuant to the award, is not an act of bankruptcy within the ſtatute of *Jac.* 1. *c.* 15. but it muſt be a departing from the dwelling houſe to avoid the payment of a juſt debt, and not the delivery of goods, for that is a duty only.

Upon a former trial before Lord Chief Juſtice *Willes*, where the bankruptcy of *Lingood* came in queſtion, he was of opinion that a perſon's abſconding to avoid an attachment upon an award for non-delivery of goods purſuant to the award, is not an act of bankruptcy, becauſe it is not within the words of the ſtatute of *Jac.* 1. *ch.* 15. which makes it an act of bankruptcy in a perſon to keep out of the way, or depart from his dwelling houſe in order to avoid the payment of a *juſt and true debt only*, and not the delivery of goods, for that is a duty only: And *Lord Chancellor* declared that he thought the determination of Lord Chief Juſtice *Willes* a very right one, and that he was very well warranted by the words of the ſtatute in the diſtinction he made between abſconding to avoid a debt, and abſconding to avoid a duty only.

December the 24th 1747.

Ex parte Meymot.

Caſe 103. A commiſſion of bankruptcy taken out againſt the petitioner, who inſiſted that as he is a clergyman, he is not liable to become bankrupt within the intent of any of the bankrupt ſtatutes, Lord Chancellor would not ſuperſede the commiſſion, or direct an iſſue, but left the petitioner to his action at law.

THE petitioner applies to ſuperſede a commiſſion of bankruptcy taken out againſt him, inſiſting that as he is a clergyman, and is now, and hath been ever ſince 1729, rector of the pariſh church of *Normanton* in *Derbyſhire*, he is not liable to become bankrupt within the intent and meaning of any of the ſtatutes made concerning bankrupts.

Mr. *Brown* for the petitioner cited the 21 *Hen.* 8. *ch.* 13. *ſec.* 5. "Whereby 'tis enacted that no ſpiritual perſon, ſecular, or regular, of "what eſtate or degree ſoever, ſhall from henceforth by himſelf, nor "by any other for him, nor to his uſe, bargain and buy, to ſell again "for any lucre, gain or profit, in any markets or fairs, and other "places, any manner of cattle, corn, lead, tin, hides, tallow, fiſh, wool, "wood, or any manner of victual or merchandize, what kind ſoever "they be of, upon pain to forfeit treble the value of every thing by "them, or by any to their uſe, bargained and bought to ſell again, "contrary to this act, and that every ſuch bargain and contract "hereafter to be made by them, or by any to their uſe, contrary

" to this act, ſhall be utterly void and of none effect, and the " one half of every ſuch forfeiture to be to the King, and the other " half to him that will ſue for the ſame."

And argued, that as this act paſſed before any ſtatute of bankrupt, and is ſtill in force, no ſubſequent act could ever intend to include a ſpiritual perſon under the general words of the bankrupt acts; and as by theſe acts he is to be examined upon oath with regard to the diſcovery of his eſtate, it would oblige the petitioner to accuſe himſelf, and lay him open to the penalties of the ſtatute of *Hen.* 8.

Mr. *Wilbraham* of the ſame ſide ſaid, The clergy have many privileges, ſome belonging to their perſons, and ſome to their eccleſiaſtical benefices; therefore though in many caſes where perſons hold lands and tenements, by reaſon whereof they are liable to be elected to offices, as a reeve, bailiff, *&c.* yet the clergy are diſcharged from ſuch ſervices by reaſon of their function, and there is a writ in the *Regiſter* which lies for their diſcharge, *Reg.* 187. *b. recites quod clerici infra ſacros ordines conſtituti non eligantur ad officium.* And Lord *Coke*, 2 *Inſt.* 2 & 3. upon *Magna Charta*, ſpeaking of the privileges of the clergy, lays it down that they are not to be choſen into any temporal office; and in 1 *Ventr.* 105. there is the following caſe: One Dr. *Lee* having lands within the level, was made an expenditor by the commiſſioners of ſewers in the county of *Kent*, whereupon he prayed his writ of privilege to the court of King's Bench, and it was granted; for ſays the *Regiſter*, *Vir militans Deo non implicetur in negotiis ſecularibus*, and the antient law is, *quod clerici non ponantur in officia.*

This was the rule as eſtabliſhed by the common law, but it has been ſaid the ſtatutes of bankrupts are general, and therefore the clergy ought not to be exempted; but then the 21 of *Hen.* 8. prohibits this order of men from exerciſing any ſort of trade or merchandize, by buying and ſelling again, with a view to prevent them from being diverted from the proper buſineſs of their function, and their contracts are *ipſo facto* void with a ſevere penalty.

Thoſe laws that have the ſanction of a penalty annexed to them, are more regarded than acts of parliament, which are merely prohibitory, without any penalty.

Can it be intended, when by a former act the legiſlature had prohibited the clergy from exerciſing any trades, that they meant to include them under the general words *perſon and perſons* in the bankrupt acts? There is not a word in theſe acts that ſeems to comprize the clergy.

General words in an act of parliament may be reſtrained, when the reaſon of the law ſeems to require it. In the caſe of *Long* v. *Baker*, 1 *Roll. Rep.* 202. it is laid down as a rule in the conſtruction of ſtatutes, that a general law does not make that good, which was diſabled by a particular ſtatute before; and in *Hob.* 346. the caſe of *Sheffield* v. *Ratcliffe*, he ſays, Judges have a power in the conſtruction of ſtatutes to mould them to the trueſt and beſt uſe according to reaſon and convenience. Acts, general in words, have been conſtrued to be but particular, where the intent was particular. *Plowd.* 204. *Stradling* v. *Morgan*; for though the ſtatute of *H.* 7. of fines be conceived in

general terms, and will bind corporations in general, yet by conſtruction of law the ſucceſſor of a parſon, vicar, or any other ſole corporation, ſhall have five years to make his claim; for if by their laches they ſhould bind their ſucceſſors, it would cauſe a diminution of eccleſiaſtical livings; and therefore by conſtruction of the general law they are excepted. 11 *Co. Magdalen College Caſe*, 71. *a.*

Can the bankrupt acts be ſaid to intend *the clergy*, when they deſcribe perſons uſing the moſt ſecular employments which are prohibited to the clergy, and to mean thoſe very perſons which they do not deſcribe, but who by the ſtatute of *Hen.* 8. are forbid to fall under that deſcription?

If this had been the conſtruction, there muſt have been ſome inſtances; and where the penning of an act is dubious, long uſage is a juſt medium to expound it by, for *jus et norma loquendi* is governed by uſage.

If the petitioner ſhould be adjudged a bankrupt, what muſt be done? Can the commiſſioners examine him touching an act of bankruptcy? This is not to be done, without examining into his buying and ſelling; this ſubjects him to a forfeiture, and the bankrupt acts could never intend the power of commiſſioners to examine, ſhould be ſo extenſive, as to enable commiſſioners to examine perſons, who, if they diſcover, muſt ſubject themſelves to a forfeiture.

Could the commiſſioners aſſign over his living? No, for the aſſignee muſt either have the whole or none; ſo that there can be nothing left for the performance of divine ſervice in this caſe, which is, of itſelf, an argument it was not the intention of the bankrupt acts to include ſpiritual perſons; beſides, he may defeat ſuch an aſſignment at any time, for he may reſign, and is not obliged to keep a curate.

And in another inſtance of ſequeſtring a living, the law has provided that enough muſt be left of the benefice for the cure, that the pariſhioners may not be without a perſon to perform divine ſervice; and therefore in caſes of debts, if the ſheriff returns that a defendant is *clericus beneficiatus nullum habens laicum feodum*, he can do no more, but then proceſs muſt go to the biſhop to ſequeſter his living. And in ſuch caſe, as 'tis ſaid in 2 *Mod.* 256. *Walwyn* v. *Aubery*, the biſhop may retain to ſupply the cure, and pay only the reſidue.

Here there can be no ſuch proviſion, and therefore this becomes a queſtion of conveniency. No general inconvenience can ariſe from ſuperſeding the commiſſion, as this is the firſt inſtance ſince the bankrupt acts; but there may be a great inconvenience, if it ſhould not be ſuperſeded, becauſe the cures of ſuch clergymen cannot be ſeized.

Mr. Attorney general, of counſel for the petitioning creditor in ſupport of the commiſſion, ſaid, the trading of the petitioner is a partnerſhip with a potter in *Staffordſhire*, and there is no diſpute either as to the trade or act of bankruptcy; for Mr. *Meymot* has not ventured to produce any affidavit to contradict theſe facts.

Lord Chancellor ſtopped Mr. Attorney general, and declared, if he could ſhew him that the petitioner had committed a plain act of bankruptcy, and had traded, he would not ſuperſede the commiſſion, becauſe a man has the hardineſs in a court of juſtice to ſay, I have been guilty

guilty of a breach of one law, and therefore releaſe me from the breach of another.

The affidavits were then read which had been made to ſupport the commiſſion, and were very ſtrong for that purpoſe.

Lord Chancellor: There has no queſtion been made concerning the debt of the petitioning creditor, nor does Mr. *Meymot* contradict his trading, his having contracted this debt, or his abſconding; and therefore the whole for my conſideration is, whether a clerk in holy orders is liable to a commiſſion of bankruptcy?

It is not proper for me to determine this queſtion abſolutely, becauſe it is a mere matter of law; but I am of opinion I ought not to ſuperſede the commiſſion, or direct an iſſue, but leave the petitioner to his action at law.

If I was obliged to give an opinion, I am rather inclined to think he may become a bankrupt.

The ſtatute of the 21 *H.* 8. is rather in the nature of a prohibition, and a prohibition will not exempt him from being a bankrupt; for if a man, with his eyes open, will break the law, that does not make void the contract. It is undoubtedly very improper for a perſon to ſay, I have broke the law, and therefore I am exempt from any remedy a creditor may have againſt me; and the petitioner cannot take advantage of the breach of one law, in order to avoid his being ſubject to another.

The ſtatute of the 21 *H.* 8. will not exempt a clergyman from being a bankrupt, for he cannot take advantage of the breach of one law to excuſe him from the breach of another.

This is different from uſurious caſes, becauſe then both the borrower and the lender are equally criminal, or the lender rather more criminal, as he takes the advantage of the borrower's indigent circumſtances; but it is not ſo here, for the borrower only acts in breach of the law, and the lender may not know it at the time, or that he is a clergyman.

I will compare it to the caſe of a perſon who has dealt merely in ſmuggling and running of goods, though this is an offence, and contrary to an act of parliament, yet ſtill it will be a trading within the meaning of the bankrupt acts, and ſuch trader is liable to a commiſſion.

Smuggling, tho' contrary to an act of parliament, is ſtill a trading within the meaning of the bankrupt acts, and ſuch perſon liable to a commiſſion.

Next as to the penalty in the ſtatute of the 21 *H.* 8.

I am inclined to be of opinion on this part of the act, that the contract ſhall be void, as to the parſon himſelf only; for it would be a moſt extraordinary conſtruction of the ſtatute that the bargain ſhall be void for his own benefit; and it would be very miſchievous to conſtrue the act in ſuch a manner.

A bargain or contract made by a parſon, contrary to the ſtatute of the 21 *Hen.* 8. *ſec.* 5. is void as to himſelf only, and he alone is liable to the penalty of the act.

Many perſons in this kingdom deal as graziers in buying of cattle, *&c.* the ſeller does not know a grazier to be a clergyman; ſhall the bargain then be void for the parſon's benefit?

Suppoſe in the counties of *Surry*, *Kent*, *&c.* a parſon buys a quantity of hops, can the vendor know that he buys to conſume only in his houſe, and not to make a profit by retailing them again? If ſuch a contract therefore was to be made void by the ſtatute of *H.* 8. it

would be a great hardſhip and inconvenience to vendors: I mention this to ſhew the miſchiefs which would reſult from ſuch a conſtruction, and conſequently this part of the act ought to be ſo conſtrued, as to make it a penalty on himſelf only.

Next as to the objection of going on with the commiſſion, and examining the petitioner in relation to his eſtate and effects.

If a bankrupt has an objection to a queſtion, he muſt demur to the interrogatories, and the court will judge of it upon a petition, or if he refuſes to anſwer any queſtion, and the commiſſioners commit him, and the delinquent brings an *habeas corpus*, the queſtion muſt be ſet forth, particularly in the return to the *habeas corpus*, that the judges may judge, whether it was lawful or not.

In the caſe I put before of ſmuggling, there is no examination of the commiſſioners, but will ſubject to penalties; and yet that is no reaſon why the commiſſion ſhould not proceed, for if the bankrupt has an objection to the queſtion, he muſt demur to the interrogatories, and this court will judge of the queſtion upon a petition; or if the bankrupt refuſes to anſwer any queſtion, and the commiſſioners commit him, and the delinquent brings an *habeas corpus*, the queſtion muſt be ſet forth, particularly in the return to the *habeas corpus*, that the judges may judge whether it was a lawful queſtion or not, and notwithſtanding all this, the commiſſioners may undoubtedly examine as to his eſtate and effects, what he has, where it lies, *&c.*

The ſecond objection is, That a clergyman's is a ſpiritual preferment, and that his living is not within any of the ſtatutes relating to bankrupts.

This is indeed a more doubtful queſtion.

Eccleſiaſtical eſtates may be taken in execution, and upon a ſequeſtration likewiſe, and the method which is purſued in executions and ſequeſtration, may be followed upon a commiſſion of bankruptcy.

To be ſure there are in the bankrupt acts, no words that relate merely to eccleſiaſtical eſtates, and therefore it is ſaid, if the whole living is ſeized, it may prevent ſerving the cure; but I do not know this would be the conſequence.

1*ſt*, A *fieri facias de bonis* iſſues againſt the parſon, and the ſheriff returns *nullum laicum feodum*, then a ſpecial *fieri facias de bonis eccleſiaſticis* iſſues to the biſhop, and he apportions a part to ſerve the cure, and the remainder is taken under the execution.

This rule has been conſtantly followed, but I do not know any particular law for it; and yet the court follows the rule of law analogically, but though they permit a ſequeſtration to iſſue, yet the biſhop in that caſe allots a ſufficient part of the living, for the ſervice of the cure.

I do not ſee (but I give no opinion) why the ſame method may not be followed under the commiſſion of bankruptcy, for it does not appear to me, that this would ſuperſede the biſhop's authority.

A parſon holds a living in right of the church, and it is not for his own benefit, but for the good of the church, he is preſented to it, and therefore may properly be ſaid to be *in autre droit*, as he is ſeized in right of the church, and in ſome reſpects may be compared to an executor who acts *in autre droit*, tho' the parſon's is not quite ſo ſtrong a caſe.

A commiſſion of bankruptcy formerly iſſued againſt a peer, an earl of *Suffolk* for trading in wines, and though there may be ſome particular powers that commiſſioners of bankrupt could not exerciſe againſt a peer, yet notwithſtanding this, he may be liable to a commiſſion of bankruptcy, if he will trade, and ſo may a member of the houſe of commons, though while he continues a member, there are ſome particular powers of commiſſioners that cannot be exerciſed.

A peer or a member of the houſe of commons if they will trade, are liable to a commiſſion of bankruptcy, otherwiſe as to infants.

Lord *Cowper* and Lord *Macclesfield* carried it ſo far as to hold that infants were liable to acts of bankruptcy, but it has been ſince determined otherwiſe.

Upon the whole circumſtances of the caſe, I am of opinion, the commiſſioners ſhould proceed in the commiſſion; but ſo as not to prejudice any remedy the petitioner may have by an action at law.

December the 21ſt 1753.

Ex parte Hall.

THIS was a petition on behalf of the bankrupt, praying to ſuperſede the commiſſion.

Caſe 104.

It appeared upon the affidavit of his wife, that two perſons called one night at her huſband's houſe after eleven o'clock, that they were both in bed at that time, and as he did not care to riſe, ſhe went to the window and aſked who was there, and upon theſe perſons refuſing to mention their names, ſhe ſaid, "Whoever ye are, if you will "come to-morrow, or any other proper time, you may ſpeak with "my huſband."

A perſon's denying himſelf to a creditor who calls at eleven o'clock at night, is no act of bankruptcy, for it cannot be ſaid to be done *with an intent to defraud his creditors*, which is the ingredient the acts of parliament require to make a man a bankrupt.

The commiſſioners declared *Hall* a bankrupt on the evidence of theſe very perſons, one of whom was a creditor, they only ſwore generally, that they went upon the day mentioned in Mrs. *Hall*'s depoſition, and that they ſaw her huſband go into his houſe, and followed him directly, and inquiring for him of his wife, ſhe ſaid that her huſband was not at home, though they verily believed and apprehended that he was, and that he kept his houſe for fear of being arreſted by his creditors.

Lord Chancellor: There is no pretence to ſay that *Hall* has committed an act of bankruptcy, for eleven o'clock at night is a very improper hour for creditors to call, nor can a man's denying himſelf at ſuch an hour, be ſaid to be done *with an intent to defraud his creditors*, which is the ingredient the acts of parliament require to make a man a bankrupt.

And as the ſtatute of the 5 *Geo.* 2. has declared, "That if it ſhall "appear a commiſſion is taken out fraudulently or maliciouſly, that "then the *Lord Chancellor*, &c. for the time being, ſhall, and may, "upon the petition of the party grieved, examine into the ſame, "and order ſatisfaction to be made to him, for the damages by him "ſuſtained; and for the better recovery thereof may, in caſe there

" be occaſion, aſſign the bond (meaning the bond before mentioned, " which the petitioning creditor gives to the *Lord Chancellor*, *&c.* be- " fore the granting of the commiſſion, in the penalty of 200 *l.* con- " ditioned for proving his debt, and alſo for proving the party a " bankrupt, and further proſecution of the commiſſion,) to the party " petitioning, who may ſue for the ſame in his name; any law, cuſ- " tom, or uſage to the contrary notwithſtanding."

Referred to a Maſter to ſettle the coſts and aſcertain the damages Mr. *Hall* has ſuſtained, and if the petitioning creditor does not within a fortnight pay the ſame, the bond to be aſſigned to be put in ſuit againſt him.

I ſhall therefore order, that it ſhall be referred to a Maſter to ſettle the coſts, and to aſcertain the damages Mr. *Hall* has ſuſtained, and if the petitioning creditor does not within a fortnight after the Maſter's report of what is due for coſts, and likewiſe for damages, pay the ſame to Mr. *Hall*, I will upon his application to me, direct the bond to be aſſigned to him, to be put in ſuit againſt the petitioning creditor, where at law, the jury may, if they think proper, give to the value of the whole penalty in damages.

N. B. His Lordſhip ſaid, the circumſtances of this caſe were ſo flagrant, that if any thing of the ſame ſort ſhould ever be attempted again, he would certainly commit the attorney who ſued out the commiſſion.

(Aa) Rule as to ſales before commiſſioners.

April the 11th 1747.

Ex parte Green.

Caſe 105. Advertiſements in caſes of ſales before commiſſioners of bankrupts ſhould not be general, but ought to name the hour as maſters do, and after the time expired, if commiſſioners are not gone, ſhould admit a better bidder, in order to give creditors as great ſatisfaction for their loſs as poſſible.

A Reverſionary eſtate of the bankrupt's has been put up to ſale before the commiſſioners, and as uſual, it was agreed by the parties preſent, that the bidding ſhould be cloſed by a certain time though in the advertiſement for the meeting it was general, without naming any hour; one *Coward* was declared the beſt bidder: and after the time allotted by the commiſſioners for bidding was expired, a perſon of the name of *Eldridge*, bid 10 *l.* more, but the commiſſioners and aſſignees were of opinion, *Coward* according to the terms of the bidding, was the purchaſer, and would not admit Mr. *Eldridge*'s to be a proper bidding.

Since the ſale at *Guildhall*, the reverſion is come into poſſeſſion, and now in point of value the eſtate is worth 500 *l.* more than it was at the time of the bidding.

Lord Chancellor: I am of opinion, that commiſſioners of bankruptcy ſhould not be ſo extremely nice, as to preclude a perſon from being a purchaſer, becauſe he happens to have outſtayed the time ſet by the commiſſioners; and think this like the caſe of eſtates ſold before Maſters for payment of creditors, where they always advertiſe the ſale to be at a definite time, as between the hours of ten and twelve, becauſe they may not be under the neceſſity of ſtaying beyond that time; but if a perſon comes to bid, even after that

time, before the Maſter is gone, he is admitted notwithſtanding: And the advertiſements in caſes of ſales before commiſſioners of bankrupts ſhould not be general for a meeting in order to ſell a bankrupt's eſtate, but ſhould name the hour as Maſters do, and after the time expired, if the commiſſioners are not gone, they ought to admit a better bidder, in order to give creditors as great ſatisfaction for their loſs as poſſible; and as matters of bankruptcy are diſcretionary in this court, I ſhall never tye up a bidding to ſuch ſtrict rules; and I order the bidding to be opened again.

(Bb) Rule as to examinations taken before commiſſioners.

May the 23d 1747.

Eade v. *Thomas Lingood* a bankrupt, and *Margaret Lingood* his daughter, &c.

Caſe 106.

An order had been obtained to read *inter alia* the examinations of *Margaret*, taken before the commiſſioners under *Thomas*'s bankruptcy. They cannot be read, unleſs proved in the cauſe, that there were ſuch examinations taken before the commiſſioners; for the proceedings in a commiſſion of bankruptcy againſt *Thomas* are, as to *Margaret*, *res inter alios acta*.

THE plaintiff had obtained an order to read the proceedings in the commiſſion of bankruptcy, as an exhibit in his cauſe, and amongſt the reſt, the examination of *Margaret Lingood* before the commiſſioners.

It was objected by the counſel, that *Margaret Lingood*'s examination cannot be read where ſhe is a defendant, unleſs it had been proved over again in the cauſe.

Lord Chancellor: Two queſtions have been made on the plaintiff's offering to read the examination of *Margaret Lingood*.

Firſt queſtion: Suppoſing the order had been ſufficient, whether the plaintiff could have read her examination taken before the commiſſioners?

Now I am extremely doubtful, if the plaintiff could have read it even then.

The rules in reſpect to *viva voce* examinations are held extremely ſtrict in this court: As for inſtance, in caſes of wills, this court never ſuffers them to be proved by examinations of witneſſes *vivâ você*, for it is not ſufficient to prove a ſigning and ſealing, but the ſanity of the perſon, and all other requiſites under the ſtatute muſt be proved, and this cannot be done by *vivâ você* examinations; becauſe the defendant has a right to a croſs examination of the plaintiff's witneſſes.

I will put the caſe of an affidavit made to contradict an anſwer; ſuppoſe there the plaintiff ſhould produce a copy of the original affidavit from the office, I never knew it allowed as ſufficient.

The

The next queſtion has ariſen upon the order obtained by the plaintiff to read the proceedings under the commiſſion of bankruptcy in the preſent cauſe, ſaving juſt exceptions.

An order to read the proceedings in one cauſe in another, muſt be between the ſame parties.

This order is obtained upon the ſame foundation as an order to read in one cauſe, the bill, anſwer, and the reſt of the proceedings in another cauſe, where it is between the ſame parties; but ſuch an order cannot be extended to a third perſon, who was no party to the firſt.

Now *Margaret Lingood* is not at all bound by the proceedings in a commiſſion of bankruptcy againſt *Thomas Lingood*, for as to her it is *res inter alios acta*.

Upon the whole, his Lordſhip would not admit this examination to be read, unleſs the plaintiff had proved in the cauſe, that there were ſuch examinations taken before the commiſſioners.

Where one defendant is charged with a fraud, his depoſition cannot be read for another, as it may tend to excuſe him with regard to his own coſts.

The bill here is brought againſt *Thomas Lingood*, charging a fraud againſt him, in pretending to have bought a copyhold eſtate with his daughters money, when it was in fact with his own.

His daughters are made defendants in the cauſe, in order to reconvey the copyhold to the aſſignees under the commiſſion againſt *Lingood*.

Mr. Solicitor general, counſel for the daughters, in excuſe of their coſts, offered to read the defendant *Thomas Lingood*'s depoſition, to ſhew that he led them into the miſtake, by informing them that the purchaſe was made with their money.

Lord Chancellor refuſed to let *Thomas Lingood*'s depoſition be read, becauſe where one defendant is charged by the bill with a fraud his depoſition cannot be read for another defendant, as it will be an advantage to himſelf, and may tend to excuſe him with regard to his own coſts.

December the 24th 1747.

Ex parte Parſons.

Caſe 107. *Lord Chancellor* on a former application limited Mrs. *Parſons*'s examination before the commiſſioners to her ſon's trading only, but upon the preſent application, refuſed to reſtrain the commiſſioners from inquiring into any circumſtances which may make him a trader.

LORD Chancellor upon a former petition had directed the commiſſion of bankruptcy that had been taken out againſt Mr. *Parſons* the ſon of the petitioner ſhould proceed, and the commiſſioners were allowed to go ſo far as to make a proviſional aſſignment, but no warrant of ſeizure to iſſue, nor any advertiſement to be publiſhed for the bankrupt's appearing and ſurrendring himſelf till further order.

Upon the commiſſioners proceeding in the commiſſion, and examining Mrs. *Parſons* the petitioner and mother of the bankrupt, an application was made to *Lord Chancellor* before the long vacation, on the part of Mrs. *Parſons*, that the examination ſhould be limited to her *ſon's trading only*, and *Lord Chancellor* did limit it accordingly.

The

The preſent petition is, that the commiſſioners may be reſtrained from aſking a particular queſtion mentioned in the petition, concerning *her ſon's trading*.

Lord Chancellor ſaid, he did not intend by the former order to reſtrain the commiſſioners from aſking any queſtion that might be relevant to *his* being a trader, or any circumſtances relating thereto.

She was aſked by the commiſſioners, whether her ſon was a trader or not, or had any concern in the brewhouſe? and anſwered negatively. He would not therefore reſtrain the commiſſioners from inquiring into any circumſtances which may make him a trader; as for inſtance, "Did your ſon aſſign over any ſhare he had in the "brewing trade to you? For if ſhe anſwers in the affirmative, that will ſhew he was a trader before he executed an aſſignment.

Suppoſe in the deeds themſelves it ſhould appear he carried on the trade with his mother, this will be a material evidence for the ſupport of the commiſſion.

His Lordſhip would not reſtrain the commiſſioners from examining Mrs. *Parſons* concerning her ſon's trade, and therefore diſmiſſed the petition, and ſaid further that he would not make any order that Mrs. *Parſons* ſhould be at liberty to be attended by counſel upon her examination, as is prayed by the petition, becauſe it may be made a precedent in other commiſſions, and he thought an inconvenience would ariſe if allowed in every caſe, and therefore only recommended it to the commiſſioners, in this particular inſtance, to indulge Mrs. *Parſons* with counſel, but would make no order for that purpoſe.

Lord Chancellor would not make an order that Mrs. *Parſons* ſhould have counſel upon her examination, becauſe it might be made a precedent in other commiſſions, and thought an inconvenience would ariſe, if allowed in every caſe.

Ex parte Bland.

Caſe 108.

THE petitioner is a banker in *Lombard-ſtreet*, and had been ſummoned under the commiſſion of bankrupt againſt *Lingood*, in order to be examined touching his trade and dealings with the bankrupt.

Mr. *Bland*, inſtead of attending the commiſſioners, petitioned *Lord Chancellor* that he might be examined upon interrogatories, and might have a copy of the interrogatories, and a month's time to prepare himſelffor this examination, and that the commiſſioners might be reſtrained from aſking him queſtions touching notes given for money, or bank notes, or goldſmith's notes, or money paid by him for bank bills, or caſh notes of the petitioner or other bankers.

Mr. *Bland*, inſtead of attending commiſſioners, petitioned that he might be examined upon interrogatories, and have a copy thereof, and a month's time to prepare himſelf, and that the commiſſioners may be reſtrained from aſking him particular queſtions in his buſineſs of a banker.

Lord Chancellor diſmiſſed the petition upon the opening of the petitioner's counſel, without hearing the aſſignees counſel, and ſaid he would not limit or reſtrain commiſſioners in their examinations, for if he did it would be attended with expence and inconvenience from applications of this kind.

Lord Chancellor will not reſtrain commiſſioners in their examinations, as it would be attended with expence and inconvenience from applications of this kind.

The bare exchanging of notes with a bankrupt, or giving money for bank notes cannot affect him as a trader with that bankrupt.

The bare exchanging of notes with a bankrupt, or giving money for bank notes, cannot affect him as a trader with that bankrupt, and conſequently Mr. *Bland* cannot be hurt by ſuch a diſcovery, nor would he preſume that the commiſſioners will aſk ſuch trifling and immaterial queſtions, and therefore would not direct the examination to be upon interrogatories.

(C c) Who are liable to bankruptcy.

December the 11th 1737.

Highmore v. *Molloy.*

Caſe 109. Pawn-brokers within the ſtatutes of bankrupts, and ſeem particularly included in the general word *brokers*, in the 39th ſection of the 5th of *Geo.* 2. and ſo is a public officer, as an exciſeman, &c. if he will trade.

LORD Chancellor: I am inclined to think a pawnbroker within the ſeveral ſtatutes concerning bankrupts, and eſpecially within the general words of the 39th clauſe of the 5th of *Geo.* 2. the words of which are, "Whereas perſons dealing as bankers, *brokers*, and "factors, are frequently intruſted with great ſums of money, and "with goods and effects of very great value belonging to other per"ſons: It is hereby further enacted that ſuch bankers, *brokers*, and "factors ſhall be, and hereby are declared to be ſubject and liable to "this, and other the ſtatutes made concerning bankrupts."

For though pawnbrokers are not expreſly named, yet the general word *brokers* is the genus, and all other kind of brokerage the ſpecies.

His Lordſhip ſaid in the ſame caſe, Though a man be a publick officer, as an exciſeman, *&c.* yet, if he will trade, he makes himſelf ſubject to the ſtatutes of bankrupts.

January the 22d 1739.

Ex parte Carington.

Caſe 110. The daughter of a freeman of *London*, if ſhe trades ſeparately from her huſband, may be a bankrupt.

A Commiſſion of bankruptcy had been taken out againſt *Dorothy Jones*, as a widow. Her lying in gaol from the 8th of *November* (on an arreſt) to the 4th of *January*, being two months, was the act of bankruptcy, on which ſhe was declared a bankrupt.

The petition was preferred in order to ſuperſede the commiſſion, upon a ſuggeſtion of her being a married woman at the time the commiſſion iſſued, and the wife of the petitioner.

Lord Chancellor: I am of opinion the taking out a commiſſion againſt her as a widow, is but a miſnomer at moſt; but if the petitioner thinks this a ſufficient ground, I leave him at liberty to bring his action.

As *Dorothy* is admitted to be the daughter of a freeman of *London*, and appears plainly to be a ſeparate trader, by the cuſtom of *London*, ſhe is clearly liable to bankruptcy, notwithſtanding her coverture.

The petition diſmiſſed.

Auguſt

Auguſt the 2d 1744.

Ex parte Criſp.

Vide under the diviſion, Rule as to Partnerſhip.

December the 24th 1747.

Ex parte Meymet.

Vide under the diviſion, What is or is not an Act of Bankruptcy.

February the 24th 1752.

Richardſon and *Gibbons*, aſſignees of *Alexander Wilſon* a bankrupt, —— —— —— —— Plaintiffs,
Bradſhaw, *Taylor*, and *Wilſon*, —— —— Defendants.

Vide under the diviſion, What is a trading to make a man a bankrupt.

March the 26th 1750.

Ex parte Williamſon.

Vide under the diviſion, Rule as to the Certificate of a Bankrupt.

(D d) Rule as to a bankrupt's allowance.

October the 20th 1744.

Ex parte Grier.

THE petitioner *Ruth Grier*, the widow and adminiſtratrix of *John Grier*, againſt whom a commiſſion of bankruptcy had been awarded, prayed that the aſſignees of the eſtate and effects of the bankrupt might be ordered to pay unto the petitioner the ſum of 35*l.* being the remainder of the 5*l. per cent.* unreceived, which the petitioner inſiſts *John Grier* the bankrupt was intitled to as his allowance, in reſpect of the ſum of 800*l.* recovered in from his eſtate, or that ſhe might have ſuch other allowance as he was intitled unto at his death. Caſe 111.

A bankrupt is not intitled to his allowance, till he has had his certificate.

Lord Chancellor: I am of opinion on the conſtruction of the clauſes in the act of parliament, made in the 5th year of the preſent King, that though *Grier* the bankrupt did ſurrender and conform, yet that he was not intitled to the allowance given to bankrupts, unleſs he had had his certificate; for if the creditors ſhould conſent to give it him before, it would be of no ſervice, as they might take it from him again the next moment; for it would be liable in his hands to ſatisfy any creditors, till he is intirely cleared by the certificate.

His Lordſhip therefore ordered the petition to be diſmiſſed.

December the 24th 1747.

Ex parte Trap.

Caſe 112.

A bankrupt's allowance under the act of parliament is a veſted intereſt, and if he dies, will go to his repreſentative

THE petitioner is the repreſentative of a bankrupt, whoſe eſtate had paid a neat 10*s.* in the pound to his creditors under the commiſſion, and thereby became intitled to an allowance of 5 *l. per cent.* provided the 5 *per cent.* did not amount in the whole to above the ſum of two hundred pounds. The commiſſioners directed the aſſignees to pay the bankrupt the ſum of 163*l.* being within the ſum, his eſtate amounting to 4000*l.* but before the aſſignees had paid it, the bankrupt dies, which was the reaſon they did not think fit to pay it to the repreſentative of the bankrupt, without the ſanction of the court.

Lord Chancellor of opinion it veſted in the bankrupt, and the petitioner conſequently as his repreſentative intitled to the 163*l.*

February the 2d 1748.

Ex parte Stiles and Pickart.

Caſe 113.

Bankrupts are not intitled to their allowance under the 5th of the preſent King, till a final dividend is made, for it cannot be ſeen before, whether they will be intitled to any allowance at all.

THE petitioners by their petition ſet forth, that they had paid a dividend of 10*s.* in the pound, clear of all expences, under a joint commiſſion; and therefore prayed they may have the allowance they are intitled to under the act of the 5th of the preſent King.

A ſeparate creditor, who by order of the Lord Chancellor was admitted to prove her debt under the joint commiſſion, oppoſes it, and inſiſts the bankrupts are not intitled, as their ſeparate eſtate is ſo deficient, as not to produce 2*s.* 6*d.* in the pound, and that the bankrupts cannot receive the allowance under the act of parliament, till they have paid all their creditors, as well ſeparate as joint, twenty ſhillings in the pound.

Lord Chancellor: This application is premature, the commiſſion iſſued no longer ago than in *June* laſt, no final dividend has been made, and before that time any creditor may come, either joint or ſeparate, to prove debts.

And

And even upon the common equity of this court, if creditors will make an affidavit that they have not read the *Gazette*, they will be admitted, ſo as not to diſturb the former dividend, and by that means muſt, in the firſt place, be brought up equal to the creditors under the former dividend, before the commiſſioners can proceed to make a ſecond.

Upon an affidavit of a creditor that he has not read the *Gazette*, he will be admitted ſo as not to diſturb a former dividend, nor can commiſſioners proceed to make a ſecond till he is brought up equal to the creditors under the firſt.

So that till after a final dividend, it cannot be ſeen whether the bankrupts will be intitled to any allowance at all, for the act of parliament directs that the neat produce of his eſtate ſhall be ſufficient to pay the creditors of the bankrupt, who have proved their debts under the ſaid commiſſion, the ſum of ten ſhillings in the pound, *over and above ſuch allowance.*

Therefore to grant this petition would be a dangerous precedent; and for this reaſon I diſmiſs it, but ſo as not to prejudice any allowance they may be intitled to after a final dividend.

November the 2d 1754.

Ex parte Calcot, and others.

Caſe 114.

THE petitioner is an adminiſtrator of one *Tirrell*, a bankrupt, his application to the court for the bankrupt's allowance under the act of parliament, he having made a neat dividend of 10*s.* in the pound.

The repreſentative of a bankrupt, who had in his life time divided 10*s.* in the pound is, as ſtanding in his place, intitled to the allowance.

Lord Chancellor ordered the aſſignee out of the effects in his hands ſhould pay the allowance to the petitioner, at the rate of 5*l. per cent.* upon the money got in from the bankrupt's eſtate, not exceeding the ſum of 200*l.*

(E e) Rule as to Sollicitors in bankrupt caſes.

June the 17th 1742.

Ex parte Holliday.

Caſe 115.

A Petition againſt *Phelps* the clerk, in a commiſſion of bankrupt for not attending a trial at the aſſizes upon an indictment againſt the bankrupt for concealment, notwithſtanding he was ſerved with a *ſubpœna* for that purpoſe; and praying that the whole coſts of the ſuit may be paid by *Phelps*, as the petitioner apprehends that the acquittal of the bankrupt was owing to the want of *Phelps*'s evidence.

The court cannot, upon petition, make the clerk of the commiſſion pay coſts of ſuit, for not attending to give evidence at a trial, by reaſon of which the bankrupt was acquitted, the remedy lying at law.

Lord Chancellor: This is not a matter proper for me to determine in a ſummary way, or to interfere in a proceeding before a judge of oyer and terminer.

If the petitioner has really ſuſtained any damages in this trial for want of Mr. *Phelps*'s evidence, he may proceed againſt him by way of

indictment or information, and recover damages for this neglect of Mr. *Phelps*; and therefore as to this part I ſhall diſmiſs the petition, as I have no juriſdiction at all in a matter of this kind.

June the 7th 1749.

Ex parte Whitchurch and others.

Caſe 116. Where a ſolicitor carries on ſuits for an aſſignee, without the authority of the majority in value of the creditors, the eſtate of the bankrupt is not liable to his bill for ſuch ſuits.

HIS Lordſhip, by a former order in petitions of bankrupts, referred it to a Maſter to tax Mr. *Skurray*'s bill as ſolicitor, in ſuits carried on in this court by the aſſignees of *Halliday*'s bankruptcy.

The Maſter taxed the bill accordingly, and reported ſo much due to him on account of theſe ſuits.

Some of the creditors of *Halliday* in behalf of themſelves and the reſt of the creditors, take exceptions to this report, becauſe the aſſignees engaged in theſe ſuits of their own accord, without a previous meeting of the creditors to impower them to commence ſuits in equity, purſuant to the directions in a clauſe in the 5 *Geo.* 2. intitled, *An act to prevent the committing of frauds by bankrupts.*

" Provided always, that no ſuit in equity ſhall be commenced by " any aſſignee or aſſignees, without the conſent of the major part in " value of the creditors of ſuch bankrupt, who ſhall be preſent at a " meeting of the creditors, purſuant to notice to be given in the " *London Gazette* for that purpoſe."

Lord Chancellor: The exception muſt be allowed, and as he was employed by the aſſignee, Mr. *Skurray* has a perſonal remedy againſt him, but ſince he acted without the authority of the majority in value of the creditors at a previous meeting for that purpoſe, the eſtate of the bankrupt is not liable to this demand.

(Ff) Rule as to the ſale of offices under a commiſſion of bankruptcy.

Auguſt the 3d 1749.

Caſe 117. The bankrupt 1746. purchaſed the office of the under marſhal of the city of *London* for 900 *l.* a ſalary annexed to it of 60 *l.* payable half yearly, and a freedom of the ſaid city, worth annually 25 *l.*

Ex parte Butler and *Purnell*, the aſſignees of *Edward Richardſon* a bankrupt.

EDWARD Richardſon in 1746. and for ſome years before, followed the buſineſs of a victualler in the city of *London*, and having acquired ſome money, and borrowing more, in *September*

Richardſon's effects not amounting to 5 *s.* in the pound, his aſſignees applied to the lord mayor and court of aldermen, for liberty to ſell the bankrupt's office; but he being preſent in court and refuſing to conſent, they declared that they could not alienate it without his conſent. The preſent application, that this office may be forthwith ſold, and that the lord mayor, &c. may be indemnified in accepting ſuch alienation, on the aſſignees paying the uſual alienation fine. The *Lord Chancellor* of opinion, that aſſignees might ſell this office of under marſhal, and that it is not within the ſtatute of *Edw.* 6. as it does not concern the adminiſtration of juſtice.

1746.

1746. purchaſed the office of the under marſhal of the ſaid city for 900 *l.* two thirds of which was paid to the then lord *Mayor*, and the other third to the ſaid city.

To the office is annexed not only a yearly ſalary of 60 *l.* payable half yearly out of the chamber of the city, but alſo a freedom of the ſaid city every year, worth 25 *l.* and conſiderable perquiſites beſides.

On the 22d of *April* 1749. a commiſſion of bankruptcy iſſued againſt him; there is not ſufficient to pay 5 *s.* in the pound from the effects in the hands of the aſſignees, and therefore they applied to the lord mayor and court of aldermen, for liberty for them to ſell the bankrupt's office, but he being preſent in that court, and aſked if he would conſent to ſuch ſale, abſolutely refuſed to do it, whereupon the court of aldermen declared, that they could not alienate it without the bankrupt's conſent.

The petitioners apprehending the intereſt of the ſaid office is veſted in them, and that as he might have ſold on the uſual alienation fine, inſiſt they as ſtanding in his place, have a right to ſell the ſame for the benefit of the creditors, without the bankrupt's conſent, and therefore pray, that the office of under marſhal may be forthwith ſold for the benefit of his creditors, and that the lord mayor and court of aldermen may be indemnified in accepting of ſuch alienation on the petitioners paying into the chamber of the city of *London* the uſual alienation fine.

At the time of *Richardſon*'s admiſſion, it is expreſſed in the appointment, that he ſhall have, hold, exerciſe, and enjoy the ſaid office with all fees thereunto belonging, ſo long as he ſhall well and honeſtly uſe and behave himſelf therein.

The buſineſs of the under marſhal is, for himſelf and his men diligently to attend the ſtreets, and carry all ſuch vagrant perſons as they ſhall find within the city and liberties to *Bridewell*, or otherwiſe to give puniſhment to them according to law.

He is likewiſe to ſee that the ſcavengers in every ward cauſe the ſtreets and lanes to be duly ſwept and paved, and that the rakers of the wards carry away the ſoil.

It is alſo required of him, that he ſhould ride or go abroad in the night time, twice in every week at leaſt, to ſee the watches duly kept.

There are other duties belonging to his office of the like kind, but the before-mentioned are the moſt material.

The principal queſtion is, Whether the place of under marſhal is an office, that concerns the adminiſtration of juſtice, and whether by the ſtatute of the 5 & 6 *Edw.* 6. *c.* 16. it is or is not lawful to ſell ſuch an office.

If it be an office which falls within the deſcription of the above ſtatute, then the counſel for the bankrupt inſiſted it cannot be ſold, becauſe by the ſtatute, "*If an officer concerning the adminiſtration of* "*juſtice, or king's treaſure, caſtles,* &c. *ſell, or take any promiſe or* "*aſſurance, to have any money or profit for any office, or deputation,*

"*he*

" *he ſhall forfeit his office, and the contract ſhall be void, and the buyer* " *or promiſer,* &c. *ſhall be diſabled to hold the ſaid office.*"

The office of ſerjeant at mace is not ſaleable as it concerns the execution of juſtice: The ſame as to a ſworn clerk of the ſix clerk's office.

The counſel for the bankrupt likewiſe cited the caſe of *William Lowfield, who in* 1722. *in conſideration of the ſum of* 400l. *was by the lord mayor and court of aldermen of the city of* London *admitted to the office of a ſerjeant at mace, to hold* quam diu ſe bene geſſerit. *The duty of his office is to execute the writs and proceſſes directed to the ſheriffs of* London, *and no ſalary but what he gets by the execution of ſuch proceſs.* William Lowfield *became a bankrupt, the aſſignees petitioned Lord Chancellor* King *to have his place ſold for the benefit of his creditors, and on the* 10*th of* April 1733. *the matter of the petition came on, when his Lordſhip was pleaſed to declare, that the place was not ſaleable, as it concerned the execution of juſtice, and therefore diſmiſſed the aſſignees petition.*

The place of Mr. *Briſtow*, one of the ſworn clerks of the ſix clerks office, who was diſcharged from his impriſonment by the late act for the relief of inſolvent debtors, was held not ſaleable.

N. B. It appeared by the affidavits which were read in the petition, that 150*l.* only of the creditor's money had been laid out by the bankrupt in the purchaſe of the ſaid office.

Lord Chancellor: This is a matter of very great conſequence, for when a man is likely to become bankrupt, he may ſell all his ſtock in trade and effects, and inveſt the produce in one of theſe *ſaleable offices*, and in that manner cheat his creditors.

There are two queſtions which naturally ariſe.

1*ſt*, Whether this office is of ſuch a nature, that the creditors can lay hold of the ſalary belonging to it?

2*dly*, Whether the creditors are bound to wait for theſe profits as they accrue, or may ſell them by anticipation?

I am of opinion, that this is clearly an office within the meaning of the 34 & 35 *Hen.* 8. *c.* 4. and 13 *Eliz. c.* 7.

The words of the preamble to the firſt act are, " Where divers " and ſundry perſons, craftily obtaining into their hands, great ſub- " ſtance of other mens goods, do ſuddenly flee to parts unknown, or " keep their houſes, not minding to pay or reſtore to any their cre- " ditors, their debts and duties, but at their own wills, and conſume " the ſubſtance obtained by credit of other men, for their own " pleaſure and delicate living, againſt all reaſon, equity and good " conſcience." Be it therefore enacted, *That the Lord Chancellor of* England, *or Keeper of the Great Seal, the Lord Treaſurer, the Lord Preſident, Lord Privy Seal, and other of the King's moſt honourable Privy Counſel, the Chief Juſtices of either Bench, for the time being, or three of them at the leaſt, upon every complaint made to them in writing, by any parties grieved, ſhall have power and authority by vertue of this act to take by their diſcretions, ſuch orders and directions as well with the bodies of ſuch offenders, as with their lands, tenements, fees, annuities, and offices, which they have in fee ſimple, fee tail, term of life, term of years, or in the right of their wives, as much as the intereſt,*

The office of under marſhal is clearly within the deſcription of the 34 & 35 *Hen.* 8. *c.* 4. and 13 *Eliz. c.* 7.

reſt, right and title of the ſaid offenders ſhall extend to be, and may then lawfully be departed with, and to cauſe the ſaid lands, &c. and offices to be appraiſed and ſold, for ſatisfaction and payment of the ſaid creditors.

The ſtatute of the 13 *Eliz.* begins with a recital of the former act. *Foraſmuch as notwithſtanding the ſtatute made againſt bankrupts in the 24th year of the reign of our ſovereign lord King* Henry VIII. *thoſe kind of perſons have, and do ſtill increaſe into great and exceſſive number, and are like more to do, if ſome better proviſion be not made for the repreſſion of them; Be it enacted, That the Lord Chancellor or the Lord Keeper for the time being, upon every complaint made to him in writing, againſt ſuch perſon being bankrupt, as is before defined, ſhall have full power by commiſſion under the great ſeal, to appoint diſcreet perſons who ſhall take by their diſcretions, ſuch order,* &c. *with the body of ſuch perſon,* &c. *and alſo with his lands,* &c. *and cauſe the ſaid lands, offices,* &c. *to be appraiſed and ſold.*

This is an explanation of the former act, and changes the juriſdiction by veſting it in the Lord Chancellor or Lord Keeper only, the conſideration of the former act is taken up, and is, as it were, incorporated into this, the moſt remarkable part is, *cauſe the ſaid lands and offices,* &c. *to be appraiſed and ſold*; and notwithſtanding *Stone* and *Billinghurſt* in their reading on theſe acts ſay, that only offices of inheritance are within the meaning of theſe words, yet I am of opinion this conſtruction is contrary to the expreſs words of the acts, for terms of years relate directly to offices, not in lands only, but all other offices.

Is this an office for life? it certainly is, for an office *quam diu ſe bene geſſerit*, has always been held to be an office for life, and as they expreſs it in the Scotch law, it is what a perſon holds *aut per vitam aut culpam.*

An office *quam diu ſe bene geſſerit*, is an office for life.

It has been admitted at the bar, that if the bankrupt ſhould not obtain his certificate, that the moment he receives any profits from his office, it veſts in his aſſignees.

But it is not therefore to be taken for granted, that every thing which does not immediately veſt in the aſſignees, is not liable to the creditors under a commiſſion of bankruptcy.

I will put you a caſe, in which I ſhould not ſcruple to conſider a bankrupt as a truſtee for creditors.

Suppoſe a tradeſman is under a will made executor and reſiduary legatee, and before his bankruptcy collects in enough of the teſtator's effects, to pay debts, and particular legacies, and the remainder of the aſſets ſtood out in mortgages: The aſſignees would not in law be intitled to get it in, becauſe the bankrupt has it in *auter droit* as executor, and yet if he refuſed, I ſhould certainly be of opinion the aſſignees under the commiſſion, notwithſtanding the legal intereſt is

Where a bankrupt is an executor and reſiduary legatee, and has paid the debts, and particular legacies out of part of the aſſets, if he refuſes to collect in the reſt, notwithſtanding the aſſignees have not the legal intereſt veſted in them, the court would aſſiſt them to get in the remainder, in the name of the executor.

not veſted in them, might by the aid of this court get in this part of the aſſets in the name of the executor, and would direct accordingly.

I think clearly therefore, that the aſſignees may in this caſe by anticipation ſell the office of the under marſhal of the city of *London*, and that it is not within the ſtatute of *Edw.* 6. which concerns the execution of juſtice, and for this reaſon not like *Lowfield*'s caſe, that did plainly concern the execution of juſtice, and if it had come before me, I ſhould certainly have made the ſame order, as Lord Chancellor *King* did, that the petition ſhould ſtand diſmiſſed.

The office of under marſhal does not concern the execution of juſtice, but only the police of the city of *London*, and there have been laid before me ſeveral inſtances of acts of common council for the ſale of this office.

Another objection has been ſtarted by reaſon of the words of the act, which reſtrain it to ſuch a property, as *a bankrupt may depart withal*, becauſe this muſt be done by the leave and intervention of the lord mayor and court of aldermen.

This is only a medium, though to be ſure, I have no authority to make an order on the lord mayor and court of aldermen, compelling them to accept of a ſale.

But what I ſhall direct here, is like the common caſe of renewals of leaſes: I cannot make deans and chapters, *&c.* grant leaſes, and yet ſuch orders are every day's experience, and the ſame likewiſe with regard to lords of manors in copyhold caſes.

His Lordſhip directed, that the aſſignees of *Edward Richardſon* ſhould agree with a perſon to ſell this office, and then propoſe ſuch perſon to the lord mayor and court of aldermen as a purchaſer, and if they approved of ſuch purchaſer, the bankrupt was to attend the lord mayor and court of aldermen, and to ſurrender his office to them, to the end the purchaſer might be admitted thereto; and the money ariſing from the ſale of the office, was to be applied for the benefit of the creditors; and if the bankrupt refuſed to comply with this order, his Lordſhip declared he would commit him to the *Fleet* till he thought proper to comply.

If an officer of the army

N. B. *Lord Chancellor* in arguing this caſe, ſaid, that if an officer of the army ſhould become a bankrupt, he ſhould have no doubt but he had a power to lay his hands upon his pay, for the benefit of his creditors.

Decem-

December the 22d 1749. This matter came on again.

Ex parte Butler and *Purnell*, the aſſignees of *Edward Richardſon* a bankrupt.

AT the time of iſſuing of the commiſſion, *Richardſon*, as has been before ſtated, was poſſeſſed of the office of under marſhal of the city of *London*, and had refuſed to ſurrender, or to let the aſſignees diſpoſe of it, for the benefit of his creditors.

By an order of the 3d of *Auguſt* laſt, the aſſignees were to be at liberty to treat for diſpoſing of the office, and after they had agreed with any perſon, were to propoſe him to the lord mayor and court of aldermen for their approbation, and if they approved of him, the bankrupt was ordered to attend them, and ſurrender the ſaid office to the lord mayor and court of aldermen, to the end that ſuch perſon might be admitted to the office in the uſual manner.

Mr. *Buck* accordingly agreed with the aſſignees for the purchaſe of the office, at the price of 850 *l.* and on the 17th of *October* laſt was preſented to the court of lord mayor and aldermen, who approved of him, and were ready to take the bankrupt's ſurrender, but he refuſing to do it, upon an application to *Lord Chancellor*, he ordered *Richardſon* to be committed for his contempt, and a warrant iſſued accordingly, but he thereupon abſconded, and hath kept out of the way ever ſince.

It was therefore prayed by the preſent petition, that his Lordſhip would make an order on the court of lord mayor and aldermen to admit Mr. *Buck*, in the room of *Richardſon*, to the ſaid office.

The court of lord mayor and aldermen did not think they were juſtified in admitting *Buck*, without an actual ſurrender of the bankrupt, and therefore the principal end of this application was, that they might be ſafe in doing it, and to ſupply the want of a ſurrender.

It appeared that a conſtant perſonal attendance was required in this office, and that by the rules and cuſtoms of the court of lord mayor and aldermen, the perſon who neglects or refuſes to give ſuch attendance, may be totally diſmiſſed, and that in conſequence thereof, the court may admit any perſon they think fit.

Caſe 118.

The bankrupt being under marſhal of the city of *London*, and refuſing to ſurrender, the aſſignees obtained an order for diſpoſing of the office. *B.* agrees with the aſſignees for the purchaſe of the office at 850 *l.* and on the 17th of *October* laſt was preſented to the court of lord mayor, *&c.* who approved of him, and were ready to take the bankrupt's ſurrender, but he refuſing was ordered to be committed for his contempt, and hath abſconded ever ſince. The preſent petition, that *Lord Chancellor* would order the court of lord mayor, *&c.* to admit *B.* in the room of *Richardſon*. His Lordſhip ſaid, he could not make an order upon the lord mayor, *&c.* to admit *B.* as it was intirely diſcretionary in them, but recommended to the lord mayor, *&c.* upon the bankrupt's non-attendance, by which his office was forfeited, to diſmiſs him, and admit *B.*

Lord Chancellor ſaid, he was in doubt what directions he ſhould give, for he was of opinion, that he could not make an order upon the lord mayor and aldermen to admit Mr. *Buck*, as it was intirely diſcretionary in them who they would admit, and that he could not ſupply the want of a ſurrender here, as in the common caſe of a

Where the legal intereſt of a copyhold is in one, and the equitable in another, the court can order the truſtee to ſurrender, though *ceſtuique truſt* refuſes.

copyhold, where perhaps the legal intereſt might be in one perſon, and the equitable intereſt in another, by which means the court can order the truſtee who had the legal intereſt to ſurrender, tho' *ceſtuique truſt* refuſes, but here the legal and equitable intereſt are both in *Richardſon*.

But to the end juſtice might be done to the creditors, he recommended it to the lord mayor and aldermen, upon *Richardſon*'s non-attendance by which his office was forfeited and vacated, to diſmiſs him, and to admit *Buck* in his room, upon payment of the 850 *l.* and the alienation fine to the chamber of *London*.

(Gg) What ſhall or ſhall not be ſaid to be a bankrupt's eſtate.

October the 27th 1746.

Brown aſſignee of *Roger Williams* a bankrupt v. *Heathcote* and *Martyn*.

Vide under the diviſion, The conſtruction of the ſtatute of 21 Jac. 1. cap. 19. *with reſpect to bankrupt's poſſeſſion of goods after aſſignment.*

December the 23d 1748.

Ex parte Richard Flyn and *Richard Field* merchants.

Vide under the ſame diviſion.

(Hh) Where there is a truſt for a bankrupt's wife.

December the 23d 1740.

Ex parte Elizabeth Greenaway.

Vide under the diviſion, Contingent Debts.

October the 20th 1744.

Ex parte Groome.

Vide under the ſame diviſion.

November the 6th 1745.

Walker and others v. *Burrows.*

Vide under the diviſion, Where aſſignees are liable to the ſame equity with the bankrupt.

July the 31ſt 1749.

Grey v. *Kentiſh.*

Vide title *Baron and Feme, under the diviſion, Rule as to a poſſibility of the Wife.*

December the 23d 1751.

Ex parte Elizabeth Michell.

Vide under the diviſion, Contingent Debts.

(I i) What is a trading to make a man a bankrupt.

December the 11th 1737.

Highmore v. *Molloy.*

Vide under the diviſion, Who are liable to bankruptcy.

January the 22d 1739.

Ex parte Carrington.

Vide under the ſame diviſion.

December the 24th 1747.

Ex parte Meymot.

Vide under the diviſion, What is or is not an act of Bankruptcy.

February the 24th 1752.

Richardſon and *Gibbons*, aſſignees of *Alexander Wilſon* a bankrupt, —— —— } Plaintiffs.

Bradſhaw, *Taylor*, and *Wilſon*, —— — Defendants.

Vide under the diviſion, Rule as to Drawers and Indorſors of Bills, &c.

January the 22d 1752.

Caſe 119.

Bankers having taken upon them to act as *ſcriveners*, made it neceſſary for the legiſlature in the 5 *Geo.* 2. to add *bankers*, as being liable to commiſſions of bankruptcy.

Ex parte Wilſon, and *Ex parte* Bradſhaw.

LORD Chancellor: The clauſe in 5 *Geo.* 2. relating to dealers as bankers, *&c.* took it's riſe from that part of the 21 *Jac.* 1. relating to *Scriveners*, who were more numerous than in latter days; for bankers have taken upon them to act as *Scriveners*, and therefore made it neceſſary for the legiſlature to add *Bankers*, as being liable to commiſſions of bankruptcy.

Mr. *Wilſon* being an agent to 26 regiments, will not make him a bankrupt, nor will it exempt him from being one.

It is ſaid, he could be no banker, becauſe he kept no ſhop.

A perſon acting as banker, will be conſidered as one, tho' he does not keep an open ſhop.

A *Scrivener* does not keep an open ſhop, and yet as he receives money belonging to other people, and places it out on ſecurities, which is the buſineſs of a *Scrivener*, he may be a bankrupt.

So may a perſon acting as banker, though not keeping an open ſhop.

His keeping his caſh with *Drummond*, and paying from 1739. to 1751. 30,000 *l.* a month, in all three millions, is inſiſted to be very ſtrong, if not concluſive evidence, that he was no banker himſelf.

It is inconceivable that he could lodge ſuch ſums in another perſon's hands, and have no profit or allowance.

A commiſſion of bankruptcy is as much *ex debito juſtitiæ* as a writ, and no inſtance where the court ſuperſedes it, without directing an iſſue, unleſs it appears to be taken out fraudulently or vexatiouſly.

The great point is, That here is a doubt upon the evidence, and if the weight of evidence had been againſt the commiſſion, yet the court will not ſuperſede it, becauſe a commiſſion of bankruptcy is as much *ex debito juſtitiæ* as a writ, and I know no inſtance where this court have ſuperſeded a commiſſion, without directing an iſſue, unleſs it appears very plainly to be taken out fraudulently, or vexatiouſly.

Lord Chancellor directed the iſſue to be tried in the court of King's Bench in *Middleſex*.

(K k) Rule as to acts of parliament relating to bankrupts.

April the 2d 1742.

Ex parte Burchell.

Vide under the diviſion, The Conſtruction of the Repealing Clauſe of the tenth of Queen Ann.

May the 12th 1742.

Ex parte Lingood.

Vide under the diviſion, Rule as to a Certificate from Commiſſioners to a Judge.

November the 6th 1745.

Walker and others v. *Burrows.*

Vide under the diviſion, Rule as to Aſſignees.

(L l) What is or is not an election to abide under a commiſſion.

April the 4th 1739.

Ex parte Capot.

Caſe 120. An aſſignee upon refunding what he had received under two dividends, allowed to make his election, to proceed at law againſt the bankrupt.

AFTER a commiſſion of bankruptcy iſſued, and two dividends made in conſequence, one of the aſſignees brought an action againſt the bankrupt, and laid him in execution for the reſidue of the debt, and upon application to the *Lord Chancellor*, three queſtions were made by his Lordſhip.

Firſt, If the creditor was intitled to purſue the perſon of the bankrupt, and yet receive a proportionable benefit under the commiſſion, which he ſaid he thought was by no means to be done, as the law of bankrupts now ſtands: The old laws conſidered bankrupts as fraudulent inſolvents, and they are often called offenders, but the more modern laws have conſidered them as unfortunate inſol-

The old laws conſidered bankrupts as fraudulent inſolvents, but the more modern, as unfortunate ones,

and upon theſe ſtatutes have the applications been made, to compel creditors who proceed in a double way, to make their election.

vents,

vents, and upon theſe ſtatutes, theſe applications have been made to the court, which has obliged creditors who were proceeding in the double way, to make their election.

The next queſtion was, If he was now at liberty to make his election, or whether he had not made his election by taking the dividends.

But upon refunding what he had received as dividends, his Lordſhip gave him leave to make his election.

The third queſtion was, If he upon refunding, and electing to proceed againſt the perſon, ſhould have liberty to come in under the commiſſion and prove his debt, ſo as to diſſent from, or aſſent to his certificate.

The reaſon why ſuch creditor who elects to proceed at law, ſhall ſtill be allowed to aſſent or diſſent to the bankrupt's certificate, is to make the remedy againſt the perſon effectual.

Lord Chancellor ſaid, ſeveral ſuch orders were made by Lord *Talbot*, and accordingly ſuch order was made in the preſent caſe, and he ſaid the reaſon of the court for ſuch order was, to make the remedy againſt the perſon effectual; for otherwiſe the perſon may, by the reſt of the creditors, be abſolutely diſcharged from the remedy which this creditor has elected to take.

December the 23d 1743.

Ex parte Ward.

Vide under the diviſion, Rule as to a Petitioning Creditor.

October the 26th 1745.

Ex parte Lindſey the bankrupt.

Caſe 121. Notwithſtanding a creditor under a commiſſion of bankrupt elects to proceed at law, he may ſtill aſſent or diſſent to the certificate.

A Petition to be diſcharged from a commitment at the ſuit of one *Henkle*, who has proved a debt under the commiſſion.

Lord Chancellor: The creditor muſt either waive his proof under the commiſſion, or make his election to proceed under it, but notwithſtanding he elects to proceed at law, he may ſtill aſſent or diſſent to the certificate.

It not being clear, whether the debt under the commiſſion is the ſame for which the action was brought, his Lordſhip adjourned the petition for want of the proceedings under the commiſſion which were miſlaid.

Auguſt the 7th 1746.

Ex parte Lewes.

Vide under the diviſion, Rule as to a Petitioning Creditor.

Auguſt the 7th 1751.

Ex parte Dorvilliers.

AN application by the petitioner the bankrupt, praying that *Moſes Moravia*, who has brought an action againſt him, and alſo proved a debt of 800*l.* and upwards under the commiſſion, may make his election to continue under the commiſſion, or proceed at law. Caſe 122.

Moravia alone, being the majority in value of the creditors, choſe himſelf aſſignee.

Lord Chancellor was doubtful whether the circumſtance of chuſing himſelf is not making an election to proceed under the commiſſion; but on his electing in court to proceed at law, his Lordſhip made an order that *Moravia* ſhould be diſcharged as a creditor under the commiſſion, but ſtill allowed to aſſent or diſſent to the bankrupt's certificate.

Though a perſon chuſes himſelf aſſignee, he may elect to proceed at law, or under the commiſſion.

(M m) Rule as to proſecutions againſt bankrupts for felony in not ſurrendring himſelf.

Auguſt the 7th 1751.

Ex parte Wood; in the matter of *Comerlan* a bankrupt.

AN application to the court that the commiſſioners ſhould admit him a creditor for 21*l.* upon a note of hand under this commiſſion, and that the clerk of the commiſſion may be ordered to attend at the *Old Bailey* with the proceedings under the commiſſion, upon a proſecution againſt the bankrupt for felony, in not ſurrendring himſelf according to the directions of the act of parliament of the 5th of *George* the ſecond. Caſe 123.

The petitioner applies for an order upon the commiſſioners to admit him a creditor for 21*l.* upon note, and that the clerk of the commiſſion may be ordered to attend at the *Old Bailey*, with the proceedings upon a proſecution againſt the bankrupt for felony, in not ſurrendring himſelf according to the directions of the act of parliament. As the petitioner has not yet proved his debt, if not made out to the ſatisfaction of the commiſſioners, it may be rejected; and though ſuch a proſecution may be carried on by a perſon who is not a creditor, yet by the words of the act of parliament, it looks as if the legiſlature intended there ſhould be a concurrence of the creditors under the commiſſion; and as this is a penal law, a court of equity will not lend its aid to ſuch a proſecution, by ordering the clerk to attend with the proceedings at the *Old Bailey*, and therefore would not grant the petition.

The bankrupt is a foreigner, but lived ſeveral years in *England*, and went to *Holland* before the commiſſion was taken out, and ſtayed there till the 42 days were expired for his ſurrendring himſelf, and about ſix weeks after the time expired returned to *England*.

Lord Chancellor: Though ſuch a proſecution may be carried on by a perſon who is not a creditor, yet by the words of the act of parliament it looks as if the legiſlature intended there ſhould be a concurrence of the creditors under the commiſſion.

In the preſent caſe the petitioner has not as yet proved any debt, and when he goes before the commiſſioners, if he does not make it out to the ſatisfaction of the commiſſioners, he may be rejected.

Affidavits have been read of the aſſignees and creditors, whoſe debts amounted to 1800 *l.* and upwards, that they are very well ſatisfied with the account he has given them of the ſtate of his affairs, and that they believe he could not have made a fuller diſcovery or diſcloſure of his eſtate and effects, if he had appeared at the third ſitting of the commiſſioners at *Guildhall*, which is the time appointed for the bankrupt's finiſhing his examination.

This is a penal law, and a ſevere one, for it reaches to the life of the bankrupt, and therefore a court of equity will not lend its aid to ſuch a proſecution, by ordering the clerk of the commiſſion to attend at the *Old Bailey* with the proceedings under the commiſſion, but the petitioner muſt go on in ſuch manner as the law preſcribes to prove him a bankrupt, and a felon within the intent and meaning of the act of parliament; and therefore would not grant that part of the petition, which relates to this intended proſecution of *Comerlan* the bankrupt.

Where a bankrupt did not ſurrender himſelf in due time, if there did not appear to be any intention of defrauding his creditors, Lord *Macclesfield*, in ſeveral inſtances, ſuperſeded the commiſſion, in order to prevent ſuch a proſecution.

Lord *Maclesfield* did in more inſtances than one ſuperſede a commiſſion of bankruptcy, where the bankrupt had not ſurrendered himſelf within the 42 days, if there did not appear to be any intention in the bankrupt of defrauding his creditors by not appearing within the time appointed, and where his abſence proceeded rather from an ignorance of the conſequence, or accident; and his Lordſhip took this method to prevent a proſecution.

But there is no occaſion to do any thing of that ſort here, as it is not probable the petitioner will be able, upon the circumſtances of this caſe, to ſupport ſuch a proſecution.

(N n) Rule as to contingent creditors in reſpect to dividends.

October the 20th 1744.

Ex parte Groome.

Vide under the diviſion, Contingent Debts.

December the 23d 1751.

Ex parte Elizabeth Michell.

Vide under the ſame diviſion.

(O o) Rule as to mutual debts and credits.

January the 22d 1741. and *March* the 31ſt 1742.

Ex parte Henry Lanoy Hunter Eſq; In the matter of *James Hunter* and *Loth Specht*, bankrupts.

Caſe 124.

A. lends a ſum of money to one partner on his own ſecurity, he lends the ſame to the partnerſhip trade, a joint commiſſion is taken out. *A.* ſhall not come in as a creditor upon the joint eſtate of the bankrupts immediately and directly, with the reſt of the partnerſhip creditors, but by way of circuity he is intitled, as ſtanding in the place of that partner who has paid the money to the uſe of the partnerſhip trade.

MR. *James Hunter* and Mr. *Loth Specht* were partners in trade, and the terms of the articles were, that the ſtock ſhould conſiſt of 4500*l.* and that this ſum of money ſhould be put in by *Hunter* only, and that he ſhould be intitled to two-thirds of the profit of the trade, and *Specht* to the remaining one-third; but as to the principal ſum of 4500*l.* the articles provided that it ſhould belong wholly to *Hunter*. Under theſe reſtrictions the partners entered upon trade, and more money being wanted to carry it on, *James Hunter* applied to his brother Mr. *Lanoy Hunter*, the petitioner, who in the year 1733 advanced him, at three different times, upon his note of hand, the ſum of 1500*l.* at 4 *per cent.* and afterwards gave a bond for this money, in which he was ſingly bound; for Mr. *Specht* was not then privy to any part of the tranſaction, but agreed afterwards that *James Hunter* ſhould, in his own name, lend this ſum to the partnerſhip; and in the book intitled, *The private account of caſh*, the partnerſhip ſtock is made debtor to Mr. *James Hunter* for the 1500*l.* and intereſt for the loan of this money, at the rate of 4 *per cent.* to be allowed him out of the produce of the partnerſhip trade.

Mr. *James Hunter* having in his poſſeſſion for ſafe cuſtody twenty-five *South Sea* bonds, and eight *Eaſt India* bonds, which were the petitioner's property, did, without his knowledge upon the ſecurity of the ſeveral bonds borrow of the bank of *England* in *November* 1735. 3000*l.* and afterwards lent that ſum too at the like intereſt to the partnerſhip trade, and made an entry in the ſame manner with the former made in the private caſh book.

Mr. *James Hunter* and Mr. *Specht* having become bankrupts in *July* laſt, a joint commiſſion of bankruptcy iſſued againſt them as partners, and they were declared bankrupts, and *Samuel Nicholſon* choſen aſſignee.

The petitioner applied to the commiſſioners to be admitted a creditor for the two ſums of 1500*l.* and 3000*l.* on the bankrupts joint eſtate, who refuſed to admit him to prove the ſame; and therefore prays that his Lordſhip would order that the petitioner ſhould be admitted a creditor upon the joint eſtate for the ſeveral demands; and in caſe the court ſhould not think fit to admit the petitioner a creditor for the ſeveral debts under the partnerſhip eſtate, that then he might be admitted a creditor for the ſame, upon the reſpective ſeparate eſtate of *James Hunter*.

To intitle the petitioner to come upon the joint eſtate, it was ſuggeſted that though the money was borrowed by one of the partners, and

and ſecurity given by him only, yet as it came to the uſe of the partnerſhip, that he ought to be admitted to come in as a creditor upon the partnerſhip.

Lord Chancellor: My opinion is, that the petition ought to be diſmiſſed, but without prejudice to the petitioner's bringing a bill, if he ſhould think proper, to have the benefit of the ſame matter which he now inſiſts on.

It has been contended on the part of the petition, that the money in queſtion was jointly lent to the partners; but that is expreſly contradicted by their own affidavits, for they admit particularly the 1500*l.* to be lent to *James Hunter* with an intention that he ſhould apply the ſame for the benefit of the partnerſhip; the conſequence of this is, that here are plainly two contracts, one as between *Henry Lanoy Hunter*, and *James Hunter*, the other as between *James* and his partner.

As this is the caſe, there is no ground for the petitioner's coming in as an immediate creditor for this money upon the partnerſhip eſtate; but then it has been ſaid that by a circuity the petitioner may have the ſame kind of relief; for if the money which was advanced by *Henry* to *James* was lent by *James* to the partnerſhip eſtate, then as *James* might have come in as a creditor for this ſum upon that eſtate, the petitioner will be intitled to ſtand in the place of *James*, and to have the ſame remedy as he would have had.

But I do not know any determination of the court which has gone ſo far in a caſe of this nature. Mr. *Murray* has put this matter in another way; he ſays that there is no occaſion for the petitioner to make uſe of a circuity in this caſe, but that he ought to be let in originally upon the partnerſhip eſtate, becauſe *Specht* had no intereſt in the capital, for by the articles, if *James* ſhould happen to die during the life of *Specht*, the whole principal of the 4500*l.* was to go to the executor of *James*.

But it would be going too far to ſay, that any ſecret agreement which partners enter into between themſelves, can hinder thoſe that immediately truſt the partnerſhip eſtate from having their compleat ſatisfaction out of it.

The only method therefore wherein the petitioner can have his ſatisfaction out of the partnerſhip eſtate, is by way of circuity by ſtanding in the place of *James*.

Conſider what great inconveniencies would follow, in caſe this doctrine ſhould prevail. In the firſt place, thoſe that are plainly creditors upon the partnerſhip eſtate, muſt be at liberty to controvert whether the fact is as ſtated by the articles, that the whole 4500*l.* was brought into the partnerſhip eſtate by *Hunter* only; in the next place, ſuppoſing this was the fact, yet, in reſpect of ſtrangers, the money muſt be conſidered as brought into the partnerſhip eſtate by both.

For theſe reaſons his Lordſhip ſaid he would not determine this matter in favour of Mr. *Henry Lanoy Hunter*, upon a petition, but would have him to bring a bill for this purpoſe, if he ſhould be ſo adviſed.

Upon which the Attorney general, who was counſel for the petitioner, ſaid, that in *Lavington* v. *Paul*, before Lord *Talbot*, to the beſt of his remembrance it was determined that in caſes of this nature the party might be allowed to have his ſatisfaction out of the partnerſhip eſtate. The petition upon this was ordered to ſtand over to ſearch for precedents.

Upon the 31ſt of *March* 1742. the petition came on again.

Mr. Attorney general, who was counſel for the petitioner, conſidered him as ſtanding in the place of the bankrupt, and as the partnerſhip was increaſed by the money lent by Mr. *James Hunter*, he ſaw no reaſon why one partner might not be a debtor to another, and in ſupport of this argument he cited a caſe, *ex parte Drake*, *December the 20th* 1735. *before Lord* Talbot, *where there were two partners, and one had taken out more money from the partnerſhip ſtock than his ſhare amounted to, and therefore became a debtor for ſo much*; *and my Lord* Talbot *was of opinion, that the partnerſhip creditor had a right to come upon the ſeparate eſtate of the partner who was ſo indebted.*

Where one partner takes out more money from the partnerſhip ſtock than his ſhare amounted to, the other has a right to come upon the ſeparate eſtate of that partner *pro tanto*.

Mr. *Murray* cited a caſe *ex parte Gilbert Brown*, *the 4th of* March 1725. *There two partners agreed to borrow a ſum of money for the uſe of the partnerſhip, but one of them only gave a bond for ſecuring the payment, and the other was a witneſs to it*; *this money was afterwards entered in the caſh book of the partnerſhip, a joint commiſſion taken out againſt them, and the obligee denied by the commiſſioners to be admitted a creditor*; *but Lord* King *on his petition was of opinion that he ought to be admitted, and directed accordingly.*

Two partners agree to borrow a ſum of money, but one only gives a bond, and the other only a witneſs to it, the money afterwards entered in the caſh book of the partnerſhip, a joint commiſſion taken out, obligee is intitled to be admitted a creditor.

So in the preſent caſe, the partnerſhip being in want of money, one of the partners borrows it, and gives a ſeparate bond indeed for it, but ſtill the money came to the uſe of the partnerſhip; then the queſtion will be, whether the obligee ſhall be admitted to come in as a creditor upon the joint commiſſion? But ſuppoſe your Lordſhip ſhould be of opinion that the obligee cannot come in upon the joint eſtate, I would ſubmit it to you that he can clearly come in as a creditor upon the ſeparate eſtate of *James Hunter*, for if there had been no bankruptcy the partners could not have made a dividend of the joint ſtock, till this money, which *James Hunter* lent to the partnerſhip, had been firſt taken out of it.

Joint creditors have no right to any thing but what is properly the joint eſtate, and if this money had not been lent, the partnerſhip fund would have been 4500*l.* leſs than it is now; and it would be an extreme hard caſe, where there has been ſuch a large increaſe of the fund by the means of a third perſon, if he ſhould not be allowed to come in as a creditor. The rules eſtabliſhed in this court in relation to bankruptcies are not founded upon the acts of parliament, merely, but upon equitable conſtructions; and to lay it down for a rule, that nothing ſhall intitle a perſon to come in as a creditor upon the joint eſtate, but where partners are jointly bound, notwithſtanding the money has been applied to the uſe of the partnerſhip, is not a very equitable one.

Mr. *Brown e contra.*

There is no foundation for the petitioner to be admitted a creditor on the partnerſhip account, as this is a diſpute between two ſets of contending creditors.

No doubt but payment of money may raiſe a conſideration, and make it a debt, and ſo *vice verſâ* it may not raiſe a conſideration; but it is pretended that at the time this money was advanced, Mr. *Henry Lanoy Hunter* knew the partnerſhip would be liable to anſwer it to him; it appears from his own evidence that he lent it merely upon the credit of his brother Mr. *James Hunter*, and if it ſhould extend further, it would be attended with great inconveniencies.

The open and publick books do not mention it as a loan; it is only a private caſh account, which they might have ſunk if they pleaſed, as it was intended for their private uſe only. Now creditors would never be ſafe, if near relations of bankrupts, as in this caſe, may ſet up a demand or not againſt the partnerſhip, juſt as the event turns out, *viz.* whether the ſeparate eſtate or the joint eſtate of the obligees will anſwer beſt. Could Mr. *Lanoy Hunter*, who lent this money, have brought an action againſt Mr. *Specht* the other partner? I apprehend clearly he could not.

The next conſideration is, whether the petitioner has any right to ſtand in the place of *James Hunter*, and by that means be intitled to recover this money before the joint ſtock is divided?

I will not diſpute the petitioner's right, if the bankrupt had any, and therefore conſider it merely as the bankrupt's caſe, and ſuppoſing there were no ſeparate creditors, then the whole fund in the firſt place muſt go to ſatisfy the partnerſhip creditors; and the bankrupt, if there is any ſurplus, is intitled to that only.

Lord Chancellor: 1*ſt queſtion*, Whether the petitioner is intitled to come in as a creditor, upon the joint eſtate of the bankrupts immediately, and directly with the reſt of the partnerſhip creditors?

2*d queſtion*. Suppoſing he is not immediately and directly intitled, whether he is not intitled to come in by a circuity, which this court allows, as ſtanding in the place of *James Hunter*, who has paid the money to the uſe of the partnerſhip trade?

The firſt queſtion ought to be conſidered in the firſt place, becauſe if the petitioner is immediately intitled, then there is no occaſion to have recourſe to the circuity.

But I am of opinion that he is not immediately and directly intitled, and the evidence upon his own affidavits rather turn againſt him, for a man muſt be a creditor by force of ſome contract, either expreſs or implied: as where goods are delivered, though no expreſs contract, the law implies one, and an *aſſumpſit* will lie; but according to the account Mr. *Specht*, the other partner, gives of this tranſaction, Mr. *Lanoy Hunter* had neither an expreſs nor implied contract with the partnerſhip.

Mr. *Specht* agreeing that *James Hunter* ſhould, in his own name, lend this money to the partnerſhip, explains in what manner *Specht* meant to borrow money for the uſe of the partnerſhip, and does by

no means prove that he intended the partnerſhip fund ſhould be a ſecurity to the petitioner.

It is very true there might have been a loan to the partnerſhip, notwithſtanding the notes were given by one of them only, and if the contract had been originally between the petitioner and both the partners, though the bond is executed by one only, yet it would be conſidered as a collateral ſecurity, and both of them would have been liable notwithſtanding.

Upon the whole of the queſtion, *James Hunter* only appears to have lent the 1500 *l.* to the partnerſhip, and the petitioner does not ſeem ſo much as to have it in his thoughts.

As to the 3000 *l.* borrowed of the bank upon the ſecurity of the *South Sea* ſtock, and *Eaſt India* bonds, which were the property of the petitioner; Mr. *James Hunter*, by a miſapplication and abuſe of his truſt, has procured this money, and lent it upon the ſame terms, and in the ſame manner as he did the 1500 *l.* to the partnerſhip trade, as appears by the private caſh account.

Now in that book, *James Hunter* is made debtor on one ſide, and *per contra* creditor, and therefore I cannot call it the account of any other perſon.

So that upon the firſt point, I am clearly of opinion, that the petitioner cannot be directly and immediately intitled.

As to the ſecond queſtion, his coming in by way of circuity, I own formerly I was very doubtful, but now I of am opinion, that Mr. *Henry Lanoy Hunter* is this way intitled.

The principal obſcurity in this caſe has ariſen from his counſel's inſiſting, that the petitioner ought to ſtand in the place of *James Hunter*, who is one of the bankrupts; for by this means they have confined it merely to the ſeveral lights in which he ſtands.

Now it is certain, *James Hunter* himſelf can have no ſatisfaction but out of the ſurplus which ſhall remain after the joint creditors are paid; but as between different ſorts of creditors, it is otherwiſe.

The truth of the thing is this, *Henry Lanoy Hunter* being a ſeparate creditor to *James Hunter*, is intitled to have his ſatisfaction out of every thing which can be conſidered as the ſeparate eſtate of *James*, and therefore the rules which the court go by, with regard to the diſtribution of bankrupts effects, will be a material conſideration in this caſe.

Joint creditors, where there are no ſeparate, may exhauſt both the joint and ſeparate eſtate, till their debts are paid, and the bankrupt will not be intitled to a ſhilling till the joint creditors are fully ſatisfied; but where there are ſeparate as well as joint creditors, tho' as I ſaid before, in the caſe of the bankrupts, the ſeparate eſtate ſhall be equally applied; yet as between joint and ſeparate creditors it is otherwiſe, for the joint eſtate ſhall be applied to the ſatisfaction of the joint, and the ſeparate eſtate to the ſatisfaction of the ſeparate creditors.

Joint creditors, where there are no ſeparate, may exhauſt both the joint and ſeparate eſtate, but where there are both joint and ſeparate creditors, the joint eſtate ſhall be applied to the ſatisfaction of the joint, and the ſeparate eſtate, to the ſatisfaction of the ſeparate creditors.

Suppoſe

Suppoſe a joint commiſſion againſt two partners, and a ſeparate commiſſion likewiſe, and the aſſignees under the joint, poſſeſs themſelves of any ſpecifick part, the bankrupts themſelves could not take away this ſpecifick part, tho' they had a diſtinct and a joint property in it, yet it is every day's experience, that the aſſignees under the ſeparate commiſſion may do it, upon application to this court.

Suppoſe theſe partners had never become bankrupt to the end of the parnerſhip, and they had ſettled accounts, muſt not the demand Mr. *James Hunter* had upon the partnerſhip be taken out, before a diviſion could be made of it.

If there be a ſurplus of the ſeparate eſtate, the joint creditors are intitled to it, for a bankrupt has no right to any thing till they are fully ſatisfied.

This ſhews clearly, that Mr. *James Hunter* was a creditor upon the joint ſtock, then it follows that the creditors of his ſeparate eſtate have a right to this in the firſt place; indeed if there ſhould be any ſurplus of the ſeparate eſtate, after this money is paid, the joint creditors will be intitled to it.

And this determination is according to the rule of the court, in regard to the diſtribution of bankrupts effects, upon a view of the different rights of creditors.

November the 4th 1743.

Bromely and others, creditors of Sir *Stephen Evance*, Plaintiffs.

Goodere, ſurviving aſſignee of Sir *Stephen Evance*, and others, —— —— —— —— } Defendants.

Vide under the diviſion, Rule as to the Certificate of a Bankrupt.

October the 20th 1744.

Ex parte Groome.

Vide under the diviſion, Contingent Debts.

June the 8th 1748.

Caſe 125.

A Packer may retain goods till he is paid the price of packing, and if he has another debt due to him from the ſame perſon, the goods ſhall not be taken from him till he is paid the whole, notwithſtanding the debtor is become a bankrupt.

Ex parte Deeze.

MR. *Norton Nicholls* a merchant, borrowed of the petitioner the ſum of 500 *l.* for which he gave a note of hand, afterwards he ſent the petitioner, who was a packer, ſix bales of cloth to pack and preſs; ſome time after *Nicholls* paid off a part of the 500 *l.* and intereſt for the remainder, and then aſked the petitioner if he would have the whole paid off, which the petitioner declined, and then the old note was delivered up, and a new one given for the remainder: Before the remainder was paid, and before the 6 bales were taken out of the petitioner's cuſtody, *Nicholls* became a bankrupt, and it was agreed between the petitioner, and the aſſignees of *Nicholls* under

the commiſſion, that it ſhould be determined in a ſummary way, upon a petition to *Lord Chancellor*, whether the petitioner could retain the 6 bales till his whole debt was ſatisfied.

N. B. There were no goods in the hands of the petitioner, when he firſt lent the money, nor had there been dealings between them for many years.

It alſo appeared there was at the time of the bankruptcy 19*l.* due to *Deeze* for the packing and preſſing theſe bales, and there was due from *Deeze* to *Nicholls* near that ſum for wine.

Lord Chancellor: I am of opinion that under the circumſtances of the preſent caſe, the aſſignees have not a right to take thoſe goods from the petitioner, without making him a ſatisfaction for his whole debt.

Nothwithſtanding the rules of law as to bankrupts reduce all creditors to an equality, yet it is hard where a man has a debt due from a bankrupt, and has at the ſame time goods of a bankrupt in his hands, which cannot be got from him without the aſſiſtance of law or equity, that the aſſignees ſhould take them from him without ſatisfying the whole debt.

And therefore the clauſe in the act of parliament of the 5 *Geo.* 2. relating to mutual credit, has received a very liberal conſtruction, and there have been many caſes which that clauſe has been extended to where an action of account would not lie, nor could this court upon a bill decree an account.

There have been many caſes to which the clauſe in the act of parliament relating to mutual credit has been extended, where neither an action of account would lie, nor could this court decree one.

The queſtion then will be, whether there is any ſpecifick lien on thoſe goods in the petitioner's hands, either by expreſs contract, or from the nature of the dealing; if not, whether there is any mutual credit and account.

To be ſure packers may retain goods till they are paid the price and labour of packing, and ſo other trades may retain in the like manner, therefore theſe goods were in the petitioner's hands in the nature of a pledge for ſome part of his debt, that is, the price of the packing; and what right has a court of equity to ſay, that if he has another debt due to him from the ſame perſon, that the goods ſhall be taken from him without having the whole paid?

In the caſe of *Demainbray* v. *Metcalfe*, before Lord *Cowper*, 2 *Vern.* 691. he ſaid, he looked upon it as an account current between the pawner and pawnee, the preſent caſe I think is ſtronger, for here the goods are undoubtedly a pledge in the petitioner's hands for part of his debt.

It is very hard to ſay mutual credit ſhould be confined to pecuniary demands, and that if a man has goods in his hands, belonging to a debtor of his, which cannot be got from him without an action at law, or bill in equity, that it ſhould not be conſidered as mutual credit; and Lord *Cowper*'s opinion plainly favours that conſtruction, for he looked upon the jewels pawned, and notes given, as an account current between them.

Mutual credit is not confined to pecuniary demands only, but if a man has goods in his hands belonging to a debtor, it ſhall be conſidered as ſuch.

And here, though, if there had been no bankruptcy, in an action for theſe goods, the debt could not have been ſet off, yet as the clauſe of mutual credit has been extended, I think it may come within that

rule, eſpecially as here is an account between them, on the one ſide 19 *l.* due for packing, &c. on the other ſide much about the ſame ſum due to the bankrupt's eſtate for wine.

November the 25th 1749.

Billon v. *Hide.*

Vide under the diviſion, Rule as to Drawers and Indorſors of Bills of Exchange.

Auguſt the 16th 1753.

Ex parte Charles Preſcot: In the matter of *Preſcot* a bankrupt, and brother to the petitioner.

Caſe 126. The petitioner a creditor of the bankrupt for 100 *l.* and 10 *l.* and a debtor to him upon bond for 340 *l.* payable on the 4th of *March* 1756. with lawful intereſt, applies that he may ſet off his demand of 110 *l.* againſt the principal and intereſt due on the bond as far as it will go, and not be obliged to prove his debt under the commiſſion, and take a dividend upon it only. Though this is not in ſtrictneſs a mutual debt, yet it is a mutual credit, for the bankrupt gives a credit to the petitioner in conſideration of the bond, though payable at a future day, and he gives the credit for the debt the bankrupt owes him upon ſimple contract, and therefore within the equity of the 5 *Geo.* 2. An account directed to be taken between the petitioner and the bankrupt, and the ballance only to be paid to the aſſignees.

THE petitioner a creditor for two debts, one of 100 *l.* and the other of 10 *l.* and at the ſame time a debtor upon bond given to the bankrupt for 340 *l.* payable on the 4th of *March* 1756. with lawful intereſt, applies to the court, that he may be at liberty to ſet off his demand of 110 *l.* as far as it will go againſt the intereſt and principal due on the bond, and not be obliged to prove his debt under the commiſſion, and take a dividend only upon it.

Lord Chancellor: No caſe has been cited to me, either on one ſide or the other, and therefore I muſt make a precedent, and determine it on the rules of equity.

The time of payment on the bond is not yet come, and therefore the condition of it not broken, as there is no debt that can be recovered upon it till the 4th of *March* 1756.

The petitioner inſiſts he is not to be compelled to come in as other creditors to prove the debt of 110 *l.* as he pays intereſt now upon the bond, and in 1756. muſt pay the principal, but that he has a right to ſet off, and therefore prays the 110 *l.* may be deducted out of the principal and intereſt of the bond, and founds this right on the clauſe in the 5 *Geo.* 2. relating to mutual credit.

The words of that clauſe are, "That where it ſhall appear to the "commiſſioners, that there hath been mutual credit given by the "bankrupt, and any other perſon, or mutual debts between the "bankrupt and any other perſon, at any time before ſuch perſon be-"came a bankrupt, the commiſſioners, or the aſſignees of ſuch "bankrupt's eſtate ſhall ſtate the account between them, and one

" debt may be ſet againſt another; and what ſhall appear to be due " on either ſide, on the balance of ſuch account, and on ſetting ſuch " debts againſt one another, and no more, ſhall be claimed or paid " on either ſide reſpectively."

It has been objected by the counſel againſt the petitioner, that this is not a caſe of mutual debts, becauſe the act means debts actually due; and here one debt is due, and the other not due, and therefore they are not properly mutual debts.

Before the making of this act, if a perſon was a creditor, he was obliged to prove his debt under the commiſſion, and receive perhaps a dividend only of 2*s.* 6*d.* in the pound from the bankrupt's eſtate, and at the ſame time pay the whole to the aſſignee of what he owed to the bankrupt; to remedy this very great inconvenience and hardſhip the act was made.

It is very true, as Mr. *Clarke* ſays, that the 5th of *Geo.* 2. being a poſterior act, muſt be conſtrued with a reference to the 7th of *Geo.* 1. *cap.* 31. and both acts conſidered together.

Taking it upon this foundation, what will be the reſult?

Suppoſe for inſtance there had been a bond from the bankrupt to *A.* payable at a future day, and a debt owing from *A.* on ſimple contract to the bankrupt for a leſs ſum, the account between *A.* and the bankrupt ſhall firſt of all be ſtated, and one debt ſet againſt the other, and *A.* ſhall be intitled to a proportionable dividend of ſuch bankrupt's eſtate, *pro ratâ* with the other creditors, " diſcounting the " bond payable at a future time, after the rate of 5. *per cent.* for what " he ſhall ſo receive, to be computed from the actual payment there- " of, to the time ſuch debt ſhould or would have become payable in " and by ſuch bond." Theſe are the words at the concluſion of the clauſe in the ſtatute of the 7th of *Geo.* 1. relating to creditors whoſe debts are payable at a future day.

Conſider it then the other way, where *A.* is a debtor to the bankrupt by bond payable at a future day, and a creditor upon his eſtate by ſimple contract for a leſs ſum, would it be juſt and equitable that he ſhould be obliged to prove his debt under the commiſſion, and receive perhaps 1*s.* only in the pound, and yet when his bond becomes due, which in ſome inſtances might be in three months only, pay the whole debt, principal and intereſt, to the aſſignee under the commiſſion?

This may indeed in ſtrictneſs be ſaid not to be a mutual debt, but is it not a mutual credit?

The bankrupt gives a credit to the petitioner in conſideration of this bond, though payable at a future day; and the petitioner gives the bankrupt credit for the debt he owes the petitioner upon ſimple contract; and therefore I think this caſe is within the equity of the 5th of *George* 2.

Therefore upon the petitioner's agreeing to pay the balance forthwith to the aſſignees, which the act of parliament requires, let it be referred to the commiſſioners to take the account between him and the bankrupt, and let what ſhall be found due from the bankrupt, at the

the time of the bankruptcy, be deducted out of what ſhall be due on the petitioner's bond for principal and intereſt, and the balance only be paid by the petitioner to the aſſignees.

Auguſt the 9th 1754.

Ex parte Dumas; in the matter of *Peter Bartholomew Jullian*, a bankrupt.

Caſe 127. *Dumas* and others, the petitioners, drew bills of exchange on *Jullian* and ſon for 1115*l.* and undertook to make remittances to pay the ſame, and at the ſame time acquainted them that theſe bills were for the proper account of the petitioner's houſe at *Cadiz*, and deſired the *Jullians* would keep a diſtinct account, and diſtinguiſh ſuch new account by the letter *G.* being the initial letter of the firſt partner's name at *Cadiz*. Bills drawn on *Vanneck* and Company in *London* to the amount of 1146*l.* 11*s.* 11*d.* remitted accordingly. The *Jullians* by letter acknowledge the receipt thereof, and promiſe the petitioners to give credit in the account *G.* *Jullian* the father died the 25th of *February* laſt. The day before the ſon ſtopped payment, he got two of theſe remittances diſcounted for 566*l.* 11*s.* 11*d.* On the 20th of *March* a commiſſion of bankruptcy iſſued againſt *Jullian* the ſon. The application was, that the aſſignees may be directed to deliver to petitioners the ſeveral bills of 1146*l.* 11*s.* 11*d.* or pay the full value.

Lord Chancellor of opinion the ſpecifick bills amounting to 580*l.* ought to be delivered by the aſſignees of *Jullian* to the petitioners. As to thoſe which were diſcounted, the petitioners waived their claim.

THE petitioners, who were merchants and co-partners at *Paris*, had dealings with *John Jullian* the father, and the bankrupt his ſon, who were merchants in *London*, and co-partners.

The petitioners drew ſeveral bills of exchange in *December* laſt on *Jullian* and his ſon, amounting to 1115*l.* and undertook to make remittances in order to pay the ſaid bills, and at the ſame time acquainted them that theſe bills were intended for the proper and particular account of the petitioners houſe at *Cadiz*, and deſired them to open a new account for theſe bills in their books, and to keep the ſame ſeparate and diſtinct from their own, and to diſtinguiſh ſuch new account by the mark or letter *G.* being the initial letter of the name of the firſt of the partners, who have the management or direction of the houſe at *Cadiz*.

The petitioners did accordingly remit to *Jullian* and his ſon ſeveral bills drawn on *Vanneck* and Company, and on the other merchants in *London*, amounting in the whole to the ſum of 1146*l.* 11*s.* 11*d.*

Jullian the father and his ſon, in a letter to the petitioners, acknowledge the receipt of the ſeveral bills, and expreſly promiſe to give the petitioners credit in their new account *G.*

On the 25th of *February* laſt *Jullian* the father died.

On the 27th of *February*, the very day the creditors of the *Jullians* met, a reſolution had been taken by *Peter* the ſon to ſtop payment, and which he did accordingly. The next day he ventured to get two of theſe remittances diſcounted, one for 300*l.* and another for 266*l.* 11*s.* 11*d.* making together 566*l.* 11*s.* 11*d.*

On the 20th of *March* a commiſſion of bankruptcy was awarded, and iſſued againſt *Peter Jullian*; and *James Godin* and *Francis Duval* of *London*, merchants, were choſen aſſignees.

The petitioners inſiſt the ſaid bills were not liable to be applied or converted by *John Jullian* and his ſon to any other uſe, or on any other

other account, than as the petitioners had directed and charged; that the ſeveral bills now remain in the hands of the aſſignees, or if the bills or any part have been applied to any other uſe, ſuch proceeding was not only a groſs fraud, but abſolutely illegal.

They pray therefore that the aſſignees may be ordered to deliver to the petitioners the ſeveral bills, amounting together to the ſum of 1146*l.* 11*s.* 11*d.* and in caſe it ſhall appear, that any of the bills have been received either by the ſaid *Jullian* and his ſon before the father's death, or by *Peter* the ſon ſince his father's death, or by the aſſignees ſince *Peter*'s bankruptcy, that in ſuch caſe the aſſignees may pay to the petitioners the full value of ſuch bills.

The counſel for the petitioners inſiſted the bills ought to be appropriated to the particular purpoſe mentioned in the letter of the petitioners to the *Jullians*, and that while the bills are in being, they belong to the petitioners, and they have a ſpecifick lien upon them wherever they are; but as to thoſe which were diſcounted, as money has no ear mark, they waived their claim in that reſpect.

The counſel for the aſſignees relied on the bankrupt's affidavit, in which he denied that *Dumas* and Company did acquaint him or his father, by any letter whatſoever, that theſe bills were intended for the proper and peculiar account of *Dumas* and Company's houſe at *Cadiz*, and inſiſted that all bills are conſidered as caſh, and that merchants have credit for them as ſuch, and that the uſual and common courſe of trade and buſineſs amongſt merchants is, that whenever they receive any bills from their correſpondents abroad, the ſame are blended with their general ſtock, ſo as to anſwer their daily payments, and that it appears by the bankrupt's affidavit, that he and his father frequently paid ſeveral ſums to the order of one correſpondent in bills, or in money received for the diſcount of bills of other correſpondents; and therefore theſe bills ought to be conſidered as the general credit of the *Jullians*, and muſt be brought into the general account.

N. B. The bankrupt admitted the receipt of the ſeveral bills, and that the petitioners by the letter that incloſed ſuch bills deſired they might be carried to a new account to be intitled *G.* and that ſince his father's death he did open ſuch account *G.* and placed the ſame thereto accordingly.

Lord Chancellor: The preſent is a very plain caſe to give the petitioners a title to thoſe bills which remain in ſpecie unnegotiated.

It has been truly ſaid this is a queſtion of great conſequence to the trade of the city of *London*; but then it is of a much greater weight in another reſpect, that the property of one man may not be diſſipated to anſwer the debts of other men.

The principal view I do admit under all commiſſions of bankrupts is, to put creditors as near as may be on a level, but that muſt be done only with regard to the bankrupt's own eſtate, for if the matters in queſtion are not relative to his eſtate in law or equity, eſpecially in equity, the court will be of opinion that the perſons who have either the legal intereſt in any thing, or a choſe in action, which is an equitable intereſt, ſhall be intitled to it, and aſſignees in theſe caſes muſt ſtand

The rule of equality under commiſſions of bankruptcy extend only to his own eſtate, and not to matters which are not relative to his eſtate in law or equity.

ſtand exactly in the ſame ſituation with the bankrupt himſelf, or otherwiſe commiſſions of bankruptcy would be an intolerable grievance.

Where goods conſigned to a factor continue in ſpecie, and found in his hands at the time of his bankruptcy, the principal is intitled to them, and not the creditors at large.

Suppoſe the petitioners had conſigned over goods to *Jullian* as their factor, and he had ſold them, and turned them into money, the principal then could only have come in as a general creditor under the commiſſion; but if the goods had continued in ſpecie, and had been found in *Jullian*'s hands at the time of his bankruptcy, it would have been otherwiſe, and has been ſo determined in ſeveral caſes; and even contrary to the expreſs words of the ſtatute of the 21 *Jac.* 1. factors have been excepted out of it for the ſake of trade and merchandize.

Where goods ſo conſigned are ſold, and the factors took notes inſtead of money, the principal intitled to the notes.

The court of Common Pleas in a caſe, the name of which I do not remember, determined that notwithſtanding the goods ſo conſigned were ſold, yet as the factor took notes inſtead of money for them, that the principal was intitled to the notes, and not the creditors at large.

The letter *G.* appears to be the initial letter of the firſt partner's name at the houſe at *Cadiz*.

Theſe bills I conſider as appropriated to a particular purpoſe, and intended to anſwer and reimburſe the *Jullians* what they ſhould pay on this ſpecial account, for by being indorſed they could negotiate and diſcount them; 580*l.* appears to be the amount of the bills left in ſpecie.

Upon all theſe circumſtances, it would be the hardeſt thing in the world to ſay theſe bills ſhould go to the creditors at large, and therefore on the whole I am clearly of opinion that the ſpecifick bills, amounting to 580*l.* muſt be delivered up by the aſſignees of *Jullian* to the petitioners *Dumas* and Company, or to ſuch perſons as they impower to receive them, and order accordingly.

Auguſt the 10th 1754.

Ex parte Shank and others.

Caſe 128.

A perſon who repairs a ſhip has no ſpecific lien, if delivered to the bankrupt; if repaired in a foreign port, while out upon a voyage, it would have been otherwiſe.

A Perſon who had repaired a ſhip belonging to a bankrupt, inſiſted he had a ſpecifick lien on the ſhip for the repairs, and was not obliged to prove it as a debt under the commiſſion.

It appeared after the ſhip had been ſo repaired, the workman delivered it to the bankrupt who employed him, and therefore *Lord Chancellor* was of opinion he had no pretence, under the general law of the realm, to retain till he is paid, becauſe it is out of his poſſeſſion; and though the law of *Holland* gives a perſon who repairs a houſe or ſhip a ſpecifick lien, there is no ſuch law in *England*, and conſequently he muſt account to the aſſignees for 101*l.* the money ariſing from the ſale of this ſhip, which is admitted to be in his hands, and muſt come under the commiſſion for the debt due to him for repairs, and ordered accordingly.

If the ſhip had been repaired in a foreign port, while out upon a voyage, it would have been otherwiſe; but being repaired at home,

it falls exactly within the caſe of *Stevens* v. *Sole*, before Lord *Talbot*. *Vide* this caſe ſtated in the cauſe of *Ryall* and *Rolle*, *Jan.* 27. 1749.

Auguſt the 12th 1754.

Ex parte Ockenden; in the matter of *Robert Mathews*, a bankrupt.

THIS petition came on upon the *Saturday* before, and was adjourned till to-day for further conſideration. Caſe 129.

Robert Mathews, a flour factor in 1752. employed the petitioner as his miller, who had conſiderable dealings with *Mathews* in grinding of corn for him, on which account he was generally indebted to the petitioner in a large ſum of money, who always had in his hands corn, meal, and ſacks of *Mathews*, ſometimes more, ſometimes leſs, but for the moſt part ſufficient to anſwer the ſum due to the petitioner; and for this reaſon the petitioner gave *Mathews* a much greater credit than he would otherwiſe have done, as he always apprehended the corn, meal, and ſacks, which he had in his hands, to be a ſecurity for the debt due from *Mathews*.

In *March* laſt a commiſſion of bankruptcy iſſued againſt *Mathews*, at the time he became a bankrupt indebted to the petitioner in 286*l.* 7*s.* 10*d.* for grinding of corn, and he had in his cuſtody 36 loads and 3 buſhels of wheat belonging to the bankrupt, beſides a great number of ſacks. 16*l.* 5*s.* was due to the petitioner for grinding the corn, which was in his hands at the time *Mathews* became a bankrupt. The wheat ſold by the aſſignees, by agreement between them and petitioner, without prejudice to his claim; he now applies to be paid his whole debt out of the money ariſing by the ſale. *Lord Chancellor* of opinion the petitioner had no ſpecifick lien upon the corn and ſacks, but only *pro tanto* as is due for grinding the corn in his hands.

In *March* laſt a commiſſion of bankruptcy iſſued againſt *Mathews*, and being declared a bankrupt, *Stephen Wear*, and three other perſons, were choſen aſſignees.

At the time *Mathews* became a bankrupt, he was indebted to the petitioner in 286*l.* 7*s.* 10*d.* for the grinding of corn, for which he gave two promiſſory notes of 100*l.* each, and which became due before the bankruptcy, and the petitioner at the ſame time had in his cuſtody 36 loads and 3 buſhels of wheat belonging to the bankrupt, which was ſent to be ground, part whereof was then ground into flour, and the remainder was then grinding, beſides a very great number of ſacks, and which the petitioner depended upon having as a ſecurity for his debt.

There was likewiſe due to the petitioner 16*l.* 5*s.* for grinding of corn, which was in his hands at the time *Mathews* became bankrupt making in the whole 302*l.* 12*s.* 10*d.*

The petitioner applied to the aſſignees to redeem the corn, *&c.* and pay him the 302*l.* 12*s.* 10*d.* which they refuſed, but corn being a periſhable commodity, and an immediate neceſſity of ſelling upon that account; the petitioner had delivered all the wheat and ſacks to the aſſignees to be ſold without prejudice to his demand of his whole debt, or to the aſſignees property in the goods, who have agreed

agreed, in caſe it ſhall be determined that the wheat, &c. was a ſecurity to the petitioner for his debt, to pay the whole.

Therefore the petitioner prays, that out of the money ariſing by the ſale of the corn, &c. he may be paid his whole debt of 302 *l.* 12 *s.* 10 *d.*

Lord Chancellor: In determining of this caſe, I am equally afraid of altering the conſequences and effects of the courſe of dealings in trade, or of overturning the general rule in the courſe of bankruptcies.

It lies upon the petitioner to ſhew he has any lien upon the corn, &c. in his hands; and as to the ſpecifick lien which he claims, I do not ſee there is a ſufficient reaſon to conſider it as ſuch.

In this caſe no evidence has been produced of any contract, that the debt which was owing to the petitioner ſhould be a lien on the corn, &c.

Nor is there any evidence, that there is any general cuſtom with reſpect to millers that it ſhould be a lien.

There is then no ſpecifick lien, but what ariſes from that kind of bailment at law, proceeding from a delivery of goods for a particular purpoſe, as in the caſe of a horſe ſtanding in the ſtable of an innkeeper, or cloth in the hands of a taylor, who have each of them a ſpecial property.

Might not *Mathews* in this caſe before his bankruptcy have made a tender of what was due for grinding the corn, and if Mr. *Ockenden* the petitioner had refuſed to deliver the corn, &c. could not *Mathews* have brought an action of trover for it, and in that caſe would the defendant have been allowed to have pleaded a lien for any other debt, than what was actually due for grinding corn.

Where *A.* borrows a ſum of money on the pawn of jewels, and further ſums afterwards upon his note: The executor of *A.* ſhall not redeem the jewels, without paying the money due on the notes.

The caſe of *Demainday* v. *Metcalfe*, *Prec. in Chan.* 419. was a ſum borrowed firſt on the pawn of jewels, and afterwards three more ſeveral ſums borrowed, for each of which the pawner gave his note, without taking notice of the jewels; it was determined that the executors of the borrower ſhould not redeem the jewels, without paying the money due on the notes: There it muſt have been preſumed the ground and foundation of the pawnee's lending the money, was his having a pledge in his hands, and there is no pretence to ſay, it would have been a lien, if the money had been lent before the delivery of the goods, and it therefore turned upon it's being a ſubſequent tranſaction.

The caſe between clothiers and dyers, and clothiers and packers are different from the preſent,

The caſe of *Downman* v. *Mathews* and others, *Prec. in Chan.* 580. appears to be a tranſaction between a clothier and a dyer, and there was evidence that they always made up their accounts by giving mutual credit, the dyer on one hand for work done, and on the other hand, the clothier for his cloth.

it being always cuſtomary for them to make up their accounts by giving mutual credit; the dyer for inſtance, on one hand for work done, and the clothier for his cloth.

In the petition *ex parte Deeze* the 8th of *June* 1748. before me there was evidence, that it is uſual for packers to lend money to clothiers, and the cloths to be a pledge not only for the work done in packing, but for the loan of money likewiſe.

Then it muſt come to the queſtion upon the clauſe in the act of parliament relating to mutual credit; and I own I am extremely doubtful as to that.

Here is a quantity of corn delivered from time to time by a mealman or corn-factor, to a miller the petitioner.

The law gives a particular lien *pro tanto*, as is due to the miller for grinding the corn, and no contract appears in this caſe to extend it further, and I muſt preſume therefore it was not intended to be carried further.

The clauſe in the act of the 5 *Geo.* 2. relating to mutual credit, has been carried to be ſure further, and rightfully, than a mere matter of account, but I do not know that a court of equity has gone further than the courts of law in the caſes of a ſet-off.

Courts of equity go no further than courts of law, in the caſes of a ſet-off, upon the act relating to mutual credit.

Theſe caſes go further indeed than caſes of account; but can any caſe be put, where in the preſent inſtance there could have been a ſet-off.

Suppoſe the corn-factor had tendred the money for grinding the corn, and Mr. *Ockenden* the petitioner had refuſed to deliver it, and the bankrupt had thereupon brought an action of trover, could *Ockenden* have ſet off an antecedent debt? I am clearly of opinion he could not, and would have had only an allowance *pro tanto*, as was due for grinding the corn.

Suppoſe *vice verſâ*, an action had been brought by *Ockenden* againſt the bankrupt on account of the debt due for money lent to *Mathews*, could the bankrupt have ſet off the value of the corn in the hands of *Ockenden*? I think clearly not.

Theſe are my grounds, and I confeſs I am very apprehenſive of breaking in upon the common courſe of dealing, and the rule of proceeding in commiſſions of bankruptcy.

Adjourned at the requeſt of the petitioner's counſel, to the next day of petitions, being an affair of great conſequence to trade and creditors in general.

(P p) Whether during his time of privilege he may be taken by his bail.

October the 22d 1747.

Ex parte Gibbons.

Caſe 130. *Feſcie* a ſheriff's officer, and bail for the petitioner, a bankrupt, takes him during the time of his laſt examination, and ſurrenders him in diſcharge of his bail: He prays to be diſcharged out of cuſtody, and that *Feſcie* may be cenſured for a contempt of the court. *Lord Chancellor* inclined to think, that the bail's taking the principal coming to a court of juſtice to be examined, has never been determined to be a contempt of the court, provided they bring him to be examined by that court, and therefore diſmiſſed the petition, but without prejudice to the bankrupt's application to the court of King's Bench. The taking of a bankrupt by his bail, is not a contravention of the 5 *Geo.* 2. for the act provides only againſt *arreſts by creditors*, and bail are no creditors till damnified, and therefore not within the deſcription.

THIS was a petition preſented by the bankrupt againſt one *Feſcie* a ſheriff's officer, who was bail for the bankrupt in an action, for taking him away during the time of his examination before the commiſſioners on the forty-ſecond day, and ſurrendring him in diſcharge of his bail, and keeping him in cuſtody ever ſince, praying that he may be diſcharged out of cuſtody, and that *Feſcie* may be cenſured for his contempt of the court.

Lord Chancellor: This is a queſtion of very great conſequence, but merely a queſtion of law, Whether *Feſcie* could lawfully take the bankrupt, notwithſtanding the ſtatute of the 5 *Geo.* 2.

It is not abſolutely neceſſary for me to determine it, becauſe it may come in queſtion in another place. But I am of opinion, the taking of the bankrupt by the bail is not a contravention of the act of parliament.

The words of the fifth clauſe in the act are " the bankrupt ſhall " be free from all arreſts, reſtraints or impriſonments *of his creditors*, " in coming to ſurrender, and from the actual ſurrender of ſuch " bankrupt to the ſaid commiſſioners, for and during the ſaid forty- " two days, or ſuch further time as ſhall be allowed to ſuch bank- " rupt for finiſhing his examination.

The act provides againſt *arreſt by creditors*.

Bail are no creditors till damnified, and therefore are not within the deſcription.

The ſubſequent words in the clauſe are, " and in caſe ſuch bank- " rupt ſhall be arreſted for debt, or on any eſcape warrant, coming " to ſurrender himſelf to the ſaid commiſſioners, or after his ſurren- " der, ſhall be ſo arreſted within the time before mentioned, that " then on producing ſuch ſummons or notice under the hands of " the commiſſioners, to the officer who ſhall arreſt him, and ma- " king it appear to ſuch officer, that ſuch notice or ſummons is ſign- " ed by the ſaid commiſſioners, or ſuch aſſignee or aſſignees, and " giving

" giving ſuch officer a copy thereof, ſhall be immediately diſ-
" charged."

It plainly appears through the whole clauſe, to be confined to an arreſt, reſtraint, or impriſonment *by his creditors.*

Every perſon that is arreſted in the court of King's Bench is by bill of *Middleſex*, or *Latitat*, which recites the bill of *Middleſex*, and the bail-piece is, ſuch a one defendant *traditur in ballium ſuper cepi corpus, &c.* (naming the bail, their additions, and places of abode,) ſo that in the conſtant language of that court, the bail are his gaolers, and it is upon this notion the bail have an authority to take the principal, and he may be arreſted on a *Sunday*; for as he is only at liberty by the permiſſion and indulgence of the bail, they may take him up at any time.

In the language of the court, the bail are the gaolers of the principal, and upon this notion of law may arreſt him on a *Sunday*, as he has his liberty only by the indulgence of the bail.

Therefore to ſay, that an act of parliament ſhall prevent a perſon, who has been ſo kind as to give the principal his liberty, from taking him up in diſcharge of himſelf, would be very hard, eſpecially as there is no ſort of danger here to the bankrupt, of his being a felon, as the commiſſioners may examine him in gaol, and conſequently it in no ſort can be ſaid to be in contradiction to the act of parliament.

But Mr. Attorney general ſays, it is contrary to a known rule of law, *That* all who are ſummoned to appear before perſons acting in a judicial capacity, ſhall have a privilege to be ſafe from arreſts *eundo, et redeundo.*

I do not know that the bail's taking the principal coming to a court of juſtice to be examined as a witneſs, has ever been determined as a contempt of the court, provided they bring him to be examined by that court.

But I will not be underſtood to be bound by this opinion, or to have it cited in another place, which is the only proper place, the court of King's Bench, where he is ſurrendred, and it is that court only that can diſcharge the proceſs: For I cannot diſcharge the proceſs of a court of law in a ſummary way; however I clearly think I ought not to puniſh *Feſcie* for a contempt in a doubtful caſe, and eſpecially where the man was in thoſe perilous circumſtances of paying the debt, if he had not ſurrendred his principal.

Therefore let the petition be diſmiſſed, but without prejudice to any application the bankrupt may be adviſed to make to the court of King's Bench.

(Qq) Rule as to a certificate from commiſſioners to a judge.

May the 12th 1742.

Ex parte Lingood.

Caſe 131. The petitioner being declared a bankrupt, and the three ſittings at *Guildhall* advertiſed, the commiſſioners upon the examination of witneſſes, in the intermediate time, finding that he was removing and concealing his effects, ſummoned him to appear before them the next day from the date of the ſummons, and on his refuſing to come, certified this fact to Mr. Juſtice *Chapple*, who committed him to *Newgate*, and on the keeper's ſending notice thereof to the commiſſioners, they brought him before them upon their own warrant, and on his refuſing to be examined, recommitted him to *Newgate*; the bankrupt petitioned now to be diſcharged, as being illegally committed. The court of opinion, the certificate is purſuant to the powers given to the commiſſioners under the ſtatutes of bankruptcy, and that where they have full evidence of his intention to ſecrete his effects, they may examine him in the intermediate time between the declaration of bankruptcy, and the ſittings at *Guildhall*.

UPON the 6th of *April* laſt the commiſſion was ſued out by *Jonathan Eade*, who had been formerly a partner with *Lingood*, but ſuſpecting he was not juſtly dealt with, he diſſolved the partnerſhip, and brought his bill for an account.

After the cauſe had been depending ſome time in *Chancery*, upon the propoſal of *Lingood*, all matters in difference were referred to arbitration, and the ſubmiſſion to the award was made a rule of court.

The arbitrators after fifteen months conſideration awarded 9400 *l.* to be due to *Eade* on a ballance of accounts, and directed this money to be paid by inſtallments, and likewiſe awarded *Lingood* to deliver ſome amber and ſhells to Mr. *Eade*; but *Lingood* not appearing, nor any agent for him, on the day and place appointed for the delivery of the amber and ſhells, and for making one of the payments, according to the award, attachments were made out againſt him into *London* and *Middleſex*, for a breach of the award; and upon his abſconding to avoid his being arreſted under the attachments, a commiſſion of bankruptcy was taken out againſt him, and he was declared a bankrupt.

After the three ſittings at *Guildhall*, *viz.* the 27th of *April*, the 8th and 22d of *May*, had been advertiſed in the *Gazette* for the bankrupt to ſurrender, and to diſcover his eſtate and effects, the commiſſioners in the intermediate time having met, and examined witneſſes upon interrogatories, and finding upon ſuch examination, that the bankrupt had been removing and concealing his effects, and fraudulently conveying away his real eſtate, in order to defraud his creditors, thought proper to ſummon him by their meſſenger on the 14th of *April*, to appear before them the next morning; and it appearing that he had been ſerved with the ſummons, and refuſed to attend, the commiſſioners in purſuance of a clauſe in the 5th of the preſent King, certified this fact to Mr. Juſtice *Chapple*, who committed him to *Newgate*, and upon the keeper of *Newgate*'s ſending a writ-

a written notice to the commiſſioners, that he had *Lingood* in his cuſtody, they immediately ſent their own warrant to bring him before them, and upon his refuſing to take the oath in order to his being examined, the commiſſioners re-committed him to *Newgate*, where he has lain ever ſince.

Upon the 27th of *April*, *Lingood* preferred his petition to *Lord Chancellor*, ſuggeſting that he had been illegally committed to *Newgate*; that he was not indebted to *Eade* the petitioning creditor, and praying that he might be diſcharged from his confinement, and that his Lordſhip would pleaſe to direct an iſſue at law to try whether the petitioner was a bankrupt at or before the iſſuing of the commiſſion of bankruptcy againſt him, and that all proceedings on the ſaid commiſſion might be ſtayed in the mean time, and that his Lordſhip would enlarge the time for finiſhing his examination for 49 days, over and beſides the 42 mentioned in the *Gazette*.

Lord Chancellor: There are three things which are proper to be conſidered upon this petition;

1*ſt*, Whether the bankrupt has been illegally committed, and therefore ought to be diſcharged?

2*dly*, Whether an iſſue ſhould be directed to try the bankruptcy?

3*dly*, Whether the petitioning creditor's is a juſt and proper debt?

The laſt ought to be conſidered firſt, becauſe if there is no foundation for the petitioning creditor's debt, all the proceedings under the commiſſion muſt of courſe fall to the ground.

I think there can be no doubt as to the petitioning creditor's being a juſt debt, while the award ſtands, for the arbitration bond is a debt at law, and binds the parties, until it is ſet aſide for corruption or partiality, *&c.* And the bill which has been brought by *Lingood* for that purpoſe, cannot be a foundation to ſuſpend it; for if it was, a perſon then has nothing more to do but to file ſuch a bill, and fruſtrate the effect of the award; and therefore I think the debt is very ſufficient to ſupport the commiſſion.

An arbitration bond is a debt at law, and binds the parties, till ſet aſide for corruption or partiality, and is alſo a ſufficient debt to ſupport a commiſſion of bankruptcy.

The act of bankruptcy likewiſe is extremely plain, and attended with fraudulent circumſtances; I have not met with ſtronger in any caſe whatever, for *Lingood* appears to have acted intirely by the advice of his attorney Mr. *Vaughan*, who contrived the whole ſcheme of his going away to avoid the attachment of this court; and likewiſe the conveying away and ſecreting his effects is made out very clearly, from the depoſitions of ſeveral perſons who were examined before the commiſſioners; ſo that, in reality, here are no leſs than two diſtinct acts of bankruptcy; the one ariſing from his abſconding, and the other from his fraudulently conveying away his goods; and therefore there can be no reaſon to ſuperſede the commiſſion, or to direct an iſſue, as there is nothing but a general affidavit of the bankrupt, that he is not one, and that is by no means ſufficient; for he ought to have given a particular anſwer to the facts charged in the depoſitions taken before the commiſſioners, and in the affidavits on the other ſide.

The court will not ſuperſede a commiſſion, or direct an iſſue, upon a general affidavit of the bankrupt, that he is not one, but will leave him to bring a *habeas corpus* if he thinks proper.

Where a perſon apprehends he is aggrieved by a commitment of commiſſioners of bankrupt, the ready way is to ſue out a *habeas corpus*, that the legality thereof may be determined by the judges of the common law.

As to the legality of the commiſſioners certificate to Mr. Juſtice *Chapple*, and proceedings upon it, 'tis an intire new queſtion, and quite a new caſe; and therefore at the firſt opening of it I had a great doubt, whether I could properly determine the legality of the commitment, as a *habeas corpus* might have been ſued out, and have been decided by the Judges of the common law, which is the ready way. But I do remember a caſe of *John Ward* before Lord Chancellor *King*, not unlike the preſent, where he determined a commitment by commiſſioners of bankrupt to be juſtifiable, after he had taken ſome time to conſider of it.

The old acts of parliament conſidered a bankrupt as a criminal, and commiſſioners might at their diſcretion impriſon him; but though the rigour of the law is taken away, yet as to his perſon, the power of examining ſtill remains, and a greater puniſhment is inflicted if he does not ſurrender, *viz.* felony without benefit of clergy.

I think therefore the certificate which has been made in this caſe is purſuant to the powers given to commiſſioners under the ſtatutes of bankruptcy, for by the old acts, which conſidered him as a criminal and fraudulent perſon, commiſſioners "had full power and authority "to take by their diſcretions ſuch order and direction with the body "and bodies of a bankrupt, whereſoever he or ſhe may be had, either "in his houſe, ſanctuary, or elſewhere, as well by impriſonment of "his or her body or bodies, as alſo with all his or her lands, *&c.* and "alſo with his or her money, goods, chattels, wares, merchandizes, "and debts whatſoever." 13 *Eliz. ch.* 7.

The rigour of the law indeed as to his perſon is taken away, and yet the power of examining ſtill remains; but though the ſeverity of the old acts is removed, yet a greater puniſhment is inflicted for a bankrupt, if he does not ſurrender; it is now made felony without benefit of clergy, but then he has to the laſt day to conform himſelf to this and the other acts.

The 5 *Geo.* 2. appoints three ſittings at *Guildhall* in the ſpace of forty-two days for particular purpoſes; but would it not be a very great abſurdity, if the bankrupt might make uſe of the forty-two days to imbezil his effects and to quit the kingdom; and that the commiſſioners, though apprized of his intention, ſhould have no power to prevent it, by ſummoning him before them in the intermediate time, and committing him if he refuſes to be examined?

The judge, upon the bare certificate of commiſſioners that a bankrupt refuſed to attend, though the cauſe of ſummoning is not mentioned, is obliged to commit him.

It has been objected by the petitioner's counſel, that the commiſſioners have made the certificate variant from the ſummons, for the latter is general for the bankrupt to attend, and the certificate mentions the cauſe for which they ſummoned him, namely, to examine him upon an imbezilment of his effects.

But there is no weight in this objection; for the commiſſioners were not under any neceſſity of mentioning *the cauſe of ſummoning the bankrupt* in their certificate, becauſe the judge, upon their barely certifying that he refuſed to attend, is obliged to commit him.

As

As in this caſe the commiſſioners had full evidence of the bankrupt's intention to ſecrete his effects, and to make fraudulent aſſignments of them, they have done *rightly, wiſely, and diſcreetly* in the method they have taken to prevent it, by ſummoning the bankrupt, and committing him for diſobeying their ſummons.

I do not ſay this to encourage commiſſioners of bankrupt to uſe this power wantonly; but upon ſuch circumſtances as appear in the preſent caſe, I am of opinion it was very properly exerciſed, and the proviſo which immediately follows the clauſe that relates to the certificate of the commiſſioners of bankrupt to the judges, *&c.* in the 5 *Geo.* 2. makes it extremely clear, that the commiſſioners at their diſcretion may examine a bankrupt in the intermediate time, between his being declared a bankrupt and the ſittings at *Guildhall.*

For the words are, "Provided always, that if any ſuch perſon or "perſons ſo apprehended and taken, ſhall within the time or times "allowed by this act for that purpoſe, *ſubmit to be examined,* and in "all things conform as if he, ſhe, or they had ſurrendered, as by this "act ſuch bankrupt or bankrupts is or are required, that then ſuch "perſon ſo ſubmitting and conforming ſhall have and receive the "benefit of this act, to all intents and purpoſes, as if he, ſhe, or "they, had voluntarily come in and ſurrendered himſelf, herſelf, or "themſelves; any thing herein contained to the contrary thereof in "any wiſe notwithſtanding."

But though I have no doubt as to the conſtruction of this act of parliament, yet I do not mean to preclude the bankrupt from his *habeas corpus,* which I ſhall leave him at full liberty to bring if he thinks proper.

His Lordſhip ordered, that ſo much of the petition as prays that the bankrupt may be diſcharged from his confinement, and which controverts his being a bankrupt, be diſmiſſed; but the time for the bankrupt's ſurrendring himſelf and diſcloſing and diſcovering his eſtate and effects, and finiſhing his examination before the commiſſioners, be directed to be enlarged for the ſpace of forty-nine days, to be computed from the 22d day of May inſtant.

(R r) The effect of acquieſcence under a commiſſion.

June the 21ſt 1753.

Ex parte Deſanthuns.

Vide under the diviſion, Commiſſion ſuperſeded.

(S s) Rule as to debts carrying intereſt under a commiſſion of bankruptcy.

November the 4th 1743.

Bromley, and others, creditors of Sir *Steven Evance*, — Plaintiffs.
Goodere, ſurviving aſſignee of Sir *Steven Evance*, and others, Defendants.

Vide under the diviſion, Rule as to the Certificate.

Auguſt the 13th 1746.

Ex parte Marlar & al'.

Vide under the diviſion, Rule as to diſcounting Notes.

December the 22d 1753.

Ex parte Rooke.

Caſe 132. On the 10th of *April* 1744. it was referred to a Maſter to ſettle what was due to the creditors under the commiſſion againſt *Rooke*, and upon payment by the bankrupt the commiſſion to be ſuperſeded. The bankrupt now offers to pay what is reported due, but the creditors inſiſt upon intereſt likewiſe from the date of the Maſter's report. The creditors here are equally intitled, as if they were in the common caſe of a reference to a Maſter in a cauſe to ſtate what is due for principal and intereſt, to be paid intereſt from the time of the Maſter's report, when the ſums due are liquidated. And the bankrupt ordered to pay in a month accordingly.

BY an order dated the 10th day of *April* 1744. *Lord Chancellor* directed that it ſhould be referred to Maſter *Eld* to ſettle what was due to Mr. *Smales*, and the reſt of the creditors who had proved their debts under the ſaid commiſſion, and upon payment by the bankrupt of what the Maſter ſhould report due to them reſpectively, the commiſſion was ordered to be ſuperſeded.

On the 16th of *March* 1744. the Maſter certified there was due to the executors of *Smales* for his debt, and charges under the commiſſion 277*l.* 1*s.* 8*d.* ½ and to the other creditors ſuch ſeveral ſums as are ſtated in the report.

The preſent petitioner the bankrupt offers to pay what is ſo reported due, but the agent for the executor *Smales*, and the reſt of the creditors, refuſe to take the 20s. in the pound, unleſs they have intereſt likewiſe from the date of the Maſter's report.

N. B. The debt to *Smales* was a draft given by the bankrupt to him for value received, but not expreſſed in the body of it that it ſhould carry intereſt.

Lord Chancellor: It is very near ten years ago ſince the pronouncing the laſt order, and the Maſter's report is ever ſince *March* 1744.

The petitioner's excuſe is, that when he made the offer of paying 20*s.* in the pound, he had a reverſion in a freehold eſtate only, which is now fallen into poſſeſſion; but this will not avail him, becauſe at the time I directed the commiſſion to be ſuperſeded, I did it altogether upon his offering to pay immediately the whole debts to the creditors under the commiſſion.

Therefore they are equally intitled as if they were in the common caſe of a reference to a Maſter in a cauſe, to ſtate what is due for principal and intereſt, to be paid intereſt from the time of the Maſter's report when the ſums due are liquidated.

His Lordſhip ordered the petitioner to pay the principal and intereſt in a month accordingly to all his creditors.

(T t) Rule as to principals and their factors.

February the 23d 1743.

Snee and *Baxter*, Aſſignees of the Eſtate of *John Tollet*, a Bankrupt, } Plaintiffs.

Preſcot, *Dawſon*, *Julian* and *Le Blon*, *Thomas* elder and younger, and *Tollet*, } Defendants.

Caſe 133.

Where agents abroad are in diſburſe for their principal, and upon being doubtful of his circumſtances, make bills of lading to their own order indorſed in blank, notwithſtanding theſe bills of lading come to the principal's hands, yet if the agent's partner in *London* writes them word that their principal is become bankrupt, and deſires them to ſend the bills of lading, and an order to the captain to deliver the goods to him, he may retain them for himſelf and Company againſt the aſſignees under the commiſſion till paid, and reimburſed ſo much as the partnerſhip is in advance.

THE plaintiffs made the following caſe by their bill: That *Tollet* in 1740. conſigned to *Ragueneau* and Company, reſiding at *Leghorn*, *German* ſerges amounting to 2062 *l.* 11 *s.* beſides the inſurance made by *Tollet*, with directions to the partners to ſell the goods as ſoon as they could; and alſo conſigned to them other goods to the value of 181 *l.* 14 *s.* 6 *d.* The partners not being able to ſell all the goods, *Tollet* gave orders to barter them for *Italian* goods, and the copartners agreed that part of the goods ſhould be diſpoſed of for thoſe of the growth of *Italy* to half the value of the *Italian* goods, and the other to be paid for in money; and afterwards by letter of the 18th of *November* 1741. they adviſed *Tollet* thereof, and that they ſhould load the goods, which were ſilks, on board the *Prince Edward*, and incloſe a bill of lading for 12 bales. *Tollet* in 1741. received the bills of lading indorſed by the ſaid partners, but intended for the uſe of *Tollet* only.

Tollet in 1741. borrowed of the defendants, *Julian* and *Le Blon*, 505 *l.* and by way of ſecurity aſſigned the bills of lading for the 12 bales. *Tollet* being alſo indebted to the other defendants the *Thomass* in ſeveral ſums, for ſecuring thereof he aſſigned invoices for five bales and three bales, and delivered the ſame to the *Thomass*.

Soon after a commiſſion of bankruptcy iſſued againſt *Tollet*, and the plaintiffs were choſen aſſignees, and received a letter, directed to *Tollet*

from *Ragueneau* and company, mentioning that they had bought four bales of ſilk more for him, and had given in payment for it four bales of ſerges, and ſent him the invoice of 2448 dollars, which they had placed to *Tollet*'s debt.

On the 10th of *February* 1741. *Dawſon* the captain of the *Mermaid*, on board of whoſe ſhip were the bales of ſilk, arrived, *and theſe goods were conſigned to* Tollet, *and were ſhipped at the riſque and in the name of* Tollet; the defendants *Jullian* and *Le Blon*, and the *Thomass* ſhewed *Dawſon* the bills of lading, and demanded the goods, but he refuſed to deliver them, and *Preſcot* partner of *Ragueneau* who lived in *London*, on *Tollet*'s being a bankrupt, wrote to his partners, deſiring them to ſend the bills of lading that *Dawſon* had ſigned and left with them, which they ſent to him accordingly, and at the ſame time ſent an order to *Dawſon* to deliver the goods to *Preſcot*, who ſets up a right thereto.

But the plaintiffs inſiſt, that the bills of lading, though made to the order of *Ragueneau* and company, *yet being indorſed by them in blank and ſent to* Tollet, it did, according to the cuſtom of merchants, veſt the property in *Tollet*: And further, that it is the cuſtom of merchants at *Leghorn*, to ſend bills here filled up as aforeſaid, in order to conceal the perſons names to whom the goods are ſent, that the publick may not know the perſons in *England*, with whom ſuch houſes deal, or to whom the property belongs.

That at the inſtant the goods were loaded on board the prince *Edward*, the property veſted in *Tollet*, who was then in good circumſtances, and the reaſon of the maſter of the ſhip's ſigning ſeveral bills of lading, is for fear of loſing one: That it is the cuſtom of merchants to borrow money upon bills of lading, which have been looked upon as a good ſecurity: That *Tollet* was made debtor for the goods in *Ragueneau* and company's books, and the delivery to *Dawſon*, was for the uſe of *Tollet*, whoſe loſs it would have been, if loſt in the voyage.

That the defendants *Le Blon* and the *Thomas's*, notwithſtanding they have an aſſignment of the bills from *Tollet*, yet do admit they were only pledged to them for what was owing on the ſums they had lent, and upon payment of that, and the expence of the inſurance, they are willing the goods ſhould be delivered to the plaintiffs, who pray by their bill, that the goods brought by *Dawſon*, and delivered to *Preſcot*, may be ſold, and after paying what ſhall appear to be due to *Le Blon* and the *Thomass*, that the remainder may be paid to plaintiffs for the benefit of *Tollet*'s creditors; and alſo, that the bills of lading for the four bales ſent in the *Mermaid*, may be delivered to the plaintiffs.

The defendant *Preſcot* inſiſted, that the bills of lading in the *Prince Edward*, were not to deliver the goods to *Tollet*, but to the order of *Ragueneau* and company, and that it is uſual among merchants, to require the maſter of the ſhip, by which the goods are conſigned, to ſubſcribe his name to three parts of every bill of lading, and that there is a clauſe in each, that one being accompliſhed, the other two ſhall be void, and ſays, on the delivery of the goods,

he wrote a receipt for them, by indorſement of the bills of lading tranſmitted to him, and delivered the ſame to *Dawſon*.

That it is uſual among merchants and factors at *Leghorn*, when they ſhip goods for perſons who have not remitted them the money before-hand, or for which they draw bills of exchange, or where they run a riſque, not to fill up the bill of lading directly to the order of ſuch perſon, but to the order of the ſhippers or factors; ſo that if any accident happen to their principal, before the delivery of the goods, they may get back the ſame, and thereby reimburſe themſelves, and that there was the greater reaſon for ſuch precaution, in regard *Ragueneau* and company had, and were to draw on *Tollet* for 2757 *l.* 19 *s.* 3 *d.* for money advanced on the barter of the woollen goods for ſilk.

That being informed *Tollet* had ſtopt payment, and was in danger of failing, and that the ſilk was about to be ſhipped by the partners at *Leghorn*, for the account of *Tollet*, he reſolved to prevent the ſilk falling into *Tollet*'s hands till ſatisfaction was made, and thereupon wrote by the next poſt to his partners, who in their anſwer ſent the two parts of the bill of lading to be delivered to *Dawſon*, and an order for him to deliver the ſilks to *Preſcot*, according to the bills of lading, in preference to any other claim.

That his partners at *Leghorn* having notice of *Tollet*'s circumſtances ſoon after ſhipping the four bales of goods, applied to the perſon with whom they made the barter, and prevailed with him to relinquiſh the bargain, and they took the ſerges back again, and the ſilks to their own account, and paid for them in money, and then ſent them to the defendant *Preſcot* in *London*, who inſiſts he hath a right to claim the ſame for himſelf and his partners.

By his anſwer he ſaith he is willing to ſell the ſilks he received of *Dawſon* as the court ſhall direct, but ſubmits that the delivery of the ſilks to *Dawſon*, was not a delivery to the uſe of *Tollet*.

The defendants the pawnees inſiſted that *Ragueneau* and company's indorſement on the bills of lading, was according to the uſage of merchants, as much a transfer of all their right to *Tollet*, as if the ſame had been ſold in an open exchange, and that the ſubſequent aſſignment made by *Tollet* to them, veſted the property of the goods in the defendants for repayment of the money ſo lent.

Lord Chancellor: This is as harſh a demand againſt *Ragueneau* and company, as can poſſibly come into a court of equity: to inſiſt on taking their goods for which they have paid half the price, without reimburſing them what they are out of pocket, and then telling them that they ſhall come in as creditors, perhaps for half a crown in the pound only, under the commiſſion of bankruptcy againſt *Tollet*, notwithſtanding they have the goods now in their cuſtody, and a ſpecifick lien upon them; and to be ſure in ſuch a caſe, a court of equity will lay hold on any thing to ſave this advantage to *Preſcot* and the partnerſhip.

If *Tollet* the bankrupt had gained any legal property in the ſilks, it was gone by his *aſſignment*, or *pledge*, or *pawn* to the defendants *Le Blon*,

Blon, &c. call it which you will, and if it had not been for this circumſtance of their being ſo pledged, the aſſignees bill ought to have been diſmiſſed with coſts.

But this court is obliged to retain bills for redemption, becauſe the parties have no other way of coming at juſtice.

There are twelve parcels or bales for which bills of lading are ſent, and four parcels or bales for which no bills of lading were ſent, and therefore I will deliver the caſe from the latter, as there can be no pretence that *Tollet* had a legal property in theſe, for a promiſe to ſend a bill of lading, if it amounted to any thing, would be only to be carried into execution in equity.

As to the twelve bales, they will fall under a different conſideration.

Ragueneau and company having advanced a moiety of the price for the ſilks, there can be no queſtion while the goods remained in their hands, but they were liable to this debt, and *Tollet* could never have compelled them to deliver the goods, without paying the money ſo advanced.

A factor who ſells goods for a principal, may bring an action in the name of the principal againſt the vendee, and make himſelf a witneſs, or a vendor of goods to a factor for the uſe of his principal, may maintain an action againſt the principal, and the factor may be a witneſs for the vendor.

If a factor ſells goods for a principal, he may bring an action in his own name, or an action may be brought in the name of the principal againſt the vendee, and the factor may make himſelf a witneſs.

On the other hand, a vendor of goods to a factor for the uſe of his principal, may maintain an action againſt the principal for goods ſold, and the factor may be made a witneſs for the vendor; it has been often ſo ſettled at *Guildhall*.

Therefore while the goods remained in the hands of *Ragueneau* and company, no doubt but they had a lien upon them, for the moiety of the price advanced by them; *and he who would have equity, muſt do equity*, by reimburſing them firſt, before he can intitle himſelf to the ſilks, and thus it would have ſtood, if there had been no *conſignment*; which it is inſiſted makes a conſiderable alteration, and veſts the property in *Tollet*.

If goods are delivered to a carrier, &c. to be delivered to *A.* and are loſt by the carrier, &c. the *conſignee* can only bring the the action. But if before delivery conſignor hears *A.* is likely to become a bankrupt, or is actually one, and gets the goods back again, no action will lie for the aſſignees of *A.* becauſe while *in tranſitu*, they may be countermanded.

I admit the caſe mentioned by the plaintiff's counſel, of inland dealers in *England*, that if goods are delivered to a *carrier* or *hoyman* to be delivered to *A.* and the goods are loſt by the carrier or hoyman, the *conſignee* can only bring the action, which ſhews the property to be in him, and it is the ſame where goods are delivered to a maſter of a veſſel.

But ſuppoſe ſuch goods are actually delivered to a carrier to be delivered to *A.* and while the carrier is upon the road, and before actual delivery to *A.* by the carrier, the conſignor hears *A.* his *conſignee*

ſignee is likely to become a bankrupt, or is actually one, and countermands the delivery, and gets them back into his own poſſeſſion again, I am of opinion that no action of trover would lie for the aſſignees of *A.* becauſe the goods, while they were *in tranſitu*, might be ſo countermanded.

In the preſent caſe there was no conſignment to any particular perſon, but bills of lading indorſed in blank to the order of conſignor, and therefore rather in the nature of an authority than any thing more.

Promiſſory notes and bills of exchange are frequently indorſed in this manner, *Pray pay the money to my uſe*, in order to prevent their being filled up with ſuch an indorſement as paſſes the intereſt. Mr. *Lutwych*, who was an experienced practiſer in this court, always did ſo in his bills of exchange.

Notes or bills indorſed in this manner, *Pray pay the money to my uſe*, will prevent their being filled up with ſuch an indorſement as paſſes the intereſt.

The queſtion of law is, Whether before the actual delivery of the goods it was not in the power of the conſignor to countermand it?

This muſt depend upon the cuſtom of merchants, and here indeed there is a contrariety of evidence. For the defendant *Preſcot* the evidence is, that if agents are in diſburſe for the goods bought for their principal, they generally make bills of lading to their own order, indorſed in blank, eſpecially where they are in doubt of the principal's circumſtances, that they may by this means have it in their power, if they ſhould ſee occaſion, to vary the conſignment.

The evidence for the plaintiff is, that indorſing bills of lading in blank does not retain the property in the conſignor, any more than if they were indorſed to the conſignee by name, but is done only to conceal the amount of the quantity of the goods conſigned, it being detrimental to the conſignee that it ſhould be known.

But then the proof on the part of the plaintiff does not ſpeak as to the particular circumſtances, where the agents ſuſpect their principals to be failing.

The queſtion is, On which ſide the evidence is ſtrongeſt?

The ſtrongeſt proofs are certainly on the part of the defendants, and there is no occaſion to ſend it to law on this account.

Though goods are even delivered to the principal, I could never ſee any ſubſtantial reaſon why the original proprietor, who never received a farthing, ſhould be obliged to quit all claim to them, and come in as as a creditor only for a ſhilling perhaps in the pound, unleſs the law goes upon the general credit, the bankrupt has gained by having them in his cuſtody.

The reaſon the law goes upon in compelling an original proprietor of goods after delivery, to come in as a creditor under a commiſſion, muſt be on account of the general credit a bankrupt has gained by having them in his cuſtody.

But while goods remain in the hands of the original proprietor, I ſee no reaſon why he ſhould not be ſaid to have a lien upon them till he is paid, and reimburſed what he ſo advanced; and therefore I am of opinion the defendant *Preſcot* had a right to retain them for himſelf and company.

It has been objected, *that in caſe of any loſs or accident to the goods, it was* Tollet's *riſque only.*

But ſuppoſe any damage had happened to theſe goods during the voyage, and *in tranſitu*, there had been an alteration of the *conſignment*, the loſs clearly muſt have been borne by the conſignor.

Conſider this caſe, in the next place, under the act of parliament of the 5 *Geo.* 2. upon the clauſe of mutual credit.

" Where it ſhall appear to the commiſſioners that there hath " been mutual credit given by the bankrupt and any other perſon, " or mutual debts between the bankrupt and any other perſon, at " any time before ſuch perſon became bankrupt, the commiſſioners " or the aſſignees ſhall ſtate the account between them, and one debt " may be ſet againſt another, and what ſhall appear to be due on " either ſide on the balance of ſuch account, and on ſettling ſuch debts " againſt one another, and no more ſhall be claimed or paid on either " ſide reſpectively."

The conſtruction on this clauſe has always been, that an account muſt be taken of their reſpective demands, and that the balance only, if in favour of the bankrupt, ſhall be proved under the commiſſion.

Suppoſe *Tollet* had never aſſigned theſe goods, and the aſſignees under the commiſſion of bankruptcy had brought an action of trover in his right, and by ſtrictneſs of law had recovered, would even the courts of law have ſuffered execution to be taken upon the whole goods? I think they would not, and in that caſe I would have directed that out of the damages, upon a writ of inquiry, there ſhould have been deducted the half price, paid by *Ragueneau* and Company for the ſilks; *a fortiori* this ought to be done in a court of equity.

As to the caſes cited, *Wiſeman* v. *Vandeput*, 2 *Vern.* 203. is much ſtronger than the preſent. There " *A.* being beyond ſea, conſigns " goods to *B.* then in good circumſtances in *London*, but before the ſhip " ſet ſail news came that *B.* was failed, and thereupon *A.* alters the " conſignment of the goods, and conſigns them to the defendant; the " court held, that if *A.* could by any means prevent the goods com- " ing into the hands of *B.* or his aſſignees, it is allowable in equity, " and *B.* or his aſſignees ſhall have no relief in equity." And ſo is the caſe *ex parte Clare*, before Lord Chancellor *King*, for the goods there had been actually delivered.

If the defendant *Preſcot* had got the goods back again by any means, provided he did not ſteal them, I would not blame him; and I am of opinion that to take them from him would be extremely unequitable.

In the caſe *ex parte Frank*, before Lord *Talbot*, the goods were actually delivered, here they are not.

Upon the whole, from the juſtice of the caſe, and from the evidence on the cuſtom of merchants, *I declare as to the four bales of ſilks, that the ſame being in the poſſeſſion of* Preſcot *and his partners, the ſaid bales or the value ought not to be taken from them, without ſatisfaction made them for the money laid out by them on the laſt mentioned bales and charges incident thereto, and for their commiſſion thereon.*

Let the Maſter take an account of the money received by Preſcot *by ſale of the ſilks, and he and his partners to be charged with the ſame. Let the ſilk remaining in ſpecie be ſold, and the Maſter is to diſtinguiſh what is the produce of the ſilk comprized in the pledges to the ſeveral pawnees, and let the ſame be rateably applied to pay what ſhall be due to* Preſcot

and

and partners, for the money advanced for the laſt mentioned bales, charges and commiſſion, according to the proportion which the ſame bears to the reſpective values of the particular bales of ſilk comprized in each of the pledges, and after ſuch proportion as is to be borne out of the value, the reſidue to go towards paying Julian *and* Le Blon, *for their principal and intereſt, and alſo after the like deduction to* Preſcot *for the ſilks pledged to the* Thomass, *the reſidue to be applied towards payment of principal and intereſt to the* Thomass, *and if not enough to pay* Julian *and* Le Blon *and the* Thomass, *they to come in as creditors under the commiſſion in proportion*; and if any overplus by the ſales of the ſilk, the ſame to go towards paying the coſts of *Preſcot* and partners, *Julian*, *Le Blon*, and the *Thomass*; if no overplus, the Maſter to rate the coſts between them; and if any overplus after payment of the ſaid debts and coſts, the ſame to be paid to the aſſignees of the bankrupt, for the uſe of the other creditors.

(V v) Rule as to annuities under commiſſions of bankruptcy.

Auguſt the 1ſt 1738.

Ex parte Le Compte.

Caſe 134. *C.* in 1720. gave 300*l.* for an annuity of 30*l. per ann.* for her life, payable out of a perſon's eſtate, who becomes a bankrupt in 1738. Commiſſioners directed to ſettle the value of her life, and *C* to be admitted a creditor for ſuch valuation and the arrears of her annuity, and not for the whole 300*l.*

IN the year 1720. the petitioner gave three hundred pounds for an annuity of 30*l. per ann.* for her life, payable out of the eſtate of the perſon who is now a bankrupt, which he not being able to pay her by reaſon of the commiſſion, ſhe petitioned to be admitted a creditor for the whole 300*l.*

Lord Chancellor ordered that it be referred to the commiſſioners to ſettle the value of her life, and that ſhe be admitted a creditor for ſuch valuation, and the arrears of her annuity, it being unreaſonable ſhe ſhould have the whole 300*l.* when ſhe had enjoyed the annuity 18 years.

Auguſt the 1ſt 1744.

Ex parte Belton.

Caſe 135. Where a bankrupt is under an agreement to pay an annuity, a value muſt be put upon it, and proved as a debt under the commiſſion.

A Bankrupt before the time of his bankruptcy entered into an agreement to pay an annuity of twenty pounds a year for the maintenance of an infant till his age of fourteen, with a penalty on non-payment.

By his failing in one of the payments, the penalty becomes forfeited.

The guardian of the infant who had maintained him, applies to the court by petition to have a value ſet on this annuity, and that the infant may be admitted a creditor for ſuch value.

Lord

Lord Chancellor: I am of opinion that a value ought to be put upon the annuity, that it ſhould be proved as a debt under the commiſſion.

January the 22d 1753.

Ex parte Coyſegame.

Vide under the diviſion, Where aſſignees are liable to the ſame equity with the bankrupt.

(U u) Rule as to taking out a ſecond commiſſion.

March the 20th 1743.

Ex parte Proudfoot.

Caſe 136.

No ſecond commiſſion can be taken out before a bankrupt has his certificate under the firſt, for till then nothing can paſs to the ſecond, at leaſt of perſonal eſtate.

ONE *Jackſon* became a bankrupt in 1732. and aſſignees were choſen under the commiſſion; upon *Jackſon*'s raiſing forty pounds to defray the expences of the commiſſion, and a hundred pounds more to be divided among his creditors, four parts in five of them in number and value ſigned his certificate, but the commiſſioners refuſed to ſign it; upon which the creditors returned the money to *Jackſon* again, and nothing further was done under that commiſſion.

Jackſon after this ſets up a different trade, in a different part of the town, and being largely indebted, a ſecond commiſſion is taken out againſt him in 1736, and aſſignees were choſen under it, and his certificate ſigned and allowed by *Lord Chancellor*. Before the certificate was ſigned, an advertiſement, by order of the aſſignees under the firſt commiſſion, was put into the *Gazette* for *Jackſon*'s creditors to meet the new aſſignees, to give their aſſent or diſſent to the certificate, and 39 letters were alſo written to the creditors under the firſt commiſſion, to appear at this meeting. Great numbers of them came, and did all aſſent to the certificate; and at the ſame meeting, by agreement, the ſum of 65 *l.* was paid to the aſſignees under the firſt commiſſion to defray the charges thereof, by the aſſignees of the latter.

The preſent petition was preſented by two of the creditors under the firſt commiſſion to ſuperſede the ſecond.

Lord Chancellor: The firſt queſtion, Whether the ſecond commiſſion can have any effect, and if it ought to be ſuperſeded?

The ſecond queſtion, Whether the agreement made in this caſe will preclude the court from ſuperſeding it?

All future perſonal eſtate is affected by the aſſignment, and every new acquiſition will veſt in the aſſignees; but as to future real eſtate, there muſt be a new bargain and ſale.

As to the firſt queſtion, I am of opinion that if this caſe ſtood clear of the agreement, the ſecond would have iſſued irregularly, and I

ſhould without ſcruple have ſet it aſide, and the certificate likewiſe; becauſe when aſſignees are choſen under a firſt commiſſion, all the eſtate and effects of the bankrupt are veſted in them, and he is incapable of carrying on any trade, and all his future perſonal eſtate is affected by the aſſignment, and every new acquiſition will veſt in the aſſignees; *but as to* future real eſtates, there muſt be a new bargain and ſale.

The bankrupt is incapable of acting, and therefore no ſecond commiſſion can be taken out before he has his certificate under the firſt, for till then nothing can paſs under the ſecond, at leaſt of perſonal eſtate; conſequently the certificate here can have no operation at all, and I am of opinion it would have been void at law.

There may have been inſtances where ſecond commiſſions have been taken out, when former commiſſions have been deſerted, and the aſſignees perhaps, and the commiſſioners dead, and this innocently, and may have paſſed *ſub ſilentio*, but is by no means a rule to govern the court.

The ſecond queſtion is, Whether the acts done by the aſſignees under the commiſſion, will give a ſanction to the certificate.

The ſecond commiſſion was taken out four years after the firſt, the certificate ſigned three years ago, and allowed by me two years and three quarters, nothing clandeſtine appears; but an advertiſement has been put into the *Gazette* as uſual, for creditors aſſenting or diſſenting to the certificate, and was plainly intended that the creditors under the firſt commiſſion ſhould meet, becauſe the advertiſement was put in by the aſſignees under the firſt; the two aſſignees under the firſt, and ſeveral of the creditors met accordingly, and accept of 65 *l.* towards the charges of the firſt commiſſion, and the expence of a law ſuit, and in conſideration of this ſum, the aſſignees of the firſt commiſſion withdrew their petition, which was filed before this meeting for ſuperſeding the ſecond commiſſion.

I am of opinion therefore, on the circumſtances of this caſe, that I cannot ſet aſide the ſecond commiſſion, becauſe it would be a great prejudice and injuſtice to thoſe perſons who have given *Jackſon* credit ever ſince his certificate was confirmed, which is no leſs than two years and three quarters ago.

Aſſignees may advertiſe a meeting upon any extraordinary occaſion, that concerns the creditors, as well as for the particular purpoſes directed by the acts of parliament.

Though the acts of parliament relating to bankrupts do only direct the aſſignees to advertiſe a meeting of creditors in relation to commencing ſuits, and for particular purpoſes, yet the aſſignees are very much to be commended for advertiſing meetings upon any other extraordinary occaſion, that concerns the creditors, becauſe where they are numerous, there is no way ſo good to collect the whole body together.

The preſent is a ſtronger caſe than uſual, for the aſſignees are truſtees for all the creditors, and if they have acted improperly, the perſons who prefer this petition, may have their remedy againſt them at law, for a breach of truſt.

Upon the whole, after all that has been tranſacted between the aſſignees under the firſt, and the creditors under the ſecond commiſſion, in relation to the certificate, and after the bankrupt has been once more enabled to trade, and gained a new credit by my confirming his certificate, I ſhould do very wrong, if I ſet aſide the ſecond commiſſion under all theſe circumſtances; *and therefore the petition muſt be diſmiſſed.*

(W w) Rule as to an open account under a commiſſion of bankruptcy.

December the 22d 1744.

Ex parte Simpſon and others.

Vide under the diviſion, Concerning the Commiſſion and Commiſſioners.

(X x) Rule as to principal and ſurety.

Auguſt the 2d 1744.

Ex parte Criſp,

Vide under the diviſion, Rule as to Partnerſhip.

March the 26th 1750.

Ex parte Williamſon.

Vide under the diviſion, Rule as to the Certificate.

(Y y) Rule as to the inſolvent debtors act.

October the 26th 1744.

Ex parte Burton.

THE petitioner was a bond creditor for fifteen hundred pounds of *Stevens* the bankrupt, who had lived formerly in *Holland*, and exerciſed a trade there, but failed, upon which there was a *ceſſio bonorum*. *Stevens* comes afterwards to *England*, and had intereſt enough to be appointed a governor of a ſettlement abroad, belonging to the *African* company, and applies to the petitioner to be his ſecurity to the company, and to advance him a ſum of money to equip him properly in his office: The petitioner agreed to do it, but inſiſted, as he run a riſque of forfeiting the ſecurity to the company on *Stevens*'s miſbehaviour, that the bond ſhould comprize the remainder of the old debt, as well as the further ſum advanced, which was done accordingly: *Stevens* becomes a bankrupt here, and a commiſſion is taken out againſt him; the commiſſioners on the application of *Burton* to be admitted a creditor, for the whole money on the bond, being doubtful whether he was ſo intitled, refuſed to admit him, and he now petitions for that purpoſe.

Caſe 137. *Stevens* formerly a trader in *Holland* fails there, upon which there was a *ceſſio bonorum*: He comes to *England*, and is appointed a governor abroad; he applies to the petitioner to be his ſecurity to the company, and to advance him a ſum of money, who agreed to it, provided *Stevens* would give him a bond, that ſhould comprize the remainder of an old debt due before the *ceſſio bonorum*, as well as the further ſum advanced, which was done accordingly: *Stevens* becomes a bankrupt, and the commiſſioners doubting if *Burton* ought to be admitted a creditor for the whole money, he now petitions for that purpoſe.

Lord Chancellor on the circumſtances of the caſe, of opinion he was intitled to be admitted a creditor for the whole money upon his bond.

Lord Chancellor: The queſtion is, Whether this be ſuch a real debt as to intitle the petitioner to come in amongſt the reſt of the creditors under the commiſſion of bankruptcy againſt *Stevens*, and that will depend upon another queſtion, Whether the compoſition in *Holland* was an abſolute diſcharge of the bankrupt? and if it was, Whether there is ſtill a ſufficient conſideration for this bond? for if it was not an abſolute diſcharge in *Holland*, no queſtion can ariſe.

A man indebted to ſeveral perſons becomes a bankrupt in *Holland*, where there are the ſame proceedings upon an inſolvency, as on a *ceſſio bonorum* among the *Romans:* The queſtion is, Whether this proceeding is a diſcharge of his effects, as well as of his perſon? for if it was, it would be an abſolute diſcharge of this debt.

Upon what appears before me, I do not take it to be the law of *Holland*, that it is an abſolute diſcharge of the effects as well as of his perſon: It certainly was not ſo even by the law of *England*, till the ſtatute of the 4 & 5 *Ann.* which was temporary at firſt, and never intended to be a perpetual law, but was made in conſideration of two long wars which had been very detrimental to traders, and

rendred them incapable of paying their creditors; but I much queſtion whether it is ſo by the law of any other country except *England*; the exempting his wearing apparel or tools of his trade, was left to the diſcretion of the *Roman Prætor*, but was not a binding law upon him there, as it is here.

If a debtor cleared under the inſolvent acts afterwards gives a bond for the reſidue of the old debt, this will be binding upon him.

Can it then be doubted, that if the bankrupt gives a new ſecurity, that his effects are all liable? Suppoſe by our law under the inſolvent acts, the debtor delivers up his all, as the ſtatute requires, which is the *ceſſio bonorum* of the *Romans*, and the juſtices of peace diſcharge his perſon, and he afterwards gives a bond for the reſidue of the old debt; will not this be binding upon him, notwithſtanding his being cleared under the inſolvent act?

If a bankrupt after his diſcharge, gets future effects, in point of juſtice he ought to make good the deficiency, tho' no court will compel him.

In the preſent caſe, I think I might reſt here without going any further; but ſuppoſing by the law of *Holland*, his perſon and effects were actually diſcharged, I am very far from being clear, whether a bond given, as this was, for the reſidue of a debt, would not make his effects liable to anſwer it; for if a bankrupt after his diſcharge gets future effects, in point of juſtice and conſcience he ought to make good the deficiency, though no court of equity or prætor would do it for the creditor.

Here is a man wants a ſecurity to the *African* company, for his exerciſing an office of governor in one of their ſettlements, and likewiſe a ſum of money; was it not very reaſonable for the petitioner upon ſuch an application to ſay, if I do this, you ſhall give me a bond for the reſidue of my old debt, ſince I run a riſque of forfeiting to the company if you miſbehave?

I am of opinion on ſuch a caſe ſo circumſtanced, that the petitioner is intitled to be admitted a creditor for the whole money upon his bond, and lay no ſtreſs upon the word compoſition, in the determination in *Holland*, for it was a diſpoſition made by the judge, and not a voluntary compoſition by the bankrupt.

Lord Chancellor ſeemed to think, if a bankrupt, after a diſcharge, applies to an old creditor, to lend him a new ſum of money to carry on his trade, or to be his ſecurity for any office, this would be a good conſideration for his giving bond for the remainder of the old debt, and the whole may be proved under a ſecond commiſſion.

If a bankrupt applies to an old creditor after a diſcharge by certificate, to lend him a new ſum of money, to carry on his trade, or to become a ſecurity for any office; I am inclined to think that this ought to be a good conſideration for his giving bond for the remainder of the old debt, and that he ought to be admitted a creditor for the whole debt under the ſecond commiſſion; but I will not be bound down by this opinion, though as I am at preſent adviſed, I think it would be ſo.

The law of *Holland* with regard to a *ceſſio bonorum* follows the *Digeſt*, and is no diſcharge of effects, but only of the perſon.

The next day *Lord Chancellor* ſaid, he had looked into *Voet on the Pandect*, under the head of *ceſſio bonorum*, 2 *tom. lib.* 42. *tit.* 3. who lays down the law of *Holland* exactly as the digeſt does in ſuch caſes, that it is no diſcharge of effects, but only of the perſon, ſome few trifles, as wearing apparel, *&c.* excepted.

Auguſt

Auguſt the 7th 1746.

Ex parte Green.

THE petitioner is an aſſignee under a ſecond commiſſion of bankruptcy againſt *Bowler*, who had been diſcharged once before under a former commiſſion, afterwards again under the inſolvent debtors act, and now by a certificate under a ſecond commiſſion, taken out by his friends for that purpoſe. Caſe 138.

Where a perſon diſcharged by the inſolvent debtor's act, becomes a bankrupt afterwards, his certificate muſt be ſpecial, and will be allowed only as a diſcharge of his perſon, but not of his future eſtate and effects.

The prayer of the petition is, That the bankrupt's certificate may not be allowed, and inſiſted by the aſſignee's counſel, that according to a clauſe in the act made in the 5 *Geo.* 2. relating to future effects, he cannot be diſcharged by a certificate, as to his eſtate under a commiſſion of bankruptcy, if he has been before diſcharged under the ſtatute for relief of inſolvent debtors.

That clauſe is as follows.

" Provided always, and be it further enacted, That from and " after the 24th of *June* 1732. in caſe any commiſſion of bankruptcy " ſhall iſſue againſt any perſon or perſons, who after the ſaid 24th of " *June* 1732. ſhall have been diſcharged by virtue of this act, or " ſhall have compounded with his creditors or delivered to them his " eſtate or effects, and been releaſed by them, or been diſcharged " by any act for the relief of inſolvent debtors, after the time aforeſaid, that then and in either of theſe caſes, the body and bodies " only of ſuch perſon and perſons conforming as aforeſaid, ſhall be " free from arreſt and impriſonment by virtue of this act; but the " future eſtate and effects of every ſuch perſon and perſons, ſhall remain liable to his creditors as before the making of this act, " (the tools of trade, the neceſſary houſhold goods and furniture, and " neceſſary wearing apparel of ſuch bankrupt, and his wife and children only excepted), unleſs the eſtate of ſuch perſon or perſons " againſt whom ſuch commiſſion ſhall be awarded, ſhall produce " clear, after all charges, ſufficient to pay every creditor under the ſaid " commiſſion, fifteen ſhillings in the pound for their reſpective debts."

Unleſs ſome fraud had been ſhewn, this man ſeems to me to be intitled to his certificate, but of a ſpecial nature.

This act of parliament has made two proviſions, one with regard to the perſon of the bankrupt, the other with regard to his eſtate, for before the making of the ſaid act, neither were diſcharged, but both were liable.

Then comes this clauſe, and makes a particular kind of diſcharge in this ſpecial caſe; an abſolute one as to his perſon, with regard to all his creditors before the commiſſion, but, upon a particular circumſtance only, with regard to his eſtate.

Therefore ſome kind of certificate he muſt have, the preſent ſeems to be a general one, and I do not find that the form of the certificate is ſettled.

The certificate being read, appeared to be a general one, whereupon *Lord Chancellor* made it ſpecial, by ordering this certificate to be allowed a diſcharge of the bankrupt's perſon only, but not of his future eſtate and effects.

(Z z) Rule as to a bankrupt's future effects.

March the 20th 1743.

Ex parte Proudfoot.

Vide under the diviſion, Rule as to taking out a ſecond Commiſſion.

October the 26th 1744.

Ex parte Burton.

Vide under the diviſion, Rule as to the Inſolvent Debtors Act.

Auguſt the 7th 1746.

Ex parte Green.

Vide under the ſame diviſion.

(A a a) Rule as to a ceſſio bonorum.

October the 26th 1744.

Ex parte Burton.

Vide under the diviſion, Rule as the Inſolvent Debtor's Act.

(B b b) Rule as to depoſits under commiſſions of bankruptcy.

October the 19th 1744.

Bromley v. *Child.*

Caſe 139.

A Petition on the behalf of the repreſentative of a perſon who was intitled to navy bills to the amount of 6000*l.* and who had in the year 1711. depoſited them in the hands of Sir *Steven Evans* and his partner *Hale*, who gave a note ſpecifying them, and promiſing to be accountable. In ſix months after Sir *Steven Evans* becomes a bankrupt.

A. intitled to navy bills in 1711. depoſits them with Sir *Steven Evans*, who gave a note to be accountable for them, and in ſix months afterwards becomes bankrupt. The repreſentative of *A.* petitions to be admitted before the Maſter to prove both principal and intereſt to the time of the decree, as navy bills in their nature carry intereſt. As this is a ſpecial depoſit, a calculation ſhall be made of the value of the whole intire thing depoſited, both principal and intereſt at the time of the depoſit, and intereſt not to run on as in a ſimple debt.

The application now was that the petitioner be admitted before the Maſter to whom the cauſe ſtands referred between the aſſignees and repreſentatives of Sir *Steven Evans*, to prove both the principal and intereſt to the time of the decree, as navy bills in their nature carry intereſt.

When the petitioner appeared before the commiſſioners of bankruptcy, they ſet a value upon the navy bills, according to the market price they bore at the day of the depoſit, which was only 4200*l.* becauſe there was a large diſcount, as there was no publick fund appropriated for the payment of them.

Lord Chancellor: I cannot allow the petitioner to come in as a creditor before the Maſter for the *intereſt* upon the navy bills as well as the principal, becauſe there is a plain diſtinction between debts that carry intereſt and a ſpecial depoſit of goods and ſtock; for in the former the intereſt ſhall be continued down to the date of the commiſſion; but in the latter 'tis otherwiſe, for the intereſt ſtops from the time of the depoſit, and a calculation ſhall be made of the value of the whole entire thing depoſited both principal and intereſt, be it ſtock or goods, according to the market price at the time of the depoſit, and intereſt not allowed to run on as in the caſe of a ſimple debt.

The petition diſmiſſed.

(C c c) Rule as to relation under commiſſions of bankruptcy.

March the 5th 1744.

Barwell, and others, — — — Plaintiffs.
Ward, and others, — — — Defendants.

Caſe 140.

Where the act of bankruptcy is lying in gaol for 2 months, a perſon ſhall be deemed a bankrupt from the firſt day of his ſurrender to priſon by relation, ſo as to over reach all intermediate tranſactions.

THE defendant's brother conveyed the moiety of a reverſionary eſtate for leſs than half the value to her, and in a month afterwards ſurrenders himſelf to priſon, and during his lying there, before the two months were expired, he turns his book debts into notes, and indorſes over one from Sir *Roger Burgoyne*, and another from Sir *Francis Shipworth to Barbara and Margaret Ward.*

A commiſſion of bankruptcy was afterwards taken out againſt *Ward*, and the plaintiffs were choſen aſſignees, who have brought this bill to ſet aſide the conveyance, and pray that the plaintiffs and the other creditors may have the benefit of the ſaid eſtate, and that the deeds relating thereto may be delivered to them, and that the ſaid notes and ſecurities may be alſo delivered to them, and that they may have a ſatisfaction from ſuch of the defendants to whom the ſame were indorſed, aſſigned, or delivered.

The counſel for the plaintiffs inſiſted that the conveying lands for half the value is an act of bankruptcy of itſelf, and that the ſiſter of the bankrupt ought to be directed to convey the ſame to the aſſignees, and that the notes being tranſactions during the intermediate time between his impriſonment and the lying there *two months*, that when the *two months* were compleat, he ſhall be deemed a bankrupt from the firſt day of his ſurrender to priſon by relation, ſo as to over-reach all intermediate tranſactions.

On the part of the defendants it was urged, that the ſeveral deeds, and the indorſement of the notes, were previous to *Ward*'s bankruptcy, and that the bankrupt being indebted to the defendant *Martha Doughty* in 450 *l.* on bond, did in *September* 1741. execute a warrant of attorney to confeſs judgment for the ſaid debt, and that being alſo indebted to his ſiſter *Barbara Ward* in 60*l.* he did by indentures, bearing date in *September* 1741. convey to her and her heirs his reverſionary intereſt of the ſaid premiſſes, who did then deliver up a bond, which had been given her for 150*l.* to be cancelled, of which debt 60*l.* remained due, and the deeds were executed a few days after they bore date, but before *Ward* had committed any act of bankruptcy.

Lord Chancellor: The preſent is a plain caſe, and appears to be a fraudulent conveyance to cover the eſtate, for the deeds are executed at a time when *Ward* was in declining circumſtances, having in the *October* following ſurrendered himſelf in diſcharge of his bail, and was confined in priſon.

No more than 60*l.* paid for the moiety of an eſtate in reverſion, of the value of 39*l.* a year, which is pretended now to be redeemable on payment of 60*l.* but no clauſe of this kind in the deed itſelf, for it is an abſolute bargain and ſale.

The court in this caſe ought to do no more than to let the deed ſtand only as a ſecurity for the money really and *bona fide* advanced.

It is not diſputed but that Mr. *Ward* was a bankrupt at the end of the *two months*, and that the act of parliament by relation makes him ſo at the time he indorſed the two notes; but it has been ſaid by the defendant's counſel, the aſſignees might have brought an action of trover, but it would have been very difficult to have deſcribed the notes at law properly, and therefore the plaintiff is right to come here for a diſcovery.

It has been alſo ſaid, the bankrupt indorſed the notes to raiſe a ſum of money to put out his apprentice to another maſter, for the reſt of his time.

The moſt equitable method is to allow him a groſs ſum out of the bankrupt's effects, and commiſſioners of late years have recommended it to creditors to allow it, and in my opinion very rightly, for it would be hard to make him come in as a creditor under the commiſſion.

His Lordſhip declared that the leaſe and releaſe of September 1741. *ought to be ſet aſide as an abſolute conveyance, and to ſtand only as a ſecurity for what (if any) was really due from* Ward *the bankrupt to defendant* Barbara Ward *upon the bond, and referred it to a Maſter to inquire whether at the execution of the ſaid deeds any ſuch bond was ſubſiſting, and what money was* bona fide *due from the bankrupt to* Barbara *thereon, and if no money due at that time, that* Barbara *ſhould then convey the ſaid premiſſes to the plaintiffs in truſt for the creditors.*

His Lordſhip alſo declared that the aſſignment of the two notes, being after Mr. *Ward* was in point of law a bankrupt, is void, and directed the Maſter to ſee if the notes are in the hands of *Martha Doughty*, or in whoſe hands, and whether ſhe hath received any money thereon, and to inquire what ſhe paid in conſideration of the ſaid notes, and whether the ſame was applied to procure another Maſter to the apprentice, and if ſo, how much was proper to be allowed (according to the uſual courſe of proceedings under commiſſions) for turning over the apprentice of a bankrupt to another maſter, and ſo much to be allowed to *Martha Doughty*, and the ſurplus ſhe is to pay over to the aſſignees, and deliver up the ſaid notes, and decreed the defendant *Barbara Ward* to pay coſts, ſo far as relates to the conveyance to her, to this time.

(D d d) Rule as to an extent of the crown.

March the 28th 1751.

Ex parte Marſhall and others; in the matter of *Garway*'s bankruptcy.

Caſe 141. An extent of the crown is taken out againſt a ſurety of a bankrupt who pays the debt, after diſputing it ſome time, and being put to an expence thereby. He ſhall, notwithſtanding he diſputed the payment of a juſt debt, be admitted to prove the expences of ſuch ſuit under the commiſſion againſt the principal.

HATTON was ſurety in a bond with *Garway* to anſwer particular debts; *Garway* becomes a bankrupt, and an extent of the crown is taken out againſt *Hatton*, who pays the debt after diſputing it for ſome time, and is put to an expence thereby.

Hatton is ſince dead, and his repreſentatives apply now to be admitted creditors under *Garway*'s commiſſion, and to prove the expences he was put to in the diſpute with the crown; the counſel for the aſſignees oppoſed it, and inſiſted that notwithſtanding as between debtor and creditor, the latter is intitled to have compleat ſatisfaction againſt the ſurety as well as the principal; there is no rule, that if a ſurety diſputes a juſt debt, and occaſions an expence by that means, that he ſhall charge the eſtate of the principal with the expences of ſuch a ſuit.

An extent of the crown is an action and execution in the firſt inſtance.

Lord Chancellor: I know of no ſuch diſtinction, and it would be a very hard caſe here, as the failing of *Garway* was in all probability the ſole occaſion of the difficulties that *Hatton* was under, and made him incapable of paying the demand of the crown; and as an extent is both an action and execution in the firſt inſtance, *Hatton* in his ſituation could not be ſuppoſed prepared to pay it immediately, and therefore no pretence to ſay his repreſentatives ſhall be precluded from proving the expences *Hatton* was put to in the ſuit with the crown.

October the 26th 1745.

Anon'.

Caſe 142. A bankrupt, though he has conformed in every reſpect to the acts relating to bankruptcy, cannot be diſcharged from a commitment under an extent of the crown.

A Petition on behalf of a bankrupt to be diſcharged from a commitment under an extent of the crown, having ſurrendred himſelf to the commiſſioners, and conformed himſelf according to the acts of parliament relating to bankrupts.

Lord Chancellor: The crown is not within the ſtatutes of bankrupts, and therefore he cannot be diſcharged from a commitment on behalf of the crown.

(E e e) Rule as to creditors aſſenting or diſſenting to a certificate.

Auguſt the 14th 1742.

Ex parte Turner.

Vide under the diviſion, Joint and ſeparate Commiſſion.

October the 26th 1745.

Ex parte Lindſey.

Vide under the diviſion, What is or is not an Election to abide under a Commiſſion.

March the 25th 1750.

Ex parte Williamſon.

Vide under the diviſion, Rule as to a Certificate.

December the 21ſt 1752.

In the matter of the *Simpſon*'s bankruptcy.

Vide under the diviſion, Rule as to Partnerſhip.

(F f f) Bankruptcy no Abatement.

November the 10th 1748.

Anon.

Caſe 143. An order for diſſolving an injunction *niſi* will be made abſolute, notwithſtanding the plaintiff is a bankrupt, unleſs he ſhews cauſe.

MR. *Wilbraham*, where the defendant had an order for diſſolving the injunction *niſi*, moved it might be made abſolute, unleſs cauſe ſhewn before the riſing of the court.

Mr. *Sewell* of the other ſide ſaid, the cauſe was abated by the plaintiff's having become a bankrupt ſince the granting of the injunction, and that the aſſignees under the commiſſion have not as yet revived.

Lord Chancellor: Bankruptcy is no abatement, and therefore if he had any cauſe to ſhew he muſt go on, or he would diſſolve the injunction: Upon which he ſhewed exceptions for cauſe, which were allowed upon the common terms of procuring the Maſter's report in four days.

(Ggg) Arreſt upon a Sunday for a contempt regular.

June the 2d 1749.

Ex parte Whitchurch.

Vide title *Arreſt, under the diviſion, Where good on a Sunday.*

CAP. XVI.

Baron and Feme.

(A) How far the husband ſhall be bound by the wife's acts before marriage.
(B) How far a feme covert ſhall be bound by the acts in which ſhe has joined with her husband.
(C) Concerning the wife's pin-money and paraphernalia.
(D) How far gifts between husband and wife will be ſupported.
(E) Concerning alimony and ſeparate maintenance.
(F) Rule as to a poſſibility of the wife.

3

(A) How

(A) How far the husband ſhall be bound by the Wife's acts before marriage.

March the 2d 1737.

Samuel Newſtead, *Stokes* and *Suſannah* his wife, *Atkinſon* and *Elizabeth* his wife, and others, — } Plaintiffs.

Samuel Searles, *Miller* and *Balls*, and others, — Defendants.

THE plaintiff *Newſtead* is the eldeſt ſon and heir of *Elizabeth*, late the wife of *Newſtead* ſenior, who was the eldeſt daughter and coheir of *Elizabeth Searles* deceaſed, by *John Martyn* her former husband, and the plaintiff *Suſannah* is the youngeſt daughter, and another of the coheirs of *Elizabeth Searles* deceaſed, by *John Martyn*, and the plaintiff *Elizabeth* the wife of *Joſeph Atkinſon*, is the daughter of *Suſannah Stokes*, and grandchild of *Elizabeth Searles*. Caſe 144. A widow who had two children by a former huſband, and no proviſion made for them, and theſe two children each of them a child, and being in poſſeſſion, in her own right, of freehold, copyhold, and leaſehold eſtates, by articles before her ſecond marriage, to which her huſband was a party, and by his conſent, conveys the whole to truſtees, that they ſhould divide the freehold, copyhold, and leaſehold, if no iſſue of the marriage, in moieties, one to the plaintiff her grandſon, his heirs and aſſigns, the other to her grandaughter in fee, provided if there ſhould he any child or children of the marriage, that child or children to have an equal ſhare of the ſaid eſtates, with the grandſon and grandaughter.

The huſband and wife afterwards mortgage the ſettled eſtates, to perſons who had notice of the ſettlement.

Declared, that the ſettlement is no voluntary agreement, but a binding one, and no inſtance where ſuch a limitation has been held fraudulent, and void againſt ſubſequent purchaſers, or creditors; for if it ſhould, no widow on her ſecond marriage, would be able to make any certain proviſion for the iſſue of a former.

Mr. *Cornwallis* ſeized in fee of freehold and copyhold, and poſſeſſed of leaſehold, held of the biſhop of *Norwich* in *Suffolk*, of the yearly value of 150 *l.* made his will in 1698. having firſt ſurrendred his copyhold eſtate to the uſe of his will, and thereby gave to *Grace* his wife all his freehold, copyhold, and leaſehold, for ſo long as ſhe ſhould continue his widow, and after her deceaſe, then he gave the freehold, copyhold, and leaſehold eſtates, to *Elizabeth Searles*, then *Elizabeth Martyn* his daughter, and her heirs; the teſtator died ſoon after.

Elizabeth Searles, before her marriage with the defendant *Samuel Searles*, *by indenture dated the* 30*th of* April 1709. between her of the firſt part, *Samuel Searles* of the ſecond part, *Smith* and *Maltyward* of the third part, reciting the will of Mr. *Cornwallis*, and that a marriage was intended between *Elizabeth* and *Samuel*; and that it was agreed *Elizabeth* ſhould have the diſpoſition of her eſtates after the death of *Grace*; *Elizabeth* with the conſent of *Samuel* for the ſettlement of her eſtate upon ſuch children, and grandchildren, as *Elizabeth* ſhould have living, either by her late husband *John Martyn*, or by *Samuel Searles* at the time of her death, did covenant with *Smith* and *Maltyward*, that they and their heirs ſhould after the intended marriage, and the death of *Grace*, ſtand ſeized of the meſſuage held by leaſe of

the biſhop of *Norwich*, and all other the eſtates of *John Cornwallis*, given by his will to *Elizabeth Searles* after *Grace*'s deceaſe, to the uſes therein and after mentioned, that is to ſay, when the freehold and copyhold lands ſhould come to be veſted in *Elizabeth*, to permit *Samuel Searles* to receive to his own uſe during the coverture, the rents and profits thereof, and if *Elizabeth* ſurvived *Samuel*, then ſhe to receive them during her life, with a power to *Elizabeth* to charge the ſaid eſtates by her will, or any other writing with 200 *l.* to be paid after her deceaſe, as ſhe ſhould appoint, *and for want of ſuch appointment*, to be paid to *Samuel*, and after the deaths of *Grace* and *Elizabeth*, that the truſtees and their heirs *ſhould divide the freehold, copyhold, and leaſehold eſtates in manner following, (that is to ſay,) if no iſſue between* Samuel *and* Elizabeth *living at her deceaſe, that then they ſhould convey one moiety of the ſaid premiſſes, to the uſe of the plaintiff* Newſtead, *his heirs and aſſigns, and the other moiety to the uſe of plaintiff* Suſannah Stokes *her daughter for life, remainder to her grandaughter the plaintiff* Elizabeth Atkinſon, *her heirs and aſſigns; provided, if there ſhould be any child or children between* Samuel *and* Elizabeth, *that then each ſuch child to have an equal ſhare of the ſaid eſtate, with the plaintiff* Newſtead *and* Elizabeth Atkinſon.

The marriage took effect, and the defendant *Searles* entred upon the freehold, copyhold, and leaſehold lands, and received the rents thereof, upon the death of *Grace*, which happened in 1719. and enjoyed the ſame unto the death of *Elizabeth*, which happened in *September* 1733, without leaving any iſſue by the defendant *Searles*; the plaintiff on the death of *Elizabeth*, became intitled to the ſaid moiety under the ſettlement, and *Suſannah Stokes* to the other for life, with remainder to *Elizabeth Atkinſon* and her heirs, and inſiſt the ſame ought to be conveyed accordingly, and that the deed of the 30th of *April* 1709. ought to be carried into execution; and therefore by their bill pray an account of the rents, *&c.* received from the freehold, copyhold, and leaſehold eſtates, ſince the death of *Elizabeth Searles*, and that one moiety of the reſidue of the profits may be paid to the plaintiff *Newſtead*, the other to the plaintiff *Stokes*, and *Suſannah* his wife, and that the legal eſtate of the ſaid freehold, copyhold, and leaſehold eſtates may be granted, ſurrendred, and conveyed to ſuch of the plaintiffs as are intitled to the ſame, according to the ſettlement of the 30th of *April* 1709.

The defendant *Searles* in 1719. together with *Elizabeth* his wife, mortgaged the freehold eſtate for a term of years, for 200 *l.* to *Pendar*, and the leaſehold eſtate was afterwards aſſigned to him, as a further ſecurity, and *Searles* and his wife levied at that time and afterwards fines, whereby the freehold and leaſehold became veſted in *Searles* in fee, after *Elizabeth*'s death, ſubject to the mortgage.

Searles inſiſted that he was intitled to the equity of redemption, and that his wife executed ſuch deeds and fines, out of affection to him, and alſo that *Elizabeth* dying without appointing the two hundred pounds under the deed of the 30th of *April*, he ought to have it paid to him.

The

The defendant *Miller* claims as aſſignee of *Pindar*'s mortgage term, which after ſeveral meſne aſſignments became veſted in him the 26th of *March* 1733. at which time he advanced a further ſum to *Searles* and his wife, and that there is now due to him for principal 1310*l.* beſides intereſt, and ſays that he never had any notice, till after the death of *Elizabeth Searles*, of the plaintiff's claim, nor of the indenture of the 30th of *April* 1709.

Lord Chancellor: The queſtion is, Whether the articles of the 30th of *April* 1709. are for a valuable conſideration and binding, or ought to be conſidered as voluntary and fraudulent, with reſpect to ſubſequent creditors or purchaſers?

If I was to lay it down as a rule that ſuch articles as theſe are not binding, it would become impoſſible for a widow on her ſecond marriage to make any certain proviſion for the iſſue of a former, and the ſecond huſband might then contrive to defeat the proviſion made for thoſe children.

I am of opinion theſe articles ought not to be conſidered as a voluntary agreement, and that the plaintiffs are intitled to relief in this court. This is the caſe of a widow, who has two children by a former huſband, and no proviſion made for them, and thoſe two children have each of them a child, and the mother being in poſſeſſion in her own right of freehold eſtate, leaſehold, and copyhold, the ſecond huſband, if there had been a child born alive, would have been intitled to be tenant by the curteſy of the freehold, and alſo to the leaſehold and copyhold immediately upon the marriage.

To prevent this, by the articles before the ſecond marriage, 200*l.* is allowed to be raiſed by the wife out of the eſtate, and in caſe there ſhould be no children of the ſecond marriage, then one moiety thereof was to go to the plaintiff *Newſtead* his heirs and aſſigns, and the other to *Suſanna Stokes* for life, remainder to *Elizabeth Atkinſon* her heirs and aſſigns, the former her grandſon by the firſt marriage, and the latter her daughter and grandaughter; but if there ſhould be any child or children of the ſecond marriage, then they were to have an equal ſhare with the plaintiffs.

Upon the mortgage to *Pindar*, by the contrivance of ſome country attorney, *Elizabeth Searles* and her huſband levied a fine, and in the deed to lead the uſes there is a compleat recital of the will, under which the wife claimed, and of her marriage ſettlement in ſo ample a manner, that the will and ſettlement muſt neceſſarily have been laid before him, and he muſt conſequently have had full notice of it as agent for the mortgagee.

The children of the firſt marriage ſtand in the very ſame plight and condition as the iſſue would have done, if there had been any, of the ſecond marriage, and even are provided for before them.

Suppoſing there had been iſſue of the ſecond marriage, and they had brought their bill to carry theſe articles into execution, upon a decree in their favour, would not the children by the firſt marriage have been equally intitled to a benefit from the decree?

Taking the caſe with all its circumſtances, I think the ſettlement no voluntary agreement, but a binding one; the ſtatute of the 13 and 27 *Eliz.* that make conveyances fraudulent, are voluntary conveyances made againſt purchaſers upon a valuable conſideration, or *bonâ fide* creditors: But it would be difficult to ſhew that ſuch a limitation, as in the preſent caſe, has been held fraudulent, and void againſt ſubſequent purchaſers or creditors. *

The preſent is a ſtronger caſe, for here are reciprocal conſiderations both on the part of the huſband and wife, by the proviſion under the articles for the children of the ſecond marriage.

The mortgagees had notice that the lands were liable to theſe articles, and therefore the plaintiffs are intitled to have the benefit of them againſt the defendants who are affected by notice; and his Lordſhip decreed an account to be taken of what is due for the principal ſum of 200*l.* and intereſt, from the death of *Elizabeth* the late wife of defendant *Searles*, and to tax *Miller* his coſts ſo far as relates to the mortgage of 200*l.* and upon being paid what ſhall be reported due, ordered the defendants *Miller* and *Searles* to convey the freehold, and to aſſign the leaſehold, and ſurrender the copyhold free of all incumbrances done by them to the plaintiff *Newſtead*, *Suſannah* the wife of *Stokes*, and *Elizabeth* the wife of *Atkinſon*, according to the ſeveral eſtates and intereſts therein provided and limited to them by the ſaid marriage articles.

---

* "*Jenkins* v. *Keymis*, 1 *Lev.* 150. & 237. there Sir *Nicholas Keymis*, being tenant "for life, remainder to his ſon *Charles* in tail, in 1641. in conſideration of a mar- "riage to be had between his ſon and *Blanch Manſell*, and 2500*l.* portion, levied "a fine to the uſe of Sir *Nicholas Keymis* for life, remainder to *Charles* and *Blanch* for "their lives, remainder to the heirs of the body of *Charles* of *Blanch* begotten, remain- "der to the heirs of the body of *Charles*, with power for Sir *Nicholas Keymis* to charge "the premiſſes with 2000*l.* Sir *Nicholas* and *Charles* in 1642. joined in a leaſe and "releaſe to *David Jenkins* and his heirs for 2000*l.* on condition of payment of 2000*l.* "with intereſt ſome years after, to be void, *Blanch* afterwards dies without iſſue, "*Charles Keymis* marries another wife, by whom he had iſſue the defendant, and dies, "the mortgagee dies, and his heir brought an ejectment, and adjudged the leaſe and "releaſe was no good execution of the power at common law. He then brought his "bill in equity on theſe grounds; 1*ſt*, that the conſideration of the marriage of *Blanch*, "and the 2500*l.* paid with her, did not extend to the defendant, being an iſſue by "the ſecond *venter*, and ſo the eſtate in remainder whereby he claimed was volun- "tary; (two other grounds not material to this caſe) but on the firſt Lord Keeper "*Bridgman* declared that the conſideration of 2500*l.* paid on the firſt marriage, ſhould "extend to the iſſue by the ſecond *venter*." 1

(B) How far a feme covert ſhall be bound by the acts in which ſhe has joined with her husband.

June the 18th 1737.

Metcalf v. *Ives.*

Vide title, Award and Arbitrament, under the diviſion, For what Cauſes ſet aſide.

(C) Concerning the Wife's pin-money and paraphernalia.

March the 25th 1738.

Ridout v. *Lewis.*

Caſe 145. *A.* had 300 *l. per annum* pin-money, the huſband for ſeveral years before his death paid her 200*l.* only, but promiſed her ſhe ſhould have the whole at laſt.

MRS. *Lewis* had three hundred pounds *per annum* ſettled on her for pin-money; for ſeveral years before Mr. *Lewis*'s death he paid her only two hundred pounds *per annum*, and there was evidence read, that often, on Mrs. *Lewis*'s complaining of being paid ſhort, Mr. *Lewis* told her ſhe would have it at laſt.

The queſtion was, Whether ſhe ſhould be let in to have the arrears of her pin-money, made a charge on the aſſets of Mr. *Lewis*.

If the wife accepts leſs, or lets her huſband receive what ſhe has a right to receive to her ſeparate uſe, it implies a conſent in her to ſubmit to ſuch a method. But where the pin-money is paid to her *eo nomine*, her agreement with the huſband relating to her ſeparate eſtate amounts not to a new agreement, and his promiſing ſhe ſhould have it at laſt is an undertaking to pay the arrears.

Lord Chancellor: I allow that it is a general rule, when a wife accepts a payment ſhort of what ſhe is intitled to, or lets the huſband receive what ſhe has a right to receive to her ſeparate uſe, it implies a conſent in the wife to ſubmit to ſuch a method, where the huſband and wife have cohabited together for any time after; but here is no pretence that the pin-money was departed from by the wife, for there is evidence of ſeveral payments *eo nomine*; and though a wife may come to an agreement with her huſband in relation to any thing ſhe is intitled to ſeparately, yet this does not amount to a new agreement, for here was a promiſe ſhe ſhould have it at laſt, which was an undertaking to pay the arrears; ſhe is therefore intitled to have the arrears of her pin-money raiſed by the truſtees out of the eſtate, which was by ſettlement charged with it.

His Lordſhip therefore decreed, that an account ſhould be taken of the arrears of the three hundred pounds a year due to the defendant, and what ſhall be found owing on the balance of that account was to be conſidered as a charge on the term of 500 years created by the marriage ſettlement, for ſecuring the payment of the three hundred pounds a year.

(D) How far gifts between husband and wife will be ſupported.

July the 12th 1738.

Sarah Lucas, only child of *John Lucas*, by *Mary* his firſt wife, — — — — — } Plaintiff.

Iſabella Lucas, widow of the ſaid *John Lucas*, and *Iſabella Lucas* an infant, their child, — — } Defendants.

Caſe 146. *Mary Lucas* in her laſt illneſs requeſted of her huſband that her wearing apparel, gold watch, pearl necklace, rings, &c. in her poſſeſſion, and uſed by her, might be given to her daughter, and put into a friend's hands for her daughter's uſe, which the huſband promiſed, and after his wife's death, gave the ſaid things to his daughter, and made an inventory, and locked them in a ſtrong cheſt, and gave the key to his wife's friend, and ſent the things therein to her for his daughter's uſe. Though the huſband afterwards took ſome of the things into his poſſeſſion again, that is not ſufficient to invalidate the gift, which was perfect by the former act.

MARY Lucas, in her laſt illneſs, requeſted of *John Lucas* her huſband, that her wearing apparel, gold watch, pearl necklace, rings, ornaments, and ſeveral pieces of plate, coins, and other things in her poſſeſſion, and uſed by her, might be given to the plaintiff, and put into the hands of Mrs. *Dunſter* (a friend) for the plaintiff's uſe; which *John Lucas* promiſed, and after her death he gave the ſaid things to the plaintiff, and made an inventory and valuation of the ſame, to the amount of 187*l.* 8*s.* 6*d.* and locked them in a ſtrong cheſt, and after making three copies of the inventory, put one into the cheſt, and gave the key with another copy to Mrs. *Dunſter*, and the third to *James Lucas* his brother, to the intent it might be known what was given: In the preſence of ſeveral perſons he ſent the cheſt, with the things therein, to Mrs. *Dunſter*, for the plaintiff's uſe, and ſhe accepted the ſame on the plaintiff's behalf.

John Lucas, after his firſt wife's death, by articles of the 26th of *June* 1734. between him of the firſt part, and *Holmes* and defendant *Iſabella* of the ſecond part, reciting an intended marriage between him and *Iſabella*, and that *Holmes* had agreed to pay him 2000*l.* and that he had a daughter (the plaintiff) by a former wife; the ſaid *Lucas* agrees that if he ſhould die in the life-time of *Iſabella*, and there ſhould be any child between them, or that the plaintiff ſhould be then living, that then *Iſabella* ſhould enjoy one third of his perſonal eſtate, after payment of his debts and funeral expences, and her widow's chamber, according to the antient cuſtom of *London*; and that the children of ſuch marriage, together with the plaintiff, if living, ſhould enjoy one third of his perſonal eſtate for their reſpective uſe, and that the proviſion made for *Iſabella* was in full of her dower and thirds.

John Lucas in 1736. died, leaving *Iſabella* his wife, and one only child by her, *Iſabella* the infant, and alſo his daughter the plaintiff, and by his will of the 10th of *June* 1736. directed that the ſurplus of his eſtate and effects, after his marriage contract was duly provided for, and all his perſonal eſtate, ſhould be divided between his wife and daughters, the plaintiff, and *Iſabella* the infant.

The defendant *Iſabella* the widow, inſiſts on 1000*l.* *South Sea* annuities, which the teſtator in his life time transferred to her, and as ſhe ſays intended thereby to give them to her, and by word of mouth declared

declared that ſhe ſhould hold and enjoy them to her own uſe, and before the transfer promiſed often to transfer them to her own uſe, and gave inſtructions to an attorney to draw a deed to declare them to her own uſe, who accordingly veſted it in truſtees, in truſt that they ſhould transfer the ſame to defendant for her own uſe, but that teſtator (on information that it would be better) transferred them to the defendant, and aſſured her that ſuch transfer would effectually ſecure them to her, and which he did as a further proviſion. And to make it equal to her fortune.

And as to the watch, pearl necklace, and other things claimed by the plaintiff, inſiſts that the teſtator voluntarily, and of his own accord, ſent for the cheſt, and diſpoſed and altered the things therein, as he thought fit, and that he made her a preſent of the ſnuff box, and a pearl necklace out of the cheſt.

The bill prayed a delivery of the cheſt, and the things therein contained, and a diſtribution of the eſtate according to the marriage articles, and the will of the teſtator *John Lucas*.

Lord Chancellor: As to the firſt part of the bill, I am of opinion that the delivery by *John Lucas* of the things in a cheſt to Mrs. *Dunſter* for the uſe of his daughter, who was the child left by the firſt wife, according, as he ſaid, to the promiſe made to his wife in her life-time, is a ſufficient delivery, to veſt the property in the daughter, and though he did afterwards take ſome of the things into his poſſeſſion again, as the watch and necklace, that was not ſufficient to invalidate the gift, which was made perfect by the former act.

Gifts between a huſband and wife will be ſupported in this court, though the law does not allow the property to paſs.

As to the transfer by *John Lucas* of 1000 *l. South Sea* annuities to his wife in her own name, I am of opinion this is not a good transfer, ſo as to affect the marriage articles, by making any alteration in the groſs eſtate of the teſtator, the whole of which was liable by the marriage articles to be divided into ſuch proportions, which he could not voluntarily alter; and therefore this is as much a fraud on the articles, as it would be on the cuſtom of the city of *London*, yet it is good as againſt the teſtator himſelf, and to be anſwered out of his teſtamentary ſhare, if ſufficient; and in this court, gifts between husband and wife have often been ſupported, though the law does not allow the property to paſs: It was ſo determined in the caſe of Mrs *Hungerford* and in lady *Cowper*'s caſe, before Sir *Joſeph Jekyll*, where gifts from lord *Cowper* in his life-time were ſupported, and reckoned by this court, as part of the perſonal eſtate of lady *Cowper*.

" His Lordſhip declared, that the jewels and other things given " by the teſtator to the plaintiff, and delivered in a cheſt to Mrs. " *Dunſter*, for her benefit, are not to be conſidered as any part of " the teſtator's perſonal eſtate, and that what ſhould appear to be the " clear perſonal eſtate, after payment of debts, ſhould be divided " into three parts; one third to be retained by defendant *Iſabella* in " her own right, by virtue of her marriage articles; another third to " be the teſtamentary part of teſtator, and the remaining third is to be " divided into moieties, one to belong to the plaintiff, the other to " *Iſabella* the teſtator's daughter, by his ſecond wife.

" And his Lordſhip declared, that the transfer of the 1000*l.* " *South Sea* annuities, by the teſtator to his wife, ought not to take " effect in prejudice of the marriage articles, but to be brought into " the perſonal eſtate before the diviſion be made, but that ſuch " transfer ought to be conſidered as a good gift againſt the teſtator " *John Lucas* himſelf, and that the defendant *Iſabella* the widow " ought to receive a ſatisfaction for the 1000*l. South Sea* annuities " out of the teſtator's third or teſtamentary part of his perſonal eſtate, " ſo far as that will extend, and doth therefore order that the teſta- " tor's third part be applied in the firſt place, to make good to the " defendant *Iſabella* the value of the *South Sea* annuities, and the di- " vidends thereof from the death of the teſtator." The jewels, *&c.* his Lordſhip directed to be delivered to the defendant *James Lucas* for the benefit of the plaintiff.

(E) Concerning alimony and ſeparate maintenance.

February the 17th 1737.

Moore v. *Moore.*

Caſe 147. *A.* before, and in conſideration of a marriage and a portion with his intended wife, conveys lands to truſtees, upon truſt to pay 100*l. per ann.* to the lady for her ſeparate uſe. She many years after the marriage, upon diſputes between her and her huſband, leaves him, and goes abroad. The truſtees (there being great arrears of the annuity) bring an ejectment for recovery of the terms, and the huſband his bill for an injunction to ſtay the proceedings in ejectment.

Lord Chancellor was of opinion he could not relieve againſt the payment of the annuity, notwithſtanding the huſband by his bill offers to receive his wife again, and pay her the annuity, if ſhe would live with him, but directed an account, and on payment of the arrears of the annuity, the injunction to be continued, or otherwiſe, diſſolved; and if default in the growing payments, the wife to be at liberty to apply.

SIR *Richard Francis Moore* by ſettlement dated the 18th of *October* 1707. made before, and in conſideration of the marriage to be had between the plaintiff and defendant, and of 6000*l.* her portion, conveyed lands to truſtees for 99 years, upon truſt to pay out of the rents 100*l.* a year, tax free, by half yearly payments, to lady *Moore* for her ſeparate uſe.

The marriage took effect, and after living above twenty years with great harmony, upon ſome differences and diſputes ariſing between the husband and wife, ſhe went privately from him in *January* 1728. and got into *France*, and now reſides there; and having prevailed with her truſtees to bring an ejectment for the recovery of the term, there being great arrears of the annuity due, they were proceeding to judgment and execution, when the husband thought proper to bring his bill in equity, complaining of his wife's withdrawing herſelf, and inſiſted that ſhe is intitled to the annuity only during her cohabitation with him, and offers to pay the annuity if ſhe would live with him, and to receive her kindly, and forgive what is paſt;

and therefore prays that he may be relieved againſt the payment of the annuity, and may have an injunction to ſtay the proceedings in ejectment.

After the ejectment brought by the truſtees, the husband commenced a ſuit in the eccleſiaſtical court, for a reſtitution of conjugal rights, and upon the wife's not appearing to the proceſs of the court, a ſentence of excommunication was pronounced againſt her.

For the plaintiff in this caſe, there were two points chiefly inſiſted upon.

Firſt, That his wife by her misbehaviour in cauſeleſly deſerting her family, had forfeited her pin-money.

Secondly, That it was intended for her only to ſpend in her family.

Upon which it was argued, that by the marriage contract, ſhe is obliged to cohabit, and that failing in this, ſhe ought not to have her annuity, and that therefore it is equitable to reſtrain her till ſhe returns, and lives with her husband, and behaves as ſhe ought to do, and that he has no remedy to get her back but by ſtopping this pin-money.

That this allowance was only to promote harmony between the plaintiff and the defendant, and to enable her to do acts of bounty in her family, therefore when the reaſon for it ceaſes, the allowance ought to ceaſe likewiſe.

That in many caſes the court have interpoſed to make a proviſion for a wife, on the misbehaviour of the husband, *pari ratione* they ought to interpoſe, where the wife misbehaves, as in the caſe of *Colemore* v. *Colemore*, and *Oxenden* v. *Oxenden*, 2 *Vern.* 493. and that, in the preſent caſe, the lady's deſerting her family, in the manner ſhe has done, is a ſufficient reaſon for the court to interfere ſo far, as to ſtop the payment of the pin-money, in order to induce her to return to her duty.

Mr. *Cox* for the defendant, argued that theſe three conſiderations naturally aroſe upon this caſe.

Firſt, Whether the ſettlement ſhall be taken ſtrictly, or whether it ſhall be taken to intend a benefit to the defendant, on condition only of cohabitation.

Secondly, If to be conſtrued conditionally only, then whether on cruel uſage, ſhe is not juſtifiable in ſeparating from her husband.

Thirdly, Whether the uſage here has been ſuch as may juſtify her ſeparation.

He argued, that according to the words and legal operation of the deed, there is a proviſion at all events for the defendant of 100 *l.* a year, and *quoad hoc*, ſhe is to be conſidered as a feme ſole, and as a ſtranger to the plaintiff; and to take in other matters extrinſick, and not appearing from the words of the deed, would be judging of another deed, not of this. In the caſe of *Wills*, which generally allows the greateſt ſcope, in order to let in the intent, the conſtruction has always been bounded and circumſcribed to the words, for the general rule has uniformly been, that unleſs the intent can be

collected from the words, it is in vain to urge it, for that otherwiſe it would be making a man's will, not conſtruing it, and deeds are to be conſtrued more ſtrictly, and the rule of law is, that they are to be taken moſt ſtrongly againſt the grantor, and moſt beneficially for the grantee (*a*). That *nemo contra factum ſuum venire poteſt*, 2 *Inſt.* 66. but to come into the conſtruction contended for on the part of the plaintiff, would be to invert both theſe rules.

(*a*) 5 Co. 7. b. and Co. Lit. 183. a. and 197. a.

In *Aſtry* v. *Ballard*, 2 *Mod.* 193. it is ſaid men's grants muſt be taken according to uſual and common intendment, and where words may be ſatisfied, they ſhall not be reſtrained further than they are generally uſed, for no violent conſtruction ſhall be made to prejudice the right of any one, contrary to the plain meaning of the words.

If the words then in the preſent caſe are to govern, they are ſo expreſs and plain, that they leave no room for conſtruction, and to put a meaning upon them, contrary to the plain ſenſe, would be bringing things to the utmoſt incertainty. In *Edrick*'s caſe (*b*) the judges ſaid they would not make a conſtruction againſt expreſs words, and yet there was a ſtrong equity in that caſe, to induce them to do it.

(*b*) 5 Co. 118. b.

If in the preſent caſe, the defendant ſtood in need of the aid of this court, from any defect in her ſettlement, it might with ſome colour of reaſon be ſaid, that ſhe had forfeited her right to it by her elopement, but even in ſuch a caſe, though it appeared that a wife had lived in open lewdneſs, yet ſhe was not diſmiſſed with ſuch an anſwer; for in the caſe of *Mildmay* v. *Mildmay*, 1 *Vern.* 53. and 2 *Chan. Caſ.* 102. the plaintiff a feme covert, who had 50 *l. per ann.* ſettled on her by her husband, to be paid out of certain rents, ſuggeſted by her bill that he had, on purpoſe to defraud her of this annuity, procured the tenants to ſurrender their eſtates, on which the ſaid rents were reſerved, and prayed that it might be made good to her by decree of the court; and notwithſtanding it appeared that ſhe was a very lewd woman, and had eloped, the *Lord Chancellor* ordered, that the husband ſhould ſtand in the place of the tenants, and admit the rent payable, and ſhe to recover it at law as well as ſhe could: There the ſettlement was merely voluntary, and after marriage, and the wife charged not only with elopement, but *open lewdneſs*, and yet it was thought reaſonable to decree in her favour, and give her ſuch relief, that without it ſhe muſt have failed at law: In the preſent caſe, the ſettlement appears to be upon the higheſt conſiderations, that of marriage, and a large portion, and the utmoſt charged upon the lady, is a bare elopement; if therefore, in *Mildmay*'s caſe, it was reaſonable to aid her legal remedy, *a fortiori* it would be unreaſonable in the preſent caſe, to reſtrain her from purſuing it.

As to the offer of the plaintiff to receive her, and on her return to pay the annuity, there are many caſes, where ſuch an offer, againſt the expreſs contract of the party has been rejected, as in the caſe of *Seeling* v. *Crawley*, 2 *Vern.* 386. and numberleſs more to the ſame purpoſe: For if a man will with his eyes open make a bargain, that he

he after finds reaſon to repent of, he is not intitled to relief here, it is the effect of his own folly, and he muſt take the conſequences.

It may beſides be material to conſider, what ſpecies or kind of offence it is that the defendant ſtands charged with; it is at moſt but a ſimple elopement, which is an offence not taken notice of, or any way puniſhable by the law of the land: By the Common law, a wife was intitled to dower, notwithſtanding an elopement accompanied with adultery, and though by the ſtatute of *Weſtminſter* (*a*) adultery and elopement are made a bar to dower, yet it has always been taken ſo ſtrictly, that the one without the other, has often been held to be not within the ſtatute (*b*), certainly both together, tho' a bar to dower, would be no bar to her claiming a proviſion made for her by a jointure; and though in the ſpiritual court, the husband may ſue her for reſtitution of conjugal rites, and for refuſal ſhe may fall under the cenſures of the church, yet that is not in reſpect of elopement, for ſuch a ſuit may be as well where there is a cohabitation, as otherwiſe.

(*a*) Weſt. 2. ch. 34.

(*b*) Perk. pl. 335. Fitz. Abr. tit. Dower, pl. 153. Fitz. N. B. 150. lett. H.

To ſay then, that in equity ſhe is puniſhable, or that ſhe might in this reſpect be deprived of any of her legal privileges, would be to ſet up an arbitrary legiſlative power in the court, to declare offences, and to puniſh them by no other meaſure than it's own diſcretion.

That a woman is juſtifiable in deſerting her husband, where he uſes her with cruelty, cannot be diſputed; but then another queſtion will ariſe, whether the uſage which the defendant hath met with, in the preſent caſe, be ſufficient to juſtify her conduct or not?

It appears evident from the proofs on both ſides, that there were continual quarrels between the plaintiff and the defendant about the pin-money, and they became ſo publick, that one witneſs ſwears, the plaintiff himſelf declared, his wife had been adviſed by a clergyman, to go away from him, and many of the witneſſes fully prove, that the plaintiff diveſted her of all kind of management, and made her not only as a cypher in his family, but took from her even the reſpect due to her from his ſervants; whether this be ſuch uſage as may juſtify her conduct, muſt be ſubmitted.

It is obſerved by *Puffendorff*, in his book of the law of nature and nations, in the chapter of marriage, that in caſe a husband denies his wife the reſpect due to her ſex, and her relation, ſo as to ſhew himſelf not ſo much a kind partner, as a troubleſome vexatious enemy, it ſhould ſeem very equitable, that ſhe might be relieved by divorce. *Barbeyrac* in his note (*d*) cites, to confirm this, the *Theodoſian Code*, *lib.* 5. *tit.* 17.

In the laws of our own country, there are hardly any footſteps to go by, or on which it may be ſaid with any certainty, what is cruelty in the husband. In the caſe of the wife of one *Cloborne*, *Hetley* 149. it was ſo far held, that ſpitting in her face was cruelty in the husband, that the court refuſed to grant a prohibition to the ſpiritual court, on a ſuit for a ſeparation, and alimony, founded on this cauſe, and ſaid by *Richardſon* chief juſtice, certainly the matter

ter alledged is cruelty, for ſpitting in the face is puniſhable in the ſtar-chamber.

Lord Chancellor: This is entirely a new caſe, and I do not remember any like it, that hath ever yet come in queſtion. None have been cited, and I believe there are none; but it is not this, or any other difficulty in the caſe itſelf, that makes it neceſſary for me particularly to ſpeak to it, but becauſe ſome things have been mooted of a much higher nature that require it.

The points to be conſidered are,

Firſt, Whether in any caſe this court ought to reſtrain a legal remedy, which a wife, or her truſtees have, to recover a ſeparate maintenance againſt the huſband?

Secondly, If from the evidence, in the preſent caſe, there be any reaſon to lay this reſtraint upon the defendant?

Upon the firſt it has been argued, that the defendant has cauſeleſly deſerted her family, and ſtood out contumaciouſly againſt the proceedings in the ſpiritual court.

Though this be a bill *primæ impreſſionis*, I ſhould think there might be caſes, where a huſband would be intitled to come into this court, to reſtrain the truſtees of his wife, by a decree here, from proceeding at law for her ſeparate maintenance; and it would be reaſonable to do this, eſpecially when ſhe elopes out of the juriſdiction of the eccleſiaſtical court, for that would be defeating their power, and there have I believe been caſes where there has been a ſentence for alimony in the ſpiritual court, in which this court have awarded *ne exeat regnum* in aid of the ſpiritual juriſdictions.

Theſe ſeparate maintenances are not to incourage a wife to leave her huſband, whatever his behaviour may be; for was this the conſtruction, it would deſtroy the very end of the marriage contract, and be a public detriment.

If a wife ſhould elope, be guilty of adultery, or a criminal converſation, or ſhould leave her huſband without any cauſe, and the eccleſiaſtical court can only puniſh her for contumacy, but ſhe is intirely out of their reach as to any other puniſhment, I ſhould think a huſband right in his application to this court, to prevent her truſtees from proceeding at law to recover her ſeparate maintenance; but then the relief muſt ariſe from a very plain caſe, where there is a criminal converſation plainly proved, and plainly put in iſſue.

But this is not the preſent caſe, for here is no incontinence, and nothing but the bare elopement is put in iſſue; ſo that it will turn upon the ſecond point, whether upon the circumſtances of this caſe, there be any reaſon to lay ſuch a reſtraint upon the defendant?

Two things have been urged in behalf of the plaintiff.

Firſt, That the wife has eloped without any cauſe.

Secondly, That ſhe has been duly ſummoned in the eccleſiaſtical court, on the part of the plaintiff, for reſtitution of conjugal rights, and has continued in contumacy, and as ſhe has been thereupon *excommunicated*, which is all the eccleſiaſtical court can do, as ſhe is

out of their juriſdiction, the huſband cannot have any fruit from his ſuit there.

As to the firſt, I am afraid theſe ſeparate proviſions do often occaſion the very evils they are intended to prevent, and if the plaintiff hath made his wife uneaſy in reſpect of the pin-money, as there is great reaſon to believe he did, though this will not juſtify her going away, yet it may be an excuſe, and poſſibly this agreement before marriage might be deſigned to provide for the wife, if ſuch diſſention ſhould happen between the parties, as would be a juſt inducement for them to ſeparate, though their quarrels ſhould be of ſuch a nature as are not proper to be laid before a court.

As to the objection, that the plaintiff can have no effect from his eccleſiaſtical ſuit, I lay no great ſtreſs upon it, for it was not inſtituted in the ſpiritual court till eight years after her going away, and after the ejectment brought by the truſtees; and though the ſpiritual court only fix citations upon the church door, or ſome other place, yet the huſband, who knew where ſhe was, might have given notice to her, or at leaſt to her attorney, who was employed in the ſuit at law. It has therefore the appearance of being commenced, in order to lay a better foundation for a ſuit here.

I do not find that the huſband has ever made any application to the wife, ſince ſhe ſeparated, to induce her to return, and therefore this caſe is diſtinguiſhable from *Whorwood* v. *Whorwood*, 1 *Ch. ca.* 250. becauſe there the huſband, before the bill brought, offered to be reconciled, and deſired to cohabit with her, and uſe her as his wife; nor was there any ſeparate maintenance in that caſe on the contract of the parties.

There is another thing that has great weight with me, the huſband's paying the annuity ſince the ſeparation, for ſix months after the wife was gone from him; when ſhe petitioned the court for other money upon a different truſt, he, upon an application by a croſs petition to ſtop this, expreſly ſays, that he had conſtantly paid her the annuity ever ſince ſhe left him, and offered to continue it: This is a ſtrong preſumption that he thought at leaſt ſhe was excuſable in ſeparating herſelf from him.

Theſe being the circumſtances of the caſe, I am of opinion there is not ſufficient foundation to give the plaintiff the general relief prayed by his bill, againſt the payment of the rent charge of one hundred pounds a year, but that he is intitled to be relieved againſt the ejectment, on the terms hereafter mentioned; and therefore do in the firſt place direct the Maſter to ſee what is due to Lady *Moore* for the arrears of her annuity, and to tax her coſts at law, and upon the plaintiff's payment of what the Maſter ſhall certify to be due to the defendant for the arrears of her annuity, and the coſts at law, and continuing the growing payments of the ſaid annuity, according to the marriage ſettlement, the injunction to be continued; but in default of payment of the arrears of her annuity and coſts at law, then the injunction to be diſſolved, and the plaintiff's bill diſmiſſed with coſts to be taxed; and if the plaintiff ſhall make default in continuing the growing payments of the annuity, then lady *Moore* is to be at liberty

to apply to the court. And I do further order, that the plaintiff in a fortnight's time pay to the defendant's ſollicitor a hundred pounds, on account of the arrears of her annuity now due.

N. B. Mr. Attorney general, after the decree was pronounced, ſaid, this was ſo uncommon a caſe that probably it would never happen again.

Lord Chancellor replied, If you think ſo, you muſt have a very good opinion of the ladies; for

In amore hæc omnia inſunt vitia, injuriæ,
Suſpiciones, inimicitiæ, inducæ.
Bellum, pax rurſum.

February the 17th 1737.

Thomas Cecil, and *Mary* his wife, and *Mary Juxon*, the wife of *Emanuel Juxon*, by her next friend, } Plaintiffs,

The ſaid *Emanuel Juxon*, *Moſes Juxon*, *Thomas Juxon*, and *Samuel Juxon*, } Defendants.

Caſe 148. The defendant *Emanuel Juxon*, ſome few years after his marriage, left his wife and two ſmall children, and went abroad, and did not ſee her or them in fourteen years; the wife's mother during this time intruſted her with millenary and other goods, and permitted her to maintain herſelf and children out of the profits. The huſband upon his return breaks open the wife's houſe, and takes away all her goods and produce of the ſtock ſo lent as aforeſaid. The bill therefore (*inter alia*) brought for the re delivery of the goods. What the wife has acquired in her huſband's abſence to ſubſiſt herſelf and family, is her ſeparate property, and not liable to the diſpoſition of the huſband; and what he has forcibly taken, he muſt deliver in ſpecie, but if diſpoſed of, muſt pay her the value ſet by the Maſter.

IN 1708. the plaintiff *Mary Juxon*, then *Mary Egginton*, daughter of *Ann Egginton*, intermarried with the defendant *Emanuel Juxon*, and had iſſue a ſon and two daughters. One of the daughters died an infant, and the ſon in 1731. and the plaintiff *Mary Cecil* the other daughter in 1733. intermarried with the plaintiff *Thomas*. The defendant *Emanuel Juxon*, ſome few years after the marriage with *Mary Juxon*, left her and two ſmall children, and went abroad, and did not ſee or ſend to them for fourteen years; and upon their being ſo deſerted, *Ann Egginton* in 1714, intruſted the plaintiff *Mary Juxon* with a ſtock of goods, proper for the buſineſs of a milliner and broker, and permitted her to take the profits thereof to maintain herſelf and children. In 1720. *Ann Egginton* being of a great age, did by bill of ſale, in conſideration that her ſon *Richard Egginton* had undertaken to provide for her during her life, ſell to him, his executors, *&c.* the goods, chattels, and perſonal eſtate therein mentioned, and deſired him to be aſſiſting to the plaintiff *Mary Juxon*, by lending her, as ſhe had done, ſuch of the goods as ſhe ſhould have occaſion for, *to ſupport herſelf and children.* And by another bill of ſale in 1722. *Ann Egginton* conveyed to the plaintiff, *Mary Cecil*, the reſidue of her goods and chattels, houſhold ſtuff, and all other her ſubſtance whatſoever, to her own proper uſe. *Ann Egginton* ſoon after died.

In 1725. the plaintiff *Mary Juxon*, who had been conſtantly aſſiſted by her daughter the plaintiff *Mary Cecil*, did by her ſeparate trade, and intirely out of the ſtock ſo lent, ſave the ſum of twenty

pounds, which ſhe intended to place out at intereſt. This ſum the defendants *Moſes*, *Thomas*, and *Samuel Juxon* deſired they might have on their bond, and ſhe conſenting, they executed a bond, and gave the ſame to her, and and ſhe afterwards advanced to the ſaid defendants another twenty pounds, and they gave her a note for the ſame: *Mary Juxon* never read either the bond or note, and it appeared that the ſaid defendants had made the bond and note payable to the defendant *Emanuel Juxon*, and no mention or notice taken that the money was the property of *Mary Juxon*.

The defendant *Emanuel Juxon*, upon his return to *England*, broke open the door of the wife's houſe, and took away the goods that belonged to *Thomas* and *Mary Cecil*, and alſo the very goods and the produce of the ſtock which had been lent by *Ann Egginton* to the plaintiff *Mary Juxon*, and were comprized in the ſaid bill of ſale.

Therefore the bill is brought, among other things, for the principal and intereſt of the bond and note, and for the re-delivery of the goods, which the defendant *Emanuel Juxon* had forcibly taken away, and that his wife the plaintiff *Mary Juxon* may be quieted in the poſſeſſion of what ſhe had acquired by trade, during the abſence of her huſband.

The defendant *Emanuel Juxon* inſiſted, that in her dealings ſhe made uſe of his name and credit, and that though he was out of the kingdom, yet the plaintiff *Mary Juxon* knew where he was, and notwithſtanding they lived ſeparately, yet it was no ſeparation by agreement, and therefore he being liable to be arreſted for the debts contracted by her in trade, was intitled to the profits and produce of the trade.

Sir *Joſeph Jekyll* was of opinion, as the deſertion of the defendant *Emanuel Juxon* was fully proved, this court would look upon any thing acquired by the wife in his abſence, to ſubſiſt herſelf and family, as her ſeparate property, and not liable to the diſpoſition of the huſband, when he ſhould pleaſe to come home and plunder her, and therefore declared that the plaintiff *Mary Juxon* is intitled to the goods that were in her poſſeſſion, and alſo to the ſtock in her ſeparate trade, before the ſame were taken away by the defendant *Emanuel Juxon*, *for her ſeparate uſe*, and that ſhe is alſo intitled to the bond and note, and therefore ordered it to be referred to a Maſter to ſee what was due for principal and intereſt, and that the ſame be paid to the plaintiff *Juxon* for her ſeparate uſe, and to ſee what goods and ſtock in trade were taken away, and the defendant *Emanuel Juxon* to deliver the ſame in ſpecie, to plaintiff *Cecil* and his wife, in truſt for the plaintiff *Juxon*, and if the goods are diſpoſed of, the Maſter to put a value on them, and the defendant *Emanuel Juxon* to pay the value in the ſame manner. No coſts of either ſide.

(F) Rule as to a poſſibility of the Wife.

July the 31ſt 1749.

Grey v. *Kentiſh.*

Caſe 149. Where a particular aſſignee took with notice of an equity in a wife, and the aſſignees under a commiſſion of bankruptcy againſt the husband, take ſubject to the ſame equity, the court, as it is her property, will decree it to be transferred to her.

AARON Wood gives by his will the moiety that he was intitled to of General *Wood*'s eſtate, to *Elizabeth Clarke* firſt for life, and then to *Elizabeth Kentiſh* for life, and afterwards to be equally divided among ſuch of the children of *Elizabeth Kentiſh*, as ſhould be living at her deceaſe.

This was afterwards, by a decree of the court of Chancery, directed to be laid out in *South Sea* annuities, and the intereſt thereof to be paid to *Elizabeth Clarke* for life, and after her death to *Elizabeth Kentiſh* for life, and after her death to her children.

The husband of *Elizabeth Kentiſh* aſſigns this legacy to one *Barret*, for ſecuring 150 *l.* upon a contingency mentioned in the deed of aſſignment, which alſo recites the decree.

The husband afterwards becomes a bankrupt, and the contingency upon which the wife was to take, not having happened at the time of the bankruptcy, *Barret* waived his aſſignment, and choſe to come in as a general creditor, and aſſigned over the legacy to the aſſignees under the commiſſion of bankruptcy againſt *Kentiſh*.

The petitioner (one of the children of *Elizabeth Kentiſh*, who is now dead) prays the *South Sea* annuities may be transferred to her, ſhe being intitled thereto under the will of *Aaron Wood*.

A husband cannot in law, aſſign a poſſibility of the wife, nor a poſſibility of his own, but this court will ſupport ſuch aſſignment for a valuable conſideration.

Lord Chancellor: A husband cannot aſſign in law a poſſibility of the wife, nor a poſſibility of his own, but this court will notwithſtanding ſupport ſuch an aſſignment, for a valuable conſideration, though I do not know any caſe where a perſon claiming under a particular aſſignee, has been obliged to make ſuch a proviſion as is prayed here.

As to aſſignees under a commiſſion of bankruptcy, and the wife of the bankrupt, the court has interpoſed, and obliged the aſſignees to make a proviſion.

What makes this caſe particular is, that there was a decree which ordered the money to be paid to the uſher of the court, and it is alſo in another reſpect particular, that this was not an abſolute aſſignment, but in the nature of a ſecurity only, and is now come back into the hands of the aſſignees of the husband.

What then is the equity ariſing to the wife under the decree? It will neither let the husband, if he remained *ſui juris*, or if he becomes bankrupt, his aſſignees touch the money, unleſs they firſt make a proviſion for the wife.

I will

I will put this caſe; Suppoſe the husband living and no bankrupt, and he had paid off the 150 *l.* and had died, would the repreſentative of the husband have been intitled? I am of opinion not, as it was in the nature of a pledge, but would have been the wife's by ſurvivorſhip.

Or if the husband had died without redeeming the eſtate of the wife, ſhe would have been intitled to have this eſtate diſincumbred, and the eſtate would have ſurvived to her.

The particular aſſignee, having taken with notice of the equity of the wife, and the aſſignees under the commiſſion taking it ſubject to the ſame equity with the particular aſſignee, I am of opinion it is her property, and therefore ſhall direct the *South Sea* annuities to be transferred to her.

His Lordſhip made an order accordingly.

Vide title *Infant, under the diviſion, How far favoured in Equity.* Smith *v.* Lowe.

Vide title *Dower and Jointure.*

Vide title *Injunction.*

Vide title *Partition.*

Vide title *Evidence, Witneſſes, Proof,* Cotton *v.* Luttrel.

CAP. XVII.

Bills of Exchange.

Vide title *Bankrupt, under the diviſion, Rule as to Drawers and Indorſors of Bills of Exchange.*

Vide title *Bankrupt, under the diviſion, Rule as to Principal and Factor.*

(A) Rule as to an indorſee.

Between the Seals after *Hilary* term 1736.

Lake v. *Hayes.*

LORD Chancellor: His Lordſhip ſaid, there has been a difference of opinion amongſt judges, Whether a demand muſt be made upon the drawer of a bill of exchange, to intitle an indorſee to an action, but that he was very clear in his own judgment, there is no

Caſe 150. Every indorſee is a new drawer.

occaſion to make that demand, for he conſidered every indorſor as a new drawer.

Rule as to the ſtatute of limitations.

It was adjudged by the late Maſter of the Rolls, that a bill in Chancery, which had been depending almoſt ſix years, ought not to be conſidered as a ſufficient demand of the debt, ſo as to take it out of the ſtatute of limitations.

CAP. XVIII.

Bill.

(A) Bill of peace to prevent multiplicity of ſuits.
(B) Bills of diſcovery, and herein of what things there ſhall be a diſcovery.
(C) Who are to be parties to it.
(D) Bills of review.
(E) Croſs bills.
(F) Supplemental bills.
(G) Bill to perpetuate teſtimony of witneſſes.

(A) Bill of peace to prevent multiplicity of ſuits.

December the 5th 1737.

Mayor of *York* v. *Pilkington* and others.

Caſe 151. Where there has been a poſſeſſion of a fiſhery for a conſiderable length of time, a perſon who claims a ſole right to it, may bring a bill to be quieted in the poſſeſſion, though he has not eſtabliſhed his right at law, and it is no objection upon a demurrer to ſuch bill, that the defendants have diſtinct rights, for upon an iſſue to try the general right, they may at law take advantage of their ſeveral exemptions, and diſtinct rights.

A Bill was brought in this court, to quiet the plaintiffs in a right of fiſhery in the river *Ouſe*, of which they claimed the ſole fiſhery for a large tract, againſt the defendants, who, as it was ſuggeſted by the bill, claimed ſeveral rights, either as lords of manors, or occupiers of the adjacent lands, and alſo for a diſcovery and account of the fiſh they had taken.

The defendants demurred to the bill, as being a matter cognizable only at law.

Lord Chancellor: Such a bill againſt ſo many ſeveral treſpaſſers is improper before a trial at law, a bill may be brought againſt tenants

by a lord of a manor for incroachments, *&c.* or by tenants againſt a lord of a manor as a diſturber, to be quieted in the enjoyment of their common; and as in theſe caſes there is one general right to be eſtabliſhed againſt all, it is a proper bill, nor is it neceſſary all the commoners ſhould be parties; ſo likewiſe a bill may be brought by a parſon for tythes againſt pariſhioners, or by pariſhioners to eſtabliſh a *modus*, for there is a general right and privity between them, and conſequently it is proper, to inſtitute a ſuit of this kind.

There is no privity at all in the caſe, but ſo many diſtinct treſpaſſers in this ſeparate fiſhery; beſides the defendants may claim a right of a different nature, ſome by preſcription, others by particular grants, and an injunction here would not quiet the poſſeſſion, for other perſons, not parties to this bill, may likewiſe claim a right of fiſhing.

It is more neceſſary too in this caſe, there ſhould be a trial at law, for it does not clearly appear, whether there is a right even in the plaintiffs, and if it ſhould eventually come out that the corporation of *York* are lords of this fiſhery, then would be the proper time to have an injunction to prevent their being diſturbed in their poſſeſſion. His Lordſhip therefore allowed the demurrer.

This demurrer was ſet down to be re-argued on the 13th of *March* 1737. when in ſupport of it, it was urged, that though it is charged in the bill, that this bill is to prevent multiplicity of ſuits, yet that was never allowed in this court, where the defendants have all different titles, and depend upon various matters and rights, and is not like the caſe of lords and tenants, or parſons and pariſhioners, nor properly under the rule of bills of peace, for no other party who has a title or right of the ſame nature, could be bound by this bill: The plaintiffs ſay, they have a preſcriptive right, this being a publick royal river, the defendants being lords of manors may have the ſame right, or for the ſame reaſon they cannot preſcribe for that, unleſs for ſome conſideration paid.

Mr. Attorney general *e contra*. The defendants never attempted to ſet up this excluſive privilege till now, but have always applied for leave to the plaintiffs; the defendants are owners of lands and lords of manors adjoining to this river, and it may properly be determined, whether the plaintiffs have that ſole and ſeparate right of fiſhery, and that is incumbent on the plaintiffs to prove; ſuch bills have been brought by the city of *London* for ſome certain duties, and though a great many particular rights have been inſiſted on, yet a general iſſue has been directed to try the right. In the caſe of

v. *Carter* 1734. a bill was brought by the lord of the manor of *Stepney*, for ſixpence on every load of hay carried to *Whitechappel*, though the lord, houſekeepers, and ſcavengers claimed each ſome right in the ſixpence, yet one general iſſue was directed by lord *Talbot* to try that queſtion, and the demurrer in that caſe was over-ruled.

Lord Chancellor: When this caſe was firſt argued, I was of opinion to allow the demurrer, but I have now changed my opinion.

Here

Here are two cauſes of demurrer, one aſſigned originally, and one now at the bar, that this is not a proper bill, as it claims a ſole right of fiſhery againſt five lords of manors, becauſe they ought to be conſidered as diſtinct treſpaſſers, and that there is no general right, that can be eſtabliſhed againſt them, nor any privity between the plaintiffs and them.

In this reſpect it does differ from caſes that have been cited of lords and tenants, parſons and pariſhioners, where there is one general right, and a privity between the parties. But there are caſes where bills of peace have been brought, though there has been a general right claimed by the plaintiff, and yet no privity between the plaintiffs and defendants, nor any general right on the part of the defendants, and where many more might be concerned than thoſe brought before the court: Such are bills for duties, as in the caſe of the city of *London* v. *Perkins* in the houſe of lords, where the city of *London* brought only a few perſons before the court, who dealt in thoſe things whereof the duty was claimed, to eſtabliſh a right to it, and yet all the King's ſubjects may be concerned in this right, but becauſe a great number of actions may be brought, the court ſuffers ſuch bills, though the defendants might make diſtinct defences, and though there was no privity between them and the city.

I think therefore this bill is proper, and the more ſo, becauſe it appears there are no other perſons but the defendants who ſet up any claim againſt the plaintiffs, and it is no objection that they have ſeparate defences; but the queſtion is, whether the plaintiffs have a general right to the ſole fiſhery, which extends to all the defendants; for notwithſtanding the general right is tried, and eſtabliſhed, the defendants may take advantage of their ſeveral exemptions, or diſtinct rights.

Another cauſe of demurrer is, that the plaintiffs have not eſtabliſhed their title at law, and have therefore brought their bill improperly to be quieted in poſſeſſion. Now it is a general rule, that a man ſhall not come into a court of equity, to eſtabliſh a legal right unleſs he has tried his title at law, if he can; but this is not ſo general an objection as always to prevail, for there have been variety of caſes both ways.

There are two caſes reported together in *Prec. in Eq.* 530. *Buſh* v. *Weſtern*, and the *Duke of Dorſet* v. *Serjeant Girdler*; in the former it was held, that a man who has been in poſſeſſion of a water courſe 60 years, may bring a bill to be quieted in his poſſeſſion, although he had not eſtabliſhed his right at law; in the latter, that a man who is in poſſeſſion of a fiſhery, may bring a bill to examine his witneſſes *in perpetuam rei memoriam*, and eſtabliſh his right, though he has not recovered in affirmance of it at law; otherwiſe if he is interrupted, and diſpoſſeſſed, for then he had his remedy at law.

In the preſent caſe the demurrer was over-ruled.

November

November the 16th 1738.

Conyers, and others, —— —— Plaintiffs.

Lord *Abergavenny*, and others, — — Defendants.

Caſe 152. A bill of peace praying an injunction to ſtay the defendants who have an intereſt in the manor of *Tunbridge*, from proceeding at law againſt the plaintiffs for building houſes on the manor without leave, and that they may accept of ſuch a compenſation as the court ſhall think reaſonable.

A Motion by the plaintiff for an injunction to ſtay the proceedings of the defendants at law till the hearing of the cauſe in this court, upon a ſuggeſtion that this is a bill of peace and always favoured in equity, for the principal prayer of it is, that the defendants who have only a ſmall intereſt in that part of the manor of *Tunbridge*, which is in diſpute, may accept of ſuch a compenſation as this court ſhall think reaſonable, for the houſes the plaintiff has built upon the waſte.

Lord Chancellor: I do not ſee how this court can aſſume ſuch a power, unleſs they had a right of being applied to as an arbitrator, or had a legiſlative authority lodged in them, neither of which belong to them; for they act only in a judicial capacity.

The court diſſolved the injunction, as they cannot be applied to as an arbitrator, nor have any legiſlative authority, but act in a judicial capacity.

The proper bill of peace was a former one, brought by the tenants of this manor, for ſuch a bill may as well be brought by tenants againſt a lord, as by a lord againſt tenants; but that bill was diſmiſſed, upon the ſuggeſtion of this very plaintiff Mr. *Conyers* himſelf, that they ought regularly to proceed at law; and therefore thither let him go, and not apply improperly for relief in that court, which he had abſolutely inſiſted had no power of relieving. This comes very near the caſe of election, for he has choſen to proceed at law, and therefore let him ſeek his remedy there.

A bill of peace may as well be brought by tenants againſt a lord, as by a lord againſt tenants.

His Lordſhip for theſe reaſons ordered the injunction to ſtand diſſolved.

(B) Bills of diſcovery, and herein of what things there ſhall be a diſcovery.

February the 9th 1737.

Phipps v. *Steward.*

Caſe 153.

SIR *Robert Cowan* intending to leave *England*, declared to the plaintiff he had made his will, and that after giving his perſonal eſtate

to his daughter and the heirs of her body, he had limited the ſame to the plaintiff.

While a ſuit is depending in the eccleſiaſtical court for an adminiſtration, a bill may be brought here for an account of the perſonal eſtate. The reaſon why a bill is allowed to be brought before probate is, that the eccleſiaſtical court have no way of ſecuring the effects in the mean time.

Some time after Sir *Robert Cowan* died, the daughter married the defendant, and upon a ſuppoſition that there was no will, adminiſtration was applied for by the daughter in the ſpiritual court; pending a ſuit there, the preſent bill was brought by the plaintiffs to have an account of the perſonal eſtate.

A deviſe of perſonal eſtate to *A.* and the heirs of her body, it has never been ſolemnly determined that where money is ſo entailed, the whole ſhall go to the firſt taker.

To this bill the defendant demurred, for that there was a ſuit now depending in the ſpiritual court for adminiſtration to the perſonal eſtate of Sir *Robert Cowan*.

Lord Chancellor over-ruled the demurrer, and ſaid, in the caſe of *Powis* v. *Andrews*, a bill of this nature was allowed before probate, and that determination was founded on a former caſe of *Japhet Crooke*, in the time of Lord *Harcourt*, relating to the will of Mr. *Hawkins*. *(a)*

(a) 1 *Vern.* 106. *Wright* v. *Blick*, and 2 *Vern.* 49. *Dullwich College* v. *Jackſon.*

The reaſon for theſe caſes is, that the eccleſiaſtical court have no way of ſecuring the effects in the mean time, nor did he know there was any ſolemn reſolution, where money is entailed in the manner the teſtator has done here, that the whole of it ſhall go to the firſt taker. The caſe of *Colvel* v. *Shadwell* in the time of Lord *Cowper* is to the contrary.

His Lordſhip reſtrained the defendants from receiving any more of Sir *Robert Cowan*'s perſonal eſtate till further order.

January the 23d 1738.

Woodcock v. *King*.

Caſe 154. Where a bill is for a diſcovery merely, you cannot move to diſmiſs it for want of proſecution, but pray an order only on the plaintiff to pay defendant the coſts of the ſuit to be taxed.

IT was in this caſe laid down by *Lord Chancellor* as a general rule, that where a bill is brought for a diſcovery merely, and prays no relief, you cannot move to diſmiſs it for want of proſecution, but can only pray an order upon the plaintiff to pay to the defendant the coſts of ſuit to be taxed by a Maſter.

February the 28th 1738.

Atkins v. *Farr.*

Case 155. The defendant voluntarily gave the plaintiff a bond in the penalty of 1000*l.* on condition that if he did not marry her within a twelvemonth after date, he would pay her 500*l.* Soon after, under pretence of reading it, he took it againſt her conſent, and carried it away with him. The bill brought for the delivery of the old bond, or if cancelled, that he may execute a new one. The plaintiff in the original bill dying inteſtate, the mother, as adminiſtratrix, and thereby intitled to the 500*l.* revived againſt the defendant. The plaintiff, as the bond was gone by the default of the defendant, is therefore intitled not only to a diſcovery here, but relief by payment of the money, and the defendant decreed to pay what is due for the principal ſum of 500*l.* in the condition of the bond, with intereſt for the ſame at the rate of 4 *per cent.* from the day of filing the original bill.

THE plaintiff in the original bill, and daughter of the preſent plaintiff, did thereby charge, that being a ſingle woman, ſhe became acquainted with the defendant, who made his addreſſes to her by way of courtſhip, and for marriage, and ſhe conſented thereto; and that on the 9th of *February* 1732. he voluntarily executed to her a bond in the penalty of 1000*l.* on condition that if the defendant did not marry her within a twelvemonth after date, he would pay her 500*l.*

On the 17th of *March* following paying her a viſit, and ſaying he was deſirous to read the bond, ſhe fetched it him, and at the defendant's requeſt gave it him to read, who took it, and againſt her conſent put it into his pocket, and immediately went away with it; but coming to her again the next day, ſhe inſiſted on the bond, but he pretended he had burnt it, and would execute another bond of the like purport, and deſired her to get it drawn. She accordingly applied to the perſon who drew the former bond, and he in purſuance of the defendant's directions ingroſſed a new bond to the ſame effect with the other, and the defendant promiſed to execute the ſame, but afterwards abſolutely refuſed to do it. And ſhe therefore by her bill prayed that the defendant might be decreed, if he had not cancelled the bond, to deliver the ſame again, and in caſe he had deſtroyed it, then to execute a bond of the like tenor.

The defendant, by his anſwer to the original bill, admitted that in 1732 he became acquainted with *Mary Atkins*, but that ſhe was then, and before, a woman of very bad fame and character, and had been an orange girl in the playhouſe, and that he never made any addreſſes to her, except ſuch as are uſually made to women of ill character, and that during his acquaintance with her he did execute a bond conditioned for a marriage within twelve months, but when he executed it, apprehended it would not be of any validity againſt him, and that about two months after the execution of the bond, ſome difference ariſing between them, ſhe of her own accord delivered him the bond, telling him at the ſame time ſhe had a gentleman would do better for her, and that he then put the bond into his pocket, and that ſhe did not within twelve months after her giving up the bond inquire after, or aſk for the ſame, till the demand ſet up by her bill, and that

he never promiſed to give her any bond of the like effect, or ever gave directions for any other to be drawn, and inſiſts as ſhe delivered it up voluntarily, that he ought not to be obliged to execute any other bond.

The plaintiff in the original bill dying inteſtate, and the mother having taken out adminiſtration, and thereby become intitled to the 500 *l.* due from the defendant by his bond, brought her bill of revivor againſt him.

Lord Chancellor: The plaintiff in the original bill had certainly an equity founded on the bond's being gone by the default of the defendant, on which ſhe might have had her remedy at law, and therefore was intitled not only to a diſcovery, but relief by the payment of the money; and though the proof of the bond's being forced from her is by one witneſs only, it is no objection in this caſe, for the plaintiff herſelf was intitled to make oath of the loſs of the bond, and that it was thus taken from her; and as this fact is proved by the oath of one witneſs againſt the oath of the defendant in his anſwer, and as there is likewiſe proof of the defendant's offering to execute a new bond, that is a circumſtance ſupporting the evidence of this ſingle witneſs, ſufficient to take it out of the general rule; nor are there any collateral circumſtances to bar her, for no other averment was neceſſary to be made at law, if ſhe had the bond, than that the money was not paid; and as ſhe has by the defendant's fault loſt the bond, ſhe has ſufficiently averred it in her bill; nor was there a neceſſity that the promiſe ſhould have been reciprocal in this caſe, or any occaſion for the court to relieve againſt the penalty of the bond, becauſe it is not inſiſted on by the original bill, which is brought merely for the five hundred pounds, which muſt be conſidered as the ſtated damages between the plaintiff and defendant.

His Lordſhip therefore ordered that it be referred to a Maſter to compute what is due for the principal ſum of 500 *l.* mentioned in the condition of the bond, with intereſt for the ſame from the day of filing the original bill, at the rate of 4 *per cent. per ann.* And decreed the defendant to pay what ſhall be ſo found due to the plaintiff, and alſo the coſts of this ſuit.

November the 24th 1738.

Dun, and others, —— —— —— Plaintiffs.

Coates and *Balguy*, —— —— — Defendants.

Caſe 156.

This court will not admit a bill of diſcovery in aid of the juriſdiction of the eccleſiaſtical court, becauſe they are capable of coming at that diſcovery themſelves.

THE defendants had inſtituted a ſuit in the eccleſiaſtical court, for a church rate, to which there was a cuſtom pleaded of ſomething done in lieu of the rate, and that plea admitted.

And now a bill is brought here for an injunction to ſtay the defendants proceedings in the eccleſiaſtical court, and to be relieved againſt the rates, and to compel a diſcovery from the defendant *Balguy* of the value of the reſpective real and perſonal eſtates of the ſeveral inhabitants

inhabitants of the ſeveral pariſhes and places in the bill mentioned, and how the money collected by means of the ſaid rates had been diſpoſed of.

The defendants demurred to ſo much of the bill as ſought to ſtay the proceedings in the eccleſiaſtical court by injunction, and alſo as to the diſcovery prayed thereby, as the matters contained in ſuch part of the bill as they demurred to, were properly cognizable in the eccleſiaſtical court, and, if true, ought to have been inſiſted on there, or at common law, and was not a proper foundation for a bill in this court.

Lord Chancellor: This court will not admit a bill of diſcovery in aid of the juriſdiction of the eccleſiaſtical court, becauſe they are capable of coming at that diſcovery themſelves.

Where there is a cuſtom pleaded to a ſuit in the eccleſiaſtical court for a church rate, and the plea admitted, they may proceed to try the cuſtom; but if denied, 'tis a ground for a prohibition.

If there is a ſuit inſtituted in the eccleſiaſtical court for a church rate, and a cuſtom pleaded of a certain ſum in lieu of the rate, or ſomething done in the room of it, and that plea admitted, they may proceed to try that cuſtom in the ſame manner as a modus; but if the cuſtom is denied, it would be a proper ground for a prohibition, *propter triationis defectum in curiâ eccleſiaſticâ*, for the trying of the cuſtom is the province of the common law.

His Lordſhip was of opinion it was a good demurrer, and therefore ordered that the ſame do ſtand and be allowed.

Hil. Term 1747.

Boden and others, aſſignees of *Dellow* a bankrupt, v. *Dellow* and others.

Caſe 157.

Where a bill is brought for the diſcovery of concealments of a bankrupt's eſtate, the court will not allow the defendants to look into their depoſitions taken by the commiſſioners before they put in their anſwer.

THE aſſignees ſuſpecting the bankrupt had made concealment, examined a great many of his relations at *Guildhall*, and have now brought a bill againſt the ſame perſons for diſcovery of thoſe concealments.

Mr. *Green* moved on the part of the defendants, that they might be allowed to look into their depoſitions before the commiſſioners, in order to make their anſwers conſiſtent.

Lord Chancellor: I will not grant the motion, for as truth is always uppermoſt, they may, if they pleaſe, put in an anſwer conſiſtent with what they have already ſworn in their depoſitions, ſuppoſing they are true; if falſe, they ſwore at their own peril, and I will not give leave to ſee them, merely for their own ſecurity, that they ſhould not ſwear differently in one from what they have done in the other.

(C) Who are to be parties to it.

February the 8th 1737.

Herring v. *Yoe.*

Case 158. A husband tenant for life, remainder to his wife for life, he brings a bill alone for the opinion of the court upon the settlement; objection for want of making the wife a party allowed.

A Marriage settlement having been made of certain lands on the husband for life, remainder to the wife for life, with divers remainders over; the present bill was brought by the husband in order to have the opinion of the court whether a certain parcel of land was not intended to be included in that settlement.

There was an objection taken at the hearing of the cause, that the wife was not made a party.

Lord Chancellor allowed the objection, for he said if the court should be of opinion against the husband, such decree would not bind the wife; his Lordship therefore ordered the cause to stand over, that the wife might be made a party.

(D) Bills of Review.

June the 29th 1738. at *Lincoln's Inn Hall.*

Catterall v. *Purchase.*

Case 159. On arguing a demurrer to a bill of review, what appears on the face of the decree can be read only, but after a demurrer over-ruled, a plaintiff may read any evidence as at a re-hearing.

IN a cause that came before the court upon a bill of review to read some charges out of the original bill, the plaintiff offered to shew some errors in the decree. To this it was objected, that no errors in the decree were cognizable, but what appeared on the face of the decree, and therefore any evidence of errors but from the decree itself was opposed.

Lord Chancellor: It is true on arguing a demurrer to a bill of review, nothing can be read but what appears on the face of the decree; but after the demurrer is over-ruled, the plaintiffs are at liberty to read bill or answer, or any other evidence as at a re-hearing, the cause being now equally open; to which purpose the case of *Jackson* v. *Francis* was cited by Mr. *Brown.*

(E) Cross

(E) Croſs bills.

January the 12th 1738.

Creſwick v. *Creſwick.*

Caſe 160.

Where a defendant in a croſs bill, but plaintiff in the original, is in contempt for not putting in an anſwer, the proper motion is to inlarge publication in the original to a fortnight after the anſwer is come in to the croſs bill.

IT was in this caſe laid down by *Lord Chancellor* as a general rule, that where the defendant in a croſs bill, who is plaintiff in the original, is in contempt for not putting in an anſwer to the croſs bill, it is irregular to move to ſtay proceedings in the original cauſe, till ſuch anſwer comes in, but the plaintiff in the croſs bill, may have publication in the original inlarged to a fortnight after the anſwer to his bill is come in.

(F) Supplemental bills.

March the 19th 1736.

Brown v. *Higden.*

Caſe 161.

It is a conſtant rule, that matters ſubſequent to the original bill, muſt come by way of ſupplemental bill and revivor.

AN original bill was brought by a creditor againſt Mrs. *Higden* as adminiſtratrix of *A.* who being a married woman, her huſband was alſo made a party.

Before the cauſe was heard the wife dies, and the huſband took out adminiſtration *de bonis non, &c.* of *A.* upon which the plaintiff amended his bill againſt the husband, to which amended bill the defendant demurred. *For any matter which happens ſubſequent to the original bill, cannot be put into an amended bill,* but a bill of revivor and ſupplemental bill ought to be brought.

Mr. *Verney* for the plaintiff inſiſted that in equity the ſuit abated only againſt the wife, and cited the caſe of *Humphreys* v. *Humphreys,* 3 *Wms.* 349. there the bill charged, by way of amendment, matters which aroſe after filing of the bill, and therefore ſeemed a proper caſe for a ſupplemental bill, and though this was pleaded to the bill, yet the plea was over-ruled, for that ſuch matters may be charged either by way of ſupplemental, or by way of amended bill.

Tho' by the 8 *Will* 3. a ſuit ſhall not abate upon death of one defendant, yet it muſt be taken with this reſtriction, that the ſubject matter of the bill is not hurt thereby.

Lord Chancellor: I am of opinion that the demurrer ought to be allowed, for I take it to be the conſtant rule, that matter ſubſequent to the original bill, muſt come by way of ſupplemental bill and revivor: Beſides the ſuit abated intirely by the death of the wife; for the husband who was before joined for conformity only, has an intereſt now, and though by the ſtatute of the 8 *Will.* 3. a ſuit ſhall not abate upon the death of one defendant, but ſhall go on againſt the others, yet it muſt be taken with this reſtriction; provided, the ſubject matter of the bill is not hurt by the death of ſuch defendant.

(G) Bill to perpetuate teſtimony of Witneſſes.

Vide title *Evidence, Witneſſes, Proof.*

Bill. *Vide* title *Award.*

Bill. *Vide* title *Anſwers, Pleas, and demurrers.*

Bill. *Vide* title *Amendment.*

CAP. XIX.

Bonds and Obligations.

February the 1ſt 1737.

Ramſden v. *Jackſon.*

Caſe 162. SUSANNAH *Ramſden* having entred into a bond for the payment of a conſiderable ſum of money to the defendant at her death, in the nature of a legatary diſpoſition of ſo much ſecured by bond, and the defendant having obtained judgment on the bond againſt the plaintiff her executor, the bill was brought by him to have the bond and judgment ſet aſide, ſuggeſting there was no conſideration for entring into it, and that it was obtained by improper means.

Lord Chancellor: I am of opinion againſt the plaintiff on the merits, that the bond is a good one, and therefore the only queſtion will be on what terms the plaintiff ſhould be relieved againſt the recovery at law, and ſome relief he is clearly intitled to, the judgment being for the whole penalty of the bond.

For the plaintiff it was inſiſted that he had a right to be relieved not only againſt the penalty, but likewiſe againſt the principal ſum in the condition of the bond, or part of it at leaſt, it being ſuggeſted that there is a deficiency of perſonal aſſets, and the plaintiff chargeable no further than he had aſſets.

The fact as to this was, that the plaintiff here pleaded *non eſt factum* to the bond at law, and had a verdict againſt him, and judgment in the uſual form, *de bonis teſtatoris, ſed non de bonis propriis.* And it was admitted the plaintiff in this reſpect ſtands exactly in the ſame light as he would at law, and the queſtion is, whether, when an executor pleads *non eſt factum, non aſſumpſit, &c.* and verdict againſt him, that will not amount to an admiſſion of aſſets, or if after

after ſuch verdict, he may ſtill defend himſelf, by denying aſſets, and that matter be controverted on the ſheriff's return to a *ſcire fieri* inquiry or otherwiſe.

Mr. *Fazakerley* for the defendant inſiſted that the verdict was an admiſſion of aſſets, and that this caſe was the ſame with a judgment confeſſed by an executor, or had againſt him by default, and upon his memory referred to a caſe in *Salkeld*'s reports, where it had been ſo ruled: He admitted the executor was not chargeable *de bonis propriis* in reſpect of his falſe plea, which he ſaid, and it was agreed by *Lord Chancellor*, held only in the caſe of *ne unques executor pleaded.* But that the executor in this caſe having thought fit, to put his defence on the denial of the execution of the bond, and not having pleaded *plene adminiſtravit*, or by plea admitted aſſets to ſuch ſum, and *riens ultra*, &c. or made uſe of any defence of that kind, he cannot now reſort to any ſuch matter, or have the benefit thereof by any ſubſequent proceeding, that executors were in this reſpect only upon the ſame foot with all other perſons, and nothing is better eſtabliſhed than this rule, that no advantage can ever afterwards be taken, of what might have been inſiſted on by way of defence, and pleaded to the action: Nothing pleadable *puis darrein continuance*, which was in *eſſe* at the time of the plea pleaded: He obſerved likewiſe that the diſability a defendant at law was under, of making a double defence, gave occaſion to that proviſion in the ſtatute for the amendment of the law, the 4 *Ann. c.* 16. *ſ.* 4. with regard to pleading ſeveral matters; there was no occaſion otherwiſe for any ſuch a law in the caſe of executors, nor any reaſon for purſuing it now in thoſe caſes, though it is every day's practice: For if an executor after a verdict againſt him on ſuch a plea as this, or any of the like kind, may afterwards ſay he has no aſſets; that method of proceeding will be equally beneficial to him, and there would be no occaſion ever to apply to the court for leave to plead *plene adminiſtravit*, and any other plea. That the executor here might have applied to the court for leave to plead double, but not having done ſo, the caſe ſtands upon the ſame foot it would have done before the act.

Lord Chancellor: I agree with Mr. *Fazakerley*, the ſtatute for the amendment of the law is quite out of the queſtion, the name of the caſe hinted at by Mr. *Fazakerly*, is *Rock* v. *Leighton*, *Salk.* 310. but on looking into that caſe, I find the reſolution there, goes only to a judgment had againſt executors, either by confeſſion or default, but no further; that the rule is in general as has been laid down, that advantage cannot be taken afterwards, of what might have been pleaded to the action; as for inſtance, in the caſe of a *ſcire facias* on a judgment, nothing can be pleaded thereto, which might have been pleaded to the action; but though I am inclined to think the verdict was an admiſſion of aſſets, yet I will not give an abſolute opinion, becauſe the cauſe muſt be poſtponed at preſent, in order that the will may be produced, and the ſtate of the aſſets laid before the court, and the diſpoſition by the teſtatrix of her real and perſonal

eſtate; the fact, whether there were aſſets or not, being diſputed by the parties (*a*).

(*a*) Cro. Jac. 294. Legate v. Pinchion.

A voluntary bond in equity ſhall be poſtponed to debts on ſimple contract, if claimed for money lent, and the perſon fails in proving his conſideration, it cannot be ſet up afterwards as a voluntary bond.

N. B. The bond againſt which the relief is prayed, being a voluntary one, it was admitted clearly it muſt be poſtponed in equity to debts by ſimple contract, and alſo that where a bond is claimed in conſideration of money lent, and the perſon fails in proving his conſideration, he ſhall not be allowed afterwards to ſet it up as a voluntary bond (*b*).

(*b*) Prec. in Chan. 17.

If an executor pleads *non eſt factum* to a bond, and not *plene adminiſtravit* likewiſe, he cannot after verdict take advantage of what might have been pleaded to the action.

This point coming on again, whether the plea of *non eſt factum* admitted aſſets, *Lord Chancellor* held it did, and ſaid he had ſeen Lord Chief Juſtice *Holt*'s report of the caſe of *Rook* v. *Leighton*, where the very caſe now in queſtion was put by *Holt* Chief Juſtice, who ſaid, the law was the ſame as in the caſe of a judgment by default againſt an executor, though that is not mentioned in the report of the caſe by *Salkeld*.

The plea of *non eſt factum* only is an admiſſion of aſſets, and held the ſame as in caſe of a judgment by default againſt an executor.

Can be relieved only againſt the penalty of the bond, by paying principal and intereſt, without regard to his having aſſets or not.

Decreed that the plaintiff ſhould be relieved againſt the penalty of the bond, on payment of principal and intereſt, *&c.* without any regard had at all to the queſtion, whether the executor had aſſets or not to pay ſuch principal and intereſt.

Michaelmas term 1738.

Bower v. *Swadlin.*

Caſe 163.

A releaſe to one obligor, is a releaſe to both, in equity as well as in law.

AN obligee gave a releaſe to one of the obligors in a bond, the bill brought by the repreſentative of the obligee, and likewiſe by a truſtee under the aſſignment of this bond, for the ſum conditioned to be paid by the bond.

The defendant inſiſted by way of plea, that a releaſe to one co-obligor, is a releaſe to all.

Where there is an aſſignment of a bond in truſt for others, precedent to a releaſe, tho' without conſideration, it will be a material queſtion, whether the obligee could releaſe, or if it could operate to the releaſee, as he muſt be preſumed to have notice of this aſſignment, being himſelf a truſtee in the aſſignment, and every man is ſuppoſed to be conuſant of a deed to which he is a party.

Lord Chancellor: There is no doubt but a releaſe to one obligor is a releaſe in equity to both, as well as in law; but if there be an aſſignment of the bond in truſt for the benefit of others, precedent to the releaſe, though the aſſignment be with or without conſideration, it will be a material queſtion, whether the obligee could releaſe, or if it could operate to the releaſee, as he muſt be preſumed to have notice of this aſſignment, being himſelf a truſtee in the aſſignment, and every man is ſuppoſed to be conuſant of a deed to which he is a party.

His

His Lordſhip directed that the cauſe ſhould ſtand over till the defendant had anſwered to the date of the releaſe; for it does not appear at preſent, whether the releaſe was precedent or ſubſequent to the aſſignment.

February the 28th 1738.

Atkins v. *Farr*.

Vide title *Bill, under the diviſion, Bills of Diſcovery, and herein of what there ſhall be a Diſcovery.*

CAP. XX.

Bottomree Bonds.

January the 18th 1750.

The earl of *Cheſterfield* executor of *Spencer* v. *Janſen*.

Vide title *Catching Bargain.*

CAP. XXI.

Canon Law.

June the 9th 1737.

Sir *Henry Blount*'s caſe.

LORD Chancellor: A ſuit was inſtituted in the court of chivalry againſt Sir *Henry Blount*, baronet, for aſſuming and uſurping arms, *&c.* as his own proper arms, which neither he nor any of his family ought to bear. In the progreſs of this cauſe, an allegation was exhibited by the defendant, ſetting forth that all pedigrees whatſoever muſt be ſigned by the proper hands of the parties, requeſting ſuch entries to be made in the books belonging to the college of arms, and then objects to the validity of ſome of the entries in the ſaid books, as not being ſigned, and therefore no credit to be given to them; but this allegation was rejected by the judge of the court of chivalry, and the defendant petitioned the court of Chancery, in order to obtain a commiſſion of delegates to determine the ſaid Caſe 164.

appeal; on the other ſide there is a croſs petition, inſiſting that no appeal lies but only from a definitive, or final interlocutory decree, having the force of a definitive ſentence.

Lord Chancellor: I obſerve no objection has been made to the juriſdiction of the court of chivalry, but only an appeal from an act of that court in their ordinary juriſdiction, and therefore as it is not inſiſted on, in Sir *Henry Blount*'s petition, it muſt be thrown out of the caſe.

There are two queſtions ariſing upon the preſent caſe.

Firſt, Whether an appeal will lie from any ſentence of the court of chivalry, except a definitive one, or from ſuch a ſentence as is termed in the Civil law, *gravamen irreparabile*.

Secondly, Whether this particular ſentence of the court of chivalry, is a *gravamen irreparabile*.

The court of chivalry proceed according to the rules of the Civil law, except in caſes omitted, and there they go according to the courſe and cuſtom of chivalry and arms.

It has been admitted on all ſides, that the court of chivalry proceed according to the rules of the Civil law, except in caſes omitted, and there they are governed by the courſe and cuſtom of chivalry and arms, and it is ſo laid down in 4 *Co.* 425.

There hath been no precedent cited in the arguing of this caſe as to the cuſtom or courſe of the court of chivalry in this particular reſpect, therefore it muſt be brought under theſe rules of the Civil law with regard to appeals, that is, ſo far as the Civil law has been admitted in *England*.

By the canon law an appeal is admitted from all grievances in general; but as the court of chivalry is governed by the Civil law, this court will not grant a commiſſion of delegates upon an appeal from any interlocutory order of that court, except only where there is a definitive ſentence, or ſuch a one as is termed in the civil law, *gravamen irreparabile*.

By the Canon law, you are admitted to appeal from all grievances in general, but in the Civil law only where *gravamen eſt irreparabile*.

The authors upon this head are very numerous, but to ſhew that this has been allowed in *England*, I ſhall mention only *Clark's praxis curiæ admiralitatis Angliæ*, who is an author of undoubted credit, and very full upon this head. His Lordſhip then cited ſeveral inſtances out of the 50th and 51ſt chapter.

Theſe rules are extremely clear, and very applicable to the preſent purpoſe; for ſays the author, although the party propounds exceptions to witneſſes, and the court of admiralty reject them, yet there can be no appeal; for in the appeal from the definitive ſentence, you may equally propound the ſame exceptions, nor are you precluded from it.

This is the rule then of the Civil law, in the proceedings of the court of admiralty, and founded upon very good reaſon, for elſe it would make cauſes there unneceſſarily tedious, if appeals ſhould be allowed upon every trifling or ſuppoſed grievance: This had great weight with me in the argument, and upon ſearch made in the court of admiralty by both ſides there is no precedent to be found of an appeal of this kind.

Doctor *Paul* cited a caſe of *Grundel* and others, againſt *Gawne* and company.

This

This ſuit commenced in the court of admiralty in *January* 1705. and heard at the delegates in *March* 1706. it was brought for wages due to the plaintiffs as mariners, and prayed that the defendants might ſet forth, whether they were owners of the ſhip *Speedwell*, bound on a voyage from the port of *London*, to the *Eaſt Indies*; this libel or ſummary petition was admitted, and the defendants gave in an anſwer upon oath, but inſiſted they were not obliged to diſcover upon what voyage the ſhip was bound, becauſe it would ſubject them to the penalties of the ſtatute of the 10 *Will.* made in favour of the *Eaſt India* company; but notwithſtanding the judge of the court of admiralty decreed, that they ſhould make further anſwer as to their reſpective intereſts, in the ſaid ſhip, and whether they were or were not owners at the time in the ſummary petition mentioned. From this act, the defendant appealed to the delegates, who pronounced againſt the appeal, remitted the cauſe, and condemned *Gawne* and company in coſts.

But this differs widely from the preſent caſe, for the judge of the court of admiralty there had committed an error, which was *gravamen irreparabile*, for if the defendant had anſwered, the cauſe would have been at an end, for by the confeſſion they muſt neceſſarily have made, their own anſwer would have deſtroyed them.

In the caſe of the earl of *Coventry* in 1701. againſt *Gregory King*, which was in the nature of a criminal proſecution, for having contrary to his oath, and the duty of his office, as *Lancaſter* herald, cauſed the arms of his father to be impaled with falſe arms, *&c.* *King* gave a negative anſwer to the libel; but it being inſiſted on behalf of lord *Coventry*, *King*'s anſwer ſhould be on oath, ſo far as he was obliged by law to anſwer, it was alledged by the defendant that the ſaid libel contained criminal matter, and therefore lord *Coventry*'s petition ought not by law to be admitted, and prayed the ſame to be rejected, but the judge decreed he ſhould give his anſwer on oath to ſuch of the articles, as he was obliged by law to anſwer. Upon an appeal to the court of delegates in 1702, they allowed the appeal from the interlocutory order.

This too is very wide from the preſent caſe, for if *King* had made a confeſſion upon oath, the cauſe would have been over; and therefore it was *gravamen irreparabile*, and cannot be uſed as an authority for Sir *Henry Blount*, for his caſe depends upon different circumſtances.

Then the queſtion will be, Whether this decretal order be *gravamen irreparabile*.

By the laws of the college of arms, all pedigrees entred in their books, muſt be ſigned by the parties requeſting ſuch entries to be made, and all the ancient books are ſo; and it has been held, that no pedigree in law is good without it; and then Sir *Henry Blount* goes on, and applies this to books produced in his cauſe.

This is rather an allegation of a matter of law, and muſt neceſſarily be open, even after a definitive ſentence, nor will Sir *Henry Blount* be precluded from any advantage he may make of it before the court of

delegates; all courts have a right to enquire of their officers, what is the uſual practice of their courts; this is the conſtant method in the King's Bench, and at trials at *niſi prius*; in 1 *Salk.* 281. it is laid down, that upon an appeal from a definitive ſentence, the judges delegates will certainly admit of this very allegation or allegations to the like effect.

The preſent caſe is not near ſo ſtrong, as the inſtances put by Mr. *Clark* in his *Praxis*, &c. who is clear of opinion, that in the inſtances he mentions no appeal would lie.

An objection was taken in the arguing of this caſe, that the *Lord Chancellor* upon a petition for an appeal, is not to try the merits of the cauſe; this is undoubtedly true, but then the *Lord Chancellor* muſt determine, whether an appeal will lie or not, though he will not enter into the merits, or decide whether the judge of the court of chivalry has properly rejected the allegation.

It has been ſaid there can no great miſchief enſue, if ſuch a commiſſion ſhould iſſue out of the court; but what weighs with me is the making a precedent for future applications to Chancery of this kind; for it would be of miſchievous conſequences to allow of ſuch dilatory appeals, becauſe as the court of admiralty proceeds by the ſame law, it would be an authority for ſuch ſort of appeals from the interlocutary orders of that court, and would create great expence and delay, and the ſuitors there are too neceſſitous for the moſt part to allow of any affected delays.

For theſe reaſons I am clearly of opinion, that there is no foundation for Sir *Henry Blount*'s petition, and therefore it muſt be diſmiſſed.

March the 30th 1739.

Jones v. *Bougett.*

Caſe 165. A perſon aggrieved by, or intereſted in a ſentence in the eccleſiaſtical court may have a commiſſion of delegates, tho' he was no party to the original ſuit.

MR. *Bougett* inſtituted a ſuit in the eccleſiaſtical court, upon a contract of marriage, againſt Mrs. *Ann Jubert*, who pending that ſuit intermarried with the appellant; a ſentence was pronounced in favour of the contract, a child of that marriage was born, and the wife was dead.

Mr. *Jones*, who with the child was very much intereſted in this ſentence, though no party to the original ſuit, petitioned for a commiſſion of delegates to review the ſentence on the ſtatute of the 25 *Hen.* 8.

Upon citing ſeveral authorities from the canon and eccleſiaſtical law, where perſons aggrieved by, and intereſted in a ſentence, may have a commiſſion of delegates to review, though no parties to the original ſuit. A commiſſion was directed.

CAP. XXII.

Carrier.

February the 23d 1743.

Snee and *Baxter*, aſſignees of *Tollet*, a bankrupt, — Plaintiffs,
Preſcot, and others, — — — — Defendants.

Vide title *Bankrupt*, *under the diviſion*, *Rule as to Principal and Factor*.

CAP. XXIII.

Caſes.

(A) Where they are miſreported.
(B) An anomalous caſe.
(C) Caſes imperfect, or denied to be law.

(A) Where they are miſreported.

November the 24th 1738.

Boycot v. *Cotton*.

Vide title *Portion*, *where the Caſe of* Cave *v.* Cave, 2 Vern. 508. *is mentioned.*

(B) An anomalous caſe.

November the 24th 1738.

Boycot v. *Cotton*,

Vide title *Portion*, *where the Caſe of* Jackſon *v.* Farrand, 2 Vern. 424. *is mentioned.*

(C) Caſes

(C) Caſes imperfect, or denied to be Law.

January the 22d 1753.

Ex parte Coyſegame.

Vide title *Bankrupt under the diviſion, Rule as to Annuities under Commiſſions of Bankruptcy, where the* obiter *Opinion in* Miles *v.* Williams *and his Wife,* 1 Wms. 255. *is mentioned.*

Auguſt the 14th 1750.

Ex parte King.

Caſe 166. IT was ſaid by Mr. *Ord* it was determined in the caſe of *Pope* v. *Onſlow,* 2 *Vern.* 286. where *A.* had two mortgages upon different independent eſtates of the mortgagor, one a deficient ſecurity, and the other more than ſufficient; that the mortgagor ſhould not redeem the laſt, without making good the deficiency of the other ſecurity.

The caſe of *Pope* v. *Onſlow,* 2 *Vern.* 286. very imperfect and not to be cited for the future, till it has been compared with the Regiſter.

Lord Chancellor ſaid he was not ſatisfied that this was the eſtabliſhed rule of the court, and upon looking into the caſe above, found it very imperfect, and therefore declared he would not have it cited for the future, till it had been compared with the entry in the Regiſter's office, and ſaid farther he was very apt to believe that the tenements were parcel of and held of the manor of *Dale,* and *that* was the reaſon Lord *Cowper* ſo determined. 3

CAP.

CAP. XXIV.

Catching Bargain.

June the 18th 1750.

The Earl of *Cheſterfield*, and others, executors of *John Spencer*, Eſq; } Plaintiffs,

Sir *Abraham Janſſen*, Baronet, —— —— Defendant.

Lord Chancellor,
Aſſiſted by { The two Chief Juſtices, The Maſter of the Rolls, and Mr. Juſtice *Burnett*.

Caſe 167.

SOME time in the year 1738. the defendant was applied to by Mr. *Backwell* on behalf of Mr. *Spencer*, to advance and lend Mr. *Spencer* 5000*l.* in conſideration of which he would give the defendant a ſecurity to pay him 10,000*l.* at the death of the late dutcheſs of *Marlborough*, in caſe Mr. *Spencer* ſhould ſurvive her; the defendant deſired he might conſider of it, which he did accordingly, and being again applied to, to lend the 5000*l.* on the terms aforeſaid, the defendant at laſt conſented thereto, and on the 17th of *May* 1738. carried the 5000*l.* in bank notes to Mr. *Spencer*, and paid the ſame to him, who thereupon executed to the defendant a bond dated the ſame day, in the penalty of 20,000*l.* conditioned for the payment of 10,000*l* to the defendant, at or within ſome ſhort time after the Dutcheſs's death, in caſe Mr. *Spencer* ſhould ſurvive her, but not otherwiſe.

The 17th of *May* 1738 defendant paid 5000*l.* to *Spencer*, and the ſame day took a bond from him in the penalty of 20,000*l* conditioned for the payment of 10,000*l.* to the defendant, at or within ſome ſhort time after the Dutcheſs of *Marlborough*'s death, in caſe *Spencer* ſhould ſurvive her, but not otherwiſe.

The Dutcheſs of *Marlborough* died the 18th of *October* 1744. and in the month of *December* following, on the defendant's delivering to Mr. *Spencer* the bond above mentioned to be cancelled, he executed a new bond, whereby he became bound to the defendant in the penalty of 20,000*l.* conditioned for payment to the defendant of 10,000*l.* with lawful intereſt on the 19th of *April* then next, and at the ſame time executed a warrant of attorney to impower a judgment to be recorded againſt him in the King's Bench, at the defendant's ſuit, for the ſaid 20,000*l.* on the ſaid bond; the defendant by virtue of the ſaid

The Dutcheſs died *Oct.* 18. 1744. and in the month of *December* following, on the defendant's delivering to Mr. *Spencer* the bond to be cancelled, he executed a new one in the penalty of 20,000*l.* conditioned for payment to the defendant of 10,000*l.* with lawful intereſt, on 19 *April* next, and at the ſame time executed a warrant of attorney to impower judgment to be recorded againſt him *in B. R.* for the 20,000*l.* which was done accordingly.

warrant of attorney cauſed a judgment to be made out on the ſaid bond againſt Mr. *Spencer*, at the defendant's ſuit, for the ſaid 20,000*l.* to be recorded in the King's Bench, of *Hilary* term next enſuing the date of the ſaid bond.

In *Dec.* 1745. *Spencer* paid defendant 1000*l.* in part, and on the 21ſt of *March* 1000*l.* more.

In the month of *December* 1745. the defendant, by the invitation of Mr. *Spencer*, being with him in his houſe at *Windſor*, he on the 14th of that month gave the defendant a bill for 1000*l.* on *Hoare* and Company, in part of the defendant's debt, and on the 21ſt of *March* following ſent the defendant 1000*l.* more by his ſteward.

On the 19th of *June* 1746. *Spencer* died, but before his death made his will, and after payment of debts, &c. gave the reſidue of his perſonal eſtate to his ſon, and appointed plaintiffs his guardians and executors in truſt, during his minority.

On the 19th of *June* 1746. Mr. *Spencer* died, but before his death made his will, and after payment of his debts and legacies, gave all the reſidue of his perſonal eſtate to be at his ſon's diſpoſal, the preſent Mr. *Spencer*, provided he left no younger child, and appointed the plaintiffs to be guardians of his ſon, and alſo executors in truſt for him during his minority.

Bill brought to be relieved againſt defendant's demand as an unconſcionable bargain, and uſurious contract.

The executors of Mr. *Spencer*, finding his ſpecialty debts very conſiderable, and that ſuch as were upon ſimple contracts only, which likewiſe amounted to a very large ſum, would receive but little ſatisfaction through the deficiency of teſtator's aſſets, after payment of ſuch ſums as were really and *bona fide* due on ſpecialties, brought a bill to be relieved againſt the defendant's demand, as being an unconſcionable one, charging that the condition ſtipulated by his ſecurity was abſolute and independant of any other contingency, than that of a grandſon of 30 years of age ſurviving a grandmother of 80; and as the period or point of time limited for the payment (which was in one month after the death of the Dutcheſs) could not, by reaſon of her great age and infirmities, be removed to any great diſtance, but was every day approaching, and in fact happened ſoon after; ſo the requiring ſuch a large ſum as 10,000*l.* for the forbearance of 5000*l.* for ſo ſhort a time, being at the proportion of 200*l.* for every 100*l.* was a moſt unreaſonable and *uſurious* contract, and ſuch as will never meet with the approbation or countenance of a court of equity, eſpecially where the demand is made upon the aſſets of an inſolvent perſon, to the prejudice and defeating of his other juſt and honeſt creditors, and of an infant heir and reſiduary legatee, and that the executing a new bond to the defendant, after the death of the Dutcheſs of *Marlborough*, is only a continuance of the former tranſactions, and partook of the original fraud, and that being an unrighteous and uſurious bargain, in the beginning, nothing which was done afterwards could help it, but on the contrary defendant in acquiring ſuch new ſecurity and judgment, and thereby ſeeking to conceal the true tranſaction, did, as far as in him lay, add to the firſt fraud, and ought to be reſtrained from taking out execution on his judgment, till the court have firſt inquired into and determined upon the fraud, and therefore 'tis prayed, that the defendant may be adjudged by the court to be a creditor of Mr. *Spencer* only, for ſuch ſums as he ſhall appear to have *bonâ fide* advanced,

The court relieved only againſt the penalty, and judgment, by directing the defendant to deliver up the bond to be cancelled, and to acknowledge ſatisfaction on the judgment, upon being paid by plaintiffs what ſhould be due at law, but would not give him coſts, as there was *probabilis cauſa litigandi*, and defendant's caſe far from being a favourable one.

advanced, with intereſt from the time of advancing the ſame, after deducting what he hath received, and that he may be decreed to come in, and receive a ſatisfaction for the reſidue of ſuch principal ſums only and intereſt, *pari paſſu* with Mr. *Spencer*'s other creditors, according to the nature of his demand, and for an injunction to ſtay his proceeding at law till the hearing of the cauſe.

July the 21ſt 1747. the injunction was continued upon the merits till the hearing.

Mr. *Noel* for the plaintiffs.

The queſtion is, Whether or no the executors are intitled to be relieved, on payment to the defendant of the principal really advanced, and legal intereſt?

Contracts of this nature can be founded only on two principles, extravagance and diſtreſs on the one part, and the exorbitant deſire of lucre on the other, and taking advantage of the neceſſity of the perſon borrowing.

Mr. *Spencer*, by a riotous courſe of life, run behind hand, and it is proved he owed above 20,000*l.* At this time his chief dependance was on the Dutcheſs dowager of *Marlborough*, who was then 78 years of age, beyond the common date of man's life, and Mr. *Spencer* himſelf only 30.

It can bear no doubt but theſe were the only motives and principles of Mr. *Spencer*'s application, nor any doubt but the view of ſecuring to himſelf ſo large a gain on ſuch a probable contingency, were the motives of the defendant; for to uſe the words of a great author, it was an abundant ſhower of *cent. per cent.*

The defendant ſays it was not of his ſeeking, but an application on the part of Mr. Spencer, *and that he was a ſtranger to his perſon and his affairs*; but notwithſtanding his pretences, he cannot be ſaid to be ignorant from the moment of the propoſal to him; for his offering ſuch an exorbitant advantage ſpoke ſtronger than a thouſand circumſtances, that Mr. *Spencer* was neceſſitous, a tranſaction too unequal and enormous to bear the light, and therefore the defendant was fixed upon to carry it on with ſecrecy, for fear, if ſuch a tranſaction ſhould be publickly known, and come to the ears of the Dutcheſs of *Marlborough*, it might be prejudicial to his future hopes.

Mr. Spencer *was of an age to diſpoſe thereof, ſays the defendant, and might act as he thought proper, as he was* ſui juris; but notwithſtanding this, as the Dutcheſs of *Marlborough* was alive, and his father and mother dead, ſhe ſtood *in loco parentis*, and conſequently he had a parental dependance on her, and therefore for fear of her knowing it, he durſt not ſeek a remedy againſt this iniquitous bargain, becauſe of the riſque he run of divulging the ſecret.

The defendant muſt know Mr. *Spencer* to be in diſtreſs, for a man of affluence and eſtate could have got money on the common terms, and therefore the propoſal itſelf ſpoke his ſituation.

This is become a caſe of publick concern, as it tends to the ruin of many other families; *but then, ſays the defendant, conſider the riſque I run, if it turned out againſt me, I had loſt my money.* When I com-

pare the ages of the perſons, one 78 the other 30, 'tis a farce to call it a riſque; the Dutcheſs of an age few arrive at, and indeed no one would wiſh to arrive at. This is certainly not a fair and juſt tranſaction, but unequal, and therefore relievable in a court of equity. *But then the defendant ſays, Mr.* Spencer, *though only thirty years of age, was of a weak and decayed conſtitution, and therefore there was an equal chance whether he ſurvived the Dutcheſs of* Marlborough. This was an after-thought, for Mr. *Backwell*, examined for the plaintiff, does not ſay it was at all conſidered at the time.

'Tis proved in the cauſe, that Mr. *Spencer* was then, and ſome years before, and after, of a robuſt conſtitution, prior to his marriage naturally ſo, but by an improper conduct brought into a decayed ſtate. *But, ſays the defendant, all theſe obſervations are out of the caſe, as Mr.* Spencer, *after the Dutcheſs of* Marlborough's *death, gave a new bond, and warrant of attorney to enter judgment, and therefore became a common creditor.*

The original bond was to pay 10,000*l.* if Mr. *Spencer* ſurvived the Dutcheſs of *Marlborough*. When he gave the ſecond bond he was not free and at liberty, nor did he know he could be relieved; and this ſubſequent tranſaction is therefore no confirmation or ſanction of the original bargain.

Then, ſays defendant, it is no fraud. Though it be not ſo in the particular ſignification of the word, yet if it be unjuſt, in its nature exorbitant and extravagant, this court have conſidered it in the nature of fraud.

I will mention caſes of this complexion, in which the court have proceeded on theſe principles, where a contract has been exorbitant and unequal, and have relieved, though nothing illegal in the caſe, as where avarice has appeared on the one ſide, and poverty on the other; and have alſo taken into their conſideration the fatal tendency ſuch caſes have, with regard to the publick. There are likewiſe other caſes in which the court has determined a ſubſequent act ſhall not eſtabliſh a contract originally bad.

The caſe of Sir *Thomas Meers*, before Lord *Harcourt*; *there Sir* Thomas *had in ſome mortgages inſerted a covenant, that if the intereſt was not paid punctually at the day, it ſhould from that time, and ſo from time to time be turned into principal, and bear intereſt. Upon a bill filed, the* Lord Chancellor *relieved the mortgagors againſt this covenant, as unjuſt and oppreſſive.* This caſe is mentioned in *Boſanquet* v. *Daſhwood*, before Lord *Talbot, Ca. in Eq.* in his time, 40. This, ſaid he, in giving his opinion, is an authority in point, that this court will relieve in caſes which (though perhaps ſtrictly legal) bear hard upon one party; the reaſon is, becauſe all thoſe caſes carry ſomewhat of fraud with them; I do not mean ſuch a fraud as is properly deceit, but ſuch proceedings as lay a particular burden or hardſhip upon any man: It being the buſineſs of this court to relieve in all offences againſt the law of nature and reaſon.

2 Vern. 121. Wiſeman *v.* Beake, A. *tenant for life, remainder to his firſt and every other ſon in tail, remainder to his nephew* B. B. *enters*

into ſeveral ſtatutes to C. *for payment of ten for one upon the death of* A. *in caſe he died without iſſue male in the life of* B. C. *in the life of* A. *brings a bill to compel* B. *either to pay principal and intereſt, or to be foreclоſed of any relief againſt the bargain.* B. *by his anſwer declares the bargain fairly made, and intends to abide by it, and that he would ſeek no relief againſt it.* A. *dies, and* B. *brings a bill againſt the executor of* C. *and notwithſtanding* B.*'s former anſwer, he is relieved againſt the bargain, on payment of principal and intereſt without coſts.*

Wiſeman was then 40 years of age, a man in buſineſs, a proctor in the commons, and yet the bargain was ſet aſide upon general reaſons of equity, and publick inconvenience, a ſtronger confirmation too there, than here, and yet he was relieved.

James v. *Oades,* 2 Vern. 402. *there* A. *borrowed* 200 l. *of* B. *and gives* B. *a mortgage defeazanced, to be void on* B.*'s paying* A. 40 l. per ann. *for* 8 *years by quarterly payments; the court declared it to be an agreement againſt conſcience, and decreed a redemption on payment of the* 200 l. *with ſimple intereſt,* and ſaid if this ſhould be allowed, it might be carried to nine years, and ſo on, without any ſtint or bounds.

So in the preſent caſe, if the court ſhould ſay it would do at 78 years of age, it might as well do at 90, and therefore no limits could be ſet to it.

The caſe of *Curwyn* v. *Milner, the 19th of* June 1731. *before the Lord Chancellor* King, 3d Wms. 292. marginal note. *There an heir of about 27 years of age, and who had a commiſſion in the guards, borrowed* 500 l. *on condition to pay* 1000 l. *if he ſurvived his father and father-in-law; but if he died before his father, or father-in-law, the lender to loſe the* 500 l. *The heir ſurvived his father and father-in-law, and was relieved, though after he had paid the money, it being for fear of an execution.*

1 Vern. 167. Nott *v.* Hill. *A purchaſer of a reverſion from an heir in the life of his father, at an under value was ſet aſide, though if the heir had died before his father, the purchaſer would have loſt all his money.*

It may be ſaid, *Nott's was the caſe of a young heir, and therefore not like the preſent;* but that is not the ſole reaſon courts of equity go upon, but on general rules: however, for argument's ſake, I will ſuppoſe it to be on the firſt principle, the Dutcheſs of *Marlborough* may then be conſidered in *loco parentis.*

The Earl of Ardglaſſe *v.* Muſchamp, 1 Vern. 237. Thomas *Earl of* Ardglaſſe *for* 300 l. *in* 1675. *granted to the defendant a rent charge of* 300 *l.* per ann. *out of lands of* 1000 l. per ann. *to hold to the defendant and his heirs, and to commence from the firſt* Michaelmas *or* Lady Day *after the Earl's death without iſſue male, afterwards the Earl ſettled his eſtate for* 300 l. *conſideration, to the uſe of himſelf for life, remainder in tail to all his iſſue male, remainder in tail to the plaintiff his uncle, and then the plaintiff and Earl* Thomas *both brought their bill to be relieved againſt the grant of the rent charge, as obtained by fraud and practice, after which bill brought the defendant obtained a releaſe of that ſuit from Earl* Thomas, *and the now Earl's bill was (Earl* Thomas *being dead) to ſet aſide the grant and releaſe, upon payment of* 300 l.

with intereſt. At the firſt hearing Lord Keeper North *doubted it might be too great a violation on contract to ſet it aſide; but upon a re-hearing, after ſome days conſideration, he decreed a re-conveyance or releaſe of the rent charge, and that the ſame ſhould be ſet aſide, and a perpetual injunction awarded, upon the plaintiff's paying the defendant* 300 l. *and intereſt; and the defendant obtaining a re-hearing afterwards, the Lord Keeper then declared he was fully ſatisfied with the decree, and that if he were to die preſently, he would make it, and ſo confirmed it.*

Your Lordſhip obſerves that after the bill brought for relief, the plaintiff releaſed it, therefore he knew he might be relieved; and on the bill brought by the uncle afterwards, the court relieved notwithſtanding the releaſe: for wherever it is a miſchief that affects the publick, as the preſent does, the court will, without regarding what is done by the private parties, relieve.

I have conſidered this caſe hitherto as an unreaſonable and unconſcionable contract, and that the bargain ought to be ſet aſide upon principles of equity, regarding the publick; but I ſhall now endeavour to ſhew it is illegal.

Lord *Coke*, in his 3d *Inſt. ch.* 70, 151. ſays, If any perſon after his death was found guilty of uſury, his goods were forfeited to the crown. Thus it ſtood as an offence at common law, but the ſtatutes have indulged it to ſuch and ſuch points, and yet wherever there is an attempt by a tranſaction to procure an exorbitant gain, it is certainly illegal, and immaterial whether it falls exactly within the ſtatute of uſury, for ſtill there is ſomething unconſtitutional and illegal in it.

But I will go further, and inſiſt it is illegal within the ſtatutes of uſury themſelves.

21 *Jac. ch.* 17. *ſ.* 2. None ſhall, upon any contract, directly or indirectly, take for the loan of any money, *&c.* above the rate of 8 *l.* for 100 *l.* for one whole year, in pain to forfeit the treble value of the money due, *&c. ſ.* 5. This law ſhall not be conſtrued to allow the practice of uſury in point of religion or conſcience.

Clayton's caſe, 5 Co. 70. b. *The plaintiff requeſted* Reighnolds *to lend him* 30 l. *and on communication betwixt them,* Reighnolds *lent* Clayton 30 l. 6 Dec. 34 Eliz. *till the ſecond of* June *following, to pay him for the principal and loan of it* 33 l. *at the ſaid ſecond of* June, *if the ſon of the obligee be then alive, and if he die before the ſaid day, that then he ſhall pay him but* 27 l. *which was* 3 l. *leſs than the principal. Reſolved by the whole court, that it was an uſurious contract within the ſtatute, for the reaſon given by* Popham *in* Burton's *caſe,* 5 Co. 69. *that if it ſhould be out of the ſtatute for the incertainty of the life, the ſtatute would be of little effect.*

I cite this to ſhew that if bargains were contingent, and a riſque run, yet even then they have been held to be uſurious.

So in the caſe of *Burton* v. *Downham, Cro. Eliz.* 642. where *A.* agreed with *J. S.* to give him 10 *l.* for the forbearance of 20 *l.* for a year, if *B.*'s ſon were then alive, it was held to be uſury by reaſon

of

of the corrupt agreement, and *it is the intent makes it ſo, or not ſo.* 2 *Anderſon* 121. *pl.* 65. S. C.

So in *Maſon* v. *Abdy*, 3 *Salk.* 390. *the obligor was bound in a bond of* 300l. *conditioned to pay* 22l. 10s. *premium at the end of the firſt three months after the date*, &c. *and ſixpence in the pound, at the end of ſix months as a further premium, together with the principal itſelf in caſe the obligor be then living, but if he dies within that time, the principal to be loſt; adjudged this as an uſurious contract, becauſe there was a poſſibility, that the obligor might live ſo long, and there is an expreſs proviſion to have the principal again, in* Carthew 67. S. C. *adjudged upon a general demurrer, that this was an uſurious contract, and if ſuch contingency of the death of a man in full health, ſhould prevent the uſury, contingencies might be extended to the death of two or three more, and ſo the ſtatute be of little uſe.*

We have full evidence to ſhew the circumſtances, and ſituation of health of Mr. *Spencer*, at the time the defendant lent the money, and Mr. *Backwell* examined for the defendant, ſays, that he does not remember that when he applied to the defendant to advance the 5000*l.* he ſaid any thing of Mr. *Spencer*'s health, or way of living, but on being preſſed to do it, ſaid he would conſider of it, and conſult his brothers about it, and afterwards agreed to lend it.

John Griffith a ſervant of the old dutcheſs of *Marlborough*'s, ſays, that in 1738. Mr. *Spencer* lay under great neceſſities for want of money, and did owe ſeveral debts to the amount of ſeveral thouſand pounds; ſpeaks too as to *Spencer*'s expectations from the dutcheſs, and as to his concealing his debts, and owning to him that he ſecreted theſe affairs from the dutcheſs, for fear it ſhould prejudice him in her favour; and hurt him in regard to the hopes he had from her will.

Another witneſs, *William Loftin* ſwears, Mr. *Spencer* was indebted to different perſons in or about *May* 1738. in 20,000*l.* and was not then able to pay them, or any part thereof; and that he took all poſſible care to prevent the dutcheſs's knowing that he was in debt, and likewiſe to keep all other debts, that he afterwards contracted, ſecret from her, for fear he ſhould forfeit her kind intentions to him.

It is admitted in the cauſe, that Mr. *Spencer* in *May* 1738, was only 30 years of age, and the dutcheſs 78.

James Napier, who attended Mr. *Spencer* as a ſurgeon, ſwears, that in and before *May* 1738. he was not of a broken conſtitution, nor was his life a precarious one, but very ſtrong and healthy, and that he was likely to live many years, and that five years after this time he had a fever, but got ſoon well, and from 1736. to 1743. enjoyed perfect health; and *John Griffiths* before mentioned ſays, that on aſking the apothecary who attended him, as to his judgment of the ſtate and condition of Mr. *Spencer*'s health, he ſaid, if *Spencer* could refrain from chewing tobacco, and drinking drams, he might ſtill live a great while, being born with a better conſtitution than moſt men; and ſeveral other perſons ſwear, Mr. *Spencer* enjoyed a good ſtate of health in general, till a few months before his death.

The dutcheſs of *Marlborough* died *October* the 18th 1744. and Mr. *Spencer June* the 19th 1746.

Mr. *Clarke* of the ſame ſide.

Firſt, I beg leave to inſiſt that if this contract had been examined into at law, it would have been conſidered there as an uſurious one.

Ever ſince money has been made the medium of trade and commerce, all civilized governments have laboured to prevent exorbitant gain upon the loan of it.

The Statute of the 11 *Hen.* 7. *c.* 8. was the firſt act that tolerated the taking of intereſt. By the 21 *Jac.* the courts of law are inveſted with a kind of equitable juriſdiction, as it requires them to take into their conſideration the particular circumſtances of the caſe.

I will lay down the inferences firſt, before I cite the caſes.

Firſt, The intention of parties at the time of the bargain, will have great weight in determining the court, and if it is plainly a loan of money, then *uſurious*.

Another principle is, that wherever a ſecurity is taken for a larger ſum of money than is really advanced, it is uſurious, unleſs the borrower by doing ſome callateral act, might be at liberty to pay legal intereſt.

Another principle is, that the whole ſum muſt be lent, or elſe within the uſurious ſtatutes.

Moore 397. *Beecher*'s caſe, cited in the caſe of *Reynolds* v. *Clayton*, as adjudged *in B. R. there B.* delivered wares of the value of 100 *l.* and no more, and took a bond with a condition to redeliver the wares to *B.* within a month, or to pay 120 *l.* at the end of a year; the obligation was adjudged void under the ſtatutes of uſury.

This reſts upon the intent of the bargain, and I mention it to ſhew what opinion courts of juſtice had of contingent bargains.

Burton v. *Downham*, *Cro. Eliz.* 642. The intent of this was to have a ſhift.

Burton's caſe, 5 *Co.* 69. *Roberts* v. *Tremain*, *Cro. Jac.* 507.

Cottrel v. *Harrington*, *Brownlow* 180. *Fuller*'s caſe, 4 *Leon.* 208. but care is to be taken ſaid the court in that caſe, there be no communication for the loan of money, for *that* will make it uſury.

Conſidering the great number of caſes on this head, there has been an extraordinary uniformity of judgment in the judges of the ſeveral courts.

Comberb. 125. *Maſon* v. *Abdy* taken notice of by Mr. *Noel* before, but I mention it again for the ſake of what lord chief juſtice *Holt* ſaid very humouroufly, You do run a great riſque indeed, not of the death of the perſon, but of the loſs of your money. Mr. juſtice *Dodderige* ſaid in *Roberts* v. *Tremain*, caſualty of intereſt is uſury, but caſualty of principal is not.

Thus it ſtands upon the caſes; to apply them and their inferences to the preſent caſe.

The intention of parties at the time of the bargain, will have great weight in determining the court, and if it is plainly a loan of money, then it is uſurious.

The only thing in view here, upon the firſt communication between the parties, was a borrowing; for Mr. *Backwell* examined for the defendant ſays, that when he applied to him, he aſked him if he would lend Mr. *Spencer* the 5000*l.* on the terms propoſed.

The bond itſelf is a direct ſecurity for paying double the ſum lent, upon the contingency happening; there is an agreement too, for paying a larger ſum than lent; another mark! and criterion!

Mr. *Spencer* could not have delivered himſelf from paying this ſum, by paying a leſs, becauſe the bond did not put it in his power to do ſo.

Next, as to that part of the caſe which is hazardous.

In none of the caſes cited, do the court enter into the diſcuſſion of the nature of the chance, but reject this, as being any ingredient, for not conſidering the tranſaction of the parties as within the act; for if they ſhould give this latitude, in the language of lord chief juſtices *Popham*, *Holt*, &c. it would be to make the acts of uſury mere waſte paper.

Next; what ought to be the fate of this bargain, now it comes to be conſidered in a court of equity.

In the firſt place, this court will not lay down any expreſs rules, how far they will go in relieving againſt ſuch bargains, for fear it would teach perſons, how far they may ſafely go, and if there is but a ſpark of oppreſſion, a court of equity will relieve; courts of equity too will make freer with theſe bargains, than courts of law will do.

In *Symonds* v. *Cockerill*, *Noy* 151. The court mediated, by obliging the borrower to pay the principal only.

The principles now eſtabliſhed, were eſtabliſhed with deliberation, and even two of the judges who doubted of theſe principles at firſt, were forced afterwards, from the growth of this evil, to diſſent from their former opinions.

1 *Chan. Caſ.* 276. *Waller* v. *Dalt*, before lord *Nottingham*. Waller *a young gentleman and two others, employed one* Willis *to borrow* 500 l. Willis *imployed* Wiltſhire, *who ſpoke to* Dalt *a ſilkman, and bought of him ſilks for* 500 l. *The plaintiff gave bond and judgment for the money*, Wiltſhire *ſold the ſilks for* 250 l. *and kept* 50 l. *for his and* Willis's *pains, and paid* 200 *l. to the plaintiff: The defendant never treated with the plaintiff, and denied on oath, that he ever treated about the loan of money, and depoſed the ſilks to be of* 500 l. *value or thereabouts, but proof was given to the contrary. Decreed only* 200 *l. and intereſt*, (quære, *for the intereſt*,) *and relief againſt the defendant* quoad reſiduum.

2 *Chan. Caſ.* 136. *Barney* v. *Beak*, Lord Keeper *North* reverſed Lord *Nottingham*'s decree, *as it was a hazardous bargain only, and no proof of fraud*, for coming recently out of a court of law, Lord *North* was at firſt ſtrictly legal, but afterwards relaxed.

Berney v. *Pitt*, 2 *Vern.* 14. *The plaintiff being a young man, and his father tenant for life only of a great eſtate, which by his death was to come to the plaintiff as tenant in tail, and allowing the plaintiff but ſcantily, he borrowed* 2000 l. *of the defendant in* 1675. *and entred into two judgments of* 5000 l. *apiece, defeaſanced each of them, that if the plaintiff outlived his father, and within a month after his death paid the defendant* 5000 l. *or if the plaintiff ſhould marry in the life-time of his father, then if he ſhould from ſuch marriage, during his father's life, pay the defendant intereſt for his* 5000 l. *the defendant ſhould vacate the judgment, with this farther clauſe in the defeazance, that it was the intent of the parties, if the plaintiff did not outlive his father, that the money ſhould not be repaid. In* 1679. *the plaintiff's father died, and to be relieved againſt the judgments, upon payment of the* 2000 l. *lent, together with intereſt, was the bill, which complained of a fraud, and an undue advantage taken of the plaintiff's neceſſity, when in ſtreights.*

This cauſe came firſt to be heard in Hilary *term* 27 *Car.* 2. *before lord* Nottingham, *who in regard the judgments were for money lent, and not for wares taken up to ſell again at an undervalue, and in reſpect of the expreſs clauſe in the defeazance of the defendant's loſing all, if the plaintiff died before the father, did not think fit to relieve the plaintiff againſt the bargain itſelf, without paying the* 5000 l. *with intereſt from a month after the plaintiff's death.*

The cauſe was re-heard before Lord Chancellor Jefferies, *who made no difference in the caſe of an unconſcionable bargain, whether it be for money or wares, and though there was not in this caſe any proof of any practice uſed by the defendant, or any on his behalf, to draw the plaintiff into this ſecurity; yet, in regard merely to the unconſcionableneſs of the bargain, he reverſed lord* Nottingham's *decree, and decreed the defendant* Pitt *to refund to the plaintiff all the money he had received of him, except the* 2000 l. *originally lent, and the intereſt for the ſame.*

In *Berney* v. *Tiſon*, 2 *Ventr.* 359. Lord Keeper *North* affirmed Lord *Nottingham*'s decree, but added a *non retrahetur in exemplum*; what ſeemed to ſtick with him, was ſetting aſide mens bargains.

Nott v. *Hill*, 1 *Vern.* 167. *This was the caſe of a purchaſe of a reverſion from an heir in the life of his father, where if the heir had died before his father, the purchaſer would have loſt all his money, and yet Lord* Nottingham *upon the firſt hearing decreed a redemption, but on a rehearing, Lord Keeper* Guilford *reverſed it, and Lord Chancellor* Jefferies *reverſed Lord* Guilford's *decree, and confirmed Lord Nottingham's, declaring he took* Hill's *purchaſe to be an unrighteous bargain in the beginning, and that nothing which happened afterwards could help it.*

Johnſon executor of *Hill* v. *Nott*, 1 *Vern.* 271. *the bill was brought by* Hill's *executor, ſetting forth, that the defendant was only tenant in tail, and had covenanted to make further aſſurance, and prayed he might be compelled to perform his covenant in ſpecie, and be decreed to levy a fine. Lord Keeper* Guilford *ſeemed now to remit from his ſtrict legal notions, for he denied the plaintiff any relief, and ſaid the practice of purchaſing from heirs was grown too common, and therefore he would*

would not in any ſort countenance it, and diſmiſſed the bill, and left the plaintiff to bring his action of covenant at law.

In the earl of *Ardglaſſe* v. *Muſchamp*, Lord *Guilford* remitted very clearly from his ſtrict legal notions; *many precedents in the Lord* Elſmere's, *Lord* Bacon's, *and Lord* Coventry's *times and ſince were produced, whereby it appeared, that unconſcionable bargains, which had been made with young heirs, had been ſet aſide by decree of this court, and after ſome days conſideration had, he decreed a reconveyance, and upon a rehearing declared he was fully ſatisfied in the decree, and made uſe of this remarkable expreſſion, that if he were to die preſently, he would make it, and ſo confirmed it.*

A ſeries of precedents induced him to give the relief he did.

Bill v. *Price*, 1 *Vern.* 467. *The defendant had for many years practiſed on young heirs, by ſelling them goods at extravagant values, and to be paid five for one, and more, upon the death of their fathers, and had obtained from the plaintiff and two other young gentlemen, heirs to good eſtates, ſeveral ſecurities, wherein they were bound ſeverally, and jointly, in* 4000 l. *for payment of great ſums of money. Lord Chancellor* Jefferies *decreed the plaintiff's ſecurity to be delivered up, on payment of what the defendant really and* bona fide *paid to him alone, and for his own proper uſe.*

Lamplugh v. *Smith*, 2 *Vern.* 77. *Wiſeman* v. *Beake*, 2 *Vern.* 121. before lords commiſſioners. *James* v. *Oades*, 2 *Vern.* 402. before Sir *John Trevor*, *Twiſleton* v. *Griffiths*, 1 *Wms.* 310. before Lord *Cowper, who grounded his opinion chiefly upon the caſe of* Berney v. Pitt, *and ſaid that Lord* Jefferies *decree, ſtanding there, ſhewed that every one thought the ſame was juſt, and that there was therefore no attempt in parliament to reverſe it.*

Lord Chancellor *King* in *Curwin* v. *Milner*, as well as Lord *North*, though ſtrictly legal at firſt coming to the Seal, determined in this caſe againſt the bargain, though an exceeding ſtrong one.

I ſhall mention only one caſe more with regard to the precariouſneſs of the bargain, *Lawley* v. *Hooper*, *Nov.* 19. 1745. before your Lordſhip, *The plaintiff a younger ſon, and intitled to an annuity of* 200 l. *a year for life, out of the eſtate of his elder brother, being involved in debt, and a priſoner in the* Fleet, *and having no other means of delivering himſelf from a gaol, than by diſpoſing of the whole, or part of the annuity, ſold to Mr.* Davenant 150 l. *a year, part thereof, for* 1050 l. *In the deed there was a proviſo, that if at any time the plaintiff ſhould deſire to repurchaſe the ſaid three fourths of the annuity, and ſhould give ſix months notice to* Davenant *in writing, of his intention ſo to do, and at the expiration of ſuch notice, pay to* Davenant, *his executors,* &c. 1050 l. *then* Davenant *was to reaſſign to the plaintiff or his aſſigns; after this deed was ingroſſed, and when all parties were met for the execution,* Davenant *inſiſted upon an indorſement, and to be ſigned by the plaintiff, that in caſe he ſhould repurchaſe the ſaid three fourth parts, the ſame ſhould be upon payment of* 1050 *l. and* 75 l. *and all arrears, which the plaintiff charged he conſented to by reaſon of his diſtreſſed circumſtances.*

Davenant *being dead, the plaintiff brought his bill for an account of what was due to the defendant for principal and intereſt of the* 1050 l. *and what defendant had paid for the inſurance of the plaintiff's life, which by the bill, the plaintiff ſubmits to allow, and that upon payment of what ſhould be due, the defendant might re-aſſign the ſaid annuity.*

Your Lordſhip, upon the circumſtances of the caſe, thought this was, and is to be taken as a loan of money, turned into this ſhape only, to avoid the ſtatute of uſury, and that it ought to be ſet aſide as a ſale, and made a ſecurity only, and that the plaintiff was intitled to redemption, on payment of 1050 *l.* with legal intereſt for the ſame.

Thus it ſtands on the caſes; and the rule they go by is the unconſcionableneſs of the bargain, and the inconvenience to the publick, for they ſpeak of it as a growing evil.

Theſe caſes, and principles, obviate the objection that, from the anſwer of the defendant, may be preſumed to come from the other ſide, as that Mr. *Spencer* was not a young heir, nor ſuppoſed to be in neceſſitous circumſtances, for he had ſeveral thouſand pounds a year.

Many of the caſes cited, were not determined on the rule of relieving young heirs, particularly the earl of *Ardglaſſe* v. *Muſchamp* and others.

Mr. *Spencer*'s expectations were as great from the dutcheſs of *Marlborough* as if he had been her ſon, and ſhe might have been conſidered as a *mater-familias* ſtanding in *loco parentis*, and he as *filius-familias*.

A man who has a conſiderable eſtate, if his expences exceed his income, is a neceſſitous man, where he is under difficulties of raiſing money, and is in great want of it; ſeveral witneſſes prove the great ſtreights Mr. *Spencer* was in, but this evidence is not the only evidence, for the contract itſelf ſpeaks it, nor did any of the caſes cited require evidence, that he was neceſſitous: In *Berney* v. *Pitt*, though no proof of practice uſed by the defendant, or any on his behalf, to draw the plaintiff into the ſecurity, yet Lord *Jefferies* reverſed Lord *Nottingham*'s decree.

Such bargains are always done in ſecret, and if the court was to require proof extrinſick to the bargain, it would be ſaying at once we cannot relieve.

I ſhall conſider next, as to what the defendant may inſiſt with regard to the hazard.

The inequality is extremely great, the dutcheſs of *Marlborough* was 78 years of age, and Mr. *Spencer* was only 30; there is evidence of his health brought down as low as within ten months of his death, and of his being of a ſtrong conſtitution for many years before this bargain, his life was inſured only in 1744. which could not have been done, if he had been in a bad ſtate of health.

In the caſe of marriage-brocage bonds, the court does not decree for the ſake of the plaintiffs, becauſe they may be ſaid to act perfi-

diouſly, but to avoid the inconvenience which would otherwiſe happen to the publick.

The ſame as to the caſes of bonds to women of bad character.

The ſame as to premiums of attorneys, and guardians by clients, and infants after coming to age, *Law.* v. *Law*, before Lord *Talbot*. *Selwin* v. *Honeywood*, 20th of *October* 1743. *Shepley* v. *Woodhouſe*, 17th *March* 1742. *Pierce* v. *Waring*, before Lord *Hardwicke*.

On the laſt point, whether the ſubſequent acts have eſtabliſhed the bargain, the caſe of *Cole* v. *Gibbons*, 3 *Wms.* 290. is extremely ſtrong in favour of the plaintiff *Cole*. *There A.* having 500 *l.* given him by his uncle in caſe he ſurvived the teſtator's wife, ſells it for 100 *l.* to be paid by 5 *l. per ann.* but that if the teſtator's wife ſhould die before *A.* and the legacy become due, in ſuch caſe the reſt of the money is to be paid within a year then next; *A.* does ſurvive the teſtator's wife, and knows the legacy was become due to him, and being fully apprized of the whole fact, confirms the bargain; he ſhall be bound *thereby*; and yet Lord *Talbot* ſaid, that had all depended on the firſt aſſignment, he would have ſet it aſide, as being an unreaſonable advantage made of a neceſſitous man. But after *Martin* was fully apprized of every thing, and yet choſe to execute a deed of confirmation, and not the leaſt fraud or ſurprize appearing on the part of the defendant, it was, he ſaid, too much for any court to ſet all this aſide.

There a man was intirely *ſui juris*, and did not owe the releaſee a groat, and therefore his act was merely voluntary. Here Mr. *Spencer* was indebted to *Janſſen* upon bond, (the dutcheſs of *Marlborough* being dead) for the payment of the money, and therefore was in his power, and the new bond, and judgment only a ſequel of what was done before, and muſt be taken to be upon the ſame circumſtances, and as was ſaid in the caſe of *Berney* v. *Pitt*, is no excuſe, but rather an aggravation.

As to the defendant's ſaying in his anſwer, that Mr. *Spencer* did not at all want to ſet aſide the bargain, but deſired him to get a bond, and judgment, forthwith for the 10,000 *l.* he owed him, the caſe of *Wiſeman* v. *Beake*, is very ſtrong.

The prudence and policy of the courts of law and equity here do no more than what other nations have done in the ſame caſes.

Dig. lib. 14. *t.* 6. *lex* 1. *Verba ſenatuſconſulti Macedoniani hæc ſunt; ne cui, qui filiofamilias mutuam pecuniam dediſſet, etiam poſt mortem parentis ejus, cujus in poteſtate fuiſſet, actio petitioque daretur; ut ſcirent, qui peſſimo exemplo fœnerarent, nullius poſſe filiifamilias bonum nomen expectata patris morte fieri.*

Lex 3. *ſec.* 3. *Is autem ſolus ſenatuſconſultum offendit, qui mutuam pecuniam filiofamilias dedit: Nam pecuniæ datio perniciosa parentibus eorum viſa eſt.*

Lex 14. *Etiamſi verbis ſenatuſconſulti filii continerentur, tamen & in perſona nepotis idem ſervari debere.*

June the 19th 1750.

The Earl of *Cheſterfield verſ.* Janſſen.

MR. *Wilbraham* for the plaintiffs made two points. *Firſt*, Whether this is a good contract in point of law?

Secondly, If good in point of law, then, Whether a court of equity can, upon its principles and powers, relieve againſt this contract?

Our laws allow a certain moderate profit to be taken for money, but if we exceed it by any ſubterfuge, or what is called a ſhift, if it be for a loan of money, acts of parliament have reſcinded a contract of this kind, though it has ſomething of a chance in it.

Lord Chief Juſtice *Anderſon*, in his ſecond report, 15 *pl.* 8. ſays, Where there is a borrowing of money, and a communication for intereſt, the deviſe to have beyond the rate of 10 *per cent.* is fraudulent, and within the 37 *Hen.* 8.

It may be objected in all caſes of contingency, where greater than legal intereſt is taken, theſe have not been held to be uſurious, and bottomree bonds will perhaps be mentioned.

But thoſe are regarded chiefly in reſpect of trade, and that is their principal foundation of being allowed.

The ſtatute of 21 *Jac.* makes uſurious bonds void in as many caſes as poſſible.

The life of a gentleman of thirty is by this contract ſet againſt a life of ſeventy-eight; and a wager, whether that life will laſt beyond this, muſt at the firſt view appear to be greatly for the advantage of the lender: I hope therefore the court will ſee it in the light of a ſhift or ſubterfuge to avoid an act of parliament, made with a good deſign, and within the meaning or intention of the ſtatutes of uſury.

If ſtopping a commerce of this kind, which is become a growing evil, will be of publick ſervice, it is time for this court to interpoſe; by theſe ſorts of contracts men pledge their eſtates before they have them, and before they know the value of them; no one, who has a preſent power over his fortune, ever makes contracts of this kind. He who has money at intereſt or in the ſtocks, he who has a real eſtate in fee ſimple, never deals in this way, which ſhews 'tis the neceſſity of the caſe that forces them to have recourſe to theſe methods, and ſhews too that this ſort of commerce muſt generally be practiſed by young and unexperienced perſons, who have expectations of ſucceeding to the old.

It is an obſervation generally true, and a melancholy truth it is, that mankind have not near ſo much regard to great reverſionary inconveniencies as to ſmall preſent gratifications; young men know not how to eſtimate what they never felt the benefit of, and by this ſort of traffick, their eſtates, like their pleaſures, are gone before they are enjoyed. That this commerce promotes and encourages extravagance, that extravagance in general is contrary to the policy of the

law, is not to be diſputed, becauſe men ſpend not their own, but the eſtate of others; for generally in the ruin of one of theſe great prodigals, a large number of poor creditors are included.

I admit that againſt this ſort of extravagance there is no immediate remedy in our law; the *Roman* law put their prodigals under curators, *prodigo interdicitur rerum ſuarum adminiſtratio.* The magiſtrate has no ſuch power here, 'tis true; but this ſhews the wiſdom and utility of the reſtraint.

What is the effect of this extravagance? A trade of annuities, of junctims, of *poſt obits*, is eſtabliſhed as a ſtaple, to encourage young gentlemen to undo themſelves. This commerce has been exclaimed againſt ever ſince I knew the world, and mankind have wiſhed that ſome ſtop might be put to it. Whoever engages in theſe ſchemes, his ruin is pronounced not far off, and by theſe means they deſtroy their eſtates, though they ſpend but half of them.

How far then this ſort of contract may be regulated by a court of equity, is the next conſideration.

The law in caſe of uſury reſcinds the contract *quoad* the borrower, and gives a forfeiture of treble the value of the loan. This is ſevere! A court of equity moderates the caſe, allows the lender the loan, and intereſt for it whilſt lent; but prevents him from receiving that unjuſt price, which his avarice had ſet upon the riſque he run. Upon theſe principles it is to be conſidered, whether this ſpecies of contracts is not within the reaſoning of other caſes, which bear an analogy to it, and governable by the ſame rules.

There are contracts of ſeveral kinds which are not ſuffered to prevail. Marriage-brocage bonds are ſet aſide, though a marriage be fairly procured, though it is a great ſervice to the party who gives ſuch bond, though the man and woman are both of age, and no diſparagement, and though they neither of them diſapprove of the marriage. In the caſe of *Hall* v. *Potter*, *Parl. Caſes* 76. the houſe of Lords, on account of the dangerous conſequence to families, reverſed a decree of the Lord *Keeper*'s, who was of opinion not to relieve againſt a marriage-brocage bond.

If contracts, allowed to be good at law, have been ſet aſide in equity, becauſe dangerous to families, *a fortiori* they ſhould be ſo where they are deſtructive to families.

The principle on which this court has ſet aſide contracts with young heirs, is, where they have ſold their reverſions or remainders, or bound themſelves to pay unreaſonable ſums on the death of their anceſtors.

In the caſe of *Twiſleton* v. *Griffiths*, 1 *Wms.* 310. Lord *Cowper* relieved againſt an agreement to ſell a reverſion at an under price, *declaring that theſe bargains were corrupt and fraudulent, and tended to the deſtruction and ruin of families, and that the relief of the court ought to be extended to meet ſuch corrupt practices, and unconſcionable bargains.* And in *Curwin* v. *Milner*, Lord *King* grounded himſelf on this, *that the court would ſet aſide contracts of this kind, where the perſon contracting had expectations after the death of another.* And in the caſe

caſe of *Cole* v. *Martin*, 3 *Wms.* 293. Lord *Talbot* ſaid, *That as to the caſe of young heirs making bargains, it was the policy of the nation to prevent what was a growing miſchief to antient families, ſeducing them from a dependance on their anceſtors, and therefore the policy of the nation has thought fit to ſet aſide ſuch bargains with young heirs.*

This is the general principle, a man if he has any reverſion, in effect ſells it, and the preſent caſe tallies with thoſe I have mentioned in all the pernicious conſequences.

What inconvenience then can ariſe in putting a ſtop to this trade? for as it is the ſame ſort of men who are concerned in every one of theſe contracts, the laying an embargo upon this commerce will not at all hurt the conſtitution; for they are only fuel to extravagance.

The defendant in his anſwer, *objects the plaintiffs are not intitled to relief, becauſe there is no pretence of fraud.*

I do not ſay there is any, but publick inconvenience alone may induce the court to interfere, though there is no apparent fraud.

It is inſiſted too Mr. Spencer *was not a young heir, for he was thirty*; but although of that age, yet not old enough to manage his fortune, ſo as to keep within bounds.

Mr. *Twiſleton* was 34 at the time his contract was made, and yet the court did relieve him notwithſtanding.

Though it be true Mr. *Spencer* was no heir to the Dutcheſs of *Marlborough*, yet from her conſtant declarations he was looked upon to be *quaſi* her adopted heir; the defendant conſidered him as ſuch, elſe why ſhould he be more able to pay at her death than at any other period? So that he was *quaſi hæres*, and as an heir has only a ground of expectation, if Mr. *Spencer* had the ſame, that is a foundation for a court of equity to relieve.

Mr. *Spencer* was indiſputably the ſole favourite the Dutcheſs of *Marlborough* had; her common expreſſion was, *Jack is no beau, nor is he a courtier, but he is an honeſt man.* I never was but four times in her company, and yet I heard her make this obſervation every time.

The next objection, that Mr. Spencer *was not under thoſe neceſſities that perſons generally are, who enter into theſe ſort of contracts, and that this is the main ingredient in the relief given in caſes of this nature.*

But the fact is clearly otherwiſe; he who has a great eſtate, but lives at double his income, who has a multitude of footmen at his gates, but more duns, is poor, is under preſſing neceſſities; it is proved that Mr. *Spencer* owed in 1738 above 20,000 *l.* and was under the greateſt difficulties; and is not the evidence of Mr. *Backwell* that he had hawked this propoſal about, the ſtrongeſt proof of his extreme neceſſities? Whoever ſuffered a traffick of this kind to be made publick, unleſs he was neceſſitous? Did he not run a much greater riſque than the defendant? Did he not riſque his whole expectations? He may be ſaid to be poor who is in debt, and cannot pay; nor do I know an inſtance of a perſon's granting a *poſt obit*, without his being reduced firſt to the greateſt extremity.

The

The laſt objection is, that Mr. Spencer, *though he lived a year and eight months after the death of the dutcheſs, yet he never thought proper to ſeek relief againſt it, but on the contrary ratified the bargain.*

As to Mr. *Spencer*'s not ſeeking relief againſt it, it is no wonder, this was in the nature of a debt of honour, a debt depending on chance, and the falſe notion of honour which prevails in the world, would engage a man to pay this ſort of debt, whilſt the poor creditor who furniſhed him with the very bread he eats, is turned away without a penny.

Mr. *Spencer* had not a ſum of money left him under the will of the dutcheſs of *Marlborough*, but only a large inveſtment to be laid out in land, ſo that here was an immediate payment to be made to the defendant, and no perſonal aſſets to anſwer it, and though the rents of his eſtate were great, and with good œconomy might have cleared him, yet there muſt have been a length of time firſt.

I uſe theſe arguments to ſhew, Mr. *Spencer* was under the ſame preſſure he was before, with this aggravation, the debt was become greater, and no money could be raiſed off his eſtate, but by rents and profits.

I do not throw out any thing againſt the perſon of the defendant, I only preſs the relief in this caſe, for the ſake of Mr. *Spencer*'s tradeſmen, who as they are only ſimple contract creditors, have no chance of being paid any other way.

I lay it down as a rule, that this ſpecies of traffick is a publick inconvenience, and as it grows into a trade and commerce, I know of no method but the application to this court to remedy it, for it is of ſuch a complicated nature, that even the legiſlature cannot help it; and therefore as this court can only meet the miſchief, we hope they will give their aſſiſtance to put a ſtop to it, and relieve upon the terms prayed by the bill, on paying the money *really* lent only.

Mr. *Crowle* of the ſame ſide.

The queſtion in this cauſe is in fact between the butcher, baker, poulterer, and other tradeſmen of Mr. *Spencer*, and the uſurer.

The relief that is prayed by this bill, never prayed before in any bill, that this contract ſhould be ſet aſide *here* for uſury.

But the defendant inſiſts this contract is not illegal, nor uſurious.

From the 27 *C.* 2. to this time, there are not above two determinations at law on uſurious contracts, and the reaſon is, this court have under the notion of frauds taken cognizance of theſe caſes.

Draper v. *Dean* and *Jaſon*, *Finch's Rep.* 439. *The plaintiff lent Sir* Robert Jaſon 1000 *l. who for ſecuring the repayment thereof with intereſt, mortgaged the lands in the bill mentioned, and afterwards the defendant* Dean *ſet up ſome prior incumbrances to defeat the mortgage, and particularly a ſtatute of* 5000 *l. againſt which the plaintiff now exhibited his bill to be relieved, for that the defendant* Dean *having*

furniſhed Sir Robert Jaſon *in his father's life-time with goods, and with five horſes, valued the ſame at* 2500 l. *for which this ſtatute was given, but that the horſes and goods were afterwards ſold by Sir* Robert Jaſon *for* 280 *l. which was the utmoſt value thereof. The court declared this to be a caſe of great hardſhip, and that dealings of this nature ought to be diſcouraged, and that if Sir* Robert Jaſon *had been the plaintiff, he might have been relieved: However they decreed an account, and to compute what was due to* Dean *for horſes and goods, and the real value thereof to be ſold, at the reſpective times when the ſame were ſold and delivered, with intereſt from ſuch time, and on payment thereof, the ſtatute to be vacated.*

Here was a moſt corrupt ſcandalous agreement, and one would have thought they could not miſs the ſtatutes of uſury, in a caſe undoubtedly within them, and yet not inſiſted upon.

Lord *King* in the caſe of *Curwin* v. *Milner*, might very well doubt whether he could give relief, becauſe, tho' they argued very prettily on the circumſtances, and fraud in the caſe, that was not ſufficient to ſatisfy him; but if he had happened to fix upon the ſteady baſis of the ſtatutes of uſury, he would have decreed upon an unſhaken foundation.

I will conſider the caſe next upon the ſtatutes of uſury, and whether this is not ſuch a ſhift or device as is within the ſtatutes, a ſhift to avoid and evade them.

The preamble to the 37 *H.* 8. *c.* 9. ſays, *Where before this time divers acts have been ordained for the avoiding and puniſhment of uſury, and of other corrupt bargains, ſhifts, and cheviſances, which acts have been ſo obſcure, as to be of little force or effect; for reformation thereof Be it enacted, That all and every the ſaid acts ſhall from henceforth be utterly void.*

The third ſection is, *That no perſon of what eſtate, degree, quality or condition ſoever, by way or mean of any corrupt bargain, loan, exchange, cheviſance, ſhift, or intereſt, of any waies,* &c. *or by any other corrupt or deceitful way, or means, or by any covin, engine, or deceitful way or conveyance, ſhall have, receive, accept, or take in lucre or gain, for the forbearing, or giving day of payment, of one whole year, of or for his or their money,* &c. *above the ſum of* 10 l. *in the hundred.*

The fifth ſection, *If any perſon ſhall do any thing contrary to this ſtatute, he ſhall forfeit the treble value of the wares, and other things ſold,* &c.

This was the firſt ſtatute that allowed any lucrative intereſt, the confirming ſtatute of the 13 *Eliz. ch.* 8. makes 37 *H.* 8. perpetual.

Then comes the 21 *Jac.* 1. *ch.* 17. *ſect.* 2. "No perſon ſhall take "for loan of monies, above eight for a hundred for one year, *&c.*"

Every ſhift, device, *&c.* to evade the ſtatute of uſury falls within this ſtatute.

The queſtion is, Whether at the time of this contract, Mr. *Janſſen* did not mean to ſecure himſelf a larger intereſt than the ſtatutes allow, if he did, it is a void bargain.

The

The *cotemporanea expoſitio* is properly laid down to have the moſt weight, and the judges at that time, were ſome of the greateſt men, that ever filled the Bench.

In *Clayton*'s caſe, 5 *Co.* 70. it is ſaid, every device, ſhift, *&c.* where there is an agreement or communication for loan of money is within the ſtatute of uſury. The concurrent opinion of the King's Bench, Common Pleas, and Court of Exchequer, that *Clayton*'s caſe is a right determination, and the judgment there within 12 years after making the ſtatute of *Elizabeth.*

Cro. Eliz. 643. *Button* v. *Downham*, a *miſtake or omiſſion in the ſtate of this caſe*; *but Lutw.* 469. in *Maſon* v. *Fulwood* has rectified the error; for ſpeaking of *Button* v. *Downham*'s caſe, he ſays, *I have ſeen the entry in the roll, by which it appears that as well the intereſt as the principal was in hazard, though it does not ſo appear in the books where this caſe is reported.*

Bottomry is not a communication for the loan of money, but a partnerſhip for the honeſt intention of ſeeking a livelihood by trade, and a plain diſtinction in *Hardres* 418. The caſe of *Joy* v. *Kent*, an action of *debt upon an obligation, conditioned to pay ſo much money, if ſuch a ſhip returned within ſix months, from* Oſtend *in* Flanders *to* London, *which was more by the third part, than the legal intereſt of the money, and if ſhe do not return, then the obligation to be void: The defendant pleaded it was a corrupt agreement, and that the obligation was entred into by covin, to evade the ſtatute of uſury, and the penalty thereof. Lord Chief Baron* Hale *held clearly, this bond is not within the ſtatute, for this is the common way of inſurance, and if this were void, ſaid he, by the ſtatute of uſury, trade would be deſtroyed, and not like the caſe, where the condition of a bond is to give ſo much money, if ſuch or ſuch a perſon be then alive, for there is a certainty of that at the time*; *but it is uncertain, and a caſualty, whether ſuch a ſhip ſhall ever return.*

Fuller's caſe, the 29 *Eliz.* a grant of an annuity, not within the ſtatute, *for no communication of loan.*

Bedingfield's caſe, the 42 *Eliz.* the principal there ſuppoſed to be riſqued. *Noy* 151. *Symmonds* v. *Cockerill*, 9 *Jac.* 1. *A rent charge of* 20 l. per ann. *for* 100 *l. for* 8 *years on a contingency, yet uſury, if on loan, tho' principal in hazard.*

Roberts v. Tremain, 14 *Jac.* 1. *held uſury though on contingency.*

King *v.* Drury, 2 *Lev.* 17. *No uſury where in the power of grantor to avoid.*

Grange *v.* Swaine 3 *Jac.* 2. *Principal in hazard, Lutw.* 464.

Maſon *v.* Fulwood, *Lutw.* 469. *Principal alſo in hazard.*

Maſon *v.* Abdy, 3 *Salk.* 390. *Principal there alſo in hazard.*

Mr. Attorney general (*a*) for the defendant.

(*a*) Sir *Dudley Rider.*

The counſel for the plaintiff would in the firſt place, ſet aſide this contract as uſurious, and if not void at law as uſurious, yet it is inſiſted ought to be ſet aſide in equity, as improper and unconſcionable.

It is in vain to lay down a rule to reſtrain every man, and every family from ruin, while the law allows every perſon to be *ſane*, till by his crime or his contract, he ceaſes to be ſo.

As to the firſt point they have been pleaſed to make *of legal uſury*, it's novelty does not recommend it much.

The notion of uſury originally was the taking any ſort of præmium, for the loan of money; but as the law ſtands now, it is taking an illegal premium only; the ſtatutes forbid a higher præmium than the legal intereſt.

The ſtatute of the 21 *Jac.* 1. *ch.* 17. *ſec.* 2. *None ſhall upon any contract, directly or indirectly, take for the loan of any money, or other commodities, above the rate of* 8 l. *for* 100 l. *for one whole year, in pain to forfeit the treble value of the money, or other things lent.*

In order to make it uſury, there muſt be *a loan* of money, which money is alſo to be repaid, and there muſt be a præmium for the loan of that money more than 5 *per cent.*'

Nor ſhall any artificial contrivance whatever evade the ſtatute, and if this contract is a colourable agreement only, to avoid the ſtatutes of uſury, and is really a communication for the loan of money, it is within the ſtatutes.

But this is no contract for a debt due, when it depends upon a contingency that may never happen.

Serjeant *Hawkins's Pleas of the Crown, book* 1. *ch.* 82. of uſury, *ſec.* 16. "No contract is uſurious, by which the lender runs the ha-"zard of loſing all his money, both principal and intereſt, as in the "caſe of *bottomry.*"

Cro. Eliz. Bedinfield *v.* Aſhley, A. *delivered to* B. 100 l. *who by indenture covenanted with* A. *to pay to every one of* A.'s *children, which then were, and ſhould be living at* 10 *years end,* 80 l. A. *having then* 5 *daughters, and for aſſurance mortgaged a manor, and was bound in a ſtatute of* 500 l. *it is not uſury, but a mere caſual bargain.*

I mention the caſe of *Roberts* v. *Tremain, Cro. Jac.* 507. for the ſake of Mr. Juſtice *Dodderidge*'s obſervation. If, ſaid he, I lend 100 *l.* to have 120 *l.* at the year's end, upon a caſualty; if the caſualty goes to the intereſt only, and not to the principal, it is uſury, for the party is ſure to have the principal again, come what will; but *if the intereſt and principal are both in hazard,* it is not then uſury.

Cro. Jac. 208. Sharpley v. Hurrel. *A ſhip going in the fiſhing trade to* Newfoundland, *(which voyage muſt be performed in* 8 *months) the plaintiff gave the defendant* 50 l. *to repay* 60 l. *upon the return of the ſhip to* Dartmouth, *and if by leakage or tempeſt ſhe ſhould not return in* 8 *months, then to pay the principal money (viz.* 50 *l. only, and if ſhe never returned, then he ſhould pay nothing. All the court held, that this is no uſury within the ſtatute, for if the ſhip had ſtaid at* Newfoundland, 2 *or* 3 *years, he was to pay but* 60 l. *upon the return of the ſhip, and if ſhe never returned, then nothing; ſo as the plaintiff run a hazard of having leſs than the intereſt, which the law allows, and poſſibly neither principal nor intereſt.*

It is not within the ſtatute, becauſe no debt, till the accident happened of the ſhip's return, as both principal and intereſt were hazarded.

The diſtinction, Wherever the contract on the loan of money is upon a contingency, *that is colourable, or ſo ſlight*, as is contrived merely to avoid the ſtatute, the ſtatute ſhall have its effect; when this ground is applied to the caſes cited on the other ſide, it will overturn the conſequence they draw from them to the preſent caſe.

The agreement muſt be corrupt, or it will not be uſurious.

Reynolds v. *Clayton*, *Mo.* 397. the ground the court went on clearly was the original contract, being really for a loan of money, and the fact in that caſe a mere evaſion to avoid its being a loan.

Cro. Eliz. 643. *Button* v. *Downeham*. It is the intent that makes it ſo or not, for if it is a wager, it is not uſury: Every contract which is a real contingency, is a wager, and is not done merely colourably to avoid the ſtatute.

Cotterell v. *Harrington*, *Brownlow* 180. *A.* for 110 *l.* granted a rent of 20 *l.* for eight years, and another of 20 *l.* a year for two years, if *B. C.* and *D.* ſhould ſo long live. In replevin the defendant avowed for the rent, and the plaintiff pleaded the ſtatute of uſury, and ſet forth the ſtatute and a ſpecial uſurious contract; ſaid in this caſe, If it had been laid to be upon a loan of money, then it was uſury; but if it be a bargain for an annuity, it is no uſury, but that this was alledged to be upon a lending.

Fuller's caſe, 4 *Leon.* 208. *A.* gives 300 *l.* to *B.* to have an annuity of 50 *l.* aſſured to him for 100 years, if *A.* and his wife and four of his children ſhall ſo long live. *Per Cur'*, this is not within the ſtatute of uſury; ſo if there had not been any condition. But care is to be taken that there be no communication of borrowing any money before.

Maſon v. *Abdy*, in *Show. Rep.* Lord Chief Juſtice *Holt* ſaid in that caſe, *that a dying in 6 months was no hazard, and therefore uſurious.* This is very material for my argument, becauſe it implies ſtrongly, if it had been a real hazard, it had been no uſury.

A bottomry bond is admitted by the other ſide to be a hazardous contract, but ſaid not to be within the ſtatute, becauſe allowed for the ſake of trade.

I do not take this to be the reaſon, the true ground of the allowance in courts of juſtice, the lender is to be paid for a *bona fide* riſque, and all turns upon this, whether a colourable contract to avoid the ſtatute.

In the caſe of *Joy* v. *Kent*, in *Hard. the bottomry contract* was put upon the ſame footing with other contingent contracts, and within former caſes, *becauſe it was* merely colourable.

The true point therefore on which the preſent caſe muſt turn is, whether the contract between Mr. *Spencer* and the defendant was for the loan of money, and whether more intereſt was originally meant to be taken than legal, and if merely colourable, and a device to avoid the ſtatute?

Firſt, The contract here, upon the face of it, is not a contract for any thing, but merely a contingent bargain.

Secondly, Nothing that can ſhew it to be otherwiſe, either from the circumſtances of Mr. *Spencer* at the time, or the light he ſtood in with regard to the Dutcheſs of *Marlborough*.

No pretence that the defendant made any agreement he ſhould have the 10,000 *l.* on any other contingency, but Mr. *Spencer*'s ſurviving the Dutcheſs of *Marlborough*.

It is objected that this is a loan, becauſe the word *lend* is made uſe of by Mr. *Spencer* to Mr. *Backwell*.

The word *loan* makes no difference; it is a communication only between the parties on a corrupt agreement to avoid the ſtatute, upon which it turns. The word *borrow* here makes no difference, for ſuppoſing he had ſaid *to ſell*, this court would equally have judged whether it was uſury, and it muſt be the *bonâ fide* intention of the party advancing muſt determine the nature.

As the defendant took it altogether upon the contingency, I will now conſider the nature of the contingency, which is ſaid to be ſo totally diſproportionate, *Spencer* being only 30, and the Dutcheſs 78 years of age; and on this account ſo glaring, that it muſt be a groſs fraud and impoſition.

Mr. *Spencer*, as is proved in the cauſe, was at that time of a bad conſtitution, according to the judgment of perſons experienced in theſe things, broken by an intemperance with women, an intemperance in wine, and an obſtinate continuance in it; and when he was told it, ſaid, *I deſire to live no longer than while I am capable of following this courſe of life.* The Dutcheſs of *Marlborough* indeed 78 years old, but in point of conſtitution extremely likely to live many years; and ſuppoſing Mr. *Spencer* was underſtood then to be in a conſumption, and known to be ſo in the opinion of eminent phyſicians, will *your Lordſhip* ſay this contract was ſo very diſproportionate, but we do not go upon meer ſuppoſition, for he actually died in ten months time after the Dutcheſs, not in a common way, but with a broken conſtitution.

Upon a computation at the time this money became due, intereſt upon intereſt, and inſurance at 5 *per cent.* only, brings it to 9630 *l.* ſo that if the Dutcheſs of *Marlborough* had lived ſix months longer, the defendant would have been a loſer, and this too upon a ſuppoſition the defendant could have inſured at 5 *per cent.* but no evidence he could have done it at this rate. Lord *Mountfort*, who has been examined, and underſtands theſe things extremely well, ſaid in *May* 1738, he looked upon Mr. *Spencer*'s life to be ſo bad, he would not advance money on any terms; no body therefore beſides the defendant would have advanced any money upon this contingency.

Having ſtated thus much, I will now come to the next point, the conſideration of the caſe as it ſtands on the foot of equity. I will firſt conſider it on the original contract, and ſecondly on the acts that have been done to confirm it, and hope to ſhew it was a fair bargain in the beginning, or if not ſo, Mr. *Spencer*, who could give up this advantage, has done it by ſubſequent acts.

The general principle laid down on the other ſide, that this is an unconſcionable bargain, is from the manner of obtaining it. The laſt conſideration is, whether it be ſuch a contract as, independant of fraud, iniquity, and unfairneſs, ought, for the public good, to be ſet aſide?

The defendant at the time was a total ſtranger to Mr. *Spencer*, ſo ſworn by himſelf in his anſwer, and no evidence to the contrary, in no ſhape whatever a perſon who has been looking out for young gentlemen to draw them into ſchemes of this kind, not of the defendant's ſeeking, but ſought out by Mr. *Backwell*, Mr. *Spencer*'s agent. He did not look upon it as a beneficial bargain, but abſolutely refuſed it, and was preſſed to accept it.

It is not pretended Mr. *Spencer* was a weak man, or liable to be impoſed upon; nay more, they do not ſo much as charge impoſition in their bill: Not a young man, not under the care of a parent, married, not wanting an eſtate, had then very near 8000*l.* a year in land, 2000*l. per ann.* long annuities, 10,000*l.* ſettled on his marriage, an intereſt in it to himſelf for life, at leaſt 400*l.* a year more, a leaſehold eſtate of 120*l.* a contingent intereſt in the ſum of 30,000*l.* which was left to the Counteſs of *Sunderland* by her huſband, with a power to diſpoſe among ſuch of his children as ſhe ſhould think fit, a great perſonal eſtate in furniture, pictures, *&c.* beſides.

What then was his neceſſity?

He wanted this ſum to pay tradeſmen only. It is proved in the cauſe, he hated gaming, and never loſt 100*l.* at any one time in his life; it proceeded from an honeſt principle to pay debts, and if he had adviſed with his beſt friends, (I do not mean lawyers) and had ſtated how his affairs were ſituated, and there was no other way of raiſing it, would his friends, or even the law ſay, You ſhall not raiſe it, becauſe you can only do it in this way?

It is objected, *he is a young heir, and compared to ſeveral caſes, and therefore, ſaid Mr.* Clarke, *here is now a general rule or principle on which this court can determine it to be a void contract.* But I ſee no ſuch inference as he endeavours to draw from it. *It is ſaid too there was a perſon who in* 1743 *inſured Mr.* Spencer's *life at* 5 per cent.

This was not a publick office, but only an under-writer, who might not know the ſtate of his health, for they are not very cautious in inſuring; we ſhall ſhew an application to the royal inſurance office, and they would not inſure his life at all.

There is not any one of the caſes but what will turn upon this principle, that there was *fraud and impoſition*, and if no actual fraud here, nor implied preſumptive fraud, there is no ground to relieve upon. The very foundation the common law goes upon to get rid of the ſtatute *de donis*, and for which the fiction of a common recovery is introduced, was for the ſake of a man's being impowered to pay his debts.

It is ſaid Mr. *Spencer* had very great expectations.

And

And yet the will, under which he took, was not in being at the time of this bargain, but was made ſeveral years after.

I ſhall now take notice of the caſes cited for the plaintiffs.

Waller v. *Dalt*, 1 *Ch. Caſ.* 276. The court relieved there upon a very groſs impoſition, and was even within the ſtatute of uſury.

Berney v. *Beak*, 2 *Ch. Caſ.* 136. It was determined likewiſe for the ſame reaſon; there wine was palmed upon the plaintiff, when he wanted money, valued too at 700*l.* and ſold for 360*l.* only.

Berney v. *Tiſon*, 2 *Ventr.* 369. there was alſo a groſs fraud.

Batty v. *Loyd*, 1 *Vern.* 141. the reaſon Lord Keeper *North* gives at the end, makes it a material caſe for the defendant; *this, ſaid he, is the common caſe; pay me double intereſt during my life, and you ſhall have the principal after my deceaſe.*

Becauſe perſons apply for money, and cannot get it juſt on the terms they would wiſh, that is no reaſon for a court of equity to interpoſe.

Nott v. *Hill*, 1 *Vern.* 167. the court relieved there, becauſe it was an unrighteous bargain in the beginning, and nothing afterwards could help it, and did not go at all upon the contingency.

The Earl of *Ardglaſſe* v. *Muſchamp*, 1 *Vern.* 75, 135, 237. a moſt extravagant impoſition in that caſe.

Bill *v.* Price, 1 Vern. 467. *went altogether upon impoſing extravagantly on young men, by taking five for one.*

James *v.* Oades, 2 Vern. 402. *ſet aſide becauſe againſt conſcience, not becauſe contingent.*

Twiſleton *v.* Griffith, 1 Wms. 310. *the court relieved, becauſe this was the caſe of an heir who was leſs upon his guard, by being ſeduced from his parents; and was beſides a growing evil, an impoſition too by a perſon under a pretence of friendſhip, by getting him from his father.*

Berney v. *Pitt*, 2 *Vern.* 14. the court there went merely upon the unconſcionableneſs of the bargain, which ſhews they conſidered it as fraudulent, and therefore theſe caſes amount to no more than relieving againſt fraud.

Mr. *Clark* concluded, that the court would conſider the nature of the bargain, and determine upon reaſons of publick inconvenience; but Mr. *Wilbraham* ſaid rightly, no certain rule can be laid down, becauſe that rule itſelf would be attended with dangerous conſequences, when applied to other caſes, and that even the legiſlature could not reach it, and if ſo, it is ſtrange to ſay this court can meet the miſchief,

——— *pudet hæc opprobria nobis,*
Et dici potuiſſe, et non potuiſſe refelli.

It is ſaid, wherever there is a private clandeſtine contract or marriage, contrary to the original proper contract, the court will relieve the very *particeps criminis.*

But the ground the court goes upon there, is, that there cannot be ſuch a caſe without fraud in it, and wherever there is a fraud, it is impoſſible to put a caſe in which the court will not relieve.

Another caſe has been put of attorneys, while their clients are in diſtreſs, and in thoſe circumſtances prevailing upon them to enter into an unconſcionable agreement, as in the caſe of *Japhet Crooke*, where your Lordſhip relieved on the ſecond hearing, though on the firſt, you doubted whether you could do it.

But in this caſe, though the party had paid the money to an attorney, the court will relieve upon general principles, his being ſuppoſed to be more knowing than his client, and therefore made the contract with his eyes open.

A man may contract on a future contingency, a mere poſſibility: I am conſidering then upon what general grounds your Lordſhip will proceed. Will the court lay it down for a rule, that Mr. *Spencer* could not have diſpoſed of a contingency on the death of father and mother, or grandmother? Will the court ſay, that a man ſhall not diſpoſe of an expectation? The caſe of *Hobſon* v. *Trevor*, 2 *Wms.* 191. is a ſtrong authority, to ſhew that a contingent or hazardous bargain, will be decreed in ſpecie in equity.

A man cannot at law ſell an intereſt in an eſtate, but he may contract, and judges have been *aſtuti*, as Lord *Hobart* ſaid in another caſe, by introducing common recoveries to give people a power for the ſake of the publick convenience, to diſpoſe of a reverſionary intereſt.

In every caſe, where it is neceſſary, a court of equity will relieve, and if they do not, I will venture to ſay, it is not ſuch a caſe as is really and ſubſtantially neceſſary: But if your Lordſhip ſhould determine in the manner the plaintiff's counſel deſire, it would be determining, that a perſon, in the ſame ſituation with Mr. *Spencer*, cannot, for the beſt purpoſe in the world, *the payment of debts*, enter into ſuch a contract.

I ſhall conſider next the point of confirmation by ſubſequent acts.

My firſt poſition is, that Mr. *Spencer had a right to releaſe any demands he had upon another.*

He has not only ratified it, but eſtabliſhed it upon terms, though I will allow at the ſame time, this judgment as well as any other contract, is capable of being ſet aſide; but then it muſt be upon the original contract being founded in fraud.

It is objected, that at the time of the latter tranſaction, he was under the ſame neceſſity.

This is clearly contradicted in evidence. It is ſaid too, he was under the preſſure of debts, but is that a reaſon for ſetting aſide every particular contract; the judgment here given in the freeſt manner: Mr. *Spencer* himſelf ſent for Sir *Abraham Janſſen*, nor is there even a ſuſpicion, Mr. *Spencer* thought the defendant had done any thing contrary to the niceſt notions of honour.

Lord *Talbot* in the caſe of *Cole* v. *Gibbons*, 3 *Wms.* 290. ſaid, he could not relieve, becauſe the perſon there, after being fully apprized of every thing, executed a deed of confirmation of the former aſſignment.

The impoſſibility of Mr. *Spencer*'s being impoſed upon at the time he confirmed the bargain, is the ſtrongeſt circumſtance that can poſſibly be in our favour.

In the caſe of *Standard* v. *Medcalf*, which came firſt before Lord *Talbot*, and afterwards went up into the houſe of Lords, his Lordſhip thought it a fraudulent tranſaction, and ſaid, if it depended only on the ſettlement, he would have relieved, but the will takes off from it, becauſe ſhe has done that voluntarily, and ſhews the fairneſs of the former contract: The preſent is a much ſtronger caſe, for there was nothing fraudulent in the original tranſaction, and therefore a voluntary confirmation will have ſtill the greater weight with the court.

(a) Mr. *Murray*.

Mr. Solicitor general for the defendant.

The firſt queſtion is, Whether the bond taken as it ſtood originally, was a void bond at law, by reaſon of the ſtatutes of uſury, and if it was, I would not take up the time of the court, in arguing on the ſubſequent tranſactions.

The ſecond queſtion is, Whether on the head of equity, this court can ſet aſide a legal contract on the ground of the defendant having acted unconſcionably.

If both theſe are againſt the plaintiffs.

A third queſtion *has been made*, that ſuppoſing it to be good in law, and in conſcience, whether the court ſhall not ſet it aſide on political reaſons.

I will endeavour to ſhew hereafter, why ſuch a ground of determination is impoſſible in this court, but at preſent beg leave to inſiſt, this is as honeſt, as fair, and conſcientious a bargain as could be made of the contingent kind.

Firſt, I ſhall take notice of the circumſtances, character, and ſituation of life of the obligor.

Secondly, The ſame as to the obligee.

Thirdly, The motive, or reaſonableneſs of it, under his ſituation then, to ſollicit ſuch a bargain.

Fourthly, The manner in which it was propoſed, and brought to a concluſion.

Fifthly, The fairneſs and equity of the price, according to the probability at the time, and the event which has happened ſince.

Sixthly, The opinion Mr. *Spencer* had of it, in his private thoughts, even down to the laſt moment of his life.

Firſt, As to circumſtances, which are always material in theſe caſes.

As to Mr. *Spencer*'s underſtanding, he is not charged by the bill to be weak, nor likely to be impoſed upon, nor that he was impoſed upon.

Mr. *Spencer* was then turned of 30, no heir of any ſort, at that time had no father, but was himſelf the father of a family; was in no ſtate of diſobedience with grandmother, uncle, or any other relation;

tion; never gamed in any part of his life; never loſt 300 *l.* in his life, put it all together.

It is material, that he had then taken up, and was grown more temperate.

Another ſort of circumſtance is, that of fortune.

Poſſeſſed of a fine family ſeat, park, *&c.* an eſtate in land of 5000 *l.* a year, had the intereſt of 10,000 *l.* reverſion to himſelf in fee for want of younger children, and he had no younger children, had a right in 2000 *l.* exchequer annuities, a chance in a ſum of 30,000 *l.* a hope or expectation from the dutcheſs of *Marlborough*; he had plate, jewels, *&c.* fit for his rank; ſo that beſides his perſonal eſtate, and his expectations from the dutcheſs, he had at that time 7500 *l.* a year for life.

He was a younger brother, and a commoner, and yet had 3000 *l.* a year more than the eſtate of the family had ever been, to ſupport the honour and title.

From all the evidence in the cauſe, he was addicted to women and wine, but reclaimed two years before he entred into this bargain.

People have as many ways of running out, as getting eſtates, unaccountable how: He had contracted 20,000 *l.* debts, and debts to tradeſmen, as is inſiſted on our ſide; the witneſſes ſwear that he was preſſed by tradeſmen, and that the debts amounted to this ſum.

The plaintiffs ſhould have adapted their interrogatories to this point, who was he indebted to?

Thirdly, The motive, or reaſonableneſs of it, *&c.*

He might very properly ſay, juſtice obliges me to pay them; it is ſcandalous not to pay them; it debaſes a man of figure and fortune.

Another motive was, that the clamour might not reach the ears of the dutcheſs of *Marlborough*.

Could he have had the aſſiſtance of all his relations, nay if he had had the honour and happineſs of conſulting your Lordſhip, attended as you are, could he have been better adviſed in his ſituation?

He muſt have done it by ſelling his reverſion, and chance on the death of the dutcheſs, either on ſingle or junctim annuities.

No man would have adviſed him to ſell his perſonal eſtate, family pictures, jewels, *&c.* This is diſgraceful, and would have been rejected by the whole family.

Could he have paid it out of the annual profits of his eſtate, how muſt he live in the mean time? Beſides, the clamour of tradeſmen would have continued, for they would not have ſtayed till the money was raiſed in this manner.

But why ſhould he at the age of 30, pinch for the ſake of a ſon, who at 21, will be maſter of 30,0000 *l.* a year.

The next conſideration is, the point of a ſingle or junctim annuity.

Whoever wants ſuch a contract muſt pay for it. If a man ſells an annuity for his own life, the price of middle age and good health, never exceed above ſeven years; but if the ſame man wants to buy, he gives 14 years, 15, and in one caſe proved in the cauſe to have hap-

happened in 1743, ſixteen or ſeventeen years. If the life is a bad one, he is made to abate in proportion, take it at the common price he muſt have paid, 1000 *l.* a year for 7000 *l.* at the beſt.

Theſe reaſons would have diſſwaded him from dealing in annuities.

Should he have ſold his reverſion?

There was a chance of his having another ſon, nay, his ſon's marrying under age, and having a ſon.

Could he have ſold the chance under Lord *Sunderland*'s will?

He could not have ſold it for any thing; and yet he had a chance, if lady *Sunderland* died without appointment, or ſhould make a void one; and a bill is now depending here, whether *the appointment* ſhe has made is good.

One thing more left, the hope from the dutcheſs of *Marlborough*.

It has been ſaid, that from the hatred of the dutcheſs of *Marlborough*, as well as her love, he had almoſt a certainty of very great advantages.

Suppoſe he had ſaid, I will live frugally for the future, and pay my debts with money raiſed out of my income, rather than mortgage my expectations; I ſhould have thought his reaſons juſt; but ſtill if he had not taken this method, would he not have been liable to an execution? where the fineſt pictures ſell by the yard, beſides the infamy of it.

Theſe being his circumſtances, the next conſideration is as to the *circumſtances* of the defendant.

No charge in the bill, either as to his condition, character, or manner of dealing; if he had made another bargain of the ſame kind, it was material to have charged it; he was not perſonally acquainted with *Spencer*, was no companion in any extravagance that might create the debt, nor did he partake of it afterwards by living with him: He cannot therefore be ſaid to be a devourer, and to be lying in wait for that purpoſe: Is his property then to be taken from him, *becauſe there may be ſuch a man?* His character in every reſpect ſtands clear and unimpeached.

When Mr. *Spencer* had engaged ſo far as to deſire a bargain of this ſort, *he forms himſelf* what he thinks the fair price, and was not haggled into it. Afterwards, by his friends and agents he propoſes to any one who would buy it, and was refuſed by ſeveral perſons, becauſe it was not an advantageous one.

Fourthly, The manner in which it was propoſed, and brought to a concluſion.

The offer ſent to Sir *Abraham Janſſen*, and propoſed in the firſt moment, as a conditional bargain: In one event a certain loſs, in another a very probable, but uncertain gain, if Mr. *Spencer* and the dutcheſs both lived many years: He conſidered not only the age of the parties, but their manner of life. If he had bought upon lives without knowing ſomething of them, it would have been a ground for a commiſſion of lunacy; the propoſal ſimply accepted of by defendant, without tacking any one condition of his own.

Fifthly, The fairneſs and equity of the price, *&c.* and now the actual event.

Whoever buys on a life, muſt have a particular regard to the conſtitution and manner of life, and age of the perſon. Mr. *Loubier*, who has been examined in the cauſe, and is a director of the *London* inſurance, ſays, unleſs all theſe circumſtances concur, they never will inſure at the publick offices. As to the objection of inequality, the bargain itſelf ſuppoſes an inequality, and that the Dutcheſs of *Marlborough* would die firſt, otherwiſe no money ought to have been paid; but it ſhould have been, I lay you a wager of 5000*l.* the Dutcheſs of *Marlborough* dies firſt, ſuppoſing it equal.

The Dutcheſs of *Marlborough* took more care of her health than moſt people; Mr. *Spencer* was intemperate in wine and women. Mr. *Middleton* the ſurgeon proves he would not forego his pleaſures for any advice with regard to health, *for on his taking the liberty to tell Mr.* Spencer, *that if he went on in his irregular courſe, or did not alter his way of life, he would deſtroy himſelf; he deſired Mr.* Middleton *would not trouble himſelf about it, for that he did not deſire to live longer than his conſtitution would enable him to live in the manner he liked.*

Mr. *Spencer* had frequent venereal diſorders, and in their ſeverity; and inſurance offices, let it be whoſe life it will, deduct two years, when a perſon has gone through ſuch a ſhock to his conſtitution. He was careleſs of his health, for if he heated his blood with ſitting up the night before, he next morning frequently appeared to his friends in the night gown he brought into the world with him: He was afflicted with the rheumatiſm from *Auguſt* 1739, and ſome part of 1741, and ſalivated in the *November* of that year: Two witneſſes indeed ſay, he was hale and ſound till within ten months before his death, and yet others ſay, he was but a twelve-month before his death very ill; his complaint of want of appetite, and indigeſtion carried him to *Bath*; theſe were notoriouſly the effects of former drinking, and a broken conſtitution, and not ſudden diſorders.

Phyſicians are not certain, nor infallible, they pronounce people dead, and yet they recover and bite them. Sir *Scipio Hill*, after he was given over lived 24 years, and annuities were held on his life: Every body looked on the Dutcheſs's life as very good, and Mr. *Spencer*'s very bad, at the time of the bargain; for a common rheumatiſm, the grand relief a very uncommon remedy; it certainly was the ill conſequences of former intemperance, ſo inveterate as to get into his bones, and yet could not come at the root of it. In 1744, he drank drams and ſmall beer in the morning.

Did not the defendant then run equal riſque? Take it on the event of deaths, the Dutcheſs of *Marlborough* lived ſix years and a half, and Mr. *Spencer* only 20 months more; he dies thro' want of care, and ſhe of old age.

It is difficult to ſay, what the riſque was equal to; they have endeavoured to ſhew for the plaintiffs, Sir *Abraham Janſſen* could have inſured *Spencer*'s life, during the Dutcheſs of *Marlborough*'s, for 5*l.*

per cent. but have examined only *Stephen Loftin* to this particular, and it is very material that they might have examined many more, and material too, that *Loftin* does not ſay, he inquired into his health, and manner of life before he inſured: For argument's ſake, I will ſuppoſe the defendant could have inſured at 5 *per cent.* He muſt ſo inſure as to have all his money back; he muſt inſure the principal, intereſt and premium; intereſt muſt be computed on intereſt, and no other way of doing it, for if I lend at 5 *per cent.* and am not paid till the end of ſix years, I have not 5 *per cent.* for my money: Biſhop's leaſes are computed on this footing, ſo in this court between tenant for life, and reverſioner, not an equal computation, for the advantage is againſt the reverſioner.

Suppoſe intereſt and præmium inſured the firſt year, intereſt upon intereſt and præmium, and intereſt on that the ſecond year, and ſo to the dutcheſs of *Marlborough*'s death, it would have amounted, the *October* in which ſhe died, to 9663 *l.* and he muſt have inſured another year.

The bargain therefore in all circumſtances fair, and in no bargain whatever does this court weigh it on nice rules of equality; as for inſtance, if a man wants a particular piece of land, contiguous to his own, and gives 30 years purchaſe, the court will not ſet it aſide for that reaſon only.

The plaintiffs have not gone into evidence, to ſhew Mr. *Spencer* could, in any time of his life, have had this money on a better bargain.

Sixthly, The opinion Mr. *Spencer* had of it in his own private thoughts.

He knew whether he was handſomely or unhandſomely dealt by, or whether impoſed upon: There were numberleſs declarations of his in private, that he had been fairly dealt by: None of the witneſſes ſay, they heard the leaſt inſinuation, he ever complained of his bargain: He writes himſelf to Sir *Abraham Janſſen* after the death of the Dutcheſs of *Marlborough*, to bring a bond and judgment, the defendant, as is proved in the cauſe, ſaid, that though he wanted the money, he would not diſtreſs him; on which *Spencer* replied, how much more handſomely you uſe me than other people do; he afterwards pays the defendant one thouſand pounds in part, and then another thouſand pound; all theſe actions ſhew his own private opinion of the defendant, and that he did not think himſelf under any diſtreſs or influence.

Lord Chancellor aſked, how ſoon after the Dutcheſs of *Marlborough*'s death the money was to be paid.

Upon turning to Mr. *Backwell*'s depoſition, he gives the following account, That he told Sir *Abraham Janſſen*, Mr. *Spencer* would pay him 10,000 *l.* at the Dutcheſs's death.

And therefore ſaid the Solicitor general, though the defendant's anſwer ſays, it was propoſed to pay him 10,000 *l.* at, or ſome ſhort time after the death of the Dutcheſs of *Marlborough*, yet as there is no evidence to contradict its being liable to be paid at the time of

her death, it makes an end of any queſtion that might ariſe from the payment being poſtponed to a further time.

The uſe that was to be made of this money, is very material, it was for payment of debts, and ſo likewiſe was the application, for the money was paid into *Loftin*'s hands, for the diſcharge of his tradeſmen.

To ſay that the defendant thought at the time, there might be a diſpute on the validity of the contract, is impoſſible, becauſe that is making him a lunatick, for then it was ſaying, one way you win, but every way I loſe.

The next queſtion, Whether the contract is void in law.

And I agree with Mr. *Crowle*, if void in law, it is putting it upon a clear ſolid foundation: A bargain for a contingency, and no objection made that it is not lawful, and for any contingency that is lawful, you may even at law contract: If any objection at law, it muſt be upon the ſtatute of uſury, where a greater intereſt than the rate allowed is taken.

A notion prevailed for many years, that it was not lawful to take any hire for money; this was adopted from the canon law, and even prevails to this day in many catholick countries. It is aſtoniſhing how prejudice ſhould have kept common ſenſe ſo long out of the world! Why is not money a commodity as well as any thing elſe? and yet a very ſenſible Civilian *Domat* argues againſt it.

Harry the Eighth, towards the latter end of his reign, had a mind to get the better of it, not in a direct way, but by fixing the rate of uſury, which continued down to Queen *Ann*'s time.

Mr. *Lock* in his conſiderations upon reduction of intereſt, ſeems to think for political reaſons, the rate of intereſt ſhould not be fixed at all, but left to find it's own rate of value in the market, and being of this opinion, never lent or borrowed himſelf.

A contract of uſury, is the hire of money at a certain price, for the uſe of it: There muſt be a principal, and there muſt be, to bring it within the ſtatute, a rate of intereſt exceeding what is allowed, if of another nature, not within the ſtatute; at Common law, a condition on hazard, and peradventure is not within it; ſome old ſtatutes call it *dry exchange*.

Contracts on bottomry are not excepted out of the ſtatute, but depend on the nature of the thing: Diſcounting of notes, no principal due from diſcounter, which is forbore; ſo buying up ſecurities at a lower rate, when paid it comes to more than legal intereſt, compared with what the buyer gave; ſo in the caſe of annuities for life, or lives, where money is not to be returned. The caſe of *Fountayne* v. *Grimes*, ſo in the particular ſort of inſurance, intereſt, or no intereſt, which is only a wager, and not within the ſtatute.

If in the truth and real ſubſtance of the contract, the agreement be for the payment of a principal ſum, with forbearance and a higher rate, then certainly it is within the words, and no ſhift or ſhape can ſecure it; all colourable ſales, and colourable exchanges are within it, no contract between man and man, but may be turned to

a ſhift.

a ſhift. No contrivance can exceed the rate of intereſt, it is abſolutely void.

All the caſes that have been cited prove this, that where the treaty is upon a contract for uſury, and more is taken than the legal intereſt, no evaſion can ſecure it.

Clayton's caſe came on upon demurrer, and confeſſes a corrupt agreement, the contingency there next to nothing, and this was fixed by evidence.

In *Maſon* v. *Abdy*, *if the perſon die within ſix months*, and there the man was in good health, and the corrupt agreement pleaded, and no objection to the pleading, therefore muſt be taken as admitted.

The caſe of *Button* v. *Downham*, was alſo on demurrer, and the corrupt agreement admitted. The reſt are all caſes of higher intereſt taken than the act of parliament allows.

Conſider the preſent caſe, and apply it to the ſtatute.

What is it on the firſt propoſal, and communication? A bargain upon a contingency.

Is there a principal due? No.

Is there a rate for forbearance? No.

It has been objected, That the witneſſes ſay, borrow, lend, and loan, and that theſe expreſſions ſhew it is a contract for money.

A loan, ſays Mr. *Crowle*, not conſumed by the uſing, is called *commodatum*, as if I lend a horſe, houſe, *&c.* it is gratuitous.

Another ſort of loan called *mutuum*, as oil, wine, *&c.* here ſomething is taken for it.

But was the preſent ever propoſed as a loan upon uſury? or as a propoſal for principal and forbearance?

I hope it will not be heard out of *Weſtminſter-hall*, pray advance me a ſum of money on this contingency, and then it will be good; but if you had ſaid, pray *lend* me a ſum of money on this contingency, then it would be bad.

Suppoſe an action on this bond, could they declare on a corrupt agreement? Suppoſe they ſet out the whole tranſaction in pleading, and conclude it to be done with a corrupt intention, could a jury upon the evidence, believe this to be a forbearance of the principal.

The very rate of intereſt depends upon the contingency itſelf, for no man alive could ſay, what would be the rate of intereſt.

If no contingent bargain can be made upon a life, but what is within the ſtatute of uſury, *that*, I will allow, would put it for the future upon clear grounds and ſolid foundations.

I will next conſider, upon what rules of equity they are intitled to be relieved.

Courts of equity adminiſter juſtice out of a conſcientious principle, therefore every caſe muſt ſtand on its own circumſtances: No fraud here, or over-reaching, nor any charge of that kind in the bill, or ſuggeſted at the bar, no evidence from whence impoſition is preſumed:

ſumed. It muſt be ſubmitted then as between man and man, whether Sir *Abraham Janſſen* has been guilty of any miſbehaviour.

They were aware of this on the other ſide, and therefore have gone on another principle; that though good in law and in conſcience, yet this court ought to ſet it aſide on principles of politicks, and make this the foundation of the juriſdiction of this court, as applied to theſe caſes.

But this court will never ſay they exerciſe a legiſlative authority. If a contract be good at law, or in conſcience, this court will not ſet it aſide. As for inſtance, *the South Sea Company's bulls and bears in* 1721, could not be ſet aſide till the legiſlature interpoſed, neither could it prevent or relieve againſt *laying wagers in political matters*; but an act of parliament in Queen *Anne*'s time put a ſtop to it. So as to gaming; as for inſtance, *fair hazard on the dice:* It is an eaſy matter to ſhew it very detrimental to the publick, and yet can any caſe be cited where the court has relieved againſt money fairly loſt, before the late act of parliament interfered.

The legiſlature has made a law, that buying chances before it is known what they are, ſhall be ſet aſide; this court could not do it.

Miſera ſervitus eſt ubi lex eſt vaga. Nothing more miſerable than that rules of property ſhould be precarious and uncertain, and yet according to the arguments of the plaintiff's counſel, though my contract is legal, and equitable too, yet it may be for ſpeculative reaſons bad: This is puniſhing a man who has done no wrong.

There are a great many inſtances alluded to, but no fixed rule produced; but it is ſaid, the court will ſet it aſide, for reaſons concerning the publick.

It is a misfortune attending a court of equity, that the caſes are generally taken in looſe notes, and ſometimes by perſons who do not underſtand buſineſs, and very often draw general principles from a caſe, without attending to particular circumſtances, which weighed with the court in the determination of theſe caſes.

If a truſtee properly, and *bonâ fide*, agrees with the *ceſtuique truſt*, that will take off the preſumption of unfairneſs.

If a common proſtitute, hackney'd in the ways of men, gets a contract from a perſon for her benefit, there ariſes a preſumption ſhe is making a gain; it is her daily trade: But if *a miſtreſs* only, who is true to him, the court will not relieve, for ſhe may be preſumed to be impoſed upon, as well as impoſing upon.

So in marriage-brocage bonds, the relation who takes money is bribed; and from ſuch a byas on his mind, he cannot give her the advice he ought as a relation. Suppoſe I treat with the father of a lady for marriage, and I make a private agreement to give him a part of the fortune, is not this a fraud?

In the caſe of Sir *Abraham Elton*, he engaged to pay a ſum of money on his marriage, but as there aroſe no preſumption of fraud, the court would not relieve, but decreed him to pay it.

The ſame as to ſelling of places, where there is no leave to ſell, bad, becauſe a breach of truſt; but if leave to ſell, will not be ſet aſide.

Another inſtance of gratuities or ſecurities to attornies pending the buſineſs, ſet aſide.

The misfortune, as I ſaid before, is laying down theſe as general rules, when in the principal caſe of this kind, *Walmeſley* v. *Booth*, before *Lord Chancellor*, 2d of *May* 1741, circumſtances had great weight, even the character of *Japhet Crooke* had great weight, who was *more likely to impoſe, than be impoſed upon*; but I never underſtood that the court has ſaid that an attorney ſhall take no gratuity, above common fees, before a cauſe is finally ended, as ſuppoſe a verdict obtained by his care and conduct.

In *Woodhouſe* v *Shipley*, before *Lord Chancellor*, 17th of *March* 1742. there is no general rule laid down about bonds on account of marriage, but the court was of opinion there was an impoſition in that caſe on the father, and decreed relief; but deſired not to be underſtood to ſay, what would be the caſe, if ſuch bond had been given by two perſons *ſui juris*, or *emancipated*.

I have reſerved for the laſt what are called *poſt-obits*.

It is ſaid they have relieved on this ground ſingly, that no heir ſhall be allowed to make ſuch contracts.

But I ſay they relieve on the miſbehaviour of the perſon, who ſeduces a young man, and makes a bargain with a *filius-familias*, by feeding his extravagance.

He then cited *Domat*, under the head of loans, and his comment on the *lex Macedoniana*; to ſhew that the civil law does not extend it to a perſon emancipated.

As to the caſes cited, Lord *Nottingham* relieved upon evidence; Lord Keeper *North* thought *he* went too far; Lord *Jeffreys* not far enough.

A man's natural temper, though ever ſo able, will give a tincture to his notions of evidence.

In the caſe of *Berney* v. *Fairclough*, and others, the 32 *Car.* 2. I, ſays Lord *Nottingham* (according to his own manuſcript from whence I cite it) made him pay the principal money borrowed before I would grant the injunction, and at the hearing I relieved, becauſe ſuch infamous trade ſhould be diſcouraged, and in the ſtar-chamber was puniſhable corporally. But his Lordſhip did not relieve the ſame plaintiff in another cauſe againſt *George Pitt*, though his advantage was three to one, becauſe the father was in good health at that time, nor did he put it on the difference between money and wares.

Lord *Jeffreys* laid a different ſtreſs on the evidence than Lord *Nottingham* did, and relieved for this reaſon, and affirmed the decree.

In *Twiſleton* v. *Griffith*, circumſtances too had weight. Did not the defendant ſtay till the father was ill? Did not he take him out of the father's hands? This was a miſbehaviour, and had great weight.

In *Curwin* v. *Milner*, Lord *King* ſaid he was tied down by precedents, and therefore he would not certainly have carried it an *iota* beyond the precedents. It is probable too there were circumſtances in that caſe, becauſe there was a double contingency.

But

But it is going a great way to ſay a man cannot ſell a reverſion; Mr. *Spencer* is not *filius-familias.*——Shall no man ſell an eſtate in jointure to his mother?—Shall no man join in ſelling a remainder?—Is it poſſible to ſupport this?—No! it cannot.

The caſe of *Batty* v. *Loyd*, 1 *Vern.* 141. never contradicted. I have a note too of a caſe where an heir ſold a contingency, and yet not thought unſaleable. In the caſe of *Whitfield* v. , an heir ſold in the life-time of father and mother, there was no diſpute, but this was fairly obtained, and the court decreed further aſſurance by the heir, and gave leave to make uſe of his name.

An inſtance with regard to an officer who aſſigned his future pay, came on to be heard, and diſcountenanced, becauſe it is eating the earnings of his daily pay, before he has it.

Courts of law allow them good as contracts, but not as conveyances; a court of equity goes farther.

Then what is this publick good, this rule they ſo much inſiſt on, that no man ſhall ſpend above his annual income? How can that be prevented? Is it in human nature? He will ſpend it; men of the beſt ſenſe have done it; where will be the publick utility? Where the encouragement to induſtry? Will the court conſider every man as a lunatick who exceeds his income? Another end perhaps, to lock up property for another age; is that deſirable? Will it procure money on eaſier terms? It is directly the contrary, and as clear as any propoſition in *Euclid*; and I refer them to Mr. *Locke* in the treatiſe before mentioned. If Mr. *Spencer* could not have it on theſe terms with any ſecurity to the defendant, he muſt have diſtreſſed him much more by taking pledges of plate, *&c.*

It is extremely material that the court ſhould not determine it upon this laſt ground, whatever may be their opinion as to the validity of the contract in law, or the conſcionableneſs of it in equity.

June the 22d 1752.

Mr. *Noel* in reply:

THE general queſtion is, Whether the facts in the preſent caſe afford a reaſonable ground for relief in a court of equity? It is admitted to be a matter of great moment; *firſt*, in reſpect to preſerving families from ruin, under pretence of relieving preſent want.

I will ſhew that the court may relieve, without infringing the liberties of mankind, or hurting property.

No man has a right in his own property beyond the limits of conſcience; men are bound to uſe their own, ſo as not to hurt or prejudice another. I ſet out with this principle early; it is laid down in the caſe of *Boſanquet* v. *Daſhwood*, *Caſ. in Eq. in the time of Lord* Talbot 38. the court may relieve, where the caſe is not ſtrictly illegal, upon rules, drawn from the caſes of nature and reaſon. It is allowed, no written law can poſſibly take in a caſe of this kind, as they cannot

poſſibly foreſee every emergency. By politicks Mr. *Sollicitor-general* muſt mean only publick utility.

I will conſider it firſt on the ſtatute of uſury, and hope to ſhew it is clearly within it.

Uſury within the ſtatute is ſecuring a higher premium of gain than the ſtatute allows.

They object *the ſtatute means, where the principal lent is to be repaid.* But here it is double the principal to be paid.

They would eſtabliſh likewiſe, *that it muſt be a communication of borrowing and lending of money*, and that there was no communication here, *on the one part*, for borrowing, or for lending *on the other.*

The terms upon which the defendant did it can make no alteration, for if the original proceeding is *for borrowing and lending*, terms cannot make it ceaſe to be a communication for money.

Has not every caſe laid it down that there muſt be no communication for money? And though the penalty be ſevere, yet the ſtatute muſt be conſtrued liberally; then has care been taken here, that there was no communication for money?

They have attempted to lay down another rule, *that where the principal is riſqued, it is not uſurious.*

In *Burton*'s caſe, 5 *Co.* held to be uſury notwithſtanding the riſque, and nothing ſaid there of the greatneſs, ſmallneſs, or extent of the riſque.

A principle indeed laid down in the books, that it is not uſury if any uncertain gain, and left to the honour of the perſon if he will pay more than legal intereſt; but if the *lender* ties down the *borrower* to pay more, *hoc eſt vitioſum.*

The ſtatute goes upon another principle, that contingent bargains are bad, reſerving more than legal intereſt, unleſs for convenience of trade and commerce, and reaſons of publick utility.

Serjeant *Hawkins*, in his *Pleas of the Crown*, when he ſpeaks of the caſes on uſury, lays it down, it is uſury notwithſtanding the riſque, and makes no diſtinction whether great or ſmall.

In the preſent caſe Mr. *Spencer* abſolutely bound to pay, and could not be relieved againſt the double payment at any time.

Principles of property are to be drawn from the general purview of the ſtatute, and ſuch as are moſt likely *to meet with the miſchief.*

Meet with it then! If a ſum ſtipulated to be lent, be it with or without riſque, exceeds the legal bounds, let it be conſtrued within the ſtatute.

A life of *thirty* againſt *ſeventy-eight* is too ſtrong, and looks too much like a *ſhift.*

They are forced by this great inequality to have recourſe to another thing, *that the young life was broken, and therefore the old a match for it.*

Mr. *Backwell* does not remember a ſyllable ſaid about the goodneſs or badneſs of Mr. *Spencer*'s conſtitution, at the time of the application to the defendant, nor does he ſay in his anſwer, that he refuſed to lend

the money, but that he did it on weighing and conſidering the propoſal.

What is the material reſult of this? Why that upon inquiry, he did not find the report of Mr. *Spencer*'s declining health true, and therefore the riſque not being ſo great as at firſt imagined, it determined him to comply with the propoſal.

The effects of his intemperance, as appears by evidence, ſufficiently removed; for his laſt relief, for a particular diſorder, was in 1732, ſix years before this contract, and then the witneſſes ſay he was of a ſtrong robuſt conſtitution. *Loftin* and *Thompſon* ſay he was of a ſound ſtrong health, and therefore likely to outlive the Dutcheſs of *Marlborough:* Theſe are their own witneſſes who were connected with him, and in the ſervice of his family.

Another reaſon they urge is, a perſon muſt be calculating how much intereſt they loſe in the mean time while the contingency is depending.

Very hard driven! for they compute *intereſt upon intereſt, præmium for inſurance, intereſt upon that, and intereſt too upon that intereſt,* and ſo round the compaſs, and yet after all this labour, falls ſhort ſome hundred pounds of the gains the defendant makes.

I would not deſire a ſtronger proof of the uſurioufneſs of this contract, than the hard ſhifts they are put to in order to ſave it out of the ſtatute.

Judging by events I always underſtood to be the worſt rule of judging; the only proper way; What was the chance at the time? And Lord *Mountfort* ſays, the Dutcheſs of *Marlborough*'s life was not worth more than three years purchaſe, and therefore her living ſix years is of no weight.

It is ſaid no impoſition is charged by the bill.

The contract is charged to be uſurious, and charged to be exorbitant, and that the defendant took advantage of Mr. *Spencer*'s neceſſities; therefore what do they mean by ſaying, We have not charged impoſition? if not in terms, yet neceſſarily implied.

As to Mr. Spencer*'s great property,* he was only tenant for life; *as to his perſonal eſtate,* he was not in effect and ſubſtance *ſui juris,* becauſe his fears of blowing up his hopes in the Dutcheſs of *Marlborough* prevented him from making uſe of the *perſonal eſtate.*

It is then ſaid, *he wanted money on a juſt cauſe for paying debts,* and that his beſt friends would have adviſed this method; nay, *your Lordſhip* would have done it.

Lord Chancellor: *I will relieve you from this part of the argument; I would not for my own part have adviſed it in any circumſtances.*

Mr. *Spencer* was bound to pay it, even if the Dutcheſs did not leave him a ſhilling! What would have been his condition then? Is it not clear he ſtaked his ruin on this engagement?

No mention made that he was indebted to tradeſmen at the time the money was borrowed; his own private juſtice might indeed lead him to apply the money in this manner, but it is no ſort of excuſe to the defendant, becauſe *he* had not this view in advancing it.

The defendant was engaged to keep it a ſecret on the principle of Mr. *Spencer*'s dependance on the Dutcheſs of *Marlborough*, this therefore was putting him under fetters. No body pretends that Mr. *Spencer* did not know the terms, or ignorant that he was only 30, and therefore it was his apprehenſion of the dutcheſs that ſubdued him to the impoſition.

I do not diſpute but that a ſon may diſpoſe of a reverſion, but that is not the caſe here, it is the hard ſevere terms we object to, and in the judgment of a court of equity, is a fraud where the relief does not infringe on the juſt rights of mankind.

Wiſeman's caſe, *a riſque on the death of an uncle.*

Here on the death of a grandmother, therefore why not ſtronger?

It is admitted arguments of publick miſchief are laudably adopted into this court.

Is not this a growing evil? all mankind feel it!

As to the tranſactions which are ſubſequent to the bargain, being a confirmation, the defendant's counſel rely on *Cole* v. *Gibbons*, 3 *Wms* 390.

But the executors here do their duty much better by endeavouring to be relieved.

The next caſe, *Standard* v. *Medcalf*, turns ſtrongly againſt them, for though the houſe of Lords affirmed the decree, and by that confirmed the will, yet if ſhe recovered her ſenſes, did it without prejudice to any alteration ſhe might make in that diſpoſition, therefore this not properly a confirmation of the ſettlement.

Mr. *Spencer* acknowledging the debt, that he could not pay it, but would execute a new ſecurity, and pay the defendant at times, ſhews his neceſſity, and that he had no proſpect of doing it but by indulgence.

The new bond produced by the defendant, antedated to the day of the Dutcheſs of *Marlborough*'s death, but charged by the bill, that it was to be paid in a month after the death of the Dutcheſs, and though by his anſwer he ſwears he cannot be quite exact as to the time of payment agreed, yet in order to gain more intereſt, carries it back to the day of her death.

If the court cannot relieve where it is double the ſum, for illegality, they cannot relieve if five times the ſum; and therefore the argument of publick miſchief muſt have great weight, as no man can ſay what bounds may be ſet to extravagant contracts of this kind, unleſs it meets with a check from this court, in the manner we have prayed by our bill.

The cauſe was ordered to ſtand over till *Michaelmas* term, and in the mean time a ſearch directed to be made after the original bond, or if that cannot be found, a copy of it.

February the 4th 1750.

The Earl of *Cheſterfield*, and others, executors of Mr. *Spencer*, } Plaintiffs,

Sir *Abraham Janſſen*, Baronet, —— —— Defendant.

The cauſe ſtood for judgment.

Lord Chancellor in court,
Aſſiſted by { Lord Chief Juſtice *Lee*, The Maſter of the Rolls, and Mr. Juſtice *Burnett*.

MR. Juſtice *Burnet*: The counſel for the plaintiffs in this cauſe have inſiſted principally upon three things.

Firſt, *That the original contract is uſurious, and contrary to the ſtatutes of uſury.*

Secondly, *That ſuppoſing it be not an uſurious contract, it is ſuch an undue advantage taken of a man's neceſſity upon an expectancy, that this court will relieve againſt it as an unconſcionable bargain.*

Thirdly, *That the new ſecurity ought to be conſidered in the ſame light as the old, and a continuation of the fraud.*

On the part of the defendant it is inſiſted, this is a mere contingent bargain, and in the nature of a wager only; no circumſtance of a diſtreſſed heir ſeduced from parental government; no fraud or impoſition, and therefore not warranted by former precedents, to ſet this contract aſide.

And that if the court could have relieved on the original agreement, yet cannot, conſiſtent with the rules of equity, do it, when the party has voluntarily taken upon himſelf to confirm it.

As to the firſt queſtion, Whether a loan of 5000 *l.* to be paid 10,000 *l.* on the death of the Dutcheſs of *Marlborough* in the lifetime of Mr. *Spencer*, be ſuch an uſurious contract as is within the ſtatutes, or only a mere caſual contingent bargain, and not uſurious.

This court has adopted the uſe of the word loan, in caſes of *bottomree*, as well as in common money tranſactions, and therefore ſhall make uſe of that term likewiſe.

To make this contract uſurious, it muſt be either, becauſe it is within the expreſs words, or an evaſion, or ſhift, to keep out of the ſtatutes.

It would be miſ-pending time to give the opinion of Civilians, and canoniſts, upon the head of uſury, becauſe trade and commerce have made great alterations with regard to money; Lord *Co.* in his 2d *Inſt.* 89. ſays, *At the time of the ſtatute of* Merton, *and alſo before the conqueſt, it was not lawful for Chriſtians to take any uſury, as appeareth by the laws of St.* Edward, *&c. and* Glanvill *and other ancient*

cient authors and records; and no uſury was then permitted but by the Jews *only.* In Lord Coke's 3d Inſt. 152. he ſaith, *that by the ſtatute of* 37 H. 8. *and* 13 Eliz. *all former acts, ſtatutes, and laws, ordained and made for the avoiding or puniſhment of uſury, are made void, and of none effect; ſo at this day, neither the common law, nor any ſtatute is in force, but only the ſtatute of the* 37 H. 8. 13 Eliz. *and* 21 *Jac.* Hardr. 420. *e contra, for* per *Lord Chief Baron* Hale, *Jewiſh uſury was prohibited at Common law, being* 40 l. per cent. *and more;* but no other.

Nothing is legally uſurious but what is prohibited by the ſtatutes, and to make a contract ſo, muſt be within the expreſs words, or an evaſion or ſhift to keep out of them.

It muſt be agreed then, nothing is legally uſurious, but what is prohibited by the ſtatutes; and the material ones are the ſtatute of the '37 *H.* 8. *c.* 3. *ſect.* 3. *No perſon by way of any corrupt bargain, loan, exchange, cheviſance, ſhift, or intereſt, of any wares, or other things, or by any other deceitful ways, ſhall take in gains for the forbearance of one year for his money, or other thing, that ſhall be due for the ſame wares, or other thing, above* 10 l. *in the hundred.* And the ſtatute of the 12 *Ann. ch.* 16. varies in nothing from the former acts, but the reducing of legal intereſt, for in the penal clauſes all the words of the ſtatute of *H.* 8. are taken in.

So that the caſes determined on the firſt of thoſe ſtatutes, are looked upon as authorities upon all the ſubſequent ſtatutes.

Whatever ſhift is uſed for the forbearance, or giving day of payment, will make an agreement uſurious, and is by a court and jury eſteemed a colour only.

If a bargain was really for an annuity, tho' bought at ever ſo under a price, no uſury; if on the foot of borrowing and lending money, otherwiſe.

Suppoſe a man purchaſe an annuity at ever ſuch an under price, if the bargain was really for an annuity, it is not uſury. If on the foot of borrowing and lending money, it is otherwiſe; for if the court are of opinion, the annuity is not the real contract, but a method of paying more money for the reward or intereſt, than the law allows, it is a contrivance that ſhall not avoid the ſtatute, by giving the avarice of one kind of men an opportunity of preying on the neceſſities of another. 4 *Leon.* 208. 2 *Lev.* 7. *King* v. *Drury. Noy* 101. *Cro. Eliz.* 642, 643.

A bargain on a mere contingency, where the reward is given for the riſque, and not for the forbearance, is not uſurious; for how can it be ſaid, with any propriety, to be for the forbearance, when the day of payment itſelf may never come.

Where there is a borrowing of money, a device to have more than the legal rate of intereſt, is within the ſtatutes of uſury.

If money is lent to be paid with more than legal intereſt; as for inſtance, in the caſe of *Clayton,* 5 *Co.* 70. *where it was agreed between the plaintiff and defendant, on the* 14*th of* December, *that the plaintiff ſhould lend the defendant* 30 l. *to be repaid the firſt of* June *following, and that the plaintiff ſhould have* 3 l. *for the forbearance, if the plaintiff's ſon ſhould then be living, and if he died, then to repay but* 26 l. *of the principal money;* this may be uſurious, for if there is a borrowing of money, and a communication for intereſt, the device to have gone beyond the rate of 10 *l. per cent.* ſaid the court, is fraudulent, and within the ſtatute, otherwiſe the ſtatute would be vain. For he might as well have made the condition, that if 20 perſons,

or any of them, ſhould be living at the day, *&c.* then he ſhould have 33 *l.*

He then mentioned ſeveral of the moſt material caſes on this point, and which were chiefly relied on by the plaintiff's counſel, to make this an uſurious contract, and concluded with *Maſon* v. *Abdy*, 3 *Salk.* 390. and laid a ſtreſs upon the laſt reaſon of the reſolution of the court, *becauſe there is an expreſs proviſion in the bond to have the principal again*, 5 *Rep.* 69, 70. *and* 15. and the ſame caſe in *Moor*, *Carth.* 67. *Comb.* 25. 1 *Shower* 8.

The ſlightleſs or reality of the riſque ſeems to be the only guiding rule, that directed the court in the caſe of *Bedingfield* v. *Aſhley*, *Cro. Eliz.* 741. *There* A. *delivered to* B. 100 l. *who by indenture covenanted with* A. *to pay to every one of* A.*'s children, which then were, and ſhould be living at* 10 *year's end*, 80 l. A. *having then* 5 *daughters*; it is not uſury *ſaid the court, but a mere caſual bargain.* But *if he had been to pay* 400 l. *at ten years end, if any were living then, it would be a greater doubt*; *or if it had been to pay* 300 l. *if any were living at one or two years end*, that had been uſury, *becauſe of the probability that one would continue alive for ſo ſhort a time, but in ten years are many alterations.* ſlightneſs

The caſe of *Long* v. *Wharton*, 3 *Keble* 304. though ill reported, ſeems to be good law: For there *in error upon a judgment in debt upon obligation to pay* 100 l. *on marriage of the daughter, and if either plaintiff or defendant die before, nothing. The defendant pleads the ſtatute of uſury, and that this was for the loan of* 30 l. *before delivered, to which plaintiff demurred*; *and* per cur. *This is ſuch a kind of caſual bargain as bottomree, and the judgment affirmed.*

I ſhould be glad to know, why a bond on a man's life is not as much an adventure, as on the bottom of a ſhip; a ſhip may ſink the day after the bargain is made; a man may die the next day after his life is inſured; but whatever favour courts may ſhew in contracts beneficial to commerce, they will not eſtabliſh contracts of another kind to the prejudice of the ſtatute.

There can be no forbearance, for what may never be due, as the ſhip may never return; ſo that it is merely a contract upon the riſque.

But ſuppoſe a contract was made for a ſhip's return to *Newcaſtle* from *London*, or to *Dover* from *Calais*, at a ſeaſon of the year when there is little or no danger, would not the court look on this as colourable, and a mere evaſion of the ſtatute?

The rule that governs the court in *bottomree bonds*, is the riſque of the principal, but may be ſo contrived as to be conſtrued an evaſion of the ſtatute, as well as any other contract.

And in the caſe of *Joy* v. *Kent* in *Hardr. Reports*, it appears very plainly from what the court did there, that even a bottomree bond may be an evaſion of the ſtatute, as well as any other contract, or Lord Chief Juſtice *Hale* would never have ſent it to trial.

The firſt caſe of bottomree is *Sharpley* v. *Huſwell*, *Cro. Jac.* 208. there the rule that governed the court, was the real riſque of the principal, and the hazard the lender run of having leſs than the intereſt, which the law allows, and poſſibly neither principal nor intereſt.

Mr. Juſtice *Dodderidge* in *Roberts* v. *Tremaine*, *Cro. Jac.* 509. makes very proper diſtinctions between contracts uſurious, and not uſurious: Mr. *Attorney general* in his argument for the defendant, has ſtated theſe diſtinctions, as to what contracts are uſurious.—As to contracts not uſurious: *If I lend to one* 100 l. *for two years, on condition to pay for the loan thereof* 30 l. *but if he pay the principal at the year's end, that he ſhall pay nothing for intereſt; this is not uſury, for the party hath his election, and may pay it at the firſt year's end, and ſo diſcharge himſelf.*

In the caſe of *Soame* v. *Gleon*, *Siderf.* 27. *Debt upon obligation for* 300 l. *in which there was a condition, that if a particular ſhip went to* Surat *in the* Eaſt Indies, *and returned ſafe to* London; *or if the owner or the goods return ſafe, that then the defendant pay to the plaintiff* 40 l. *for each* 100 l. *but if the ſhip*, &c. *is loſt by unavoidable caſualty of ſea, fire, or enemies, to be proved by ſufficient teſtimony, then the plaintiff to have nothing. The queſtion was, if this contract was uſurious within the ſtatute, as defendant has pleaded it.*

Reſolved per cur. *This is not uſury within the ſtatute, but a good bottomree contract, and the Chief Juſtice* Bridgeman *took a difference between a bargain and a loan; for where there is a plain bargain as here, and the principal hazarded, this cannot be within the ſtatute of uſury, for there are apparent dangers of the ſea, fire, and enemies between this and the* Eaſt Indies, *which indanger the loſs of the principal, and ſuch contracts called bottomree, tend to the increaſe of trade, and it is by this, ſeveral orphans and widows live in the port towns of this realm; but otherwiſe it is of a loan where the principal is not hazarded; judgment* per totam curiam, *that this was not uſurious.*

I cannot therefore but be of opinion, this is not a contract originally uſurious, but a contingent bargain, and founded on the riſque only.

The court need not determine whether a perſon advancing money to an heir or expectant, ſhould have an extraordinary premium, for an extraordinary riſque, becauſe it might be made an ill uſe of out of the court.

The ſecond queſtion is, That ſuppoſing it be not an uſurious bargain, yet whether it is not ſuch an undue advantage taken of a man's neceſſity, upon an expectancy, that this court will relieve againſt it as unconſcionable.

If it was neceſſary to give an expreſs opinion on this point, I ſhould be under great difficulties; but when the caſes come to be conſidered, I may be relieved from this neceſſity.

It would be too hard to ſay, that an heir or expectant ſhould not borrow money, let his neceſſities be ever ſo great, or which is the ſame thing, that the perſon advancing ſhall not be ſuffered to have an extraordinary premium for an extraordinary riſque; on the other hand, it might be dangerous to give a ſanction to ſuch bargain.

I will ſtate the arguments of plaintiffs counſel, and then ſhew the court is under no neceſſity to determine this point, and I am ſure no court would willingly give an opinion, that might be made an ill uſe of out of the court.

Firſt, Say they, it makes two of the worſt paſſions in the human breaſt meet, avarice on the one ſide, and craving appetites on the other.

Secondly, A man ſhall be providing a liberal ſupply for a ſon, or a near relation, as he imagines, when he is at the ſame time in fact laying up for, perhaps, twenty money lenders, and is thereby deluded to give away to ſtrangers what he intended for his own family.

The ſupplying the neceſſities of young heirs, for lucre, has been a growing practice, and the court from time to time have extended the remedy to meet the miſchief.

Nott v. *Hill*, 1 *Vern.* 167. is one of the firſt caſes Lord *Nottingham* relieved on the groſs unreaſonableneſs of the bargain, which implied no man could be drawn into it but by impoſition. Lord Keeper *North* reverſed this decree, becauſe there did not appear any expreſs impoſition. Afterwards Lord *Jeffreys* confirmed the decree made by Lord *Nottingham*, *declaring he took* Hill's *purchaſe to be an unrighteous bargain in the beginning, and that nothing which happened afterwards could help it.*

The court in proceſs of time extended the remedy, where the neceſſity alone of the perſon borrowing induced the contract.

The firſt caſe of that kind was *Berney* v. *Pitt*, 2 *Vern.* 14. Lord *Nottingham*, when it came before *him*, relieved againſt nothing but the penalty. In *H. T.* 1686. *Lord* Jeffreys *held it an unconſcionable bargain, diſcharged Lord* Nottingham's *decree, and ordered the defendant to refund to the plaintiff all the money he had received of him, except the* 2000l. *originally lent, and the intereſt for the ſame.*

In Twiſleton *v.* Griffith, 1 Wms. 310. *there were marks enough of an impoſition to warrant relief on that foot, but Lord* Cowper *choſe rather to eſtabliſh it on general principles, to prevent a growing practice of devouring an heir*; *and Lord* Jeffreys's *decree in* Berney *v.* Pitt. *ſtanding, ſhewed that every one thought the ſame was juſt, and that there was therefore no attempt in parliament to reverſe it. His Lordſhip alſo took in the whole objection, that at this rate an heir could not, without difficulty, ſell a reverſion, and ſaid he ſaw no inconvenience in the objection, for this might force an heir to go home, and ſubmit to his father, or to bite on the bridle, and endure ſome hardſhips, and in the mean time he might grow wiſer and be reclaimed.*

In *Curwyn* v *Milner*, 19th of *June* 1731, 3 *Wms.* 392. *marginal note, Lord* King *relieved, but ſaid if the thing had been new, he would not have gone ſo far, but thought himſelf bound by precedents.*

Theſe are the caſes principally relied on by the plaintiffs counſel. It is inſiſted on the other ſide, that none of theſe caſes bear any ſimilitude with the preſent, for here are no practices of fraud and impoſition; Mr. *Spencer out* of parental authority, and not in bad circumſtances, for he had 7000*l.* a year at that time, and ſaid too, the riſque here is equal, and not as in *Curwyn* v. *Milner, where the contingency was double to pay* 1000l. *for the* 500l. *lent if defendant ſurvived his father, or father-in-law.* The offer here was ſent by the borrower, and accepted on his terms; therefore it is the borrower's own ſeeking. This too is ſo equitable a bargain, that if the court would enter into the juſt proportion or calculation of ſuch a bargain, and the uſual rate for inſurance of principal, intereſt, and premium,

it

it will appear to a demonſtration, that if the Dutcheſs of *Marlborough* had lived half a year longer, the defendant would have been a loſer. And alſo it is not yet laid down that heirs ſhould not borrow on the expectancy, and that a contract muſt either ſtand or fall upon its reaſonableneſs or unreaſonableneſs, and that will be a ſufficient terror to the lender.

And indeed it might be difficult to give an opinion on this; for it may be thought too rigid to ſay, that an heir ſhall not borrow upon an expectancy; as ſome perſons are ſo niggardly and ſparing to their children, *that a poor heir may ſtarve in the deſert, with the land of Canaan in his view*, if he could not relieve himſelf this way.

Mr. *Spencer* beſides has taken away the argument of neceſſity by conſidering the whole himſelf, and in the freeſt and moſt voluntary manner imaginable has confirmed the contract, and may be therefore ſaid to have eſtabliſhed it with his eyes open, which brings me to the

Third queſtion, *Whether the new ſecurity ſhall be conſidered in the ſame light with the old, and a continuation of the fraud.*

Though the court might have relieved upon the original contract, yet will not relieve againſt the confirmation of it, if fairly obtained.

I know of no caſe where this court, though they might have relieved in the original contract, have relieved againſt the confirmation of it, where there is no pretence of fraud or impoſition in obtaining it; but if there was any thing of that complexion in the confirmation, there indeed it is conſidered only as a continuation of the firſt fraud.

And of this kind is the Earl of *Ardglaſſe* v. *Muſchamp*, 1 *Vern.* 237. and *Wiſeman* v. *Beake*, 2 *Vern.* 121. where the court looked on it as a mere contrivance and colourable proceeding, and made uſe of a very ſtrong expreſſion, *It is double hatching the cheat.* Theſe were caſes heard before the Lords commiſſioners.

But can the confirmation *here* be ſaid to be obtained by force, impoſition, or contrivance? The defendant was far from being preſſing for his money, even after the death of the Dutcheſs of *Marlborough*; for he ſtayed from *October* to *December* before the old contract was confirmed.

And though there is no caſe to warrant relieving againſt ſuch a confirmation, yet there is a ſtrong caſe to ſupport it. *Cole* v. *Gibbons* and others, and *Martin* v. *Cole and others*, 3 *Wms.* 290. *where Lord* Talbot *admitted that had all depended on the firſt aſſignment, he would have ſet it aſide, as being an unconſcionable advantage made of a neceſſitous man; but when the perſon, after being fully apprized of every thing, choſe to execute a deed of confirmation of his former aſſignment, and not the leaſt fraud or ſurprize had appeared on the part of the defendant, it was, he ſaid, too much for any court to ſet all this aſide.*

At the bottom of this caſe there is another, that goes upon the ſame principle, *where Lord* Cowper *ſaid, that after the plaintiff had coolly, and without any pretence of fear or dureſs, entered into a bond to the defendant, he had thereby aſcertained the damages, and ought not to be relieved.*

Upon the whole therefore I ſubmit it to *your Lordſhip* that there is nothing uſurious in this contract, which can warrant ſetting it aſide upon the ſtatutes.

And

And ſuppoſing any thing unconſcionable in the thing originally, yet Mr. *Spencer* taking upon him voluntarily to confirm it, I cannot help thinking it would be too much for a court of equity to overturn ſuch a bargain, and therefore my advice is, to relieve only againſt the penalty of the bond.

The Maſter of the Rolls: *

* Sir *John Strange.*

The firſt queſtion is, *Whether the defendant's originally advancing* 5000 l. *in the manner depoſed by Mr.* Backwell, *and admitted by himſelf in his anſwer, and the bond taken upon it, are to be conſidered as uſurious and void in law?*

The ſecond queſtion is, *If the bond be not within the ſtatutes of uſury, whether the bargain is of ſuch a nature as will intitle the parties to relief, on the circumſtances of this caſe, in a court of equity?*

The third queſtion is, *Whether what appears to have been done by Mr.* Spencer, *after the death of the Dutcheſs of* Marlborough, *will vary the caſe, or influence the determination of this court?*

I agree with the reverend and learned judge, that the contract is not within the ſtatutes of uſury.

The 12th of Queen *Anne, cap.* 16. appears to me to be calculated for ſuch loans, where two principal circumſtances muſt concur.

Firſt, Where there is an agreement for payment at a future day,

And *ſecondly,* Where the premium for forbearance is greater than the ſtatute allows.

In the preſent caſe, if the contingency happened one way, the whole money was loſt, and therefore may be properly called a wager between the parties, whether Mr. *Spencer* or the Dutcheſs of *Marlborough* died firſt?

The contingency here, a wager, Whether Mr. *Spencer* or the Dutcheſs of *Marlborough* died firſt?

It is ſaid, if the deſign of the parties were, one ſhould borrow, and the other lend 5000*l.* the colour, or ſhift to evade the ſtatute, will not avail.

But whether an agreement be uſurious or not, may be determined two ways.

Firſt, On the verdict of a jury, on a plea of a corrupt agreement.

Secondly, By the court's exerciſing their own judgment on the particular circumſtances of the caſe.

But on a *ſcire facias* againſt the executors of Mr. *Spencer,* no action could be maintained, for the bond being loſt or deſtroyed, could not be pleaded with a *profert hic in curiâ*; and it was ſo laid down in the caſe of *Foot* and others, againſt *Jones, Eaſter* term 9 *Geo.* 2.

Where a bond is loſt, no action can be maintained, becauſe not pleadable with a *profert hic in curia.*

The other method of the court's exerciſing their own judgment is ſtill open, as in the caſe of *Roberts* v. *Tremaine.* *Clayton*'s caſe, 5 *Rep.* ſhews what ſort of ſhifts they muſt be that a court will conſider as an evaſion of the ſtatutes of uſury. *Comb.* 125. ſhews what are, what are not hazards; and, amongſt other things, Lord Chief Juſtice *Holt* ſaid, Dying within half a year is no hazard. But if there be a wager between two, it is not uſury; for the bargain was *bonâ fide,* and ſo laid down in ſeveral of the old caſes.

The preſent caſe is fully before the court. In order to make it uſurious, it muſt be determined to be a ſhift to get an exorbitant premium, and colourable only to evade the ſtatute.

Now it appears to me to be a mere bargain on chance, a wager which outlived the other, Mr. *Spencer* or the Dutcheſs of *Marlborough*.

Some ſtreſs has been laid by the plaintiffs counſel on the word *lend*.

But I think that concludes nothing as to the nature of the contract itſelf, but is a playing on words only. Every bargain of this kind is a loan, even bottomree contracts are ſo, and expreſly called loans by act of parliament.

The intent of the agreement, and not the expreſſion, determines whether a contract be a loan or riſque.

Therefore it is not the expreſſion, but the nature and intent of the agreement which muſt determine, whether this contract be a ſimple loan or riſque.

Bottomree bonds not uſurious, becauſe the whole money is *in hazard*.

To be ſure, one reaſon why ſo large a premium has been allowed on bottomree bonds, was out of regard to commerce; but the principal reaſon muſt have been, that they are not within the ſtatutes of uſury, becauſe the whole money is *in hazard*.

I am clearly of opinion therefore on the firſt point the bond was not uſurious, and conſequently not void in law.

The ſecond queſtion is, If the bond be not within the ſtatute of uſury, whether the bargain is of ſuch a nature as will intitle the parties to relief, on the circumſtances of the caſe, in a court of equity?

My advice here will be grounded intirely on what was done after the death of the Dutcheſs of *Marlborough*, and therefore I ſhall offer nothing on this head, which I would have at all conſidered as an abſolute determination; and yet I ſee no reaſon to quarrel with the principal caſes that have been cited, becauſe they do not come up to the preſent, nor would I be underſtood to abate of the force of them in any reſpect.

There are many circumſtances on the part of the defendant that put his caſe in a favourable light. There was no intention of fraud in him; the ſcheme came from Mr. *Spencer*, not from him; the money was advanced on the borrower's own terms, after it had been refuſed by others, and not thought a good bargain according to the rules of calculation in chances.

There may be caſes where the court will interpoſe to prevent improvident perſons from ruining themſelves, though no expreſs fraud appears.

But ſtill I think there may be caſes where this court will interpoſe, to prevent improvident perſons from ruining themſelves before the expectancy falls into poſſeſſion, though no expreſs fraud or impoſition appears.

Agreements of this ſort muſt depend on their particular circumſtances.

Every ſerious and conſiderate perſon muſt ſee the ſad neceſſity there is for the court's keeping a ſtrict hand over agreements of this ſort, but then they muſt ſtill depend on their particular circumſtances; and it is not at all adviſeable to give too particular reaſons in determinations of ſuch caſes.

The

The third queſtion is, *Whether what appears to have been done by Mr.* Spencer, *after the death of the Dutcheſs of* Marborough, *will vary the caſe, or influence the determination of this court?*

And I am of opinion the plaintiffs are intitled to no other relief than in reſpect of the penalty, on payment of 10,000 *l.* and intereſt upon it, from the death of the Dutcheſs of *Marlborough.*

I will now take a view of the different ſituation of Mr. *Spencer* in 1744, and 1738.

In 1738, notwithſtanding he had a large income, he was involved in great difficulties, and extremely embarraſſed how to pay his creditors: He was obliged to mortgage his expectations from the Dutcheſs, which was a dangerous experiment, as it might have defeated them intirely: But in 1744, upon the death of the dutcheſs, he came into the poſſeſſion of ſo great an income, as enabled him to diſcharge his debts ſoon; all he deſired for doing it, was time, and he had it.

It is not material who took the firſt ſtep towards the new agreement: Two months elapſed before it was abſolutely compleated, and *Loftin*, Mr. *Spencer*'s agent, wrote to the defendant by his maſter's order, the 31ſt of *October*, to bring a bond and judgment; there was not the leaſt circumſtance of undue behaviour in the defendant, or force upon Mr. *Spencer*; and it appears in evidence, that Mr. *Spencer*'s fixed deſign was to pay off the whole, as ſoon as he could, with a preference to the defendant, who, Mr. *Spencer* himſelf ſaid, had treated him as a gentleman.

In conſequence of this intention, he paid the defendant 1000 *l.* at one time, and a ſecond 1000 *l.* at another, and there are frequent declarations of Mr. *Spencer*'s proved, of his being extremely well ſatisfied with this tranſaction from firſt to laſt.

But perhaps it may be ſaid, Mr. *Spencer* was not fully apprized of the nature of the bargain, and that he might have been relieved on the firſt bond.

Even this circumſtance is not wanting in the preſent caſe, for *Loftin*'s depoſition is, that on asking Mr. *Spencer* in 1738, what ſecurity he was to give *Sir Abraham Janſſen*, he replied, *Janſſen* much doubted if a bond would be valid at law, and therefore ſeemed inclined rather to take a note or memorandum for it only.

This ſhews Mr. *Spencer* was apprized of the nature of this contract, and the doubtfulneſs of its validity in point of law.

Mr. *Spencer* continued in the ſame mind from the beginning to his death, and, to the laſt, ſhewed a reſolution to confirm the bargain.

Poſt obits in general, not to be countenanced in a court of equity.

Contracts of a *poſt obit* nature in general, are by no means to be encouraged, are of a dangerous tendency, a publick miſchief, and not to be countenanced in a court of equity: But I ground my advice only on the particular circumſtances of this caſe, and think there may be relief given in other caſes, where ſuch ſtrong circumſtances do not concur.

I am very far from blaming the plaintiffs for ſubmitting the caſe to the conſideration of the court, but think they did extremely right;

and my humble advice upon the whole is, to relieve only on the penalty of the bond.

The idea of uſury in this country fully fixed, by the premium for forbearance of money being ſettled.

Lord Chief Juſtice *Lee:* The firſt point is, As to the nature of uſury, conſidered either according to the Common law, Divine law, Civil law, or Canon law. It would be miſpending time to mention any thing on this head, becauſe the idea of uſury in this country is fully fixed, and the premium for forbearance of money ſettled by ſtatute.

In 2 *And.* 15. and *Maſon* v. *Abdy*, *Comb.* 126. and *Carth.* 68. the true diſtinction is taken between a colourable and a fair and abſolute hazard of the principal money; if of the former ſort, the bargain is uſurious, if of the latter, it is out of the ſtatute.

Bottomree bonds are not uſurious, becauſe notwithin the ſtatutes of uſury.

The material and true reaſon why bottomree bonds are not uſurious is, becauſe they are not within the ſtatutes of uſury, and reaſons of trade were the only inducements to the court to countenance this kind of contracts.

Where the profits is for the hazard, not the forbearance, the contract is not uſurious.

The defendant's contract can be conſidered only as a real hazard, and it does appear to me very clearly, on looking into all the books, that courts of law have always held, where the profit the lender is to have, is for the hazard, and not for the forbearance, the contract is not uſurious.

In *Molloy de jure maritimo*, *lib.* 2. *cap.* 11. *ſect.* 14. he ſays, "*Moſt* "*certain it is, that the greater the danger is, if there be a real ad-* "*venture, the greater may the profit be of the money advanced, and ſo* "*hath the ſame been the opinion of the Civilians, and likewiſe ſome di-* "*vines, though others ſeem to be of opinion, that any profit or advan-* "*tage ought not to be made of money ſo lent, no more than of thoſe that* "*are advanced on ſimple loan, and on the peril of the borrower. How-* "*ever all, or moſt of the trading nations of* Chriſtendom *do at this* "*day allow of the ſame, as a matter moſt reaſonable, on account of the* "*contingency or hazard that the lender runs; and therefore ſuch money* "*may be advanced ſeveral ways, and a profit may ariſe, ſo that there* "*runs a peril on the lender.*"

Recommended to courts of equity to conſider how to prevent bargains, where a lender runs away with double what he advanced.

I ſhall ſay no more on this head, but on the ſecond point ſubmit it to *your Lordſhip*, whether it will not be worth while, for courts of equity to conſider, how they may prevent bargains, where a lender runs away with double what he advanced, and to bring them within the meaſure preſcribed by the legiſlature, the legal premium for money.

I ſpeak of the ſecond point in this general manner, becauſe what Mr. *Spencer* has done with regard to the confirmation, has taken away what might have been objected to the bargain's being unconſcionable, as it ſtood originally.

Now if the contract at firſt ſhould appear to be attended with ſuch circumſtances as might induce a court of equity to reſcind it intirely, or moderate it only; yet the new agreement would ſerve to give it a ſtrength which it had not before.

1 *Domat. fol.* 136. *ſec.* 4. intitled, *Of the prohibitions to lend money to ſons living under the parental juriſdiction.*

The

The lending of money to ſons, who are ſtill under the power and tuition of their fathers, being to them an occaſion of debauchery, is one of the pernicious effects of uſury, and it was by reaſon of the facility of borrowing money of uſurers, that the corruption of the manners of the youth in Rome *was come to ſuch a height, and attended with ſuch conſequences, that to reſtrain this diſorder, a regulation was made by a decree of the ſenate, called,* The Macedonian Decree, *from the name of the uſurer who gave occaſion to it; by which all obligations of ſons, living under the parental juriſdiction, contracted by the loan of money, were declared null without any diſtinction. But if any creditor had lent money for a cauſe that was juſt and reaſonable, ſufficient to ſupport the equity of the obligation; it was by a favourable interpretation of the decree of the ſenate, that this caſe was to be excepted from the general prohibition, according to the quality of the uſe to which the ſon put the money which he had borrowed.*

By decree of the *Roman* ſenate, all obligations of ſons, living under the paternal juriſdiction, contracted by the loan of money, are declared null without any diſtinction, except the creditor advanced it for a cauſe that was juſt and reaſonable.

The defendant had this exception in his favour, for the contract was made in order to impower Mr. *Spencer* to pay juſt debts to his tradeſmen, and applied accordingly.

It appears by the authority of *Cole* v. *Martin*, in 3. *Wms.* a ſubſequent deliberate act, where the party is fully informed of every thing, makes the bargain good.

In the caſe of *Cann* v. *Cann*, 1 *Wms.* 727. Lord *Macclesfield* makes uſe of theſe expreſſions, *Indeed if the party releaſing is ignorant of his right, or if his right is concealed from him by the perſon to whom the releaſe is made, theſe will be good reaſons for the ſetting aſide of the releaſe; but ſolemn conveyances, releaſes, and agreements made by the parties, are not ſlightly to be blown off and ſet aſide.*

But here the right was not concealed from Mr. *Spencer*, for the ſubſequent agreement appears to be made deliberately, there was no kind of fraud in any one circumſtance attending it; and therefore I concur in offering my advice in the ſame way with the Maſter of the Rolls, and M. Juſtice *Burnet*.

Lord Chancellor: Before I proceed, it is proper to mention that Lord Chief Juſtice *Willes*, being ill, has furniſhed me with his reaſons by letter, and authorized me to ſay, he concurs in opinion with me in the three points that are made in the cauſe.

Lord Chief Juſtice *Willes* being ill, ſignified his concurrence in the ſame opinion, by letter to *Lord Chancellor*.

In the next place, the able aſſiſtance I have had in this cauſe, makes my task much eaſier, and unleſs the novelty of the caſe called upon me to give my reaſons, I might very well be excuſed from ſaying any thing on a ſubject, that has been ſo fully and learnedly diſcuſſed already; and if I could have foreſeen on what points this matter would have turned, ſhould have ſpared the learned judges their trouble.

The firſt point, *Whether the firſt bond is void in law, by virtue of the ſtatutes of uſury.*

The ſecond point, *If it is valid in law, Whether it is contrary to conſcience, and relievable upon any head or principal of equity.*

The third point is, Whether the new ſecurity given by Mr. *Spencer* after the death of the Dutcheſs of *Marlborough*, amounts to a confirmation, and is ſufficient to bar the plaintiffs of relief.

The firſt is a mere queſtion of law, on the conſtruction of the ſtatutes, and therefore to be conſidered exactly in the ſame light, as in a court of Common law, and as if an action had been brought on the bond.

My lords the judges are very clear in their opinion, the bond was not uſurious, and if I had been doubtful myſelf in this point, I ſhould have thought notwithſtanding, I was as much bound by their judgment now, as if I had ſent it to be tried at law.

This contract a wager and not within the ſtatutes of uſury.

But I have no doubt at all of this contract's being out of the ſtatutes of uſury, and do not intend to go through the authorities on this head, as they have been fully obſerved upon already: It is a plain fair wager, and not within the ſtatutes, becauſe no loan.

But if a loan, it has been argued for the plaintiffs, that an agreement to receive more than principal and legal intereſt, on any event, is uſurious, and contrary to the ſtatutes.

1 *Domat.* 115. *title* 5. The civil law has very nice diſtinctions on *commodatum* and *mutuum*. As to *commodatum*, it is underſtood in the ſame ſenſe, the law of *England* underſtands it; but by *mutuum* the Civilians mean a loan, where the thing lent is to be reſtored in *genere*; when any thing was to be paid for hire, it came under the head of *locatio & conductum*. The Common law has not adopted theſe nice diſtinctions. On actions for money lent, it is expreſſed by *mutuo data & accommodata*.

Even money on a riſque is called a loan, as in the caſe of a *bottomree* bond, the 11 *H.* 7. *ch.* 8. The ſtatute contains a general prohibition of all uſury, but ſays, without *condition and adventure*; from hence it appears they underſtood an advantage might be inſerted in a loan of money, and therefore the inſerting of a contingency, will not prevent it's being a loan.

If there be a loan of money, and a contingency inſerted, which gives more than the legal intereſt, though real and not colourable, and notwithſtanding it be a hazard, yet it is uſurious.

If there has been a loan of money, and an inſertion of a contingency, which gives a higher rate of intereſt than the ſtatutes allow, and the contingency goes to the intereſt only, though real and not colourable, and notwithſtanding it be a hazard, yet it has been held to be uſurious: Where the contingency has related to both principal and intereſt, and a higher rate of intereſt taken than allowed by ſtatute; the courts have there inquired, whether it was colourable or not, and within the diſtinction taken in the caſe of *Roberts* v. *Tremaine*, by Mr. Juſtice *Dodderidge*.

If a caſualty goes to the intereſt only, it is uſury, if principal and intereſt both in hazard, otherwiſe.

Firſt, (ſaid he), If I lend 100 *l.* to have 120 *l.* at the year's end upon a caſualty, if the caſualty goes to the intereſt only, and not to the principal, it is uſury, for the party is ſure to have the principal again, come what will come: But if the principal and intereſt both are in hazard, it is not uſury.

Secondly, If I ſecure both intereſt and principal, if it be at the will of the party who is to pay it, it is no uſury; as if I lend to one 100 *l.* for two years, to pay for the loan thereof 30 *l.* and if he pay the principal

principal at the year's end, he ſhall pay nothing for intereſt, this is not uſury; for the party hath his election, and may pay it at the firſt year's end, and ſo diſcharge himſelf.

Although this contract has been called a loan, yet it is merely a caſe of chance, and I agree with my Lords the Judges, the ſound and fundamental reaſon for admitting bottomree bargains, is, their being out of the ſtatutes of uſury; for conſiderations of commerce cannot ſupport them, if held to be within the ſtatutes. Reaſon for admitting bottomree bargains, is, their being out of the ſtatutes of uſury.

The counſel for the plaintiffs, by way of objection, laid great ſtreſs on *dictums* of judges, that particular care muſt be taken there is no communication for the loan of money; therefore ſay they, this being originally an agreement for borrowing on one part, and lending on the other, is uſurious.

A very good anſwer has been already given to this, that the real and ſubſtantial foundation of the agreement muſt be conſidered, and not mere expreſſions only; but I will add to it, that loans upon a real and fair contingency cannot be ſaid to be uſurious, any more than in the caſe of bottomree bonds. Loans upon a real and fair contingency, no more uſurious than bottomree bonds.

And the very ſtating of the fact, on the purchaſing of an annuity, or on the ſale of goods, will prove the obſervation.

A man may purchaſe an annuity, on as low terms as he can; but if he ſets out at firſt with borrowing a ſum of money, and then turns it into the ſhape of an annuity afterwards, this is a ſhift, and an evaſion to avoid the ſtatutes.

It is lawful likewiſe for a man to ſell his goods as dear as he can, in a fair way of ſale; but if *A.* applies to *B.* to lend money, and offers to allow more than the legal intereſt, and *B.* ſays, no! I will not agree to your propoſal on theſe terms, but I will give you ſuch a quantity of goods, and you ſhall pay me ſo much at a future time for them, beyond the price I now fix, and then charges an extravagant profit; this is a ſhift to get more than the legal intereſt, and is uſurious.

On the ſecond head. I ſhall follow the prudent example of Mr. Juſtice *Burnet*, by not giving any direct opinion, but at the ſame time, the arguments in this cauſe have made it neceſſary to ſay ſomething.

No wiſe and good man will aſſert ſuch bargains deſerve encouragement, for as they are productive of prodigality on the one hand, ſo do they beget extortion on the other; want and avarice always generating one another, and theſe contracts may be truly ſaid to be *vitia temporis*. Contracts of this kind *vitia temporis*.

This court can certainly relieve againſt all kinds and ſpecies of fraud.

Fraud may either be *dolus malus*, a clear and expreſs fraud, or fraud may ariſe from circumſtances, and the neceſſity of the perſon at the time.

There are alſo hard unſconſcionable bargains, which have been conſtrued fraudulent, and there are inſtances where even the Common law hath relieved for this reaſon expreſly.

James v. *Morgan*, 1 *Lev.* 111. was a caſe of this kind. *Aſſumpſit* to pay for a horſe, a barley corn, a nail, and double every nail, and avers that there were 32 nails in the ſhoes of the horſe, which doubling each nail, comes to 500 quarters of barley; and upon *non aſſumpſit* pleaded, the cauſe being tried before Mr. Juſtice *Hide* at *Hereford*; he directed the jury to give the value of the horſe in damages, being 8 *l.* and ſo they did; and it was afterwards moved in arreſt of judgment upon a ſlip in the declaration, which was over-ruled, and judgment given for the plaintiff.

Fraud muſt be proved at law, but equity relieves againſt preſumptive fraud.

But this court will relieve againſt preſumptive fraud, ſo that equity goes further than the rule of law, for there fraud muſt be proved, and not preſumed only.

To take an advantage of another man's neceſſity, is equally bad, as taking advantage of his weakneſs, and in ſuch ſituation, as incapable of making the right uſe of his reaſon, as in the other.

In the marriage-brocage bonds, one of the parties to the marriage only is deceived and defrauded, and not either of the parties to the marriage-brocage bond, and yet the court have relieved, for they hold it infected by the fraud, and relieve for the ſake of the publick, as a general miſchief.

In like manner, where a debtor enters into an agreement with a particular creditor, for a compoſition of 10*s.* in the pound, provided the reſt of the creditors agree, and this creditor at the ſame time makes a private clandeſtine agreement for his whole debt, and tho' no particular fraud to the debtor, yet as it is a fraud on the creditors in general, who entred into the agreement, on a ſuppoſition the compoſition would be equal to them all, the court has relieved.

So in bargains to procure offices, neither of the parties is defrauded or unapprized of the terms, but it ſerves to introduce unworthy objects into publick offices; and therefore for the ſake of the publick, the bargain is reſcinded.

Political arguments, as they concern the government of a nation, of weight in the conſideration of this court.

Political arguments, in the fulleſt ſenſe of the word, as they concern the government of a nation, muſt, and have always been of great weight in the conſideration of this court, and tho' there may be no *dolus malus*, in contracts as to other perſons, yet if the reſt of mankind are concerned as well as the parties, it may properly be ſaid, that it regards the publick utility.

In the caſes before this court, there have been ſometimes proof of actual fraud, ſuch as *Berney* v. *Pitt*, the earl of *Ardglaſs* v. *Muſchamp*, and ſeveral others.

In theſe caſes too, fraud has been conſtantly preſumed, or inferred from circumſtances, and conditions of parties; weakneſs and neceſſity on one ſide, and extortion and avarice on the other, and merely from the intrinſic unconſcionableneſs of the bargain.

The next kind of deceit is, upon other perſons who were not parties, as anceſtor and father, and the heir and expectant, where by contrivance an heir or a ſon have been kept from diſcloſing his affairs to a father, or other relation, and by that means prevented from being ſet right, and undeceived; and the anceſtor or father, have

likewiſe been ſeduced to leave their fortunes, to be divided among a ſet of dangerous perſons, and common adventurers.

That there was unconſcionableneſs in the very nature of the bargain, the *Hawking* it about ſhews, and that there was alſo a deceit and deluſion on the Dutcheſs of *Marlborough*, who ſtood in *loco parentis*, appears from the evidence of Mr. *Backwell*, who ſwears it was intended to be carefully concealed from her, and that ſhe ſhould never hear of it.

And yet I do admit more circumſtances appear here in favour of the defendant, than have concurred in the reſt of the caſes: Mr. *Spencer* was 30 years of age, there is no foundation to ſay he was a weak man, nor any charge in the bill of that kind, the bargain was unſought for by the defendant, and intirely proceeding from the borrower, who was of a broken conſtitution; the money too was borrowed for an honeſt purpoſe, to pay debts, and yet, I would by no means have it underſtood, that this intention alone will in all caſes ſanctify ſuch a bargain.

In thoſe caſes where it has been inſerted in the defeazance, that the lender ſhould loſe his money, if the borrower dies before father or grandfather; I always thought there was good ſenſe in the words of the court upon thoſe clauſes, *that this does not difference the caſe in reaſon at all, for in theſe caſes, if the tenant in tail died, living the father, the debt would be loſt of courſe, and therefore expreſſing it particularly in the defeazance, made the bargain the worſe, as being done to colour a bargain, that appeared to the lender himſelf unconſcionable.*

Mr. Attorney general ſaid, that it was a vain and wild imagination, to think any general law can prevent prodigality and extravagance, and yet the law-makers in ancient *Rome*, though they were not ſo weak as not to know, that laws to reſtrain prodigals might be uſeleſs in many inſtances, thought it neceſſary ſtill to put a prodigal under the care of a curator, and alſo made their famous *ſenatus-conſultum Macedonianum* merely with a view to prevent it.

Law-makers in *Rome* thought it neceſſary, to put a prodigal under the care of a curator.

Whatever may be called a legiſlative authority in this court, I utterly diſclaim; but ſo far as the court have already gone in caſes, ſo far as Lord *Nottingham*, Lord *Cowper*, Lord *King*, and Lord *Talbot* have gone in the ſeveral caſes before them, I think myſelf under an indiſpenſable obligation of following.

I have ſpent ſo much time *principally* with this view, that the work of this day may not be miſunderſtood, as if the court had departed from their former precedents, and eſtabliſhed a new one for unconſcionable bargains.

Poſt obit bargains, and junctim annuities, have got their brokers and factors about this town, and I would willingly ſhut the door againſt ſuch perſons, and am not aſhamed to own, I ſhall always be ready, conſiſtent with the rules of equity, to correct ſuch enormities.

Brokers for *poſt obit* bargains, and junctim annuities, ought to be diſcouraged in equity.

The third point is, *Whether the new ſecurity given by Mr.* Spencer, *after the death of the Dutcheſs of* Marlborough *amounts to a confirmation, and is ſufficient to bar the plaintiff of relief.*

If the firſt bond had been void at law, no new agreement would have made it better, the original corruption would have infected it throughout.

New agreements may confirm, what was at firſt a doubtful bargain.

But as bargains that are not cognizable at law, are properly the ſubject of this court's conſideration, new agreements and new terms may confirm what might otherwiſe have admitted a queſtion as to the fairneſs of it.

The evidence ſeems to prove clearly, that there was no compulſion on Mr. *Spencer* at this time, his neceſſities were intirely over, for 21,000 *l.* a year was by the diſpoſition in the Dutcheſs's will added to 7000 *l.* a year he had before, ſo that a little more than a third of his annual income would have diſcharged the defendant's whole demand.

In the next place, the Dutcheſs being removed out of the way, the danger of her coming to the knowledge of it was gone, ſo that he was delivered from that circumſtance; likewiſe, and further, there was no anceſtor or relation living, on whom any deceit or deluſion could be practiſed.

Loftin's evidence of Mr. *Spencer*'s declarations as to Mr. *Janſſen*'s doubting, whether the firſt contract was legal or valid, is a ſtrong circumſtance to ſhew Mr. *Spencer* was fully apprized of the nature of it, and no fraud or impoſition therefore can be ſuggeſted on this head.

The confirmation here is much ſtronger than in the caſe of *Cole* and *Martin*, becauſe the original bargain here is attended with much fairer circumſtances.

Mr. *Spencer* here is a debtor, and Sir *Abraham Janſſen* might have diſtreſſed him by bringing an action, and yet ſo far was he from taking this advantage, that he waited two months without ſtirring one ſtep in the affair.

The plaintiffs counſel have ſaid, there has been only one caſe of confirmation, where this court have decreed in favour of it, but ſeveral, where the court have ſet aſide bargains notwithſtanding confirmations, and inſtanced in the earl of *Ardglaſs* v. *Muſchamp*, and *Wiſeman* v. *Beake*.

But the circumſtances in the firſt of theſe caſes are not at all applicable to the preſent, the ſame fraud attended the confirmation, as the original bargain; and in the ſecond of the caſes, the confirmation was ſtill more extraordinary, and the perſon juſt in the ſame diſtreſſed ſituation as at firſt, and in both of them the original tranſactions were groſly fraudulent.

But here the original tranſaction was doubtful at leaſt, if not intirely clear of impoſition.

Upon the whole, I am of opinion the only relief the court can give, is againſt the penalty and judgment, and as the plaintiffs had *probabilis cauſa litigandi*, and the defendant's a caſe far from intitling him to the favour of the court, I ſhall not therefore give him coſts againſt the plaintiffs; for I agree intirely with the Maſter of the Rolls, that the plaintiffs as truſtees, are to be greatly commended

for ſubmitting a queſtion of this nature to the conſideration of a court of equity.

Let it be referred therefore to a Maſter to take an account of principal and intereſt due on the bond in 1744, *and the judgment thereon, and to tax the defendant his coſts at law, and on payment to the defendant by the plaintiffs, of what ſhall be due at law, let the defendant deliver up the bond to be cancelled, and let ſatisfaction be acknowledged on the judgment, at the expence of the plaintiffs.*

CAP. XXV.

Charity.

(A) The power of this court with reſpect thereto.

January the 27th 1737.

The Attorney general v. *Jeanes.*

Caſe 168. The court will give a proper direction as to a charity, without any regard to an impropriety in the prayer of an information.

IT was ſaid by *Lord Chancellor* in this caſe, that in an information by the Attorney general for the regulation of a charity, it is the buſineſs of the court to give a proper direction as to the charity, without any regard at all to the propriety or impropriety of the prayer of the information, and that this caſe herein differed from all others, wherein the decree muſt be founded on the prayer in the the plaintiff's bill.

February the 27th 1738.

Attorney general v. *Pile.*

Vide title *Deviſe, under the diviſion, Of things Perſonal, and by what Deſcription, and to whom good.*

Michaelmas term 1738.

The Attorney general v. *Gleg.*

Caſe 169.

W. leaves money to be diſtributed in charity at the diſcretion of his executors, three named, one of whom died before the information filed.

MR. *Wright* having by will left ſeveral ſums of money to be diſtributed in charities therein deſcribed, at the diſcretion of his executors, named three perſons executors, one of whom died before the filing of the information; and the queſtion was, Whether this was only a bare authority in the executors, or coupled with an intereſt.

This is not a bare authority, but coupled with an intereſt, and ſurvived to the other two executors.

Lord Chancellor: I am of opinion that the executors, as taking the whole perſonal eſtate, out of which the charities were to iſſue, had an authority coupled with an intereſt, as executors have been always held to have in the caſe of legacies; and therefore the power of nominating the ſeveral perſons who were to partake of the charity, is continued to the ſurvivor of them.

This court has a particular extenſive juriſdiction in the caſe of a charity.

But though this is ſuch an authority coupled with an intereſt as would ſurvive, yet it is ſo far a truſt, that in caſe of miſbehaviour the court may interpoſe, for it muſt be allowed, that the court has a particular free and extenſive juriſdiction in the caſe of a charity, and not confined to the proper or formal methods of proceeding requiſite in other caſes.

The information here was diſmiſſed with coſts againſt the relators.

I am of opinion that the executors could not divide the charities into three parts, and each executor nominate a third abſolutely, becauſe the determination of the property of every object was left by the teſtator to the direction of all the executors, and ſo much of the information as ſeeks a ſpecifick performance of a pretended agreement to that purpoſe, was diſmiſſed with coſts, to be paid by the relators.

N. B. This was ſaid to be the firſt inſtance of ſuch a direction.

After Hilary Term 1736.

The Attorney general v. *Hayes.*

Caſe 170.

LORD Chancellor: Where a legacy is given to a charity, intereſt ſhall be paid from the death of the teſtator.

CAP. XXVI.

Chose in Action.

October the 27th 1746.

Brown assignee of *Roger Williams* a bankrupt v. *Heathcote* and *Martin*.

Vide title *Bankrupt, under the division, The construction of the statute of* 21 Jac. 1. cap. 19. *with respect to bankrupt's possession of goods after assignment.*

CAP. XXVII.

Church Lease.

Hilary term 1737.

Norton v. *Frecker*.

Vide title *Occupant*.

CAP. XXVIII.

Commission of Delegates.

June the 9th 1737.

Sir *Henry Blount*'s case.

Vide title *Canon Law*.

CAP. XXIX.

Conditions and Limitations.

(A) In what caſes the breach of a condition will be relieved againſt.

(B) In what caſes a gift or deviſe upon condition not to marry without conſent, ſhall be good and binding, or void, being only in terrorem.

(C) Who are to take advantage of a condition, or will be prejudiced by it.

(A) In what caſes the breach of a condition will be relieved againſt.

Eaſter term 10 Geo. 2. May 11.

The Attorney general v. Doctor *Stephens.*

Caſe 171. *A.* having been elected under doctor *Ratcliffe*'s donation, received the ſalary for five years and then inſtead of travelling beyond ſea for five more, as the will requires, upon ill health reſigns, and the truſtees accept the reſignation, and put another in his room. This is a diſpenſation of the condition; if they had ſaid when *A.* offered to ſurrender, we will not accept of your reſignation, but you muſt comply with the terms, or refund, it would have been otherwiſe.

THE defendant had been regularly elected under doctor *Ratcliffe*'s donation, and had received the ſalary for five years, and then inſtead of travelling beyond ſea, purſuant to the directions of the will, upon a ſuggeſtion of ill health, reſigns, and the truſtees accept the reſignation.

Above five years have incurred ſince the reſignation of the defendant, and the acceptance thereof by the truſtees.

Lord Chancellor: The *Attorney general* is certainly a neceſſary party, and the information is properly brought in his name.

Nothing, to be ſure, ſhould be done in this court, to invalidate the deſign of this donation; and on the other hand, I muſt proceed in ſuch manner as I am warranted to do, by the rules of law or equity.

There are three conſiderations in this caſe.

1*ſt*, What was the intention of doctor *Ratcliffe* by his will?

2*dly*, Whether doctor *Stephens* has complied with it?

3*dly*, If not, Whether it gives the relators a right to come into this court, to make the defendant refund what he has received?

Doctor

Doctor *Ratcliffe* by his will gives ſeveral manors, upon truſt *inter alia*, to pay 600 *l.* yearly, to two perſons, of *Univerſity* college, who ſhall be elected out of the phyſick line, by the archbiſhop of *Canterbury*, *&c.* for their maintenance for the ſpace of ten years, in the ſtudy of phyſick, and to travel half the time for their better improvement, and in caſe they ſhould die, or the place be vacant, then the vacancy to be filled up by two others, and the whole overplus to *Univerſity* college.

I think if the defendant had forfeited, the college would certainly be intitled to it, let it come to them by any means whatever: But as to the conſtruction of doctor *Ratcliffe*'s will, it was manifeſtly the deſign, that they ſhould travel, and that they ſhould travel five years, but it is truly ſaid, there is no particular time appointed when they ſhould begin their travels.

The words are, " the half of which time they ſhould ſpend in " travelling for their better improvement," and therefore it is moſt natural to intend that he meant the laſt five years for their travelling, becauſe he imagined they would in the firſt part of the time, be laying in a proper ſtock of knowledge.

But then it can never be underſtood that he intended in all events they ſhould travel, for there might be accidents which would utterly incapacitate them for travelling, and therefore he did not expect they ſhould refund when ſuch accidents happened, but left it at large to be judged of by the circumſtances; beſides, this is given not only for the expence of travelling, but for other views likewiſe, for maintenance, *&c.*

The next queſtion, Whether doctor *Stephens* has complied with the intention of the donor?

Now it cannot be ſaid, that doctor *Stephens* has complied with doctor *Ratcliffe*'s intention, but then it muſt be conſidered, whether he has a reaſonable excuſe for not doing it, and upon this there is no doubt, but that natural diſabilities will excuſe, ſuch as becoming *non compos*, ſickneſs, or other natural diſabilities: But then it has been inſiſted upon, that the defendant has fraudulently accepted of this employment, in order to put the money in his pocket, without any intention ever to do the duties of it: If this had been proved, I ſhould have no doubt but that I might decree the defendant to refund, but that is not the caſe, for there is not one ſingle circumſtance given in evidence to ſhew he took it upon ſuch a fraudulent deſign; inſtead of *that*, there is very ſtrong proof to the contrary, even by perſons of good credit in the profeſſion, that he had diligently applied himſelf to the ſtudy of phyſick, and beſides, that he was in an ill ſtate of health, in a waſting and decayed condition, which threatned a conſumption; and even ſuppoſing that he was actually able to travel, but in his own mind did not think himſelf capable, yet he would not be guilty of a fraud, for *an imaginary* as well as a real diſtemper would equally incapacitate him.

I do not think the clauſe in the will can poſſibly amount to a condition, but is merely directory, that half of the time they ſhall

travel, and is not like an executory conſideration: As where *A.* pays money upon ſuch *a conſideration* and it is not performed, an action at law lies for *A.* for money had and received to his uſe, which is expreſſed thus by the Scotch law, *cauſa data ſed non ſecuta.*

The agreement is to pay 300 *l. per ann.* for ten years, if during that time he travel 5 years; will the not travelling oblige him to refund? No! unleſs the electors had ſuffered him to continue in this poſt the whole ten years, then poſſibly the relators would have had a right to call him to an account, and might have obliged him to refund for 5 of the years.

Doctor *Stephens* communicated his illneſs firſt to the archbiſhop of *Canterbury*, and lodged a formal reſignation with him: I think the truſtees are the electors, and the perſons whom doctor *Ratcliffe* intended ſhould have the whole management of this donation; they have accepted of this reſignation, without inſiſting upon doctor *Stephens*'s going on, and it is certainly a diſpenſation of the condition; if they had ſaid we will not accept of this reſignation, but you muſt comply with the terms, *or refund*, then the caſe would have appeared quite different, but inſtead of that, they have accepted of the reſignation, and actually put another in his room.

Therefore I think as doctor *Stephens* has taken the burden of this upon him, and as at the end of five years, the truſtees accepted a ſurrender from him, and did not inſiſt then on his refunding, it would be unreaſonable to require it now.

But even if it was a condition, yet ſuppoſe this caſe, a patron preſents to a benefice, and takes a bond, as he may, from preſentee to reſide for ten years, and he, after 5 years are expired, ſhould reſign the living for the reſidue of the term, and the patron accepts it, and preſents another, no one will ſay that he has forfeited the annual income of this living, during that part of the ten years he was reſident upon it, for the acceptance of the patron has diſpenſed with the breach of the condition, and no action could be maintained on the bond.

Therefore I ſhould think it too hard in the preſent caſe, to decree an account againſt the defendant.

There are two other points.

1*ſt* Conſideration, Whether the travelling fellows muſt be members of the college?

Whether a fellow of a college has a power to let his chambers, is a point determinable by the *viſitor* only.

2*dly*, Whether they have a power to let the chambers which they hold in the right of their fellowſhip.

As to theſe matters, they are not properly the objects of this court's juriſdiction, but ought rather to be determined by the viſitor, and the will beſides is extremely incorrect in this reſpect.

As to the being members of *Univerſity* college, it is natural to ſuppoſe no body would reſide in the college, unleſs they were actual members; but this is out of the caſe, for doctor *Stephens* has complied with that part of it.

And as to the power of letting their chambers, I do not think that doctor *Ratcliffe* has laid his fellows under greater reſtrictions than

than thoſe of other colleges are liable to; and if I was to inquire whether a fellow of a college has a right to let his chambers, I ſhould make wild work, and give an opportunity to half the univerſity to bring bills againſt particular perſons to diſcover, whether they have not forfeited their fellowſhips by thus letting out their chambers.

Decreed the information to be diſmiſſed, but without coſts, as doctor *Stephens* has had a very large benefaction already from doctor *Ratcliffe*'s donation, and *Univerſity* college.

(B) In what caſes a gift or deviſe, upon condition not to marry without conſent, ſhall be good and binding, or void, being only in terrorem.

April the 30th, and 2d of *May* 1737.

Henry Harvey, and *Catherine* his wife, and *Ann Clutton*, widow, two of the daughters of Sir *Thomas Aſton*, baronet, deceaſed, } Plaintiffs.

Lady *Aſton*, widow of the ſaid Sir *Thomas Aſton*, Sir *Thomas Aſton*, baronet, ſon and heir of Sir *Thomas* deceaſed, Sir *John Cheſhyre*, *Henry Wright*, and *Andrew Kendrick*, eſqrs; } Defendants.

Caſe 172.

THIS cauſe came on upon a petition to diſcharge an order made by the Maſter of the Rolls (*a*) for raiſing the fortune of the plaintiffs: The caſe was this.

Sir *Thomas Aſton* by leaſe and releaſe limits his eſtate, to the uſe of himſelf for life, then as to part to lady *Aſton* for life, for her jointure, then to his firſt and other ſons in tail male, and for want of ſuch iſſue, to truſtees for the term of 1000 years, with power of revocation, this term is by a codicil made to take effect immediately after his death, and before the eſtate of the ſon, and declared the truſt of the term to be, that if it ſhould happen that he ſhould have no ſon, but two daughters living at the time of his death, then the truſteees, out of the rents and profits of the ſaid eſtate, ſhould raiſe and pay to the youngeſt of ſuch daughters 5000 *l.* *if ſhe marry with the conſent of her mother, if living, and continuing his widow; if not, then with the conſent of the truſtees, or the ſurvivor of them, his executors, adminiſtrators or aſſigns*, and ſhould pay to ſuch daughter the yearly ſum of 100 *l.* for her maintenance till her marriage with ſuch conſent.

And in caſe it ſhould happen, that he ſhould have a ſon and two or more daughters, then that the truſtees ſhould raiſe and pay to each of ſuch daughters the ſum of 2000 *l.* *if ſhe marry with ſuch conſent* as

(*a*) Sir *Joſeph Jeykll.*

The truſt of a term under a ſettlement was, that if there ſhould be two or more daughters of the marriage; then the truſtees were to raiſe and pay to each the ſum of 2000 *l.* *if ſhe marry with the conſent of her mother, if living, and a widow; if not, then with the conſent of the truſtees, or the ſurvivor of them, his executors, adminiſtrators, or aſſigns.*

as aforeſaid; and till ſuch marriage, ſhould pay each of ſuch daughters the yearly ſum of 50 *l.* till ſuch daughter ſhould attain her age of 18. and afterwards the ſum of 70 *l.* for her maintenance as long as lady *Aſton* ſhall live, and from and after her death ſhall pay to each the yearly ſum of 100 *l.* till their marriage: And in caſe any of the ſaid daughters ſhould happen to die before the ſaid portion was paid, that it ſhould not go to her executor, but the eſtate ſhould be exonerated thereof, or if raiſed, ſhould go to him, on whom the reverſion of the premiſſes is limited to deſcend; proviſo that the term ſhould ceaſe in caſe of no ſon or daughter: Or in caſe of the death of all the younger ſons and of all the daughters without marriage. *N. B. Here, the words, with conſent, were not added.*

And in caſe any of the daughters die before the portion was paid, that it ſhould not go to the executor, but the eſtate ſhould be exonerated thereof, or if raiſed ſhould go to him, on whom the reverſion of the premiſſes is limited to deſcend.

The father afterwards by his will gives the farther ſum of 2000 *l.* to each of his daughters, *as an augmentation of their portions, ſubject to the ſame conditions, &c. as the original portions.*

Afterwards by will Sir *Thomas Aſton*, taking notice of the ſettlement, directs, that out of his perſonal eſtate, there ſhould be paid to each of his daughters the farther ſum of 2000 *l.* as and for an augmentation of their portions, ſubject to the ſame conditions, proviſoes and limitations, as their original portions, and in caſe any of the daughters ſhould die before the original portions became payable, then his will is, that this legacy of 2000 *l.* ſhould not be paid to her executor, but that his lady and executrix ſhould have the *reſiduum* of this money, if any, and makes her reſiduary legatee and guardian of his children.

And if any of the daughters die before the original portions become payable, then he wills that this 2000 *l.* ſhould not be paid to her executor, but that his lady and executrix ſhould have the *reſiduum* of this money, and makes her reſiduary legatee.

The plaintiff *Hervey* married one of the daughters without conſent, and *Clutton* another alſo without conſent. They are not intitled to the portions under the ſettlement or will.

Sir *Thomas* died leaving eight daughters, and ſoon after his death a bill was exhibited in this court to have the will proved, and the truſts performed, and it was decreed, that the truſtees ſhould raiſe the maintenance immediately, with liberty to the parties to apply for further directions.

In 1734. the plaintiff *Hervey* married one of the daughters without conſent, and *Clutton* married another without conſent, and a bill of revivor was filed, to which lady *Aſton* anſwers, that ſhe had before ſuch marriage given notice to the plaintiffs, that they would not be intitled to their portions, in caſe they married without her conſent, and that ſhe could not in conſcience conſent to her daughter's marriage with the plaintiff *Hervey*, becauſe he could not make her any ſuitable ſettlement; but that notwithſtanding this *caution* they both married without her conſent.

And upon a hearing at the Rolls, it was decreed, that the plaintiffs were well intitled both to their original and additional fortunes, and an order pronounced by his honour accordingly; the preſent application was made by way of petition to diſcharge that order.

Lord Chancellor thinking it a caſe of great doubt and difficulty, declared that he would be aſſiſted by Lord Chief Juſtice *Lee*, Lord Chief

Chief Juſtice *Willes*, and Mr. Juſtice *Comyns*, and appointed the 21ſt of *Nov.* 1737. for the hearing thereof, when it came on accordingly.

Mr. *Attorney general* for the plaintiffs argued, that this reſtraint in the preſent caſe ought not to be conſidered as a neceſſary qualification, but that it ought at all events to be raiſed and paid when ever the daughters married. Sir *Dudley Rider.*

That while alive, parents have a natural controul over their children, but though the law allows them ſuch a power to reſtrain the children in marriage, yet it is not to be delegated to any other perſon, and it is abſurd to ſay, that this power ſhall deſcend to any aſſignees whatſoever, or executors or adminiſtrators.

Parents may be fond of extending their power, even after their children come of age, but the law leaves marriages as free as poſſible, and therefore does not encourage parents in this extent of their power. *Swinb. part the 4th, 12th chapter, God. orph. leg.* 380.

The only difference between the Civil law and ours is, that where there is no deviſe over, we call it a deviſe *in terrorem*, but the civil law ſays, ſuch a condition is abſolutely void. *Jervois* v. *Duke*, 1 *Vern.* 20. *Bellaſis* v. *Ermine*, 1 *Ch. ca.* 22.

It has been inſiſted that this is a condition precedent, and the legacy could not veſt, becauſe the condition has not been performed, but allowed, if it had been a ſubſequent condition, it might have been otherwiſe.

He argued, that in theſe caſes, the court had made no difference between conditions precedent and ſubſequent. *Greſly* v. *Luther*, *Moore* 857. In the preſent caſe, the thing that is to be done is marriage, and in all caſes of conditions precedent, there muſt be performance, or the eſtate can never veſt; here the moſt material part has been performed, which is marriage, and conſequently the eſtate veſted. *Semphill* v. *Bailey*, *Prec. in Chan.* 562.

" If any of my daughters ſhould die before the original portion be-
" comes payable, then he wills that this legacy of 2000 *l.* ſhould
" not be paid to her executor, but that lady *Aſton* his executrix
" ſhould have the *reſiduum* of the money."

This cannot be called a deviſe over, which is only ſaying, that it ſhould fall into the *reſiduum* of the perſonal eſtate, and would have done *ſo* if this had not been provided for.

So much as to the additional portions. Next as to the original portion, the words which are to make a limitation over here, are different from the words in the will, " In caſe any of the ſaid
" daughters ſhould happen to die before the ſaid portion was paid,
" that it ſhould not go to her executor, but the eſtate ſhould be ex-
" onerated thereof, or if raiſed, ſhould go to him on whom the re-
" verſion of the premiſſes is limited to deſcend."

It has been objected, that this was a caſe where the money is to be raiſed out of the land, and the Civil law had nothing to do with it.

This would be a good objection, if it was a queſtion to be determined at Common law, in an ejectment, or merely a queſtion at Common law, but it is manifeſtly a creature of equity, for it is concerning

concerning the execution of a truſt, which is not a proper ſubject for the Common law to enter into.

The principles and rules in this caſe which govern a court of equity, muſt be conſiſtent with ſimilar caſes; though this money is to be raiſed out of land, yet it ought to be conſidered as money, and to be governed by the ſame rules as money.

If money is to be turned into land, it ſhall be deviſed no other way, nor conſidered any other way but as land; here the money is to be paid out of this land, into the hands of executors, and the very fund out of which the money is to be raiſed, becomes a perſonalty, for though it is a term of inheritance, yet it is perſonal eſtate, therefore neither in law nor equity is it to be conſidered as land, and equity will reverſe the very order of things to come at the intention.

The heir at law is favoured upon many occaſions, but never to the prejudice of younger children, where the heir is otherwiſe ſufficiently provided for; and though the father here has annexed terms to the plaintiffs taking of their portions, yet they are terms which are contrary to the policy of the land, and contrary to the law, and abſolutely void.

The great fund out of which portions are to ariſe is land, and therefore reſtrictions of this kind, which make this fund precarious, ought to be diſcountenanced, eſpecially as they likewiſe diſcourage marriage, which is a much more probable way of introducing a virtuous education, than if they were born out of wedlock.

I will not ſay the mother will abuſe this power, but if ſhe marries, it devolves on the truſtees, and though they are men of honour, and will not, I believe, injure the daughters; yet if they die, it goes to executors or adminiſtrators, and even aſſigns, who may poſſibly be knaves and fools, and conſequently very improper to be intruſted with ſuch power.

The court has already determined that this is contrary to the common policy, and have fixed bounds by precedents, from which they will not depart. *Fleming* v. *Walgrave*, 1 *Chan. Caſ.* 58. *Aſton* v. *Aſton*, 2 *Vern.* 452.

Caſes of forfeiture never receive any countenance in this court, for in all conditions that are a reſtraint upon marriage, if not performed, there muſt be an expreſs limitation over to ſome other perſon, or it is no forfeiture; now in this part of the caſe, it would equally have ſunk in the land for the benefit of the heir, if it had not been ſo expreſſed in words.

Dr. *Strahan* of the ſame ſide.

I ſhall ſtate the rules of the civil law, and conſider it firſt generally as a proviſion for daughters.

The civil law has apportioned a father's eſtate, which it is not in his power to take away; if he ſhould give it away, he muſt aſſign

ſome ſatisfactory reaſon, he could not clog it, or put any reſtraint upon marriage.

The writ, *de rationabili parte bonorum*, ſhews the civil law has been received and countenanced in *England*.

With regard to marriage portions, the civil law has a particular law for that purpoſe, *Cod. lib.* 5. *title* 11. *de dotis promiſſione & nudâ polcitatione, lex* 7. *Dig. lib.* 23. 2 *Tit. de ritu nuptiarum, lex* 19. *de patribus cogendis in matrimonium collocare. Qui liberos, quos habent in poteſtate, injuria prohibuerint ducere uxores, vel nubere, (vel qui dotem dare non volunt, ex conſtitutione divorum Severi & Antonini) per proconſules, præſides provinciarum coguntur in matrimonium collocare & dotare.*

If parents had been allowed to annex conditions to portions, it might perhaps have been an unreaſonable one, and have fruſtrated the deſign of portions. This was contrary to the policy of the republick of *Rome*, the *jus trium liberorum*.

Marriages ought to be free, *libera debent eſſe matrimonia*, and it is a general rule in the civil law, where a condition is annexed to a legacy by way of total prohibition of marriage, that it is abſolutely void.

Jacobus Gothofrædus de fontibus juris civilis, p. 291. mentions the *Julian* law *de patripropria* in the time of *Auguſtus*, that if any perſon adds a reſtraint to marriage, let them be free from the condition; they endeavoured then to find out conditions which would not in direct words reſtrain marriage, but in the implication would have the ſame effect, by making the conſent of a third perſon the condition of marrying. This was declared to be eluding the deſign of the *Julian* law, *Dig. lib.* 35. 1 *Tit. de conditionibus & demonſtrationibus et cauſis & modis eorum quæ in teſtamento ſcribuntur, lex* 72. *Si arbitratu Titii Seia nupſerit, meus hæres ei fundum dato; vivo Titio, etiam ſine arbitrio Titii eam nubentem legatum accipere, reſpondendum eſt, eamque legis ſententiam videri, ne quod omnino nuptiis impedimentum inferatur, &c.* This is *Papinian*'s determination, who was looked upon to be the brighteſt of all the *Roman* lawyers; and *Cujacius*, in his comment upon this very law, ſays, His authority is of great weight, and has ſuch regard paid to it in our court, that conditions reſtraining marriage are held by us, upon his authority, to be abſolutely void. *Mantica lib.* 11. *n.* 8. *Graſſius lib.* 1. *n.* 9. *Covarruvius n.* 3. takes a difference between marriages with the conſent, and the advice of another. *Sanchez de ſanct. matrimon. ſacramento diſputat.* 34. *n.* 19. *Non tantum conditio non ineundi matrimonium, rejicitur a legato, ſed etiam conditio ineundi arbitratu, vel conſenſu tertii, et ratio eſt, quia qui tenetur conſenſum vel licentiam alieni petere, tenetur ſequi, atque ita matrimonii libertas impedietur.*

Swinbourn, part the 4th, *ſec.* 12. lays it down as a general rule, that all conditions againſt marriage are unlawful, contrary to the procreation of children, repugnant to the law of nature, and detrimental to the commonwealth.

In the preſent caſe *lady Aſton* will have the benefit, who is the perſon to refuſe. *Dig. lib.* 30. *tit.* 1. *de legatis & fidei commiſſis, lex* 43.

parag. 2. *Legatum in aliena voluntate poni poteſt, in hæredis non poteſt.* The heir in this caſe is to have the benefit alſo by refuſal, and therefore *nunquam præſumeretur velle obligari*, and ought not to receive any countenance.

The emperor *Juſtinian*, *Cod. lib.* 6. *tit.* 43. *Communia de legatis & fidei commiſſis & de in rem miſſione tollenda*, ſaith, *Rectius eſſe igitur cenſemus in rem quidem miſſionem penitus aboleri: omnibus vero tam legatariis quam fidei commiſſariis unam naturam imponere, et non ſolum perſonalem actionem præſtare, ſed et in rem, quatenus eis liceat eaſdem res ſive per quodcunque genus legati, ſive per fideicommiſſum fuerint derelictæ, vindicare in rem actione inſtituenda.*

Where a condition is null and void, the queſtion will be then, Whether any deviſe over or limitation will be good?

When the validity of the condition which is annexed to the legacy is taken off, it becomes abſolute, and no deviſe over can affect it. *Dig. lib.* 35. *tit.* 1. *de condit. & demonſtrat. lex* 22. *Quotiens ſub conditione mulieri legatur, ſi non nupſerit, et ejuſdem fideicommiſſum ſit, ut Titio reſtituat, ſi nubat: commode ſtatuitur, et ſi nupſerit, legatum eam petere poſſe et non eſſe cogendam fideicommiſſum præſtare*, the condition being void in law, the legacy is diſcharged of it.

Suppoſing ſuch conſent ſhould be neceſſary, yet it muſt be a reaſonable objection to the marriage, that is intended by this condition. Here the plaintiff Mr. *Harvey* has 300*l. per ann.* in poſſeſſion, and as much in reverſion, and was ready and able to make a proper ſettlement, and therefore there could be no reaſonable grounds for *lady Aſton*'s refuſal.

Mr. *Brown* of the ſame ſide.

As marriage was the only thing that was really and ſubſtantially in the conſideration of the parties, that has been performed, and the reſt is *in terrorem.*

The whole direction to raiſe the portion is upon the conſent of the mother, and not a word of the father; there are ſeveral inſtances which might be put where this ſettlement could not take place. Suppoſe lady *Aſton* ſhould have been viſited by the hand of God, and had become a lunatick, how could her conſent have been had? Or ſuppoſe there had been an aſſignment of the term, and an adminiſtrator of the truſtees at the ſame time whoſe conſent was neceſſary to be had?

As it ſtands on the foot of the ſettlement, it is a mere penalty, and only *in terrorem.*

Here the children might poſſibly wait the greateſt part of their lives for the conſent of perſons, to whom they are intire ſtrangers; in 1 *Mod.* 310, Lord Chief Juſtice *Hale* takes notice of a caſe cited by the defendant's counſel in *Fry* v. *Porter*, where the conſent was to be had in writing, and though no ſuch conſent, yet decreed a good marriage; and his Lordſhip ſaid there was great equity it ſhould be ſo, becauſe (ſaid he) the written conſent was only a provident circumſtance

ſtance and wiſdom of the deviſor, for the more firm obliging the party to aſk conſent, which the deviſor conſidered might be pretended to be had by ſlight words; and in the Earl of *Salisbury* v. *Bennet*, 2 *Vern.* 223. there was a marriage contrary to the expreſs terms of the condition on which the daughter was to take, and yet the whole portion decreed. In *Jackſon* v. *Ferrand*, 2 *Vern.* 424. a portion was decreed to be raiſed out of land, though the deviſee died before the time appointed for the payment.

The common law has paid a great regard to the rule of the eccleſiaſtical court, with reſpect to caſes of reſtriction on marriage, *Moore* 857. *Greſley* v. *Luther*, 11 *Jac.* 1. I mention this to ſhew that theſe ſort of caſes have been very antiently taken notice of, for Mr. Juſtice *Winch*, in giving his opinion, cites a caſe before this, where there was a condition annexed to a daughter's legacy, that ſhe marry with the aſſent of the mother, and ſhe ſued in the eccleſiaſtical court for the legacy; it was pleaded in bar that ſhe did not marry with the mother's aſſent, and notwithſtanding this, ſhe had ſentence for the legacy.

The caſes of portions are what this court have exerciſed a peculiar juriſdiction over, contrary to the other ſide of *Weſtminſter-hall*, and though it is a rule *æquitas ſequitur legem*, that muſt be confined to caſes which ariſe from a legal point and incidentally come before the court; a mortgage in equity is not conſidered as a revocation of a will, though it is at law; nor will this court conſider a mortgage as land, nor allow it to be irrevocable.

I put it upon the gentlemen of the other ſide, to ſhew, where this court have ſuffered penalties to take effect, which are in reſtraint of marriage.

It is not ſaid, any where in the deed, to whom the portions ſhall go over, provided the daughters marry without ſuch conſent; and in *Hayward* v. *Paget*, *Nov.* 12, 1733, it was held, a general deviſe of the *reſiduum* is the ſame as no deviſe over at all.

The money given by the will is as an augmentation of the daughters portions, and where a legacy is given to a perſon upon marriage, and the legatee marries accordingly, it veſts, though without the conſent of a particular perſon, *Semphill* v. *Bayly*, *Preſ. in Chanc.* 562. and where a perſon who takes it over, takes it as a reſiduary legatee, it is plainly diſtinguiſhable from the caſes where it is deviſed over to a ſpecifick legatee; and therefore this caſe muſt fall within the reaſon of thoſe determinations where the deviſe is *in terrorem* only.

Dr. *Andrews* for the defendants.

Deeds are undoubtedly of a ſtricter nature than a will, and as the will in the preſent caſe plainly refers to a deed, it muſt be conſtrued with the ſame ſtrictneſs as a deed.

It is a legacy uncertain, but to be made certain by a fact, for it is not daughters by name, *but to a daughter only who marries with the conſent of the mother*, and no body can take but thoſe who bring

themſelves within the deſcription. I do maintain that this is a legacy which has never veſted, becauſe the condition on which it is given by the teſtator has not been performed, and according to the law of the twelve tables, *voluntas teſtatoris in teſtamento totum facit*, and though a prohibition of marriage hath not been allowed, yet the civil law permits a reſtraint upon it. *Cod. lib.* 5. *tit.* 4. *lex* 1. *Cum de nuptiis puella queritur, nec inter tutorem et matrem & propinquos de eligendo futuro marito convenit: arbitrium præſidis provinciæ neceſſarium eſt. Swinb. part* 4. *ſec.* 12. *paragr.* 14. " When that which is given " with condition of not marrying, is to be diſtributed in pious uſes, " in caſe the condition be not obſerved; here the condition is not re- " jected as unlawful, and if he marries, he loſes his legacy; the reaſon " is, for that the law doth more favour piety than the liberty to " marry."

A variance between the old law, and the law in *Juſtinian*'s time, *vide Inſtitut. lib.* 2. *tit.* 20. *de legatis, ſect.* 36. In the old law a legacy reſtraining marriage void, but in the latter law, ſuch legacies, notwithſtanding the condition annexed, ſhall be equally ſubject to the condition, as any other legacy would be that is left ſubject to a condition.

The rule in our court is, that the civil law, ſo far as is conſiſtent with the *jus gentium*, ſhall prevail. *Grotius* lays it down, that after the death of the father, the mother is intitled to the ſame obedience from the children as the father, founded upon the fifth commandment.

The *jus trium liberorum* is not in force with us; if a *Roman* had three children, and not able to maintain them, the common-wealth maintained them; but the publick here takes no notice, the pariſhes muſt ſupport them. In the *Roman* law they provided not for natural children; but in our law, if a man marries, though he has lawful children, yet he may diſpoſe of his eſtate to the *illegitimate* iſſue, in prejudice of the legitimate. By the *Roman* law, the portion was the woman's diſtinct property; here it belongs to the huſband, and here it ſhould be conſidered as if the father had ſaid, I give 2000*l.* to ſuch a man as ſhall marry my daughter with the conſent of the mother.

Mr. *Fazakerley*, of counſel alſo for the defendants.

This court will conſider the conſent to be a material ingredient, and without which it could not be a marriage, conſiſtent with the intention either of the deed or deviſe.

It is ſaid this muſt be conſtrued *in terrorem*, but I hope the court will not conſtrue mens intentions into ſuch a phantom terror; for if this is the known conſtruction of this court, would any man be ſo void of underſtanding, and ſo trifling, as to make uſe of a reſtriction which he is ſenſible will be void? A reſtriction which can hardly meet with any perſon ſo weak and ignorant as to be terrified at it. As to the caſe of *Jackſon* v. *Farrand*, in 2 *Vern.* it is doubtful if that caſe would be determined as it now ſtands, if it was to be reheard.

If

If this court will conſtrue the intention contrary to the expreſs words, it is impoſſible they can operate at all; the law will not make an expoſition againſt the expreſs words and intention of the parties, which ſtand with the rule of law, *quoties in verbis nulla eſt ambiguitas, ibi nulla expoſitio contra verba expreſſa fienda eſt.*

The laws of nature are ſo ſtrong upon fathers, that the national law has not obliged them to make any proviſion, but left it intirely to their diſcretion, and has given up the children in this reſpect to the abſolute power of the father; who ſo proper to make a prudent proviſion for children as the father, who knows the temper and diſpoſition of each child? Different reſtrictions may be neceſſary in one caſe, which may be unneceſſary in another.

The 12th of *Car.* 2. *cap.* 24. *ſec.* 8. has given a father an abſolute power to diſpoſe of the guardianſhip of his children, until the age of 21, which ſhews the ſenſe of the legiſlature as to parental authority; by the cuſtom of the city of *London*, whoever marries an orphan without the proper conſent, though living intirely out of their juriſdiction, yet he is not intitled to the portion; would this cuſtom be permitted, if it abſolutely contradicted the known rules of law, as is pretended by the other ſide? this court, only upon a bill filed, and affidavits produced, that a diſadvantageous marriage is apprehended, will prevent the perſon from marrying without the leave of the court.

It has been ſaid, wherever there is a condition that is *malum in ſe*, it will make it void, and ſeveral inſtances have been put, as to murder a perſon, or where it is repugnant to a grant; but this being a collateral thing, and not preventing a marriage, can never be conſtrued or brought within this rule.

They have not cited one authority out of the common law, and with reſpect to legacies, *your Lordſhip* has a concurrent juriſdiction with the eccleſiaſtical court, and if this court follow their rules in ſimilar caſes, it is for this reaſon, that there may be a conformity in the reſolutions, and that the ſubject may have the ſame meaſure of juſtice in which court ſoever he ſued. *Abr. of Ca. in Eq.* 295.

Where a legacy charged upon land is once veſted, it becomes money, and goes to the perſon to whom it is given; but before it is veſted, it is a common law charge, and is not for the conſideration of the civil law, or the eccleſiaſtical court. A truſt term muſt be conſidered as a parcel of the inheritance, till the purpoſe for which it is raiſed is ſatisfied, and the legacy actually veſts.

1 *Ch. Ca.* 58. *Fleming* v. *Walgrave*, is not at all to the preſent purpoſe; the caſe is very ſhort, and very obſcurely ſtated; the diſpute *there* was beſides upon a mere perſonal truſt. The caſe in *Finch's Reports*, *fol.* 62. too much honoured by being called Lord *Nottingham's Reports*, *there*, if the daughter never married, ſhe might be allowed to improve the eſtate, as there was no probability of her marriage at that time; and as ſhe had the abſolute property, if ſhe did not marry at all, upon giving ſecurity that ſhe would comply with the terms, ſhe was allowed to improve.

There is no law to prevent widows from marrying, but they may marry *ad infinitum*; and yet conditions in a will to reſtrain them from marrying, have been held to be binding, though young enough to do great ſervice to the publick in point of children.

The Civil law was never received ſo far as to controul property here, but the conſtruction with regard to charges upon land, have always been adapted to the rules and diſtinctions of our own laws: In perſonal legacies indeed it may be otherwiſe, and poſſibly may be influenced by the rule of the Civil law; but money which is to be raiſed out of a truſt upon land, cannot be ſaid to exiſt, till the condition for which the truſt was raiſed, is complied with, and can never be called *debitum in præſenti ſolvendum in futuro:* This rule is applicable indeed to a bond, becauſe there the debt immediately commences from the execution, but the defeazance is not to take place till a future day; we inſiſt that this never veſted, becauſe it is only payable upon marriage *with conſent*; and therefore all that has been ſaid with relation to a forfeiture, is an argument without any concluſion.

Secondly, As to the will, if there had heen no word but *augmentation*, it could not be taken without a compliance with the terms of the original portion in the firſt place; a caſe determined before the Maſter of the Rolls (*a*) has been inſiſted on; but as there are two caſes of equal authority, being both decided by the ſame perſon, which are adjudged different ways, the queſtion is ſtill as much open, as if this had been a caſe *primæ impreſſionis.*

(*a*) Sir *Joſeph Jekyll.*

Is not the teſtator's intention to give it over equally clear by directing it ſhould ſink in the perſonal eſtate, where he has appointed a reſiduary legatee, who will conſequently have the benefit, as if he had actually in words and by name given it to *the reſiduary legatee.*

Here is a proviſion of 70 *l. per ann.* to the daughters during the life of the mother, and after her death 100 *l.* which they will ſtill be intitled to, though they have married contrary to the reſtriction; and therefore the argument of their being deſtitute falls to the ground.

There never has been any caſe in the eccleſiaſtical court, where it has been determined, that a legacy given upon a contingency, ſhall be a good legacy, before *that contingency happens* as doctor *Andrews* informs me.

Mr. *Attorney general*'s reply.

It is inſiſted, that the intention of the parties is clear and plain.

Secondly, If ſo, that this intention ought not to be over-ruled in law or equity.

There are no negative words, that this ſhall not be raiſed if the daughter marries without conſent, and if the term is to continue notwithſtanding the marriage without conſent, who is it to continue for? for the daughter only! as it was created for no other end and purpoſe.

The

The known conſtruction, that the deviſes in reſtriction of marriage, are *in terrorem*, unleſs there is a deviſe over, has in a good meaſure been allowed by the defendant's counſel; this has been the general and unſhaken rule of the court, and therefore if not intirely founded on reaſon, ought to be acquieſced under; but I do maintain, it was eſtabliſhed on great reaſon, for the court ſuppoſes the father did not intend to leave the daughter deſtitute of a portion, but guarded it only by intimidating a child from marrying improvidently, though a child ſhould be told afterwards, this is deſigned as a terror only, and does not debar you of your portion, yet this is not contrary to the intention of the father, for he imagines when they are apprized of this, that they are then of years of diſcretion, and incapable of making this reſtriction ineffectual.

It is ſaid, the conſtruing theſe reſtrictions void, ariſes from the principles of the Civil law, which is not in force in *England*, and to be ſure conſidered merely as the *Roman* Civil law, has nothing to do here; but the queſtion is, whether the ſame words in any caſe before one court of juſtice, ought not to have the ſame conſtruction in every court.

It has been inſiſted, this is a conſtraint not at all contrary to the rules in law and equity.

The parental authority, when confined to it's juſt bounds, I will readily allow, but no body will ſay, the father in *England* has the power of life and death, or that he can impriſon, or deprive his eldeſt ſon of his eſtate by right of heirſhip and inheritance: It will not be denied, but that there is a time, when a child may be as fit to govern himſelf, as the parent can be to adviſe him.

It is ſaid, that the law has given the parent who is the natural guardian, the power of appointing another guardian, and arguments have been drawn too from the cuſtom of *London*, which I allow has been ſupported upon wiſe reaſons, but they are not applicable here, becauſe at twenty-one the cuſtom ceaſes, and here they cannot marry at thirty, forty, *&c.* or at any age without the conſent of the mother; in the other inſtance, the law does not extend their view beyond the age of twenty-one; but the parent here has carried his power ſo far, as to controul his children even after they come to years of diſcretion: What is this? but *reſtraining* a perſon who is of an age equally capable of judging as his own, and is like an attempt to ſettle an eſtate *in perpetuum*, after deſtroying the end, by the very means themſelves, and generally goes much ſooner out of the family, than otherwiſe it might have done.

It is objected, that the court in deviſes *in terrorem* have proceeded only in purſuance of the eccleſiaſtical court, that the two courts who have a concurrent juriſdiction, may not claſh, but it will not hold if this court ſhould conſtrue it a condition that is binding, tho' there is no deviſe over.

The learned doctors allow, though there is a limitation over, yet it is void in the Civil law, except in one caſe, a limitation to pious uſes, becauſe there the intereſt of charity is preferable to the intereſt of

of children; this ſhews that the reaſon of this court is founded differently from the Civil law, for here it goes upon the general policy of the kingdom.

Mr. *Fazakerley* ſaid, there was no inſtance of any caſe of this nature in the eccleſiaſtical court. I am very glad no inſtance can be produced there, for then the conſequence is, this court has nothing to borrow from the proceedings in the eccleſiaſtical court.

Though the money is directed to be raiſed out of the land, yet it is to be conſidered only as money, but it has been inſiſted by Mr. *Fazakerly*, it muſt firſt veſt, before it can be conſidered as money, but notwithſtanding it is not, as they ſay, veſted, yet it does not follow, that it ſhould not till then participate of money, and veſting or not veſting makes no difference; nor can it be raiſed in any other court, for it is truſt money, and properly the creature of this court, and it has been held here more than once, that the conſtruction of truſts ought to be favoured in the ſame manner as the conſtruction of wills.

The caſe of *King* v. *Withers*, in Lord *Talbot*'s time, was upon an appeal to the houſe of Lords affirmed (*a*); there what is called on the other ſide a general rule, ſeems to be broke through, for it is determined, that money to be raiſed out of land, ſhall not ſink for the benefit of the heir, where marriage, the end of the portion was anſwered, though the whole of the condition for raiſing it, was not complied with.

(*a*) Caſes in Chan. in Lord *Talbot*'s time 117.

The caſes cited of a deviſe over, are not applicable here, becauſe in the preſent inſtance there is no legal proper deviſe over.

Needham and Sir *H. Vernon*, reſolved in Lord *Nottingham*'s time, is in point for us, and though the book itſelf is of no authority, yet the manuſcript under his hand, not differing from the printed caſe in any eſſential point, will ſurely have it's weight. *Aſton* v. *Aſton*, 2 *Vern.* 452. of the ſame kind, and ſecurity given for performing the condition, becauſe there was a deviſe over.

Lord *Harcourt* ſaying in *King* v. *Withers* (*b*), that a portion to be raiſed out of land, is to be conſidered as land, can have no weight, for there is a great difference to be made between the mere ſaying of a judge, and a *dictum* upon which the judge gave his judgment, but in that very caſe the determination was contrary to the *dictum*; for the portion was decreed to be raiſed, and conſequently a *dictum* not neceſſary to the judgment, and of no authority.

(*b*) Eq. Caſ. Abr. 112.

It has been inſiſted on the other ſide, there is a deviſe over.

Can it be ſaid, this is a giving over, where it would have fallen of courſe into the inheritance, if this had not been ſaid, a man deviſes an eſtate to his heir, he does nothing by it, for it would deſcend to him without it.

The rule of conſidering conditions in reſtriction of marriage, as *in terrorem*, is a rule of this court only, and founded upon the policy of the land, and not in conformity to the reaſoning of any other court.

As to the portions under the will, it is ſaid, if they are not intitled to the original portions, they are not intitled to the *augmentation.*

It does not follow, becauſe the teſtator calls it an *augmentation,* that they ſhall not have this portion, in the ſame manner as portions have been decreed in other wills: Suppoſe the very words of the ſettlement had been inſerted in the will, yet it ſhall have a different conſtruction where it is applied to the landed eſtate, and where to the perſonal; and therefore whatever may be your Lordſhip's opinion as to the ſettlement, you will not determine on the will by the ſame way of reaſoning.

It has been inſiſted by doctor *Andrews,* that theſe words are intended as deſcriptive, and that no perſons can take, but who bring themſelves under this deſcription.

Is not ſaying *daughter* in the precedent words, as deſcriptive as if he ſaid, my daughters *Mary, Ann,* &c.

It is ſaid, that this is given over, and to the remainder man of the eſtate, but the words are, *In caſe any of my ſaid daughters ſhould happen to die before the ſaid portion was paid, that the eſtate ſhould be exonerated thereof:* This is not giving it over, but makes it a nullity, for it ceaſes, if the contingency of marrying fails, and nothing is to be raiſed.

Can it be ſuppoſed that a child will always continue an infant, that they will never arrive at years of diſcretion, never capable of judging for themſelves, ſhall they be thought fit to preſide in the great aſſembly of the nation, be placed at the head of armies, nay even preſide in this court, and yet incapable of judging, where marriage is concerned.

Doctor *Strahan*'s reply.

How far the Civil law ſhould have weight, is in the breaſt of the perſon preſiding here, but it is certain the Civil law is interwoven in the original inſtitution of this court; what I inſiſt upon is, that being tied up to marry with the conſent of another, was by that law conſidered as a total prohibition, and held to be null and void.

It has been objected, notwithſtanding the general rule, that ſome reſtrictions were allowed upon marriage, with regard to point of time, or reſtriction to particular perſons; but this is no argument that a total prohibition is allowed, for they are ſtill admitted to marry, obſerving the direction of time, or direction of perſons: The principal alteration that I know of, was reſtraining a woman from a ſecond marriage, and this was relaxing the general law, for the intereſt and preſervation of the children of the firſt marriage, in the *Julia Marcella,* but the emperor *Juſtinian* repealed and aboliſhed the *Julia Marcella,* and made ſuch condition, whether in reſtraint of widows, or in reſtraint of others, abſolutely void.

Dig. lib. 33. *tit.* 4. *De Dote Prælegata, lex* 14. is very far from coming up to the preſent caſe, there the teſtator had two daughters and a ſon, the eldeſt of which married in his life-time, and taking notice

of his youngeſt daughter in his codicil, he ſays, *Filiam meam Criſpinam, quam vellem tradi nuptui cuicunque amici mei & cognati approbabunt, providebit tradi Pollianus ſciens mentem meam, in æqualibus portionibus, in quibus & ſororem ejus tradidi*; this amounts at moſt to a wiſh that ſhe would marry with the approbation of his friends and relations, but not that if ſhe married without it, ſhe would forfeit her portion.

It has been ſaid, that the father had a very great power, and that he might delegate it to others.

I allow it to be very great, though it was very much abridged, but whatever power he might have in his life, I apprehend, even in the Civil law, he could not delegate it after his death: With reſpect to paternal authority in the point of guardianſhip, he could not appoint a tutor to his child, beyond the age of 14, and after that age, the *Roman* law thought the child of ſufficient maturity in judgment, to chuſe for himſelf. In the preſent caſe they muſt be continually under guardianſhip, under their mother, while ſhe lives, and under others after her death: I admit according to the paſſage cited out of *Grotius*, the children ought to be under the obedience of their parents, and in point of marriage too, ſo far as to take the direction of their parents, but not under ſuch a ſervile obedience, as to refrain from marrying at all, if the parent ſhould adviſe it.

There are no printed reports of caſes with us, but there have, and muſt have been caſes of this kind, but what is the conſequence if there has been no caſe at all of this nature determined, then it muſt be adjudged according to the ſtandard rule before this caſe.

After the counſel had finiſhed, the court declared they would take time to conſider before they delivered their opinion; and the cauſe, by order of *Lord Chancellor*, ſtood in the paper for judgment the 5th of *June* 1738.

Mr. Juſtice *Comyns*, who on that day delivered his opinion firſt, after ſtating the caſe *ut ſupra*, ſaid, he thought it very clear, that it was the intention of Sir *Thomas Aſton*, that his daughters ſhould not have their original portions, if they married without ſuch conſent as preſcribed, and this intent appears upon every clauſe of the deed.

It is agreed, that the portions were not payable till marriage, and there is no direction in the deed that they ſhall be payable at marriage only, but expreſly on marriage *with conſent*.

Where any act is previous to any eſtate or truſt, and conſiſts of ſeveral particulars, every particular muſt be performed.

It is a known rule, that where any act is previous to any eſtate or truſt, and that act conſiſts of ſeveral particulars, every particular muſt be performed before the eſtate or truſt can veſt or take effect, and to this purpoſe there are many caſes, but it may be ſufficient to cite one only, and that is Sir *Cæſar Wood* v. *The duke of Southampton*, *Shower's Parliament Caſes* 83, 87. which comes up to this point as to the performance of both parts.

But *the objection* which has been moſt relied on at the bar, was, *that* in the Civil law, theſe reſtrictions are looked upon as unlawful, and that the doctrine of the Civil law has been adopted into this court: I think ſome regard is to be had to the Civil law, and what

Selden lays down in his diſſertation upon *Fleta*, *lib.* 3. *ch.* 5. ſeems to direct how far it ſhall be admitted.

It will therefore be proper to take ſome notice of the ground of this maxim in the Civil law, *that* conditions of marriage with conſent, annexed to legacies, are void conditions.

It was the rule of *that law*, that no body ſhould deviſe their eſtate without leaving ſomething to the heir; ſo alſo, by the ſtatute of the 32 *H.* 8. there is a particular ſaving of one third part not deviſable: The proviſion of the *lex Falcidia* was, *ita detur legatum, ne minus, quam partem quartam hereditatis eo teſtamento hæredes capiant.* And it was called *legitima portio:* This law was endeavoured to be evaded two ways, firſt, upon leaving the whole to the heir upon condition of marrying with the conſent of ſuch perſon, who it was known would never conſent: Secondly, Where the parties were in the power of the teſtator, by forcing them to marry ſuch perſons only, as they could not marry with honeſty and credit, ſo that this was looked upon as an evaſion of the law; but the law always was, that where the condition was not a total reſtraint, as where a particular perſon only is excepted, *then* the condition was good.

But as it has been inſiſted, that *this court* has adopted this rule, I ſhall mention the caſes on that head.

I take it to be now ſettled, that if a pecuniary legacy is given on condition of marriage with conſent, *and there is no deviſe over*, that ſuch condition is void, *Bellaſis* v. *Ermine* (*a*). *Fleming* v. *Walgrave* and *Garret* v. *Pritty* (*b*). But none of theſe caſes come up to the preſent, which is the caſe of a portion charged on land. *King* v. *Withers* (*c*) was alſo cited, but there the teſtator appointed two periods of time to intitle the daughter to her portion; marriage, or the age of 21, and as ſhe had attained that age, it became a veſted intereſt.

It is now fully ſettled, if a pecuniary legacy is given on condition of marriage with conſent, and there is no deviſe over, ſuch condition is void.

(*a*) 1 Ch. Caſ. 22, 58.

(*b*) 2 Vern. 293. (*c*) Eq. Caſ. Abr. 112.

So where the condition has been performed to a reaſonable intent, the court has diſpenſed with the want of circumſtances, as where the major part of the truſtees conſent, or where the truſtees give an implied, not an expreſs conſent; ſo where the father has made the marriage himſelf. The caſe in *Moore* 857 (*d*) ſeems to have been determined in the eccleſiaſtical court, neither does it appear there was any deviſe over: The chief reaſon on which the court went in the determination of *Fleming* v. *Walgrave*, 1 *Chan. Caſ.* 58. ſeems to be that a diſtinction was taken (as is ſaid in 2 *Vern.* 573. *Creagh* v. *Wilſon*,) between a condition that ſhe ſhall not marry without conſent, and a condition that ſhe ſhall not marry againſt conſent, or contrary to their liking: The caſe of *Needham* v. *Vernon* in Lord *Nottingham's* time (*e*), ſeems to have been determined by conſent, and though it was ſaid in that caſe, that all conditions in reſtraint of marriage are void by the Civil law, and that this court only conſiders them *in terrorem*, yet this is rather taken *pro confeſſo*, than any expreſs determination

Where a condition has been performed to a reaſonable intent, the court will diſpenſe with the want of circumſtances, as where the major part of the truſtees conſent, or where they give an implied, not an expreſs conſent.

(*d*) *Greſly* v. *Luther.*

(*e*) Eq. Caſ. Abr. 111.

termination on that point: That they are not ſo by the Common law, is evident from the caſe of *Fry* v. *Porter (a)*. The reaſon the court went upon in *Semphill* v. *Bailey* (*b*) was, that the condition was looked upon as a looſe, inconſiderate expreſſion, and intended to be by way of caution only, for there was no deviſe over.

(*a*) 1 Mod. 300.
(*b*) Prec. in Ch. 562.

Pecuniary legacies being ſueable for, in the ſpiritual court, is the reaſon why that law governs as to them in ſome reſpects.

None of theſe caſes however come up to the preſent; *pecuniary legacies* being ſueable for in the ſpiritual court, is the reaſon, why that law in ſome reſpects governs as to them. But it is undoubtedly true, that this court has not univerſally followed the maxim of the Civil law, even upon this point, for it has been always agreed, that where there is a deviſe over, it ſhall take effect. It is ſaid in this caſe, there is no particular deviſe over to any particular perſon, but I think it is equally ſtrong, for it is declared the eſtate ſhall be exonerated, or if the money be raiſed, ſhall be paid to the perſon who is intitled to the reverſion.

Where an eſtate is to ariſe on a condition precedent, it cannot veſt till that condition is performed.

It is a known maxim, that where the eſtate is to ariſe upon a condition precedent, it cannot veſt till that condition is performed, and this has been ſo ſtrongly adhered to, that even where the condition is become impoſſible, no eſtate or intereſt ſhall grow thereon (*c*).

(*c*) Co. Litt. 206. a.

Though the Civil law has no ſuch term as condition precedent, yet the rule in that law *conditio ſuſpendit legatum* is the thing in effect.

But it is ſaid, the Civil law has no ſuch diſtinction as that of conditions precedent, it is true they have no ſuch term, but they have the thing in effect: *Conditio* (they ſay) *ſuſpendit legatum*, and ſaith *Ulpian*, *Legata ſub conditione relicta non ſtatim, ſed cum conditione extiterit, deberi incipiunt; ideoque interim delegari non poterunt. Dig. lib.* 35. *tit.* 1. *De Condition. & Demonſtrat. lex* 41. They diſtinguiſh between three ſorts of legacies.—1*ſt*, A pure legacy.—2*dly*, One payable at a day future, but certain.—3*dly*, One payable on a condition that is uncertain in its event. As to the firſt, they ſay, *Dies legati venit*. As to the ſecond, *Dies cedit, ſed non venit*. As to the third, *Dies nec cedit nec venit*. And in the laſt caſe, if the legatee die before the contingency happens, it ſhall not go to his executor. *Swinb. part* 4. 12*th* & 13*th ſect.*

Since the caſe of *Amos* v. *Horner*, the deviſe of the ſurplus of the perſonal eſtate held to be a deviſe over.

As to the legacies under the will, the caſe is more doubtful, for there is no expreſs deviſe over at all, but to the perſon intitled to the *reſiduum*: And it is ſaid in 2 *Vern.* 293. *Garret* v. *Pritty*, that the daughter ſhall have the whole 3000 *l.* though ſhe married without conſent, becauſe it is not deviſed over, but only to fall into the ſurplus: But the caſe of *Amos* v. *Horner* (*d*) is a later caſe, and it is there held, that the deviſe of the ſurplus of the perſonal eſtate, is a deviſe over.

(*d*) Eq. Caſ. Abr. 112.

It would be a contradiction in this court to ſay, they are not intitled to the firſt, and yet to the ſecond, which are to be paid together with, and at the time of the original portions, and are made ſubject to all the ſame *conditions, limitations and proviſoes*, and it would be likewiſe contradicting even the courſe of the Civil law, for by that, if a legacy is payable on a contingency, and the party dies before the contingency happens, it lapſes.

Lord

Lord Chief Juſtice *Willes:* I am of opinion, if a ſtranger impoſe a condition, it is as ſtrong as if a father had impoſed it, and the law is not founded on the conſideration of the perſon giving, but on the thing given, the rule is, *Cujus eſt dare ejus eſt diſponere.*

Upon this caſe, two points have been very properly made.

Firſt, If it was the intention of Sir *Thomas Aſton*, that his daughters ſhould have their portions, whether they married with conſent or not?

Secondly, If it was his intention that they ſhould not, then whether this intent be agreeable to the rules of law and equity?

As to the firſt, I think there can be no doubt, either upon the will or ſettlement.

As to the ſecond point, to begin with the will, the rule is, that *voluntas teſtatoris totum eſt*, if not inconſiſtent with the rules of law and equity, and they ſhould be very plain indeed, ever to defeat the intention of the teſtator: We muſt agree with *Dyer*, (ſays Lord Chief Juſtice *Treby*, 2 *Vern.* 337.) that men's wills by which they ſettle their eſtates, are the laws that private men are allowed to make, and they are not to be altered even by the King in his courts of law, or conſcience.

Let us now conſider the difference between a portion payable out of lands, and one payable out of perſonal eſtate, and the difference is, that if money be given to a man, payable when he comes of age, and he dies before the day of payment, it ſhall go to his executors; but if it be a portion to be raiſed out of lands, it ſhall ſink into the eſtate, for the benefit of the heir. *Pawlet* v. *Pawlet*, 1 *Vern.* 204. and 2 *Vent.* 397. and *Tournay* v. *Tournay*, *Prec. in Ch.* 290.

In the preſent caſe it muſt be taken to be either a condition precedent, or a limitation of the time of payment; if the firſt, the caſe of *Bertie* v. *Falkland* * is in point, and that of *Fry* v. *Porter* † goes farther, for there it was held that a condition ſubſequent cannot be relieved againſt without a compenſation, which a marriage without conſent cannot have.

* 3 Ch. Caſ. 129.
† 1 Ch. Caſ. 138.

If it be taken as a limitation of the time of payment, (and that ſeems the proper conſtruction) then even the civil law will not ſay they are now intitled, becauſe the time is not yet come. *Tournay* v. *Tournay*, *Pawlet* v. *Pawlet*, are in point. The caſe of *Salisbury* v. *Bennet*, 2 *Vern.* 223. is more properly the caſe of a perſonal eſtate, but has ſome ſimilitude to the preſent, as the ſurplus was to be laid out in land; but the court there went upon this foot, that there was a diſpenſation by the father as to one part, and a conſent of the mother and truſtees as to the other part. In the caſe of *King* v. *Withers* there were two periods of time to intitle the daughter, and one of them had happened.

It is laid down as a rule that governs in deviſes of perſonal eſtates, that where there is no deviſe over, the condition is only *in terrorem*; but I rather take it this is laid down as a rule to conſtrue the teſtator's intention, but not that it is in all events a general rule, that ſuch con-

ditions ſhall be *in terrorem* only, unleſs there are words of limitation over, for the teſtator's intent may be known other ways. *Pagct* v. *Haywood*, *Nov.* 1733. * does indeed contradict the opinion now declared, for there it was held that a general deviſe of the *reſiduum* or a deviſe to the perſon intitled to the *reſiduum*, were the ſame as if no deviſe over at all; but the caſe of *Amos* v. *Horner* † is to the contrary: There is indeed no decree found in the *Regiſter*, but it appears by the *Calendar* that a decree was made, but being againſt the plaintiff, I ſuppoſe has never been drawn up. The author of the book however told me, he had a note of the caſe from a very able perſon who was preſent at the hearing.

* At the Rolls before Sir *Joſeph Jekyl.*

† Eq. Caſ. Abr. 112.

Lord Chief Juſtice *Lee* declared himſelf of the ſame opinion, and ſaid there are three ſorts of conditions to be rejected.

Firſt, ſuch as are repugnant.

Secondly, Such as are impoſſible in their creation.

Thirdly, Such as are *mala in ſe*.

The particular penning of this ſettlement makes it a condition precedent, and veſts nothing in the daughters till a marriage with conſent.

But this condition of marrying with conſent does not come under any of theſe heads. And in *Fry* v. *Porter*, and 1 *Roll. Abr.* 418. it is admitted ſuch a condition is good in reſpect of land; though where a compenſation can be made, it is true, there is but little difference between conditions precedent and ſubſequent; yet where a condition is annexed to a portion in order to have a marriage with conſent, there is an equitable difference. In the caſe of a condition ſubſequent, the thing is veſted, and though in the nature of a penalty, yet the intent ſhould be clear and plain by an expreſs deviſe over to deveſt it; but in the caſe of a condition precedent, for which there can be no compenſation, it would be giving an eſtate againſt the intent of the donor to diſpenſe with the condition. Here are no words to veſt the portions in the daughters till a marriage with conſent, and I very much govern my opinion in the preſent caſe by the particular penning of this deed, which has made this a condition precedent, and has veſted nothing in the daughters till a marriage with conſent.

The only true queſtion upon this caſe ſeems to be, Whether ſuch a condition as this can be annexed to a portion? For if it can, then all thoſe caſes where the portion is to ſink into the inheritance are in point, and that ſuch a condition may be annexed hath been already ſhewn.

As to the queſtion upon the will, all that is material upon it is the conſideration of the caſes; *Ballaſis* v. *Ermine** was conſidered on a plea only, where the court does not uſe to conſider matters ſo thoroughly, and there indeed the court looked upon it as a portion veſted. But the condition in the preſent caſe does not operate by way of defeating the eſtate, but hindering its veſting. It appears by *Aſton* v. *Aſton**, that even in the caſe of a condition ſubſequent, the length of time during which the reſtraint is to continue, is not a reaſon to relieve againſt a forfeiture. In the caſe of *Garret* v. *Pritty**, the portion was plainly a veſted portion, and the proviſo comes in afterwards, and is to be conſidered as a condition ſubſequent.

* 1 Ch. Caſ. 22.

* 2 Vern. 452.

* 2 Vern. 293.

Upon

Upon the whole therefore I am of opinion that a condition to marry with conſent is a lawful one, and that it is annexed *to theſe portions*; that it is a condition *precedent*, and that nothing can veſt in the plaintiffs till that condition is performed; and ſhall conclude with the advice of *Puffendorf*, that parents ought to uſe this power mercifully and cautiouſly. *

A condition to marry with conſent a lawful one, and being annexed to theſe portions, nothing can veſt till that condition is performed.

* *Puffend.* B. 6. Ch. 2. p. 381.

Lord Chancellor: I agree with my Lords the Judges in opinion, and do hold nothing is more fixed ſince the caſe of *Pawlet* v. *Pawlet*, than that portions charged on lands will not veſt till the time of payment comes, which in this caſe is not till *a marriage with conſent*, and there is no rule in law or equity that can excuſe the want of ſuch conſent; *that* there is no ſuch rule where they are given over, has been clearly proved, and the ordering that the eſtate ſhall be exonerated, I think is equal to a deviſe over. But admitting there is no deviſe over, then the queſtion will be, Whether this condition is *in terrorem* only? And I own I do not know that this rule obtains ſo generally as has been laid down; I have underſtood it only of legacies, and not of portions, and of this ſort was the caſe cited in *Moor* 857.

It is the eſtabliſhed rule, ſince the caſe of *Pawlet* v. *Pawlet*, that portions charged on lands do not veſt till the time of payment comes. The rule that a condition to marry with conſent is *in terrorem* only, where no deviſe over, muſt be underſtood of *legacies* only, and not of portions.

Theſe portions ariſe out of lands, and have nothing teſtamentary in them, ſo are not ſubject to the juriſdiction of the eccleſiaſtical court, nor to be governed by the rules of the civil law, but are ſubject only to the rules of the common law.

Portions ariſing out of land ſubject to the rules of the common law only.

An eſtate may be limited to a woman *dum ſola & innupta fuerit*, and this is mentioned by *Swinbourn* himſelf. If an infant under the wardſhip of the court marries without the conſent of the court, it is the common practice to commit thoſe that are concerned in it. The cuſtom of *London* goes further, for if the daughter of a freeman marries in his life-time againſt his conſent, unleſs her father be reconciled to her before his death, ſhe ſhall not have her orphanage part *. And this is more to the purpoſe here, becauſe this cuſtom is generally thought to have been taken up from the writ *de rationabili parte bonorum*, from whence an argument was drawn at the bar in favour of the plaintiffs in this caſe.

If the daughter of a freeman of *London* marry againſt his conſent, ſhe loſes her orphanage ſhare.

* *Foden* v. *Hewlet*, 1 Vern. 354.

If Sir *Thomas Aſton* had expreſly limited the term to his daughters on their marrying with conſent, the term could never ariſe till they were ſo married, as is evident from the caſe of *Fry* v. *Porter*; and why has he not the ſame power over *the truſt of this term*, as over the term itſelf?

Another material difference between portions out of lands and perſonal legacies, is, that in the firſt caſe, if the party dies before they become payable, they ſhall not be raiſed; in the latter, the legacy

If the party dies before a portion becomes payable, if out of land, it ſhall not be raiſed; but if a perſonal legacy, and legatee dies before the time of payment, it ſhall go to the executor.

ſhall go to the executor, and the ground of this diſtinction is, that the court for uniformity follows the eccleſiaſtical courts in the one caſe, and the common law in the other. There was another reaſon given for this diſtinction, that it is in favour of the heir, but that can be no reaſon at all, becauſe in a court of juſtice there ought to be no favour ſhewn to one more than to another.

As to the precedents that have been cited for the plaintiffs, they all of them depend upon the particular penning, or ſome other evidence ariſing upon the facts, and have not been determined upon general rules. *Fleming* v. *Walgrave* ſeems to be a ſettlement of a leaſehold eſtate, which, if ſo, was a mere perſonalty. *Needham* and *Vernon* ſeems rather an award between the parties, than a decree in an adverſary ſuit; for in a manuſcript I have ſeen of Lord *Nottingham*'s, "To "avoid queſtions (ſays he) I decreed the portions to be paid, upon "the giving ſecurity by recognizance not to break the conditions." As to the reaſoning in that caſe, I lay no great ſtreſs upon it, as it goes on a ſuppoſition that the portions were veſted; and the caſe of *Aſton* v. *Aſton* goes on the ſame foundation.

It muſt be admitted on the other ſide, that no caſe, exactly in point, is cited for the defendants, the meaning of which may probably be, that the general doctrine has always been, that in caſe of portions ariſing out of land, this court can give no relief, nor can take away, or ſet aſide ſuch conditions as are annexed; and in the caſe of *Pawlet* v. *Pawlet* it was ſo determined.

As to the additional legacies under the will, they will fall under the rule of perſonal legacies, unleſs ſomething is done by the teſtator that will prevent it; and *this is done* by annexing to them the ſame condition that governs the deed.

The teſtator mentions the legacies as an *augmentation* of their portions under the deed, which ſhews they are to attend the original portions; for how can they be intitled to an augmentation, if not to the thing augmented.

As to what has been ſaid, that lady *Aſton* being reſiduary legatee under the will, is the perſon that will take benefit by refuſing her conſent; I ſhall be glad to have the opinions of the judges, whether it may be proper to ſend this matter back to an inquiry into the reaſonableneſs of that refuſal: For my own part I am extremely doubtful, whether I can now direct ſuch an inquiry, as the cauſe ſtands before me. Lady *Aſton* has by her anſwer given an account of the reaſons of her refuſal, and this anſwer not being replied to, was at the hearing read as proof, and therefore I think, I muſt take it, that ſhe uſed all the caution in her power.

Some *unreaſonable behaviour* on her part ſhould have been proved in the cauſe, or ſome ſpecial caſe have been made in the bill, and unleſs that had been done, I do not ſee how I can direct ſuch inquiry, and if no corruption appears in her, this court cannot take from her the truſt repoſed in her.

Upon hearing Lady *Aſton*'s anſwer read, the three Judges were of opinion that the ſubject matter of the inquiry is already admitted, by the

the plaintiff's not replying to the defendant's anſwer; and therefore an inquiry now could be of no effect, and alſo that Lady *Aſton*'s diſſenting ſhould have been made a matter of original complaint. The *Lord Chancellor* being of the ſame opinion, he decreed that the order of the Maſter of the Rolls ſhould be diſcharged, but that the annuities ſhould be paid.

November the 26th 1739. At the Rolls.

Garbut v. *Hilton.*

PHILIPPA Downs deviſed *(inter alia)* as follows, "I give "and bequeath unto *Jane Garbut*, daughter of *Thomas Garbut*, "the ſum of 200*l. provided ſhe marries with the conſent and approba-* "*tion of her ſaid father and mother, or the ſurvivor of them,*" and made defendant *Hilton* executor in truſt for infants, who were the reſiduary legatees.

Caſe 173. *P. D.* deviſes to *J. G.* daughter of *T. G.* 200*l. provided ſhe marries with the conſent of her father and mother, or the ſurvivor of them.*

Jane Garbut before marriage, and during the lives of her father and mother, brought her bill againſt the defendant as executor to have this legacy paid, alleging it was a veſted intereſt, and the proviſo of conſent only *in terrorem*, there being no deviſe of this legacy over, if ſhe ſhould marry otherwiſe. The father and mother were made defendants to the bill, who conſented the daughter ſhould have the legacy paid to her.

J. G. before marriage, and during the lives of her father and mother, brings her bill againſt the executor to have this legacy paid, the father and mother by their anſwers conſenting. Marriage here a condition precedent, plaintiffs therefore too early, and bill diſmiſſed.

The Maſter of the Rolls: This is the firſt bill of the ſort that I ever heard of, *for a legacy given on marriage before any marriage had.* It is not to be conſidered as a condition merely to create a forfeiture, if ſhe ſhould marry without conſent, but is double; *firſt*, appointing the time when the legacy ſhall be due, and *ſecondly*, ſome circumſtances to be obſerved; and tho' the court may in particular caſes diſpenſe with the circumſtances, yet it muſt keep to the firſt, the appointment of the time.

If the words had ſtopped at *provided ſhe marries*, it would not have veſted till then; and adding the circumſtance of *conſent* cannot vitiate the whole condition. Every caſe cited eſtabliſhes this general doctrine, and marriage was actually had in all of them; the preſent a limitation of time annexed to the ſubſtance of the legacy, and a condition precedent to the veſting, which time is not come: And conſequently the plaintiff's application is too ſoon.

His Honour *therefore diſmiſſed the bill.*

(C) Who are to take advantage of a condition, or will be prejudiced by it.

July the 2d 1739.

Wigg v. *Wigg.*

Caſe 174.

E. W. deviſes lands to his ſecond ſon *Thomas*, upon condition that *Thomas* or his heirs ſhall pay to his grandchildren, (the children of the ſaid *Thomas*) 90*l.* to be equally divided among them, *and on default of payment, a clauſe of entry and diſtreſs. Thomas* died in the teſtator's life-time; the ſon of the eldeſt ſon of the teſtator entered on the lands as heir at law, and ſold them. The legacy to the children of *Thomas*, the teſtaror's ſecond ſon, is a continuing charge on the lands in the hands of the purchaſer, and they are intitled to be ſatisfied for the ſame with intereſt.

EDWARD Wigg, by will dated the 8th of *November* 1710. deviſed the lands named in the pleadings, "*To his ſecond ſon* Thomas, *upon condition that the ſaid* Thomas, *or his heirs, ſhall pay and ſatisfy to his ſix grandchildren* (*the children of the ſaid* Thomas) *the ſum of* 90*l. to be equally divided among them; and in default of payment of all or part, there was a clauſe of entry and diſtreſs.*"

Thomas the deviſee died in the life of the teſtator; the ſon of the eldeſt ſon of the teſtator entered on the lands as heir at law, and ſold the lands to a purchaſer for a valuable conſideration.

The queſtion was, Whether this is a continuing charge on the lands in the hands of the purchaſer?

Mr. *Brown* and Mr. *Noel*, who were counſel for the defendant, the heir at law of the teſtator, inſiſted, that this was only a perſonal condition on *Thomas*, the deviſee and his heirs, there being no words in the will to give a legacy to his children, otherwiſe than depending on ſuch perſonal condition, and that where a perſon claims under a will, but claims nothing except under *an eſtate* given by that will to another perſon, if ſuch eſtate did never ariſe, (as here it never did) nothing intended to be annexed to it can ſurvive, that this was an eſtate given upon expreſs terms of condition, and not within the rules of being conſtrued a conditional limitation, as not being to be performed by him who could receive a benefit from the non-performance, and that as it is not limited over, it ought to be conſtrued ſtrictly, as being to diſinherit an heir at law, and that the beneficial intereſt cannot be ſeparated from the condition, but they muſt both ſtand and fall together; and relied principally on the caſe in *Dyer's Reports* 348. *

Lord

* A man having no iſſue, deviſes certain tenements in *London* to two of his friends in fee, to hold in common, upon condition that they and their heirs ſhould pay an annual rent of 7*l.* 6*s.* 8*d.* out of the ſaid tenements, at four quarter days, to the wife of the deviſor during her life, and that if the rent ſhould be in arrear by the ſpace of ſix weeks after any of the days of payment, (and lawfully demanded) that it ſhall be lawful for his wife to diſtrain upon the tenements. The rent is in arrear, and no demand made upon the tenements by the wife; and for that cauſe the heir of the deviſor entred,

Lord Chancellor: I think the plaintiffs have a ſtrong caſe both for their legacies and intereſt: There are three queſtions,

Firſt, If the plaintiffs have any continuing charge on the lands.

Secondly, If they are proper to come into this court.

Thirdly, If there is ſufficient notice to affect the purchaſer.

The two firſt depend on the will, and a great deal ariſes from the nature of the diſpoſition in favour of the plaintiffs. It manifeſtly appears that the teſtator intended not only to make a proviſion for *Thomas* and his heirs, but alſo to make a proviſion for the ſix children who were then in being; and it would be very unfortunate, if not only *Thomas*'s heirs ſhould loſe the benefit intended, but the ſix children alſo loſe their ſmall proviſion by the act of God; and this is ſuch a conſtruction as the court never will make but when neceſſitated to do it. But on the contrary the preſent is a caſe ſo circumſtanced, as will induce a court of law, as well as equity, to make as ſtrong a conſtruction as poſſible to ſupport ſuch a charge.

The defendants inſiſt that this is only a condition annexed to the eſtate of *Thomas*, and his eſtate not taking effect, is void.

But this is not a mere condition, but a conditional limitation, there being an expreſs limitation over to the legatees in caſe of non-payment, who were to enter and hold in the nature of tenants by *elegit*; and there are many nice diſtinctions on theſe conditions ariſing by wills. *A.* deviſes lands to *B.* on condition to pay *C.* a ſum of money, and no clauſe of entry; this is no charge on the eſtate to give the legatee of the money a lien on the lands, but *the heir at law* ſhall enter and take advantage of the breach of the condition, and yet in this court he ſhall be conſidered only as a truſtee for the legatee.

A. deviſes lands to *B.* on condition to *C.* a ſum of money, and no clauſe of entry; the legatee at law has no lien on the lands, but the heir of teſtator ſhall enter for a breach of the condition, and yet in this court is but a truſtee for the legatee.

But then the queſtion will be, As *Thomas* died in the teſtator's life-time, and the eſtate deſcended to the heir at law, if the charges continue on the lands?

I think it is the ſame thing; whoever entred, it was to be only till payment of the legacy, and the heir at law might in this court redeem them; but the court will not put the legatees to ſuch a circuity, but permit them to bring a bill to have the lands ſold and the money raiſed.

This has been compared to a defective ſurrender of a copyhold purſuant to a will; but here it is different, for there the will is void, but

A man by will may make an equitable as well as a legal charge on his eſtate, and this court will maintain it againſt *the heir at law*.

---

tred, and the queſtion upon a ſpecial verdict in ejectment was, if his entry was lawful, or whether the penalty of the expreſs condition annexed to the eſtate of the deviſees be qualified, and altogether deſtroyed by the penalty of the diſtreſs, and by that means a limitation of payment of the rent to the wife, and the heir to take no advantage of the breach of the condition: The majority of the judges clearly of opinion that the entry of the heir was lawful, and that both the penalties, (that is to ſay) the condition and re-entry, and the diſtreſs given to the wife for non-payment, are good remedies and ſureties for the firm payment of the rent to the wife, according to the intent of her huſband.

ſure a man may, by will, make an equitable as well as a legal charge on his eſtate, and this court will maintain it againſt the heir at law, and therefore the children are intitled.

As to the ſecond queſtion, *Whether the remedy is proper in this court?* it is conſequential from what has been laid down before to prevent circuity.

Though a purchaſer did not know of an incumbrance before he paid his money, yet as he knew it before the deed was executed, it affects him, *with notice.*

As to the third queſtion, *Of notice to the purchaſer*, it appears he had notice, for though he had no notice before he paid his money, yet he had notice before the execution of the conveyance, and it is all but one tranſaction.

I do therefore declare that the plaintiffs are intitled to the ſum of 45*l.* being one moiety of the ſum of 90*l.* charged by the teſtator's will on his eſtate, with intereſt for the ſame, to be raiſed out of the eſtate and decree. Let an account be taken of what is due to the plaintiffs for the 45*l.* with intereſt, for their reſpective ſhares from the time the plaintiffs *Anne*, *Sarah*, and *Edward Wigg*, attained their ages of 21; and in caſe the defendants ſhall not pay unto the plaintiffs what ſhall be ſo found due, then I direct the eſtate, or a ſufficient part thereof to be ſold, and out of the money ariſing by ſuch ſale, the plaintiffs to be paid what the Maſter ſhall certify to be due, and the reſidue of the money ariſing by ſuch ſale to be paid to the purchaſer; but this without prejudice to any remedy he may have againſt the defendant the heir at law to be indemnified under the covenant in the purchaſe deed.

CAP. XXX.

Contract.

Vide title, *Catching Bargain.*

CAP.

CAP. XXXI.

Copyhold.

(A) In what caſes a defective ſurrender, or the want of it, will be ſupplied in equity.

July the 12th 1737.

Smith v. *Baker.*

Caſe 175. *A.* buys a copyhold eſtate for his own, and two lives, in the manor of—— where the cuſtom was, that whoever purchaſes in it, the eſtate ſhall go in ſucceſſion, and by his will deviſes all his eſtate, real and perſonal, to his wife.

THE cuſtom in the manor of that whoever purchaſes in it, the eſtate ſhall go in ſucceſſion; the huſband of the plaintiff purchaſed for his own, and two lives; and by his will, after giving ſome few legacies, he in general words deviſes *all his eſtate, real and perſonal, in poſſeſſion or reverſions, to his wife.*

It was inſiſted for the plaintiff, that by theſe general words ſhe is intitled to this copyhold eſtate, and that the court will ſupply the want of a ſurrender, and notwithſtanding the cuſtom of this manor, as the purchaſer paid the whole purchaſe money, the other two perſons are to be conſidered as merely nominal, and that here is an implied truſt for himſelf, though he purchaſed, knowing of the cuſtom of this manor, and therefore had a right to deviſe it. *Clarke* v. *Danvers*, 1 *Ch. Caſ.* 210. relied on as a caſe in point for the plaintiff.

Mr. *Fazakerley* for the defendants argued, that the ſucceſſors according to the cuſtom of the manor, are to be regarded as *hæredes facti*, and that there are many inſtances where they are favoured in a court of equity, and an eſtate ſhall not be taken away from them by implication, where they are not provided for ſome other way; that it can never be imagined the teſtator, by putting reverſions in the plural number, had an intention by that one ſingle letter *S.* to paſs his copyhold, however literally the gentlemen on the other ſide may extend it to carry the copyhold.

Though the legal intereſt be according to the cuſtom of the manor, yet *A.* has an equitable intereſt from being the ſole purchaſer, and ſhall be conſtrued as a truſt for him, he having advanced the money.

Lord Chancellor: The huſband of the plaintiff having purchaſed this eſtate, though his legal intereſt be not according to the cuſtom of the manor, yet he has an equitable intereſt from being the ſole purchaſer, and it may be brought near the caſe of a purchaſe at law, of an eſtate, deſcendible to the heirs, in the name of a third perſon, yet it ſhall deſcend notwithſtanding, for it ſhall be conſtrued as a truſt for the purchaſer, he having advanced the money.

The next queſtion is, Whether, ſuppoſing there was not a general reſulting truſt, yet as the purchaſer has made a will, and deviſed this eſtate, a court of equity will ſupply a ſurrender.

The firſt conſideration, Whether theſe lands are comprized in the will.

I think they plainly are.

Where a man deviſes all his eſtate, real and perſonal to a wife, or child, and has no other real eſtate but the copyhold, it ſhall paſs by thoſe general words.

Where a man deviſes all his eſtate, real and perſonal to a wife or child, and has no other real eſtate but the copyhold, it will paſs by the general words; but this depends upon the circumſtances of the caſe.

There are words at the outſet of the will which have not been taken notice of, *As to all my temporal eſtate, which it has pleaſed God Almighty to bleſs me with, I diſpoſe of as follows.*

Here is a plain intention to diſpoſe of his whole eſtate, and the ſubſequent words are general enough to carry it, his leaſehold eſtate for years can never ſatisfy the word real in the will, for it is called a chattel real only, as it is derived out of the real eſtate.

The next conſideration, Whether ſhe is intitled to have the want of a ſurrender ſupplied.

Where a copyhold is deviſed to the wife, the court will ſupply the want of a ſurrender, even though ſhe has a proviſion under a ſettlement.

As to the objection, that ſhe is not a wife unprovided for, it has not appeared to me there is any ſettlement; but even allowing ſhe has another proviſion, yet the huſband might not think it ſufficient, and therefore I do not look upon this caſe to be out of the common one, where the court will ſupply the ſurrender if he deviſes the copyhold to her.

The rule that the court will not ſupply a ſurrender againſt an heir, muſt be applied ſolely to an heir in blood, and not to a *hæres factus*.

It has likewiſe been objected, that the court will not ſupply the ſurrender againſt an heir; but this rule muſt be applied ſolely to an heir in blood, and not to a *hæres factus*, for the defendant here is merely nominal, and not even the leaſt relation, but barely of the ſame name: Therefore I muſt decree for the plaintiff.

July the 18th 1737. Trin. Vacation.

Taylor v. *Taylor*.

Caſe 176.

A father purchaſes land in his ſon's name, his ſon being then 18 years of age, the father continued in poſſeſſion till his death, this ſhall be conſidered as an advancement for the ſon, and not a truſt for the father.

A Father purchaſed copyhold lands in his ſon's name, his ſon being then 18 years of age, the father continued in poſſeſſion till his death.

The queſtion was, Whether this ſhould be conſidered as an advancement for the ſon, or a truſt for the father.

Parol evidence, though improper, when offered againſt the legal operation of a will, or an implied truſt, *admitted* in this caſe, becauſe here it was in ſupport of law and equity too.

Lord Chancellor: I am of opinion it ſhould be conſidered as an advancement for the ſon, and found my opinion greatly on the caſe

of

of *Mumma* v. *Mumma*, 2 *Vern.* 19 †. and though two receipts are produced under the ſon's hand, for the uſe of the father, I think that will not alter the caſe, for the ſon being then under age, could give no other receipt in diſcharge of the tenants who held by leaſe from the father; and in this caſe I am of opinion, parol evidence may be admitted, though indeed improper, when offered againſt the legal operation of a will, or an implied truſt, but here it is in ſupport of law and equity too (*a*).

The ſon had deviſed theſe copyhold lands in theſe words, "As to "my copyhold which I have or intend to ſurrender to the uſe of "my will, I give, *&c.* and the remaining third I give to the child "or children with which my wife is now enſeint, and to the heirs "of ſuch child or children for ever; and if ſuch child or children "ſhould not be born alive, or being born alive ſhould die, with-"out leaving lawful iſſue, or before he or ſhe has diſpoſed of the "ſame, I give it to my wife."

The wife was *not* with child.

Lord Chancellor: I am of opinion it was well deviſed, and paſſed by the will, ſo as to have a ſurrender ſupplied, and that it ought to be conſtrued as if he had ſaid, *And if no child be born alive.*

His Lordſhip declared the copyhold eſtate at *Little Shellwood* was purchaſed by *John Taylor*, for the benefit of, and by way of advancement for *Thomas Taylor* the ſon, and that in equity the plaintiffs are intitled thereto under his will, and ought to have the defect of the ſurrender to the uſe of his will ſupplied, and decreed the defendant the heir at law of teſtator, to ſurrender the copyhold land to her.

(*a*) 1 Vern. 467. Eq Caſ. Abr. 382. *Shales* v. *Shales*. *Gray* v. *Gray*, 1 Ch. Caſ. 296.

November the 29th 1734.

Avenant Hawkins an infant, by his next friend, Plaintiffs.

George Leigh, *William Hawkins*, and *Elizabeth Hawkins* infants, —— —— —— } Defendants.

Caſe 177. *A.* gives all his lands unſettled, and all his goods and chattels to his wife for life, and afterwards to his younger children in ſuch manner as ſhe ſhould think fit to diſpoſe of the ſame. Teſtator died ſeiſed of freehold lands and cuſtomary meſſuages, which were unſettled, and not ſurrendred to the uſe of his will. The lands ſettled being only freehold, naturally the lands unſettled muſt be the ſame, and therefore the copyhold lands did not paſs.

EBENEZER and *Mary Hawkins* had iſſue, the plaintiff their eldeſt ſon and heir, and the defendants *William* and *Mary Hawkins*. The father made his will in this manner: "*As for my worldly*

† There the father purchaſed a copyhold in the name of the defendant his eldeſt ſon, an infant of 11 years old, and enjoyed during his life, and afterwards having ſurrendred it to the uſe of his will, deviſed it to his wife for life, remainder to his younger children, and made other proviſions for the defendant, who having recovered in ejectment, the bill was to be relieved againſt it. Lord Chancellor *Jefferies* conceived that he being but an infant at the time of the purchaſe, though the father did enjoy during his life, that the purchaſe was an advancement for the ſon, and not a truſt for the father.

" *eſtate and goods*, I diſpoſe thereof as follows, *videlicet*, In regard " a great part of my lands are already ſettled, and the great ten- " derneſs and affection, and prudent management I have always " found in my wife *Catherine*, for the kindeſt return and acknow- " ledgement, therefore I give *all my lands* unſettled, and all my " goods and chattles of what nature or kind ſoever, to my ſaid wife " for life, and afterwards to my younger children, in ſuch manner " as ſhe ſhall think fit to diſpoſe of the ſame."

The plaintiff's father died ſeiſed of freehold lands in fee ſimple, and alſo ſeiſed to him and his heirs of cuſtomary meſſuages, held of the manor of *H.* and *B.* and are *unſettled* lands, and the latter not ſurrendered to the uſe of his will.

The bill brought for an account, and that the plaintiffs intereſt in the ſeveral eſtates may be aſcertained and ſettled.

Lord Chancellor: The only queſtion is, as to the copyhold eſtate, whether it paſſed by the will, and this muſt depend upon circumſtances.

Where there is no ſurrender of copyhold lands to the uſe of the will, they will not paſs by a general deviſe of lands.

Where there is a general deviſe of lands, and there is no ſurrender of the copyhold lands to the uſe of his will, the conſtruction at law is, that they do not paſs by the will, eſpecially, where there are other words which may anſwer the intention of the teſtator, mentioned in the will, for copyhold lands are not properly the ſubject of a deviſe, as they paſs by the ſurrender, and not by the will.

I do not think the outſet of the will, *my worldly eſtate and goods* will carry it further than the ſubſequent words, *all my lands unſettled*, and all my goods, *&c.* for as the lands ſettled were only freehold, naturally the lands unſettled muſt be of the ſame kind: Therefore I am of opinion upon the words of the will, the copyhold lands will not paſs.

Though there ſhould be no ſurrender to the uſe of a will, it is ſufficient to paſs an equity in copyhold lands.

It has been ſaid, a will is ſufficient to paſs an equity in copyhold lands, as well as an equity in freehold lands, though there ſhould be no ſurrender to the uſe of a will; and the obſervation is juſt; but that is not the preſent caſe, for here there is more than an equity, becauſe the copyhold lands actually deſcend upon the ſon as heir to his father.

This court will not ſupply the defect of a ſurrender of copyhold eſtates, in favour of a wife or younger children, to the diſinheriſon of an heir unprovided for.

It is the general rule of this court, that they will not ſupply the defect of a ſurrender of copyhold eſtates, even in favour of a wife or younger children, to the diſinheriſon of an heir, where he is unprovided for.

Diſinheriſon not confined to deſcent, for if an heir is provided for by ſettlement, or any other way, not diſinherited.

But this word *diſinheriſon* is not merely confined to an heir who is barred of his deſcent, for if he is provided for by ſettlement, or any other way, he cannot be ſaid to be *diſinherited*; but here I do not ſee any proviſion at all for the heir.

I do therefore declare, that the plaintiff is intitled to the copyhold lands in queſtion, the ſame not paſſing by his father's will.

December the 7th 1739.

Richard Macey and others v. *Nicholas Shurmer.*

NICHOLAS Shurmer by his will " deviſed to his wife, her heirs and aſſigns, ſeveral lands therein mentioned, and all his copyhold lands in *Surry*, and his freehold and copyhold in *Middleſex*, to his wife *Mary*, her heirs and aſſigns for ever, being well aſſured ſhe would at her deceaſe diſpoſe of the lands amongſt all or ſuch of his children as ſhe in her diſcretion ſhould think moſt proper, and as they by their conduct ſhould deſerve."

Caſe 178. *N. S.* by will deviſes to his wife and her heirs, all his freehold and copyhold lands, being well aſſured ſhe would, at her deceaſe, diſpoſe of the lands amongſt all, or *ſuch* of his children, as by their conduct ſhould deſerve it.

Mary Shurmer by her will " gave to her daughter in the following words, I hereby give and deviſe to my dear daughter *Martha Shurmer*, all my freehold and copyhold meſſuages, lands and hereditaments whatſoever, (except the copyhold in *Hampton* aforeſaid) to hold to my daughter, her heirs and aſſigns for ever, ſubject nevertheleſs to the payment of the juſt debts that are ſtill due, and owing from my late huſband, and alſo to the payment of my own juſt debts. And I give to my ſon *Nicholas Shurmer*, and to his heirs and aſſigns for ever, *all that copyhold meſſuage, with the appurtenances in the manor of* Hampton. And I give to my daughter *Martha Shurmer*, all my goods and chattels whatſoever, and do make her my ſole executrix."

The wife deviſes all the freehold and copyhold lands, except the copyhold in *Hampton*, to her daughter and her heirs, and *that* copyhold to the heir at law of the teſtator, and his heirs.

At the time of her executing the will, the teſtatrix gave directions that the ſurrender to the uſe of the will, ſhould be drawn up to two copyholders of the reſpective manors, but no ſuch tenants being preſent, the ſame, though written, was not perfected; ſhe afterwards went to the ſteward, but he was not in town for the ſurrender to be preſented, aud ſhe ſoon afterwards died ſuddenly.

Teſtatrix gave directions for ſurrenders of the reſpective copyhold eſtates, to the uſe of the will, but died before they were perfected. The heir not being totally unprovided for, the court ſupplied the ſurrender. The word *ſuch*, gave the wife the power to deviſe the whole to one child, if ſhe had thought fit.

The defendant the heir at law, inſiſts the copyhold eſtates belong to him, for want of a ſurrender.

Therefore the end of the bill was to reſtrain defendant from being admitted tenant to the copyhold, and that the freehold and copyhold lands, or a ſufficient part may be ſold, and the money paid to the plaintiffs the creditors, and the remainder to *Martha*, the only child unprovided for.

Lord Chancellor: It is clear, that under the word *ſuch* of his children, the wife of the teſtator, though a truſtee in ſome ſort, had a full power to deviſe the whole to the daughter, if ſhe had thought fit.

The truſt of a copyhold not neceſſary to be ſurrender'd.

As to the want of a ſurrender, the wife being no more than a truſtee, the truſt only of a copyhold not neceſſary to be ſurrender'd, but if it was neceſſary, I ſhould be inclined to ſupply it.

I think it might have been doubtful, whether the mother could have ſubjected the eſtate for payment of her own, or even her huſband's debts, but the deviſee of the wife ſubmitting to that, and deſiring it might be ſold for payment of debts, the court will not interpoſe.

If the heir had been totally unprovided for, I ſhould have doubted, whether a ſurrender could be ſupplied; but it appearing that one copyhold deſcended to him, and another had been deviſed under the mother's will, and no proof of the value, I cannot refuſe to ſupply the ſurrender.

I do therefore declare, that the wills of *Nicholas Shurmer*, and *Mary Shurmer* are well proved, and ought to be eſtabliſhed, and do decree that a ſufficient part of the freehold and copyhold, deviſed to plaintiff *Martha* be ſold, and the money applied in ſatisfaction of the creditors of *Nicholas* and *Mary Shurmer*, and the ſurplus to be paid to *Martha Shurmer*, and in caſe part of the copyhold remains unſold, I direct that the defendant do ſurrender the ſame to *Martha*.

Auguſt the 1ſt 1744.

Ex parte George Caſwell.

Vide title *Power, under the diviſion, Of the right Execution of a Power, and where a Defect therein will be ſupplied.*

Vide title *Bankrupt, under the diviſion, Rule as to Copyholds, under Commiſſions of Bankrupts.*

CAP.

CAP. XXXII.

Creditor and Debtor.

(A) What conveyance or diſpoſition ſhall be fraudulent as to creditors.
(B) What conveyance or diſpoſition ſhall be good againſt creditors.
(C) General caſes of creditors and debtors.

(A) What conveyance or diſpoſition ſhall be fraudulent as to creditors.

November the 27th 1738.

Edward Ruſſel, William Hayward and others, —— Plaintiffs.
Elizabeth Hammond and others, —— —— Defendants.

Vide title *Agreements, Articles, and Covenants, under the diviſion, Voluntary Agreements, in what Caſes to be performed.*

November the 6th 1745.

Walker and others v. *Burrows.*

Vide title *Bankrupt, under the diviſion, Rule as to Aſſignees.*

(B) What conveyance or diſpoſition ſhall be good againſt creditors.

October the 25th 1744.

Brown v. *Jones* and others.

Vide title *Bankrupt, under the diviſion, Where Aſſignees are liable to the ſame Equity with the bankrupt.*

October the 27th 1746.

Brown v. *Heathcote.*

Vide title *Bankrupt, under the diviſion, The conſtruction of the ſtatute of* 21 Jac. 1. cap. 19. *with reſpect to bankrupt's poſſeſſion of goods after aſſignment.*

(C) General caſes of creditors and debtors.

December the 5th 1739.

Frederick v. *Aynſcombe.*

Caſe 179. A father, by articles previous to the marriage of his ſon, covenants at the end of three years after the ſolemnization thereof, to pay to truſtees, their executors, *&c.* 12,000 *l.* to be ſettled to huſband for life, to the wife for life; then to the uſe of the firſt and other ſons in tail male, *remainder to the daughter and daughters in tail general,* remainder ot the right heirs of the huſband.

BY articles previous to the marriage of the defendant's ſon *Philip* with *Valentina Wight*, the defendant covenants, that he, his heirs, his executors or adminiſtrators would, at the end of three years after the ſolemnization of the marriage, or on *Valintina*'s attaining 21, pay to *Roberts* and *Malyn* their executors, *&c.* 12,000 *l.* or convey to defendants their heirs, *&c.* lands in fee ſimple within 50 miles of *London*, to make up the value, as the plaintiff ſhould not pay in ready money.

Provided, if there ſhould be but one daughter, and no other child, and the heirs, *&c.* of the huſband ſhould, *within three calendar months after his death*, pay to the truſtees 4000 *l.* Then all the uſes limited *to ſuch daughter*, and the heirs of her body in the 12,000 *l.* ſhould ceaſe and be void, and from thenceforth ſhould be to the uſe of the heirs and aſſigns of the huſband.

The huſband dies, leaving no child but a daughter, and by will deviſes the 12,000 *l.* and all his property in the ſame, and to the lands to be purchaſed therewith, ſubject to the truſts, to the defendant, his heirs, *&c.* and appoints him executor. He lets the three months lapſe, without paying the 4000 *l.* and denies he ever had aſſets ſufficient to have paid it.

The plaintiff, a judgment creditor of the huſband, brings his bill to be paid principal, intereſt, and coſts out of the perſonal aſſets, and if not ſufficient, inſiſted that the huſband's reverſionary intereſt in the 12,000 *l.* ought to be deemed real aſſets, and applied in payment of his demand.

The reverſionary intereſt in the 12,000 *l.* together with the benefit of diſcharging the ſame from the eſtate tail limited to the daughter, is to be conſidered as real aſſets, and the plaintiff, notwithſtanding the three months lapſed without payment of the 4000 *l.* ought not to be prejudiced thereby, but let into the benefit of the redemption.

To be ſettled to *Philip Aynſcombe* for life, without impeachment of waſte, to *Valentina* for life, without impeachment of waſte; then to the uſe of the firſt and every other ſon of the marriage, and the heirs male of their bodies in tail male, remainder to the daughter and daughters of the marriage, and the heirs of their reſpective bodies, remainder to the right heirs of *Philip*.

And by the ſaid articles it was agreed, that if there ſhould happen to be but *one daughter*, and no other child of the ſaid *Philip Aynſ-*

combe, by the ſaid *Valentina*, and the heirs, executors or adminiſtrators of the ſaid *Philip Aynſcombe*, ſhould within three calendar months after his death pay to *Roberts* and *Malyn*, the truſtees therein named, the ſum of 4000 *l.* Then all the uſes and eſtates therein before limited to ſuch daughter, and the heirs of her body, in the lands and hereditaments to be purchaſed with the 12,000 *l.* or of the 12,000 *l.* in caſe no lands were purchaſed, ſhould from thenceforth ceaſe and be void, and that from thenceforth the 12,000*l.* or the lands purchaſed ſhould be to the uſe of *Philip Aynſcombe*, his heirs and aſſigns for ever.

Philip Aynſcombe dies, having no other child than a daughter an infant, and by his will had deviſed his manors, meſſuages, lands, *&c.* in poſſeſſion or reverſion, remainder or expectancy, and alſo the ſum of 12,000 *l.* and all his property in the ſame, and to the lands to be purchaſed therewith, ſubject to the truſts in the ſaid articles, to the defendant *Aynſcombe* his father, his heirs, executors and aſſigns, and appointed him and *Wall* executors.

The defendant *Thomas Aynſcombe* let the three months lapſe after the death of *Philip*, without paying the 4000 *l.* to revoke the uſes limited by the articles to the daughter, and denies that he ever had aſſets of *Philip Aynſcombe* in his hands ſufficient to have paid the 4000 *l.*

The plaintiff who was a creditor of *Philip Aynſcombe*, by two ſeveral judgments, in large ſums of money, brought his bill againſt the defendant as deviſee of the real eſtate, and executor under the will of *Philip*, to be paid his principal, intereſt, and coſts, out of the aſſets of the teſtator, and inſiſted, that if the perſonal were not ſufficient, that *Philip*'s reverſionary intereſt in the 12,000 *l.* agreed by the marriage articles to be laid out in land, together with the benefit of diſcharging the ſame from the eſtate tail limited to the daughter, ought to be deemed real aſſets, and applied in payment of the plaintiff's demands.

Lord Chancellor: There are in this caſe two points to be conſidered.

1*ſt*, What is the true conſtruction of the marriage articles.

2*dly*, What equity ariſes to the plaintiff and judgment creditor out of theſe articles.

The articles in the whole are very odly penned, but however the proviſo in them, is the ſingle foundation for the preſent queſtion, and the doubt is, what may be the proper conſtruction, whether *the daughter* ſhall have the eſtate tail abſolutely upon the failure of iſſue male, or whether it ſhall be conſidered only as a ſecurity for the payment of the 4000 *l.*

And I am of opinion, that from theſe words in the articles, " if " there be one only daughter, and no other child of the marriage, " and the heirs, executors, or adminiſtrators of *Philip* ſhould " within three calendar months after his deceaſe, pay to the truſ- " tees the ſum of 4000 *l.* Then all and every the uſes, *&c.* before

" limited to the daughter in the 12,000 *l.* ſhould ceaſe." That it was intended merely to create a ſecurity for the 4000 *l.*

There is no truſt declared of the 4000 *l.* and to be ſure the articles are inartificially drawn, but however the court muſt put a reaſonable conſtruction on this proviſo.

If the bill had been brought in the life-time of *Philip*, the court would have conſtrued it as a ſecurity only for the 4000 *l.* and perhaps this is more for the daughter's advantage than any other, for ſhe might otherwiſe wait till the death of her mother before ſhe received any thing, and now ſhe will have the 4000 *l.* at all events.

The huſband by purchaſe from his father, is made owner of the fee in the eſtate to be bought with the 12,000 *l.* and therefore in nature of a right of redemption in the ſon, and not a mere naked power.

Though the 12,000 *l.* did not originally move from *Philip Aynſcombe*, yet it is to be laid out for the benefit of *Philip*, and his family, and *Philip* by purchaſe from his father, is made owner of the fee in this eſtate, and therefore it is in nature of a right of redemption in the ſon, and not a mere naked power; it might have been a very conſiderable point, if this reverſion had been ſold in the life-time of *Philip Aynſcombe*.

As to the ſecond point, *What equity ariſes to Mr.* Frederick, *the plaintiff and judgment creditor, out of theſe articles.* I am of opinion that he muſt be relieved, notwithſtanding the three months after the deceaſe of *Philip* (in which time, by the articles the 4000 *l.* was to be paid *to the daughter*, by his executors) are actually expired. The caſe of *Marks* v. *Marks*, *Eq. Caſ. Abr.* 106. is very ſtrong to this purpoſe.

Where an heir or executor have omitted to do an act within a limited time, it ſhall never be to the prejudice of a creditor, but he ſhall be admitted to do it himſelf.

The heir or executors of the teſtator not doing it, can never be to the prejudice of a fair creditor, and to determine it ſo would be contrary to all rules of equity; for if the heir or executor will not pay within the time limited, the creditor ſhall be admitted to do it himſelf; and ſo it is laid down in the caſe of *Jordan* v. *Savage*, *Nov.* 17th 1732. before Lord *Talbot*.

Upon the whole, the plaintiff ſhall have this right of redemption, but it is certain, as to the manner of it, he cannot have it to the prejudice of the widow, nor can he intitle himſelf to it, but upon payment of the 4000 *l.* with intereſt to the daughter, at the rate of 4 *l. per cent.* from her father's death.

His Lordſhip therefore directed an account to be taken of what was due to the plaintiff, for principal, intereſt, and coſts on his two judgments, and an account alſo of the perſonal eſtate of *Philip Aynſcombe*, and the plaintiff to be paid out of the perſonal eſtate, but if that is not ſufficient, then the real aſſets of *Philip* to be applied.

And his Lordſhip declared, that the reverſionary intereſt of the 12,000 l. *agreed by the marriage articles to be laid out in land, and ſettled as mentioned, together with the benefit of diſcharging the ſame from the eſtate tail, agreed to be limited to the daughter, ought to be conſidered as part of ſuch real aſſets.*

And that the defendant *Thomas Aynſcombe* the executor of *Philip* not having paid the 4000 *l.* within the three months mentioned in the articles, the plaintiff being a judgment creditor of *Philip* ought

not

not to be prejudiced, but is intitled to be let into the benefit of ſuch redemption.

And directed that an account ſhould be taken of the 4000 *l.* and intereſt, and upon payment thereof within 6 months after the report made, by the plaintiff, to a truſtee to be appointed by the Maſter, he declared that 12,000 *l.* and 11,027 *l.* South Sea annuities that had been purchaſed therewith, were diſcharged and exonerated from the limitation in tail to the daughters, and that the ſame be ſold, and that the money ariſing by ſuch ſale be applied in ſatisfaction of what the plaintiff ſhall pay for the ſum of 4000 *l.* and in the next place, in ſatisfaction of what ſhall remain due to the plaintiff for principal, intereſt and coſts, upon the two judgments, and the ſurplus of the money ariſing from the ſale of the South Sea annuities, to be paid to *Thomas Aynſcombe*, in part of his teſtator's real eſtate.

☞ *Vide* 2 *Rolls Rep.* 304. Sir *Robert Dudley*'s caſe cited in the cauſe of Sir *Chriſtopher Hatton*, and Sir *Edward Coke*, which was mentioned by Mr. *Frederick*'s counſel, and ſeems to be a very ſtrong caſe for him.

April the 11th 1747.

Ex parte Grove.

Vide title *Bankrupt, under the diviſion, Rule as to Landlords.*

Eaſter term 1737.

Powell v. *Monier.*

Vide title *Trade and Merchandize.*

Vide title *Executors and Adminiſtrators, under the diviſion, What ſhall be Aſſets.*

Vide title *Deviſes, under the diviſion, Deviſe of Lands for payment of Debts.*

Vide title *Bankrupt, under the diviſion, Rule as to Partnerſhip.*

CAP.

CAP. XXXIII.

Coſts.

February the 19th 1738.

Deggs v. *Colebrooke.*

Caſe 180. Upon payment of 20 *s.* coſts, bills may be amended after anſwer put in, but *Lord Chancellor* ſaid he would conſider how to make a more adequate compenſation to a defendant for the future, after a long anſwer, and other neceſſary proceedings on the part of the defendant.

LORD Chancellor ſaid in this cauſe, that he would not in any one particular caſe, oblige a plaintiff to pay more than 20*s.* coſt to a defendant (after anſwer put in) on the amendment of the bill, becauſe it had been the conſtant rule of this court, and eſtabliſhed at firſt, to prevent the inconvenience of entring too largely into the merits of the cauſe, before the proper time for hearing the merits.

In Lord Chancellor *King*'s time, there was an attempt to vary from this rule, but it did not anſwer; but Lord *Hardwicke* ſaid, he would notwithſtanding conſider how to make a defendant ſome amends for being put to a great expence, by allowing him a more adequate compenſation, than only twenty ſhillings coſts, on the plaintiff's amending his bill, after a long anſwer, and other neceſſary proceedings on the part of the defendant.

Vide title *Bankrupt, under the diviſion, Rule as to Coſts.*

Vide title *Evidence, Witneſſes, and Proof.*

Vide title *Charity.*

CAP. XXXIV.

Courts and their Jurisdiction.

(A) How far Chancery will or will not exert a jurisdiction in matters cognizable in inferior courts.

Auguſt the 3d 1749, and *December* the 22d 1749.

Ex parte Butler and *Purnell*, aſſignees of *Edward Richardſon*.

Vide title *Bankrupt, under the diviſion, Rule as to the ſale of Offices under a Commiſſion of Bankruptcy.*

CAP. XXXV.

Court of Chivalry.

Vide title *Canon Law.*

CAP. XXXVI.

Curteſy.

Vide title *Tenant by the Curteſy.*

CAP. XXXVII.

Cuſtom of London.

(A) Concerning the cuſtom with reſpect to the children of a freeman, and here of advancement, bringing into hotchpot, ſurvivorſhip and forfeiture.

(B) What diſpoſition made by a freeman of his eſtate ſhall be good, or void, being in fraud of the cuſtom.

(C) What is or is not an advancement.

(A) Concerning the cuſtom with reſpect to the children of a freeman, and here of advancement, bringing into hotchpot, ſurvivorſhip and forfeiture.

June the 18th 1737.

Metcalf v. *Ives.*

Vide title *Award and Abitrament, under the diviſion, For what Cauſes ſet aſide.*

(B) What diſpoſition made by a freeman of his eſtate ſhall be good, or void, being in fraud of the cuſtom.

February the 3d 1737.

Samuel Morris, and *Elizabeth* his wife, —— Plaintiffs.

Gyles Burroughs and *John Burroughs*, *Samuel Wollaſton* and *Mary* his wife, *Edward Roſe* and *Ann* his wife, } Defendants.

Caſe 181.

A father having five children, three of age, and two infants, enters into an agreement with them, that he would come to *London* and take up his freedom, provided they would releaſe any right or demand they may be intitled to, in reſpect of the father's perſonal eſtate, by virtue of the cuſtom of the city of *London*. An agreement drawn up and executed by the father and the three children who were of age. The bill brought by the plaintiff, and his wife, one of the daughters who was of age at the time of the agreement, for her cuſtomary ſhare of the father's eſtate, he having in his life-time taken up his freedom.

JOHN Burroughs, having five children, and living in the country, enters into the following agreement with them, which was drawn up and executed by the father and three of the children, who were then of age; the other two were infants, and therefore it was not executed by them.

The agreement, dated the 11th of *Sept.* 1718. recites, "Whereas "*John Burroughs* of *Thame*, in the county of *Oxford*, draper, is of "opinion he may greatly improve his eſtate by following his trade "in the city of *London*; and for the better performing the ſame, ap- "hending it neceſſary to buy his freedom of the ſaid city: And "whereas the ſaid *John Burroughs* is informed that in caſe he could "purchaſe his ſaid freedom, he ſhould thereby diſable himſelf from "abſolutely giving, or diſpoſing of his perſonal eſtate by will or "otherwiſe, in ſuch manner (to and among his children) as he can "now do, not being a freeman: And whereas we whoſe names are "hereunto ſubſcribed, children of the ſaid *John Burroughs*, are de- "ſirous our ſaid father ſhould become a freeman of the ſaid city, in "order to improve his eſtate, and are contented and agreed that our "father ſhould have and retain to himſelf full power and authority to "give and diſpoſe of his perſonal eſtate, in ſuch manner as if he was "not a freeman of the ſaid city: *Now know all men by theſe preſents*, "that we *George Burroughs*, *Elizabeth Burroughs*, and *Phillis Bur-* "*roughs*, children of the ſaid *John Burroughs*, do hereby for our- "ſelves, executors, adminiſtrators, and aſſigns, ſeverally and reſpec- "tively releaſe, diſcharge, and diſclaim any right, title, intereſt, claim, "and demand whatſoever, of, in, and to all and every part of the "perſonal eſtate of the ſaid *John Burroughs*, that he ſhall die poſ- "ſeſſed of." And they agree that if *John Burroughs* the father ſhall leave a will, they will not claim any other ſhare of the eſtate than what ſhall be given reſpectively to them by ſuch will; but upon payment

payment of what ſhall be reſpectively given them by ſuch will, they reſpectively, and their reſpective executors, *&c.* will execute a releaſe of all claims, *&c.* to any part or ſhare of the perſonal eſtate of their father, whereof he ſhall be poſſeſſed at the time of his death.

John Burroughs the father removed to *London*, and in 1718 became a freeman, and continued ſo to his death, and having made a will, thereby declared that in caſe any of his children, their huſbands or repreſentatives, ſhould not abide by his will, but endeavour to have his eſtate divided according to the cuſtom of *London*, and ſhould not execute to his executors within ſix months after his deceaſe, *releaſes* of all claims to any part of his perſonal eſtate, under the cuſtom of *London*, that then the legacies thereby given for the benefit of ſuch children, and to their huſbands, child, or children, ſhall be void and ſink into the *reſiduum* of his perſonal eſtate. He appointed *Gyles Burroughs* (among others) his executor, who has alone proved the will.

The bill is brought by the plaintiff and his wife, one of the daughters of *John Burroughs*, who was of age at the time of the agreement and party thereto, in order that the agreement and will may be ſet aſide, (in regard the plaintiff *Elizabeth* and her brothers and ſiſters had no conſideration for the agreement, but was a mere involuntary act, being intirely under their father's power) and alſo that *Gyles Burroughs* may account with the plaintiffs for the teſtator's perſonal eſtate, and that he having given the plaintiff *Elizabeth* no more than 900*l.* on her marriage, which is far ſhort of what he gave the reſt of his children, that the plaintiffs may be at liberty to bring their advancement into hotchpot, and be paid their cuſtomary ſhares of the teſtator's perſonal eſtate, and alſo their ſhares of the dead man's part.

The defendant *Gyles Burroughs* admits he was advanced in his father's life-time with 1800*l.* and ſubmits, whether by virtue of the agreement, the teſtator had not a power to diſpoſe of his perſonal eſtate, and that the reaſon the defendant and his ſiſter *Ann Roſe* did not execute the ſame, was, becauſe they were both under age at the time of the teſtator's purchaſing his freedom.

The defendant *John Burroughs*, by his anſwer ſets forth, that his father advanced him 1500*l.* and no more, over and above 100*l.* that his father made a preſent of to his wife ſoon after the defendant's marriage, and which he inſiſted ought not to be reckoned any part of his advancement, nor what his father has made preſents of to this defendant's children.

The defendant *Samuel Woollaſton*, and *Mary* his wife, who was one of the children of *John Burroughs*, inſiſted that a farm called *Brill*, in *Buckinghamſhire*, purchaſed by *John Burroughs* at the time of *Mary*'s marriage, and ſettled on *Samuel* and the uſes of the marriage, ought not to be conſidered as money advanced by the father, but as a ſettlement of real eſtate, and therefore is not to be brought into hotchpot.

For the plaintiff it was urged, there was no colour that the words of *releaſe* in the agreement could operate as ſuch, even though the father,

father, at the time of the agreement, had been a freeman, there being no pretence of any right to any part of the father's eſtate veſted in any child, whereon the releaſe could operate; much leſs as the father here was not ſo much as a freeman at that time, nor could this agreement be binding as ſuch in a court of equity, for want of a conſideration; and likewiſe the inequality of the thing with regard to the children among themſelves, that three of them ſhould thereby be deprived of their orphanage part, and the other two by that means might have ingroſſed the whole.

E contra, It was inſiſted, though this ſhould not be good as a releaſe, for the reaſons given, yet that it was binding as an agreement: That this bill was brought to deprive the parties of the legal remedy which they had at law for breach of the covenant, and is a very different caſe from what it would have been, if the bill had been brought to carry the agreement into execution: That here was a conſideration moving from the father, the diſability he laid himſelf under with regard to any wife, and two of his children, of diſpoſing of his eſtate at his diſcretion: That the father, in confidence of this agreement, took up his freedom, and the agreement was thereby executed on his part; there was no reaſon therefore why the children ſhould be diſcharged of their engagement: That on the marriage of the plaintiff *Elizabeth*, and 900*l.* given her as a marriage portion, the father very probably would have taken care to have declared, and ſettled that on her, expreſly in excluſion of her from any orphanage ſhare, if he had not apprehended ſhe was before barr'd of any claim: That the plaintiff cannot now object to the infancy of the other children, being as fully apprized of that at the time of entring into the agreement.

Lord Chancellor: As to the objection that this being a voluntary agreement, a court of equity will not interpoſe, it is certainly a general rule, where it has been entred into without any fraud, but is not applicable to this particular caſe, for here the bill is brought to have a diſtribution of the orphanage ſhare which the plaintiff is intitled to, and is a legatee likewiſe under the will of her father; and the whole matter appears on the face of the proceedings. The plaintiff therefore has a right, in one capacity or the other, to part of the perſonal eſtate of the father, and has taken a proper method in applying to this court for the recovery of it, and I muſt of neceſſity determine the merits of this caſe one way or other; and as incident thereto muſt enter into the nature of this agreement, and conſider the validity of it, without having any regard to its being voluntary or not. This is frequently done in ſimilar inſtances; in the caſe of an equity of redemption, no decree can be made without determining firſt in whom the right of redemption is. The ſame likewiſe where the benefit of a truſt is in controverſy between two volunteers.

A court of equity will not interpoſe in voluntary agreements, where they have been entered into without fraud.

As to the agreement, the queſtion is, How far it is binding, and in the firſt place, if it may operate as a releaſe? It has been rightly

The agreement could not operate as a releaſe, for want of an intereſt in the children for it to operate upon; for they had neither *jus in re*, nor *ad rem*, the whole being in the father during his life.

given up, at the bar, that it cannot, for want of an intereſt in the children, for any releaſe to operate upon, becauſe the children had neither *jus in re*, nor *ad rem*, the whole being in the father during his life; and this point has often been determined, where a releaſe has been given by a child to a parent, *though a freeman at the time*; *a fortiori*, ought the rule to hold here.

It is ſaid the act of the father in taking up the freedom, was a conſideration moving from him towards the children; but the father does not ſo much as covenant by the agreement to take up his freedom. The *recital* is, that the father was of opinion he could improve his fortune by ſo doing; but whether he would do ſo or not, was a matter altogether in his diſcretion, ſo that he might have taken it up at a period of life moſt agreeable to himſelf, or not at all: Nor can that act of his, at that time, be conſidered as a thing beneficial to the children; for ſuppoſing the agreement to be binding, whatever acquiſitions he made would have been intirely at his own diſpoſal; he might ſpend every ſhilling of it, might inveſt it all in land in order to evade the cuſtom; ſo that any advantage accruing to the children muſt be merely contingent and accidental.

But the moſt material part of this caſe, and what I lay the greateſt ſtreſs upon, is, that the end propoſed by the agreement was nugatory, and could not poſſibly be obtained on either ſide, for want of making all the children parties to the agreement, which could not be done here, two of them being infants; this affects the conſideration of the agreement, with regard to the children among themſelves; for if the two who were infants did not conſent when they came of age, they then might have engroſſed the whole orphanage part in excluſion of the reſt.

Agreements of this kind ought not to receive any encouragement, and it was founded manifeſtly on a miſtake of the father It is a rule in equity to relieve againſt ſuch agreements as are founded on miſtakes The cuſtom of *London* admits of no ſuch bar, for nothing but actual advancement of a child will have that effect.

The agreement is founded likewiſe manifeſtly on a miſtake of the father, and muſt, in the nature of the thing, be altogether ineffectual, the father being under the ſame difficulty of diſpoſing of his eſtate, as he would have been though no ſuch agreement had been made. Agreements of this kind ought certainly to receive no encouragement or favour, and it is a rule in equity to relieve againſt ſuch as are founded on miſtakes. The cuſtom of *London* itſelf admits of no bar of this kind; nothing but an actual advancement of a child by a father will have that effect, where the money is declared to be given as ſuch, and the *quantum* of money not aſcertained. Courts of equity have indeed gone further, that when a father on the marriage of his daughter has given her a portion, and *that* is agreed between the parent and child to go in ſatisfaction of any demand the child may afterwards have on the father's eſtate: This has been held to amount to a bar of any claim of that kind, and was ſo determined in the caſe of *Metcalf* v. *Ives* *.

But if a daughter, who has a portion given by a father on marriage, agrees to take it in ſatisfaction of any demand ſhe may afterwards have on his eſtate, this amounts to a bar. * *Vide ante.*

It was ſo held alſo in the caſe of *Blundel* v. *Barker* at the Rolls, though on appeal to Lord *Macclesfield*, the matter was never finally determined*; and there is a great deal of reaſon this ſhould be ſo, for the children having no right till after the death of the father, his advancement of a ſum of money for their preferment in marriage, is a meritorious act in the father, and a valuable conſideration moving from him. I ſhould think likewiſe, if a father ſhould give money to put a ſon out apprentice, or advance him in life by ſetting him up in a trade, *&c.* that would have the ſame effect. But as the parental authority is great, *to prevent* any undue influence it may have in prejudice of the children, there muſt, in all inſtances of this kind, be a valuable conſideration moving from the father, and an actual benefit accruing to the child.

A father's preferring a child in marriage, or advancing money to ſet up a ſon in trade, may amount to a bar of his cuſtomary ſhare; but in all theſe inſtances there muſt be a valuable conſideration moving from him, and an actual benefit accruing to the child.

* *Lucas's Caſes in Law and Equity* 455.

However, in the preſent caſe, what I ground my opinion upon, is, that the children are not, nor could they all of them be, made parties to the agreement; if they had been all of age, and had entered into this agreement, ſuch a caſe might fall under very different conſiderations; but two of them being infants, leaves it open to ſeveral chaſms and abſurdities.

As to what is inſiſted on by the defendant *Woollaſton*, (he having ſigned a note given to the father to this effect, *Received, &c.* 778 *l.* 15 *s.* *being ſo much more money advanced for my wife's fortune*; and by his anſwer confeſſing that 638*l.* the purchaſe money of the eſtate ſo ſettled was included in the 778*l.* 15*s.*) *Lord Chancellor* held clearly that tranſaction was to be conſidered as money advanced by the father, and muſt be brought into hotchpot. It was reſolved in this caſe likewiſe, that where a wife is compounded with on marriage, by having a jointure ſettled on her in lieu of her cuſtomary ſhare, or has ſome other equivalent given to bar her of ſuch claim, the huſband in ſuch caſe is not to be deemed a purchaſer of her third, ſo as to have a right of diſpoſing of it in prejudice to the children, and they to come in only for a third part as their orphanage ſhare. But it is to be conſidered as if there was no wife in the caſe at all, and the orphanage ſhare then becomes a moiety of the father's eſtate. *

A. on his marriage with one of the daughters of *John Burroughs*, had an eſtate in land ſettled on him, but ſigned a note to the father as a receipt for ſo much more money advanced for his wife's fortune; this muſt be conſidered as money, and brought into hotchpot.

Where a wife is compounded with on marriage, by having a jointure in lieu of her cuſtomary ſhare, the huſband ſhall not be conſidered as a purchaſer of her third, but the orphanage ſhare ſhall then be a moiety of his eſtate. * *Vide Metcalf* v. *Ives*, *ante*, the latter part of the caſe.

It was likewiſe reſolved, that where money is expreſſed to be advanced in part of a fortune, though of ſmall amount, yet it muſt be looked upon as an advancement; but if petty ſums are given, at different times, by a father to a child, and not ſaid to be as a portion, but by way of preſent, or otherwiſe, they are not to be brought into hotchpot; and ſo determined in the caſe of *Whitcombe* v. *Whitcombe* at the Rolls 1718, with which the *Lord Chancellor* concurred.

Where money is expreſſed to be given in part of a portion, though of ſmall amount, yet it is an advancement, and muſt be brought into hotchpot.

The father in this caſe had reſerved an annuity to himſelf, out of the eſtate purchaſed by him, and ſettled on the marriage of his

daughter to one of the defendants as before mentioned, and on the queſtion, Whether in the money to be brought into hotchpot a regard ought to be had to that annuity ſo reſerved, and the defendant for that reaſon not obliged to bring the whole money into hotchpot? *Lord Chancellor* held clearly that the whole muſt be brought in, and it was agreed to have been ſo determined in the caſe of *Edwards* v. *Freeman* *, that all muſt be brought in which the child was intitled to at the death of the father, for at that time the annuity ceaſed.

* Eq. Caſ. Abr. 249.

An agreement muſt depend on the circumſtances at the time, and cannot be made better or worſe by ſubſequent facts.

The children who were infants at the time of the agreement, but are now of age, having a large ſhare of the father's eſtate under the will were very ready and willing to acquieſce under the agreement, but it was held clearly, the validity of the agreement muſt depend on the circumſtances of things at the time the agreement was made, and cannot be made better or worſe by any ſubſequent facts.

A proviſion by will that a legatee controverting the diſpoſition of the eſtate ſhall forfeit his legacy, is *in terrorem* only.

There was a proviſion made by the will, that any legatee controverting the diſpoſition the teſtator had thereby made of his eſtate, ſhould forfeit his legacy, this was held clearly to be *in terrorem* only, and that no ſuch forfeiture could be incurred by conteſting any diſputable matter in a court of juſtice. *

* *Vide* 2 *Vern.* 90. *Powell* v. *Morgan.*

A perſon cannot take by the cuſtom, and under the will.

The plaintiffs muſt renounce the legatory part, for there can be no taking by the cuſtom, and under the will too, in any inſtance whatever.

His Lordſhip declared the agreement of the 11th of *September* 1718, was voluntary, and under the circumſtances of the preſent caſe, ought not to be conſidered as binding between the teſtator and his children, and that the plaintiffs are intitled to their cuſtomary ſhare of the orphanage part of the ſaid teſtator's eſtate, which is a moiety of the clear perſonal eſtate, but that they electing to claim by the cuſtom of *London*, are not to have any benefit by the teſtator's will, and that 630 *l.* paid by the teſtator for the farm at *Brill* in *Buckinghamſhire*, for the defendant *Mary Woolaſton*, is to be looked upon as ſo much money paid towards her advancement; and therefore ordered an account to be taken of the perſonal eſtate of the teſtator come to the hands of his executors, and after ſuch account ſhall be taken, the defendants *Gyles* and *John Burroughs*, *Mary Woollaſton* and *Ann Roſe*, the children of the teſtator are to be at liberty to make their election as between themſelves, Whether they will take by the will of the father, or by the cuſtom of *London*.

(C) What is or is not an advancement.

November the 30th 1739. At the Rolls.

Fawkner and his wife v. *Watts.*

THE bill was brought by *John Fawkner*, and *Mary* his wife, for an account of the perſonal eſtate of *Francis Everet*, a freeman of *London*, the father of *Mary*, and for her orphanage ſhare in ſuch eſtate. He by his will gave to the plaintiff *Mary* the whole of his eſtate, and afterwards by the codicil changed the diſpoſition intirely, and gave it in fifths to the ſons of his daughter by Mr. *Paxton*, her former huſband, two-fifths to one ſon, and three-fifths to the other. Caſe 182.

Mary died ſince the filing of the bill, and the huſband as adminiſtrator to her claims one moiety of *Francis Everet*'s eſtate, inſiſting his wife was never ſo advanced as to be debarred of her cuſtomary ſhare.

Depoſitions were read on the part of the plaintiff to prove her father a freeman, and it was admitted by the defendant that *Mary* was the *only* child of this freeman, which circumſtance the counſel for the plaintiff inſiſted made it a very ſtrong caſe in her favour, and diſtinguiſhed it from all the other caſes; and for this purpoſe cited *Shepherd* v. *Newland*, before Lord *Macclesfield*, and afterwards reheard before Lord *King*.

Mr. *Brown*, counſel for the defendant: It is not diſputed, ſaid he, but *Mary*'s marriage with *Paxton* was with her father's conſent, and likewiſe admitted that there was a ſum of money then advanced by her father, and that the exact ſum does not appear.

The conſtant rule is, ſaid he, where a daughter of a freeman is married with the father's conſent, and is advanced; but it does not appear with how much that ſhe ſhall be ſaid *to be fully advanced.*

It has indeed been objected by the counſel on the other ſide, that as *Mary* was the *only* child, ſhe ſhall not be ſaid to be fully advanced, ſo as to give the father a right to diſpoſe of the reſidue of his eſtate to the prejudice of ſuch child. But the rule of advancement will hold as well, where there is but one, as where there are many children; for what the cuſtom goes upon is, that the father by advancing the daughter upon the marriage, which he need not have done till the time of his death, gains an abſolute power over his eſtate, and therefore the circumſtance of an only child does not alter the caſe.

He cited the caſes of *Civil* v. *Rich*, 1 *Vern.* 216. *Stanton* v. *Platt*, 2 *Vern.* 753. *Dean & Ux'* v. Lord *Delawar*, 2 *Vern.* 628.

Maſter of the Rolls: As it is in the caſe of infants, and the defendants have laid ſome foundation to ſhew (by ſuggeſting the conſent

of the freeman to the daughter's firſt marriage) that *Mary Fawkner* was advanced, let the cauſe ſtand over, to give the infants an opportunity of putting in a ſecond anſwer, and charging advancement.

March the 1ſt 1741. At the Rolls.

Fawkner v. *Wat's.*

Caſe 183. If a child or children of a freeman of *London* are advanced in the father's life-time, they ſhall be ſaid to be fully advanced, unleſs the *quantum* of the advancement appears in writing under his hand.

THE advancement of *Mary* upon her firſt marriage, being now fully charged in the anſwer of the defendants, it ſtood for judgment in the paper of this day.

Maſter of the Rolls: There can be no manner of doubt but the plaintiff, if *Mary* had any right to the orphanage ſhare in the perſonal eſtate of her father Mr. *Everet*, is equally intitled.

It is inſiſted on behalf of the defendants, that *Mary*, before her marriage with *Fawkner*, had a former huſband *Paxton*; that the firſt marriage was with the intire approbation of her father, and that he advanced her at that time, and that the *quantum* of the portion does not appear; and that the rule laid down in all the caſes is, that if a daughter marries with a father's conſent, and is advanced, but the *quantum* of the advancement is not aſcertained by ſome writing under the father's hand, it muſt be conſidered as a full advancement, and will bar the child of its orphanage ſhare.

The firſt caſe cited on the part of the defendants was, *Civil* v. *Rich*, 1 *Vern.* 216. " A child advanced in marriage with a portion, is barr'd " of the orphanage part, unleſs the certainty of ſuch portion appears " by writing under the father's hand."

The next caſe which is ſubſequent in point of time, is *Chace* v. *Box*, *Eq. Caſes Abr.* 154, 155. *Vide* the cuſtom of *London* certified there.

In the firſt caſe, it is ſaid, *by a writing under the hand and ſeal of the father*; *in the ſecond, ſigned with his name or mark:* But as this is not a circumſtance in the preſent caſe, I need not take any notice of it.

There is another caſe in 1729. *Cleaver* v. *Spurling*, 2 *Wms.* 526. " If a freeman has advanced his child on marriage, and the certainty " of that advancement does not appear under the freeman's hand, this " is to be taken as a full advancement."

The reſult of theſe caſes is, that if a child or children are advanced in the father's life-time, they ſhall be ſaid to be fully advanced, unleſs the *quantum* of the advancement appears in writing under the father's hand.

But then the counſel for the plaintiff have endeavoured to make a difference when there is only *one child*, as in the preſent caſe, to diſtinguiſh it from all other caſes; and for this purpoſe have cited the caſe of *Shepherd* v. *Newland*, before Lord *Macclesfield*, and reheard afterwards before Lord *King*.

But

But notwithſtanding the rule as laid down there is certainly true, yet it does not come up to the preſent caſe; for I take the cuſtom to be the ſame with regard to an *only* child, as where there are many children, and that if a father advances ſuch a child, and the *quantum* does not appear in writing, it is a full and compleat advancement.

This cuſtom will hold equally with regard to an *only* child, as where there are many children.

The next conſideration will be upon the evidence, Whether the firſt marriage was with the father's conſent, and whether there was any advancement?

Now from the proofs that have been read, there is is no manner of doubt but the father was well ſatisfied with the match, for it appears he was chearful upon the wedding day, dined with his daughter and her husband after the ceremony was over, and expreſſed great ſatisfaction at the match.

As to the proofs of the father's declarations of ſums of money advanced as a portion with *Mary* to Mr. *Paxton*, I do not think they are proper evidence in the preſent caſe, for it would be extremely hard, if *parol evidence* of a father's declaration ſhould be allowed to debar a child of her orphanage ſhare.

Parol evidence of a father's declaration will not be allowed, to debar a child of her orphanage ſhare; but

proofs of declarations by *the huſband*, in regard to an advancement in marriage with the daughter of a freeman, will be admitted Proofs alſo of declarations of the wife, made during the coverture of her firſt huſband, may be read againſt the ſecond.

But the ſame rule will not hold as to any declarations of the huſband, in regard to an advancement in marriage with the daughter of a freeman, for the proofs of Mr. *Paxton*'s declarations here, are very ſtrong, and muſt be admitted as evidence; and it was ſo held in the caſe of *Dean* v. *Lord Delawar*, and there is great reaſon it ſhould be ſo, becauſe it is a declaration againſt his intereſt, as it cuts him off from the orphanage ſhare, which he is intitled to in the right of his wife.

I am likewiſe of opinion that the declarations of the wife, of which there are ſeveral proofs, are evidence to bind the huſband, for being made during the coverture with the firſt huſband, I ſee no reaſon why it ſhould not bind as much as if the declarations had been made after the death of the firſt huſband, and before her marriage with the other.

There is a circumſtance too, in this caſe, of the teſtator's borrowing 100*l.* the very day of his daughter's marriage with Mr. *Paxton*, and putting it into a purſe with 200*l.* more, in order to give it to the huſband, and the husband went into another room with the father, who had the purſe in his hand, and when they came out, he declared he had received part of his wife's portion; this has a good deal of weight aſſiſted with the reſt of the evidence.

There has been no writing attempted to be ſhewn on the part of the plaintiff, under the hand of the father, to aſcertain what the advancement was, but his counſel have inſiſted, though there is no particular writing, yet that it may appear what the advancement was by ſome of the father's books, and therefore the court ought to

order his books to be brought before a Maſter, to inſpect, as was done in the caſe of *Dean* v. *Lord Delawar*.

Unleſs it appears by ſome book written with a freeman's own hand, what he has advanced to a child, the court will not direct an inquiry, whether it was a full advancement.

If it did appear to me in the preſent caſe, what it was that the father had advanc'd by ſome book written in his own hand, it might be a ground to direct ſuch an inquiry, whether it was a full advancement, upon being compared with the orphanage ſhare; but as there is no ſuch ſuggeſtion at all by the bill, that there is any ſuch book, I ſhould not be juſtified in directing ſuch an inquiry.

Upon the whole, I do not think the plaintiff intitled to any orphanage ſhare of the late Mr. *Everet*'s perſonal eſtate.

The next queſtion is, with regard to maintenance, whether there ſhall be any allowance for the time *Francis Everet Paxton* an infant, and the ſon of *Mary* by her firſt husband, lived with his mother.

Where father or mother are in low circumſtances, the child ought *to be maintained* out of a proviſion left by a collateral relation.

I ſhall not diſpute but every father and mother by the law of nature is under an obligation *to maintain* their own children, but yet this may be varied by circumſtances; for ſuppoſe the father or mother ſhould be in a low or mean condition in the world, the court will order, eſpecially in the caſe of a mother, that the child ſhould be maintained out of a proviſion left to it by a collateral relation.

But here the maintenance was only for ſix months, which is ſo ſmall, that it will not bear the expence of ſending it to a Maſter; therefore, let this demand for maintenance be ſet againſt the coſts for the demand of the orphanage part, and the bill be diſmiſſed without coſts generally.

CAP. XXXVIII.

Decree.

Michaelmas term 1737.

Morgan v.

Caſe 184. An original independant decree may be had in this court, where all the facts are ſtated by the bill, notwithſtanding a former decree for the ſame matter in *Wales*.

A Bill was brought for a legacy in the court of equity in *Brecknock* in *Wales*, before the *Welch* Judges at the aſſize, and the legacy decreed to be paid; the defendant appealed from the decree to the houſe of Lords, and inſiſted there was an omiſſion in the decree; for notwithſtanding an account was directed to be taken, yet it was not ordered that all juſt allowances ſhould be made in ſuch account to the defendant: Upon the appeal, the decree as to the payment of the legacy was affirmed, but varried as to the juſt allowances; and the houſe of Lords ordered their decree to be carried into execution by the court in *Wales*.

The

The defendant afterwards fled to avoid the execution of the decree into *England*; and the bill now brought, ſets forth the will by which the legacy was given, and the proceedings and decree in *Wales*, and the appeal to the houſe of Lords, and their decree, and that the defendant had, to avoid the decree and payment of the money, fled into *England* out of the reach of the proceſs of the court in *Wales*.

To this bill the defendant demurred, and for cauſe ſhewed, that it appeared the plaintiff had obtained a proper and compleat decree, and that this court always refuſed to aſſiſt the decree of an inferior court.

On the other hand it was ſaid, that an action of debt will lie upon a judgment, in an inferior court, in the court of King's Bench, or court of Common Pleas.

Lord Chancellor was inclined to over-rule the demurrer, and ſaid, that the bill having ſtated the will, and all the proceedings in *Wales*, &c. for the recovery of the legacy, an original independant decree might be had in this court for the legacy, but would not abſolutely determine it now; and therefore reſerved the conſideration of the demurrer till the hearing of the cauſe.

CAP. XXXIX.

Deeds and other Writings.

(A) Deeds and inſtruments entred into by fraud, in what caſes to be relieved againſt.

Michaelmas Vacation 1737.

Nicholls v. *Nicholls.*

Caſe 185. Though a man is arreſted by due proceſs, yet if obliged to execute a conveyance while under arreſt, this court will relieve.

THOUGH a man is arreſted by due proceſs at law, if a wrong uſe is made of it againſt the perſon under ſuch arreſt, by obliging him to execute a conveyance, which was never under conſideration before, this court will conſtrue it a dureſs, and relieve againſt a conveyance executed under ſuch circumſtances.

Vide title *Heir and Anceſtor.*

Vide title *Voluntary Deed and it's Effects.*

CAP. XL.

Deviſes.

(A) Of void deviſes, by uncertainty in the deſcription of the perſon to take.
(B) Of deviſes of lands for payment of debts.
(C) Of executory deviſes of lands of inheritance.
(D) Where a deviſe ſhall, or ſhall not be in ſatisfaction of a thing due.
(E) What words paſs an eſtate tail.
(F) Of things perſonal, as goods, chattels, &c. by what deſcription, and to whom good.
(G) What words paſs a fee in a will.

(A) Of void deviſes, by uncertainty in the deſcription of the perſon to take.

Michaelmas term 1737.

Rivers's caſe.

Caſe 186.

A Teſtator by his will gives an equal ſhare of his real eſtate, (which ſhall be his due, when the ſaid eſtate ſhall be ſold) to his two ſons *James* and *Charles Rivers*.

Lord Chancellor: Firſt queſtion, Whether, as it appears that *James* and *Charles* are illegitimate children of the teſtator, this is ſuch a deſcription of their perſons as will intitle them to take under the will?

Though baſtards ſtrictly are not ſons, yet if they have acquired that name by reputation, in common parlance they are to be conſidered as ſuch.

In the caſe of a deviſe, any thing that amounts to a *deſignatio perſonæ* is ſufficient, and though in ſtrictneſs they are not his ſons, yet if they have acquired that name by reputation, in common parlance they are to be conſidered as ſuch.

It has been ſaid, the teſtator has likewiſe made a miſtake in their names, and therefore they cannot take; but the law is otherwiſe, for if a man is miſtaken in a deviſe, yet if a perſon is clearly made out by averment to be the perſon meant, and there can be no other to whom it may be applied; the deviſe to him is good.

The ſecond queſtion is, What intereſt in the eſtate deviſed *James* and *Charles Rivers* take by this will? The words *an equal ſhare of my real eſtate*, muſt mean in equal ſhares, ſhare and ſhare alike, or it cannot be made ſenſible; and theſe words can be no further extended

tended than to the ſurplus due to the teſtator from that eſtate which was to be ſold, and will not reach to any other eſtate.

February the 4th 1737.

Minſhull v. *Minſhull.*

Caſe 187. *R. L.* deviſes to *R. M.* eldeſt ſon of his nephew *R. M.* and the *firſt* heirs males of his body, and the heirs males of his body, and in default of ſuch iſſue, *to the ſecond ſon of the ſaid* R. M. and the heirs males of his body, and their iſſues; remainder over, *&c.*

RICHARD Leſter the teſtator, uncle of *Randal Minſhull*, who had *Randal* his eldeſt ſon, *John* his ſecond ſon, and ſeveral other children, deviſes an houſe, *&c.* in *hæc verba, viz.* " I give and de- " viſe the houſe, *&c.* to *Randal Minſhull*, eldeſt ſon of my nephew " *Randal Minſhull*, and the firſt heirs males of his body lawfully be- " gotten, and the heirs males of his body, and in default of ſuch " iſſue, I give, *&c. to the ſecond ſon of the ſaid* Randal Minſhull, " and the heirs males of his body, and their iſſues; remainder over, " *&c.*" There is a proviſion made in the will, " that to whomſo- " ever the eſtate ſhould come; he ſhould pay on his entry upon " the eſtate, to each of his brothers and ſiſters 20*l.* apiece, and to " *John*, and the ſeveral children of his nephew, naming them par- " ticularly, 20*l.* apiece likewiſe."

remainder over, *&c.* Theſe words, *the ſecond ſon of the ſaid* R. M. do not mean the ſecond ſon of the deviſee, but *John* the ſecond ſon of the teſtator's nephew *R. M.*

The deviſe in the preſent caſe was of a reverſion, which did not take effect, till many years after the teſtator's death.

Randal, the firſt deviſee, dies without iſſue; *John* enters and dies, having deviſed the premiſſes to the defendant his younger ſon, in prejudice of the plaintiff his eldeſt ſon.

The bill was brought for an account of the rents, *&c.* and at the hearing at the Rolls, the queſtion was, Whether in the deviſing words, *To the ſecond ſon of the ſaid* Randal Minſhull, the ſon of the nephew *Randal Minſhul* is meant, or the ſon of the nephew's eldeſt ſon; for ſuppoſing the latter, the particular limitations in the will extending only to the iſſue of *Randal* the deviſee, who was dead without iſſue, the reverſion on his death taking effect in poſſeſſion in *John* as heir at law of the teſtator; the diſpoſition of *John* by will was good; but ſuppoſing the will to mean the ſon of *Randal* the nephew, that *John* being tenant in tail under the will, and not having done any act to bar the entail, the plaintiff has a good title as being the eldeſt ſon of *John*.

The maſter of the Rolls (*a*) decreed in favour of the plaintiff: On appeal to *Lord Chancellor*, he directed an iſſue to try the matter of fact, which of the two perſons was meant by the teſtator, and ſaid, it was a matter that lay properly in averment, and was determinable by circumſtances, proving the intention of the teſtator, one way or other; the will was made in 1658, and the parties not being able of either ſide to furniſh themſelves with any evidence, tending to clear

(*a*) Sir *Joſeph Jekyll.*

up this point; it was agreed between them to bring the matter on, for the opinion of the court, upon the legal conſtruction of the words as they appeared on the face of the will.

The Attorney general for the plaintiff inſiſted, that *Randal* the deviſee was tenant in tail; the uſe he made thereof was by inferring from thence, that if the teſtator had made the deviſee tenant in tail, an eſtate which in it's nature included a limitation to all the iſſue of the deviſee, he could never intend likewiſe to limit a remainder by purchaſe to the ſecond ſon of the deviſee, who could otherwiſe take as iſſue in tail, nor was it poſſible elſe *that* remainder could ever take place in poſſeſſion, becauſe it could only take effect on the death of the firſt deviſee without iſſue, which ſuppoſes the remainder man then dead.

To prove that the ſubſequent words of limitation, *viz. the heirs males of his body*, annexed to the preceding limitation to the firſt heirs males of his body, would not controul the former words, and make ſuch firſt heirs male take by purchaſe, who would otherwiſe take by limitation; he cited the caſe of *Goodright* v. *Pullen*, *B. R.* 13 *Geo.* 1. *Nicholas Liſle* deviſed the premiſſes to his wife for life, remainder to his kinſman *Nicholas Liſle*, for the term of his natural life, and after his deceaſe, to the heirs males of the body of the ſaid *Nicholas* lawfully to be begotten, and his heirs for ever. But in caſe the ſaid *Nicholas* die without ſuch heir male, then he deviſes to his kinſman *Edward Liſle* for life, and after his deceaſe, to the heirs males of his body lawfully begotten, and his heirs for ever; and in default of ſuch heir male, remainder over, *&c.* it was held there, that *Nicholas* the firſt deviſee was tenant in tail.

Mr. *Fazakerley* of the ſame ſide, to prove that the words *firſt heirs males* were proper words of limitation, cited the caſe of *Dubber* v. *Trollop*. Sir *Thomas Trollop* having five ſons, deviſes the manor of *Caſwick* to his eldeſt ſon *William* for life, and from and after his deceaſe, *to the firſt heir male of his body*; it was held in that caſe by the court of Common Pleas, that *William* was tenant in tail, and on a writ of error brought, that judgment was affirmed in *B. R. M. T.* 1735.

Mr. *Chute e contra:* Both the caſes cited are diſtinguiſhable from the preſent; in that of *Goodright* v. *Pullen* there is no ſuch word as *firſt*; in that of *Dubber* v. *Trollop*, no ſubſequent words of limitation annexed to the firſt.

A court never conſtrues a deviſe void, unleſs it is ſo abſolutely dark, that they cannot find out the teſtator's meaning.

Lord Chancellor: This caſe will depend on the words of the will with regard to the perſon intended by the teſtator, by the name of *Randal*, and the legal operation of the words made uſe of; and a court never conſtrues a deviſe void, unleſs it is ſo abſolutely dark, that they cannot find out the teſtator's meaning.

The proviſion of the payment of the legacies (by the perſon to whom the eſtate ſhould come) to his brothers and ſiſters, and to *John*, *&c.* is, as has been inſiſted on for the plaintiff, a very ſtrong expreſſion of the intent of the party; for as here is a ſpecification of the children, it muſt mean the brothers and ſiſters of *Randal Min-*

ſhull, the eldeſt ſon of *Randall Minſhull* the nephew, and could never intend to mean every taker. For ſuppoſing the words to mean the ſecond ſon of the deviſee, as there is plainly an eſtate tail created prior to any intereſt he can claim, (whether the words *firſt heirs males* are conſtrued words of limitation or purchaſe;) an eſtate which may continue for a great number of years, in all probability, without any failure of iſſue, it would be a moſt abſurd thing to charge a perſon, at ſo great a diſtance from the eſtate, with the payment of money to perſons then in being, whom the teſtator could hardly ſuppoſe would be living at the time of the title accruing to ſuch ſecond ſon. On the other hand there is nothing extraordinary in charging *Randall* the firſt deviſee, or upon a ſuppoſition of his death without iſſue, in the life of *John*, in charging *John* with the payment of thoſe ſums, which raiſes a very ſtrong preſumption, that *John* was the perſon intended to take under the limitation to the ſecond ſon of *Randal*.

It has been objected againſt this conſtruction, that *John* will then be deviſee of the eſtate, and intitled to the 20*l.* likewiſe, which the teſtator could never intend; but the words muſt be taken *reddendo ſingula ſingulis*, and *John* to have the 20*l.* only in caſe of the firſt deviſee's right taking effect in poſſeſſion, and the determination of the preceding eſtates then in being at the time of making the will. It is much more natural likewiſe that the teſtator, when he was making a diſpoſition of his whole eſtate, having a nephew who had two ſons, ſhould ſettle it ſucceſſively on both the ſons, than ſtop at the firſt, without extending the entail, or diſpoſing of the reverſion.

Whether the firſt deviſee was tenant for life, or in tail, is a queſtion proper to be conſidered, and the determination of that point will certainly give great light into this matter, and clear the way towards the conſtruction of the will on the other point, in the manner it has been inſiſted on.

I am of opinion the words of limitation, ſuperadded here to the preceding words of limitation, will certainly not of themſelves make *the firſt* words of purchaſe, but the ſubſequent ought to be rejected as redundant and ſuperfluous.

In *Archer*'s caſe *, an eſtate was limited to *Robert Archer*, the firſt taker, expreſly for life, to which great regard is always had in determining whether an eſtate for life, or in tail paſſes. 2*dly*, in that caſe it was to the *next heir male* of *Robert* only, not *heirs* as here; nor will the ſubſequent words of limitation affect the legal operation of the preceding words in any caſe of this kind, unleſs the word *heir* is made uſe of in the ſingular number, or there is an expreſs eſtate for life limited to the firſt taker. It is true, in *Shelly*'s caſe †, *Anderſon* Ch. Juſt. puts this caſe, If there be a limitation to the uſe of a man for life, and after his deceaſe to the uſe of his heirs, and of their heirs females of their bodies; in this caſe, theſe words (his heirs) are words of purchaſe and not of limitation, for then the ſubſequent words (and of their heirs females of their bodies) would be void. That appears to be a caſe only put by *Anderſon*, and no reſolution of that kind; but beſides there, the ſubſequent words vary eſſentially the

* 1 Co. 66 b. Subſequent words of limitation affect not the legal operation of the preceding words of limitation, unleſs the word *heir* is uſed in the ſingular number, or an expreſs eſtate for life limited to the firſt taker.

† 1 Co 93. b. & 95. b.

preceding limitations, and alter the courſe of ſucceſſion and enjoyment of the eſtate.

No ſtreſs to be laid upon the word *firſt*, means only that they ſhould take in ſucceſſion, according to priority of birth and ſeniority of age.

There are ſubſequent words of limitation annexed likewiſe to the deviſe to the ſecond ſon, which ſhews the teſtator had no intention they ſhould operate in deſtruction of the former words. No ſtreſs at all is to be laid on the word *firſt*; there are many authorities for that purpoſe, and the caſe of *Dubber* v. *Trollop* is a very ſtrong one; there the word *heir* too was uſed, not *heirs*. The word *firſt* means only that they ſhould take in ſucceſſion, according to priority of birth and ſeniority of age, and is unneceſſarily providing for what the law itſelf does.

Decreed for the plaintiff.

October the 28th 1738.

Purſe v. *Snaplin*. Et e contra.

Caſe 188.

Robert Rowland gives to his niece *A. S.* 5000*l.* in the old *S. S.* Annuity-ſtock of the *S. S.* company, and to his nephew *R. P.* 5000*l.* in the old *S. S.* Annuity-ſtock of the *S. S.* company. At the time of making his will, and at his death, the teſtator had only 5000*l.* in old *S. S.* Annuity-ſtock.

ROBERT Rowland, on the 23d of *February* 1734, made his will in theſe words: "I *Robert Rowland* do hereby make my "will, diſpoſe of my eſtate in manner following, *viz. Firſt*, I give "and deviſe to my nephew *Robert Snaplin*, and his heirs, my free-"hold and copyold eſtates, (by the ſeveral names and deſcriptions "therein mentioned.) *Item* I give to my niece *Ann Snaplin* 5000*l.* "in the old Annuity-ſtock of the *South Sea* Company." And then after two or three intervening legacies of ſtocks of different kinds, teſtator ſays, "I give to my couſin *Robert Purſe* 5000*l.* in the old "Annuity-ſtock of the *South Sea* company, and the reſt and reſidue "of my eſtate, both real and perſonal, I give, deviſe, and be-"queath to my nephew *Robert Snaplin*, his heirs, executors and "adminiſtrators, and made *Robert Purſe* executor."

They are to be conſidered as two diſtinct legacies, and *A. S.* and *R. P.* are intitled to have them made good out of the teſtator's aſſets, and the executor directed to purchaſe, out of the perſonal eſtate, 5000*l.* old *S. S.* Annuities, and transfer one moiety to *A. S.* and the other moiety to his own uſe, and the 5000*l.* old *S. S.* Annuities, which the teſtator died poſſeſſed of, to be applied proportionably towards payment of the legacies to *A. S.* and *R. P.*

The teſtator, at the time of making his will, and at his death, had only 5000*l.* in old *South Sea* Annuity-ſtock, which *Anne Snaplin*, now the wife of *Charles Townſend*, claims under the will of *Robert Rowland*; and *Robert Purſe* brings his bill for the legacy and account of the eſtate, inſiſting to retain the ſame for his own uſe, for his legacy of 5000*l.* old *South Sea* Annuity-ſtock: In which caſe the defendant *Anne* inſiſted, that the plaintiff ſhould, out of the teſtator's perſonal eſtate, purchaſe 5000*l.* in old *South Sea* Annuity-ſtock, and transfer the ſame to her, and pay her the dividends from the death of the teſtator.

Robert Snaplin, the reſiduary legatee, inſiſted that the teſtator only deſigned to give away ſo much old *South Sea* Annuity-ſtock as he

was

was actually poſſeſſed of at the time of making his will, and that no part of the perſonal eſtate ought to be applied in the purchaſe of 5000*l.* in old *South Sea* Annuity-ſtock.

The Maſter of the Rolls decreed an account of the perſonal eſtate of the teſtator; and as to the two legacies of 5000*l.* each in old *South Sea* annuities, reſerved the conſideration thereof. The Maſter reported that the perſonal eſtate was more than ſufficient to pay all legacies.

The cauſes coming on the 22d of *December* 1738. his honour was of opinion that there could be but one 5000*l.* old *South Sea* annuity paſs by the will, and that the 5000*l.* old *South Sea* annuity which the teſtator had at the time of his death, and the intereſt ſince, muſt be divided between the plaintiffs *Robert Purſe* and *Anne Snaplin* (wife of *Townſend)* and that *Purſe* ſhould transfer one moiety of the ſaid 5000*l.* *South Sea* annuity, and pay one moiety of the intereſt to *Charles Townſend* and *Ann* his wife.

Robert Purſe and *Ann Snaplin*, becauſe they had not 5000*l.* old *South Sea* Annuity-ſtock each made good to them, appealed from this part of the decree.

Lord Chancellor: The general queſtion here is, If the two legacies of 5000*l.* are to be conſidered as two gifts of the ſame individual ſum and quantity, or different ſums and quantities? If they are gifts of the ſame individual ſum, the decree is right; if they are different and diſtinct ſums, the reaſon on which that decree is founded, totally fails.

The firſt and primary thing to be conſidered is the intention of the teſtator; and as to that I can have no doubt, he has, in very plain words, given 5000*l.* to the one and to the other. I believe it will not be denied that when he wrote the firſt clauſe, he deſigned to give *Anne Snaplin* 5000*l.* how can it then be thought that he had not the ſame intent as to *Robert Purſe*, when he wrote the ſecond clauſe, where he has uſed the ſame words?

It was urged that the teſtator had miſtaken what ſtock he had, and what he had before given; but miſtakes in making wills are never to be ſuppoſed, if any conſtruction that is agreeable to reaſon can be found out. If a man deviſes a ſpecifick individual thing which he has not, this is a plain miſtake; but ſuch argument is never to be uſed except through neceſſity, and where it is not to be avoided: So a teſtator ſhall not be charged but from neceſſity with forgetfulneſs, and here there are ſcarce two lines intervening between the two legacies now in queſtion, ſo that there was no poſſibility of the teſtator's forgetting.

Miſtakes in making wills are never to be ſuppoſed, if any conſtruction that is agreeable to reaſon can be found out.

The firſt objection is, that the teſtator by the ſecond clauſe intended to diſpoſe of the ſame 5000*l.* old *South Sea* Annuity-ſtock, and to make *Anne Snaplin* and *Robert Purſe* joint tenants.

But this argument is inconſiſtent with the former way of accounting for it, either by miſtake or forgetfulneſs, and makes the teſtator guilty of the greateſt abſurdity. If that had been his intent, when he wrote

wrote the ſecond clauſe, he might have uſed very plain and expreſſive words to ſhew the change of his intention.

I think therefore his intent was clearly to give 5000*l.* *South Sea* Annuity-ſtock to *Robert Purſe*; and the queſtion now is, If ſuch intent can have its effect?

Every clauſe in a will ſhall be conſtrued ſo as to take effect according to the teſtator's intent, if it is conſiſtent with the rules of law.

Every clauſe in a will ſhall be conſtrued ſo as to take effect according to the teſtator's intent, if it is conſiſtent with the rules of law; and a teſtator's power over his perſonal eſtate is exceeding free and clear from many reſtraints, which the law lays upon real eſtates.

This brings me to the ſecond objection, which is, that the teſtator had only 5000*l.* old *South Sea* Annuity-ſtock, either at the time of making his will, or his death, and the will is relative to what the teſtator had at thoſe periods of time.

In anſwer to this it is to be obſerved, that the teſtator has not uſed in either bequeſt the word *mine*, ſo as to determine the particular property; and the civil law makes great uſe of the inſertion or omiſſion of this word in legacies*: And where the words are general, it may be taken as an injunction to the executors to purchaſe and make up out of the aſſets what he had beqeathed, though he had it not in ſpecie at the time of his death, and as an indication how the teſtator would have his aſſets diſpoſed of, and theſe legacies to *Anne Snaplin* and *Robert Purſe* may very conſiſtently take effect as directions to the executors to purchaſe 5000*l.* old *South Sea* Annuity-ſtock, or ſo much as was wanting to make up the ſum bequeathed. In 2 *Domat*, title *Legacies*, *p.* 159. *ſec.* 18. Deviſe of a thing not *in rerum natura*, during the teſtator's life, held good*. *Vide Swinburne's* third part, laſt edition, 173, 179.

Theſe reſolutions are grounded on the rule of the civil law, in regard to legacies conſiſting in quantity and number; and there is a great difference between the teſtator's deſcribing the quantity in general, and his determining and particulariſing it by the word *mine*.

If the ſurplus of the teſtator's perſonal eſtate would not have held out ſufficient to make up their legacies, it would have been a very ſtrong objection; but the caſe is delivered from that difficulty by the Maſter's report, that it is ſufficient, and then in conſcience all his legacies ought to be ſatisfied and paid.

The third objection is, that this legacy to *Robert Purſe* is a ſpecifick legacy, and therefore, if not found among the teſtator's aſſets, muſt fail.

To this I anſwer, that there are two kinds of gifts, which by us are reckoned under the name of ſpecifick legacies.

---

* *Domat*, 2*d vol.* 159. *ſec.* 21. When a teſtator bequeaths a certain thing, which he ſpecifies as being his own, the legacy will not have its effect, unleſs that thing be found extant in the ſucceſſion. For example, if he had ſaid, "I beqeath to ſuch a "one my watch, or my diamond ring," and that there were not found in the ſucceſſion either diamond ring or watch, the legacy would be null. But if he had ſaid, "I bequeath a diamond ring, or a watch," the legacy would be due, and would have its effect.

Firſt, When a particular chattel is ſpecifically deſcribed, and diſtinguiſhed from all other things of the ſame kind.

Where a particular chattel is ſpecifically deſcribed, and diſtinguiſhed from all other things of the ſame kind, and is not found among the teſtator's effects, it fails; or if given firſt to *A* and then to *B*. they muſt divide it; or if diſpoſed of in the teſtator's life-time, it is an ademption of ſuch legacy.

Secondly, Something of a particular ſpecies which the executor may ſatisfy, by delivering ſomething of the ſame kind, as an horſe, *&c.*

The firſt kind may be more properly called an individual legacy, and if ſuch ſo bequeathed is not found among the teſtator's effects, it fails; or if given firſt to *A*. and then to *B*. they muſt divide it; or if it is diſpoſed of in the life of the teſtator, it is an ademption of ſuch legacy.

But this gift is not confined to the particular 5000*l*. old *South Sea* Annuity-ſtock which the teſtator had, and therefore does not fall within the firſt rule, but the ſecond, which is of a more liberal nature, it is a legacy conſiſting in quantity and number, and not confined to the ſtrictneſs of the firſt rule. *

The latter part of the opinion in *Partridge* v. *Partridge*, is an authority directly in point with the preſent caſe; and I think there is no real difference between the caſe of a teſtator's having only one 5000*l*. ſtock and deviſing two 5000*l*. ſtock, and the caſe of a teſtator's having no ſtock at all, and deviſing 1000*l*. or any other quantity of ſtock.

The fourth objection is, that in the other parts of the will the teſtator had given to ſeveral perſons ſeveral quantities of ſeveral ſtocks, and in each had given the exact ſum he was poſſeſſed of, and therefore it muſt be intended in the preſent caſe he meant to give no more than he really had: But I think *that* objection turns quite the contrary way.

The fifth objection is, that one of theſe two legacies is a ſpecifick legacy, and it is abſurd to ſay, that the ſame words ſhall make one a ſpecifick, and one a general legacy.

But the ground of this objection fails, for neither of theſe is a ſpecifick legacy, within the ſtrict rules, for the reaſon before mentioned. The teſtator intended 5000*l*. *South Sea* ſtock, which he was poſſeſſed of, ſhould be applied in ſatisfaction of theſe legacies as far as it would

---

* In the caſe of *Partridge* v. *Partridge*, *November* 1736, "The teſtator bequeathed 1000*l*. *South Sea* ſtock to his wife for life, with a power to diſpoſe of it among "his children. At the time of making his will he had 1800*l*. *South Sea* ſtock; he "afterwards ſold out 1600*l*. and then re-purchaſed enough to make up the ſum given. Then came the act of parliament for converting ſome part of *South Sea* ſtock "into annuities. One queſtion was, If the altering the ſtock according to the act of "parliament was an ademption *pro tanto?* and adjudged not. The ſale by the father "was likewiſe adjudged no ademption, for the deviſe of ſo much *South Sea* ſtock was "deſcriptive of the nature and kind of the thing deviſed, not of the particular ſtock "which the teſtator had: and if at the time of making his will, or death, the teſtator "had no ſtock, this would have amounted to a direction to the executors to purchaſe "ſo much, according to the terms of the deviſe."

go; as if he had given 5000*l.* in money to *Anne Snaplin* and *Robert Purſe*, and had only 5000*l.* that muſt have been applied as far as it would go; and the executors, if the aſſets were ſufficient, muſt have made up the reſt: So it is in this caſe.

The ſixth objection is, that this caſe was like money given in ſuch a cheſt, and that the ſtock was *deſcriptio loci*; but here it muſt be taken as the deſcription of the thing given, for the reaſons before mentioned.

The ſeventh objection is, that there was no reaſon why 5000*l.* *South Sea* Annuity-ſtock ſhould be given to *Robert Purſe*, any more than 5000*l.* in money, there being no particular truſt or uſe created.

But theſe, though true, are no objections. We are not to account for the teſtator's reaſons, but to follow his intent as near as it can be found out; but if a conjecture may be allowed, it was to preſerve an exact equality between the two legatees, as they were equal in degree of relation to the teſtator.

In our law particular legatees are always preferred before the reſiduary legatees, (though otherwiſe in the *Roman* law) the *reſiduum* being conſidered by us as the gleanings of the teſtator's eſtate.

The eighth objection is, that if this conſtruction prevails, there will be little or no ſurplus; but if that ſhould be the caſe, it is of no weight, for in our law particular legatees are always preferred before the reſiduary legatees, (though it was otherwiſe in the *Roman* law) the *reſiduum* being by us conſidered as the gleanings of the teſtator's eſtate: Beſides, here all his real eſtate is given expreſly to the reſiduary legatee by name.

Theſe two legacies therefore are to be conſidered as two diſtinct legacies, and *Anne Snaplin* and *Robert Purſe* are intitled to have them made good out of the teſtator's aſſets. But this is not ſuch a general rule, as that ſtock always ſhall be conſidered as a legacy of quantity and number; and therefore I perfectly agree with the caſe of *Aſhton* v. *Aſhton*, where the ſtock was to be ſold and land purchaſed; the teſtator *there* intended to give only what he was actually poſſeſſed of, and it was of great weight in that reſolution, that a truſt was declared to ſell and diſpoſe of, and it could not be ſuppoſed that the teſtator intended his executor ſhould buy ſtock, and immediately ſell it again, and buy land with the money. *

* *Vide* Caſes in Equity, during the time of Lord *Talbot*, 152.

His Lordſhip directed that ſo much of the ſaid order as relates to the 5000*l.* old *South Sea* Annuity-ſtock, given to *Robert Purſe* and *Anne Snaplin*, ſhould be reverſed; and declared that they are intitled each of them to 5000*l.* old *South Sea* Annuity-ſtock, to be made good to them out of the teſtator's perſonal eſtate; and that the 5000*l.* old *South Sea* Annuity-ſtock, which he died poſſeſſed of, ought to be proportionably applied towards payment thereof, and *Robert Purſe* to transfer one moiety of the ſtock, and the dividends to *Townſend* and *Anne* his wife; and that *Robert Purſe* do, out of the perſonal eſtate, purchaſe 5000*l.* old *South Sea* Annuity-ſtock, and transfer one moiety to *Townſend* and his wife, and the other moiety to his own uſe: The Maſter to compute how much the dividends of 5000*l.* ſtock, from

a year after the teſtator's death, would have amounted unto, and *Robert Purſe* to pay a moiety thereof to *Townſend*, and retain the other himſelf.

(B) Of deviſes of lands for payment of debts.

November the 8th 1737.

Mary Ridout widow, and executrix of *William Ridout*, — Plaintiff.

Dowding and others, —— —— Defendants.

WILLIAM Ridout who died ſeiſed in fee of the reverſion of ſeveral eſtates in *Somerſetſhire*, conveyed them to two perſons and their heirs, to the uſe of himſelf for life, and afterward to the uſe of ſuch perſon, and for ſuch purpoſes as he by will ſhould appoint, and did accordingly deviſe the ſaid premiſſes to *Robert* and *Richard Tyte*, and their heirs, in truſt for the plaintiff for life, and afterwards for a term of 2000 years, in truſt, by and with the conſent *and direction of the plaintiff*, teſtified in writing under her hand and ſeal, in the preſence of three witneſſes, for raiſing ſuch ſums as ſhould be thought neceſſary for diſcharging his debts, with remainders over, and appointed the plaintiff executrix and reſiduary legatee; and died ſoon after without iſſue. Caſe 189.

The defendants ſet up ſeveral demands upon the eſtate of *William Ridout*, and particularly the defendant *Dowding*, who claimed by bond and otherwiſe.

Lord Chancellor: A teſtator in the firſt part of a will gives his wife an eſtate for life in particular lands, and in the latter part creates a term for years, to take place from the day of his death, in truſt for raiſing ſums of money to diſcharge his debts, in ſuch manner as the wife ſhould direct.

A. by his will, firſt gives an eſtate for life to his wife, and in the latter part creates a truſt term for payment of debts to take place from the day of her death.

The queſtion is, Whether the wife is intitled to have her eſtate for life diſcharged of the term.

Notwithſtanding the teſtator has in the outſet of his will given her an eſtate for life, yet I am of opinion the term, tho' ſubſequent, ſhall take place of the wife's eſtate for life, and it is plain it was his intention it ſhould be ſo, by making uſe of theſe words, *the term to take place from the day of his death*, and it is immaterial how a teſtator places the ſeveral deviſes in a will, becauſe the whole muſt be conſtrued

The term tho' ſubſequent, ſhall take place of the wife's eſtate for life, eſpecially as it is a truſt term for raiſing money. It is immaterial how a teſtator places the ſeveral deviſes in a will, becauſe the whole muſt be conſtrued together, ſo as to make it conſiſtent.

conſtrued

conſtrued together, ſo as to make it conſiſtent, and here it is not ſubject to a bare naked term only, which might have admitted of ſome doubt, but to the truſt of a term to raiſe money for diſcharging the teſtator's debts, and the words that follow, *in ſuch manner as his wife ſhould direct*, do not intend the wife ſhall have a power of exempting her eſtate for life, but only that ſhe may raiſe it in the moſt convenient method, either by mortgage, or otherwiſe.

His Lordſhip decreed, If the perſonal eſtate of *William Ridout* is not ſufficient to pay his debts, that the truſtees ſhould ſell the term of 2000 years to make good ſuch deficiency.

May the 3d 1738.

Elatch and *Agnis*, in behalf of themſelves, and all other creditors of *Francis Elliot* deceaſed, —— } Plaintiffs.

Wilder and others, Defendants.

Caſe 190. A teſtator deviſes all his real and perſonal eſtate to be ſold for payment of his debts, and appoints the defendant executor; the perſonal eſtate not being ſufficient, a bill brought by bond and note creditors of the teſtator, to be paid their demands out of the real eſtate. The queſtion, Whether the executor can ſell the ſame, as the teſtator had given it generally to be ſold, without directing who ſhould ſell.

FRANCIS Elliot being indebted to the plaintiffs by bond and note, and to ſeveral other perſons, and being ſeized in fee in divers lands, part freehold, and part copyhold, and of a conſiderable perſonal eſtate, having duly ſurrender'd the copyhold, made his will, and thereby deviſed all his real and perſonal eſtate, whether freehold or copyhold, to be ſold for payment of his debts, and appointed the defendants *Wilder* and *Agnis* executors; *Wilder* alone proved the will, and took upon him the execution thereof, and the perſonal eſtate not being ſufficient to pay his debts, the plaintiffs bring their bill to be paid their reſpective demands out of the teſtator's real eſtate.

The defendants admit the will, but *Wilder* the executor ſubmits it to the court, whether he can ſafely proceed to a ſale of the eſtate, in regard the teſtator had only given it to be ſold generally, without directing who ſhould ſell the ſame.

Mr. *Fazakerley* inſiſted the executor ought to ſell, and for this purpoſe cited, 2 *Jo.* 25. 2 *Leon.* 220.

The money ariſing from the ſale, is legal aſſets in the hands of the executor.

Lord Chancellor: I am of opinion, that money ariſing from the ſale of lands deviſed to an executor for that purpoſe, or which the executor is impowered to ſell, are legal aſſets in his hands, and adminiſtrable as ſuch, and ſuch money, *&c.* being aſſets likewiſe in the ſame manner in the preſent caſe, it is a very reaſonable conſtruction, that the executor ſhould be the perſon who ſhould make the ſale; and therefore I decree that in caſe the perſonal eſtate ſhould not be ſufficient to pay the debts, and legacies, that then the real eſtate of the

the teſtator, both freehold and copyhold, ſhall be ſold, and likewiſe that the executors and the heir ſhall join in the ſale, and all other proper parties as the Maſter ſhall direct.

It was agreed in this caſe, that where lands are deviſed to truſtees to be ſold for payment of debts, and the heir at law is an infant, he has no day given him to ſhew cauſe on his coming of age; otherwiſe where here is no deviſe of lands expreſly to any particular perſon, for in that caſe he has, and this being one of theſe caſes, his Lordſhip directed the infant the cuſtomary heir of the copyhold premiſſes to join in the ſale thereof on attaining 21, unleſs within 6 months after he ſhall attain ſuch age, he ſhew good cauſe to the contrary, and the purchaſer of the copyhold in the mean time to hold and enjoy the ſame.

Where lands are deviſed to truſtees to be ſold for payment of debts, and the heir is an infant, he has no day to ſhew cauſe when he comes of age, but if the lands are not deviſed to any particular perſon, it is otherwiſe.

November the 21ſt 1739.

Bateman v. *Bateman* and others.

Caſe 191.

ROBERT Bateman by his will taking notice that he was ſeiſed of a copyhold, and that he had ſurrender'd the ſame to the uſe of his will, directs that the ſaid copyhold ſhould remain, one third to his wife for life, and the other two thirds to his ſon, paying to his two daughters 150 *l.* apiece at 21, but by a latter clauſe in the will, ſays, *Provided*, that if my perſonal eſtate, and my houſe and lands at *W.* ſhould not pay my debts, then my executors to raiſe the ſame out of my ſaid copyhold premiſſes.

A *proviſo* in the will of *R. B.* that if his perſonal eſtate, and houſe and lands at *W.* ſhould not pay his debts, then his executors *to raiſe* the ſame out of his copyhold premiſſes.

Lord Chancellor: The queſtion is, Whether this latter deviſe will intitle the executors to ſell the copyhold eſtates, and I am of opinion it will, for as the rents are not near enough to diſcharge teſtator's debts, theſe words will give the truſtees a power to ſell, to ſatisfy the teſtator's intention of paying his debts: Therefore let an account be taken of the rents and profits of the copyhold eſtate, deviſed by the will of *Robert Bateman* for payment of his debts; and if there is not ſufficient to pay his debts, I do decree *that the copyhold eſtate be ſold*, and the money ariſing by ſuch ſale be applied towards ſatisfaction of what ſhall be found due.

The rents not being ſufficient to diſcharge the teſtator's debts, theſe words will give the truſtees a power to ſell the copyhold lands to ſatisfy his intention of paying his debts.

(C) Of executory deviſes of lands of inheritance.

Michaelmas term 1737.

Hayward v. *Stillingfleet.*

Caſe 192.
W. H. by will gave 100 *l.* to his daughter *Frances*, and 450 *l.* between two other daughters, and then deviſes his land in truſt for a term of 99 years, with a power to raiſe a leſs term upon truſt, that if his wife ſhould within 4 years pay off the 550 *l.* then the lands to go to her for life, and after her death to *W. H.* his ſon and his heirs male and female, and for want of ſuch iſſue, to him and his heirs for ever.

WALTER Hayward ſenior by his will gave 100 *l.* to his daughter *Frances*, and 450 *l.* between two other daughters, and then deviſes his lands, in truſt for a term of 99 years, with a power to raiſe a leſs term, upon this ſpecial truſt and confidence, that if his wife ſhould within 4 years after his deceaſe pay off, or ſecure to be paid, the ſum of 550 *l.* to the ſaid truſtees, for the benefit of his ſaid daughters, then he gives all his lands to his wife for her life, and after her death to *Walter Hayward* his ſon, and his heirs male and female, and for want of ſuch iſſue, to him and his heirs for ever, the ſaid term to wait on the inheritance, and the truſtees to convey over as aforeſaid, and the fortune of each daughter upon her death to go to the ſurvivor.

This is a conditional limitation in the wife, taking place as an executory deviſe, and the freehold deſcended to the ſon as heir at law to the teſtator, till the 4 years were elapſed, or his wife had performed the condition, as a part of the inheritance undiſpoſed of, and by this deviſe the ſon had a good eſtate tail in the inheritance, expectant on the determination of the term of 99 years.

The wife did not pay the money.

And ſome years ago a bill was brought againſt *Walter Hayward* the father of the plaintiff, for the 550 *l.* and a decree was made for the ſale, and after the payment of this ſum, the reſidue was to be laid out for the benefit of *Walter Hayward* then an infant, and father to the plaintiff. The eſtate was accordingly ſold to Mrs. *Stillingfleet* for 610 *l.* the 550 *l.* firſt paid off, and the reſidue applied according to the decree.

The plaintiff's father when he came of age, in conſideration of his confirming the purchaſe to Mrs. *Stillingfleet*, and conveying the remainder of the term, to prevent the merging thereof, to truſtees appointed by her, received the 60 *l.* being the reſidue after the ſum of 550 *l.* raiſed, and paid to the daughters.

Mrs. *Stillingfleet* deviſes *the eſtate* to the defendant in fee.

The preſent bill is brought by the grandſon of the teſtator, and heir at law of the ſon, for the reverſion of the inheritance after the term for 99 years, and for an account of what timber has been cut down, and for an injunction to ſtay waſte for the future, and for the delivery of the deeds and writings, and for an aſſignment of the ſaid term, againſt the defendant the deviſee, of the purchaſer of term, and inheritance

inheritance from the plaintiff's father, the ſon of the teſtator, there being no fine levied to the purchaſer by *Walter Hayward*, and ſhe having notice, at the time of the purchaſe, of the eſtate tail.

Mr. *Brown* for the plaintiff inſiſted, that this is not ſuch a precedent condition with reſpect to the eſtate tail, as muſt be performed by the tenant in tail, before he can be intitled, but at moſt a charge only upon the eſtate.

That the teſtator, in conſequence of his wife's paying the 550 *l.* gave her an eſtate for life, and if ſhe did not pay it, could never intend that the ſon ſhould not have the eſtate upon paying this 550 *l.*

A term of 99 years created, with a remainder over, if the tenant for life paid not the 550 *l.* it is a refuſal of this eſtate, and it ſhall go over to the remainder man.

The truſtees have a power to raiſe it by ſale or mortgage of all or part of the eſtate, and after the money was raiſed, they were to aſſign over the truſt, either at the requeſt of the wife, or the ſon.

If the wife ſhould not requeſt, then at the requeſt of the ſon, which ſhews plainly, that the father had provided for the contingency of the mother's not paying.

The intention of the teſtator was, that the money ſhould be raiſed at all events, and to make a compleat ſettlement of his whole eſtate.

It is not pretended by the defendant, that there has been a fine levied, or recovery ſuffered of this eſtate, but only a covenant by the plaintiff's father, who ſold it to levy a fine, and no covenant by tenant in tail can bind the iſſue in tail.

Mr. Attorney general for the defendant.

I have often heard it laid down here, that this court will not entertain a bill, where the demand is under 10 *l.* and the plaintiffs own witneſſes do not pretend to ſay that the timber cut down amounts to more than 30 *s.* in value.

The father of the plaintiff conveyed the eſtate to a fair and *bona fide* purchaſer, and therefore the plaintiff who is a meer volunteer, claiming under a perſon who might have barred him by a fine, ſhall not overturn a purchaſe for a valuable conſideration.

The whole inheritance of the eſtate was ſold for 660 *l.* can it be ſaid then that the wife had any benefit from an eſtate for life, chargeable with 550 *l.* where the whole inheritance is worth but 660 *l.* ſo that it appears plainly to be the intention of the teſtator, to make a proviſion for his daughters, without regarding any of the limitations of this eſtate.

He then called for the deed in which the plaintiff's father conveyed the eſtate to Mrs. *Stillingfleet* the purchaſer, and read out of it the covenant on the part of the ſeller, to levy a fine in the term following.

He concluded with ſaying, that the eſtate for life to the wife, and all the eſtates concomitant upon it, depended on a contingency, the payment of the 550 *l.* and as that was not paid, the limitations cannot be ſaid to have taken place.

Lord

Lord Chancellor: The only queſtion is upon the title, and when that is determined, the decree as to the matters prayed by the bill will follow of courſe, and it depends upon the limitations in the will of old *Walter Hayward.*

He plainly declares his intention in the beginning, to diſpoſe of his whole eſtate at all events, after this he gives to his three daughters 550 *l.* to be paid out of his lands in *Cranbourn*, and then appoints the manner of raiſing it, and ſays, if his wife pay the 550 *l.* within 4 years after his deceaſe, then he gives her an eſtate for life, out of the inheritance of his land.

If it be a condition, it is inſiſted it is annexed to the term for 99 years, and that he intended to give his wife an eſtate in the term, but I think this cannot be ſo conſtrued contrary to the words, for tho' it is aukwardly expreſſed, yet he meant to carve an eſtate for life out of the inheritance of the eſtate, and not out of the term.

The queſtion is, Whether the words of payment amount to a condition, or a limitation, and whether a condition precedent or ſubſequent?

Now I think they cannot create a condition ſubſequent, for the heir at law to whom an eſtate tail is after given, muſt be the perſon to enter and defeat the condition, becauſe an eſtate of freehold cannot ceaſe without an entry for a breach of the condition, and here has been no entry, and this would deſtroy the whole intention of the will, which would not at all ſerve the plaintiff, nor can it be a condition precedent, for as I ſaid before, if there was a breach, no body can take advantage of it but the heir at law, for a deviſee cannot, and ſuch a conſtruction would defeat the eſtate tail.

And wherever there is a limitation with remainders over, made in the words of a condition, which would be conſtrued as a condition, if they could effect, it ought to be conſtrued as a limitation, if they cannot.

I am of opinion that this is a conditional limitation in the wife, taking place as an executory deviſe: For it cannot be a contingent remainder, for that can never depend upon an eſtate for years, but muſt have a *freehold* to ſupport it.

And though this is an executory deviſe to the wife, which never took effect, yet the eſtate tail to the ſon is well limited, and took place.

The caſe of *Scattergood* and *Edge*, 1 *Salk.* 229. is in point.

This being an executory deviſe, the freehold deſcended to the ſon as heir at law to the teſtator, till the 4 years were elapſed, or his wife had performed the condition, as a part of the inheritance undiſpoſed of, and where an eſtate veſts by deſcent, it can never deveſt again.

It has been inſiſted upon for the defendant, that this is a very hard caſe againſt him who claims under a purchaſer for valuable conſideration, but if it is a purchaſe of an eſtate with notice of the title, it takes off from the hardſhip.

It has been objected too, that the plaintiff comes too early, but though he cannot enter during the term, yet he may apply to this court to preſerve the inheritance.

A ſurrender of the term would not be proper, becauſe it is not merely in the nature of a ſecurity, but an abſolute power in the truſtees to ſell the eſtate for raiſing the daughters portions.

Upon the whole, I think by this deviſe the ſon has a good eſtate tail in the inheritance, expectant on the determination of the term of 99 years.

Therefore his Lordſhip decreed an injunction to ſtay waſte, and the deeds and writings that concern the plaintiff's title to the inheritance to be ſecured for his benefit, and gave no coſts on either ſide.

(D) Where a deviſe ſhall or ſhall not be in ſatisfaction of a thing due.

May the 19th 1738. Eaſter term.

Heather v. *Rider.*

Caſe 193.

EDWARD Heather, the grandfather of the plaintiff, being ſeiſed in fee of ſeveral freehold eſtates, and likewiſe poſſeſſed of leaſehold eſtates, and alſo of a conſiderable perſonal eſtate, by his will bequeathed an annuity of 20*l.* to his daughter *Anne Hunterford*, and the heirs of her body quarterly, without any abatement; and in caſe ſhe died without iſſue, then to his two ſons *Edward* and *William*, whom he made his executors. *William Heather* died inteſtate, and left iſſue *Edward* the plaintiff, and three other children. *Edward Heather*, the uncle, by his will gave an annuity of 20*l.* to his ſiſter *Anne Hunterford* and her daughter after her, to be paid quarterly, without any abatement, out of his freehold houſes in *Holborn*; but in caſe they die without iſſue, then the ſaid 20*l. per ann.* to return to his nephew the plaintiff, and gave him beſides all his real eſtate which he had from his father.

A. gives an annuity of 20*l.* to his daughter, and the heirs of her body quarterly, without any abatement. *B.* the ſurviving executor of *A.* gives to the daughter of *A.* and her daughter, an annuity of 20*l.* by his will, to be paid quarterly without any abatement out of his freehold houſes in *Holborn*, and if they die without iſſue, then to return to the plaintiff his heir; and by indorſement upon the will with a pencil, ſays, " I hope this 20*l.* will not be taken for another 20*l.* annuity, but to con- " firm the 20*l. per ann.* her father left her and her daughter.

And by a codicil ſays, " I hope the 20*l.* to my ſiſter *Hunterford* " herein will not be taken for another 20*l. annuity*, but to ſettle and " confirm the 20*l. per ann.* her father left her and her daughter; " and if they die without iſſue, let it come to my heir *Edward* " *Heather.*"

The codicil was not executed according to the ſtatute of frauds and perjuries, for it was only an indorſement upon the back of the will, and with a pencil.

The queſtion was, Whether theſe are to be conſidered as two diſtinct annuities?

The indorſement of no weight, as nothing can either enlarge or diminiſh what affects real eſtate, unleſs it be executed according to the ſtatute of frauds and perjuries.

Lord Chancellor: The teſtator's intention is moſt plain, (if the court can take notice of it) by the indorſement *that* his ſiſter ſhould have only one annuity, and that he was only willing to confirm and ſettle it on a more ſecure fund than a fluctuating perſonal eſtate, by charging it on his real eſtate, which was not done by the father's will.

If it had been inſerted in the will, there could have been no doubt; but as nothing can be taken either to enlarge or diminiſh what affects a real eſtate, unleſs it be executed according to the ſtatute of frauds and perjuries; and as the teſtator has not complied with the directions of that ſtatute, this indorſement cannot be of any weight.

In conſtruing one legacy to be a ſatisfaction for another, regard muſt be always had to the particular circumſtances, limitations, and funds out of which the two ſeveral legacies are to ariſe. The daughter of *A.* not intitled to both annuities.

I very much queſtion if this laſt annuity can be taken as a ſatisfaction of the annuity given by the father's will, it being charged on a different fund, and given in another manner; for regard has been always had to the particular circumſtances, limitations, and funds out of which legacies are to ariſe: Yet I think ſhe is not intitled to both annuities, but not ſo much on account of the codicil, as by way of exoneration of the perſonal eſtate of the father. He was the only perſon chargeable by way of perſonal demand, and might by codicil or teſtamentary ſchedule, which affects a perſonal eſtate according to the rule in the civil law, direct that in caſe his ſiſter ſhould take the annuity under his will, ſhe ſhould not have it out of his father's perſonal eſtate, but that his perſonal eſtate ſhould be diſcharged therefrom; and taking it in that light, it does not contradict the ſtatute of frauds and perjuries, and for that reaſon his Lordſhip altered Sir *Joſeph Jekyll*'s decree.

February the 11th 1737.

Bellaſis v. *Uthwatt.*

Caſe 194.

R. B. on his marriage in 1713, ſettled exchequer annuities for 99 years, amounting to 300*l.* *per ann.* in truſt to himſelf for life, remainder to his wife for life, remainder to his children in ſuch manner as he ſhould appoint. By the marriage there was only one child, a daughter. In 1720. *R. B.* deviſed all his real and perſonal eſtate to his wife and her heirs, charged with 10,000*l.* as a portion for his daughter, payable at eighteen. After the death of *R. B.* his wife makes her will, and gives all her real and perſonal eſtate to her daughter and her heirs; *but if ſhe die before ſhe was of age to diſpoſe thereof*, then to truſtees to raiſe 6000*l.* for a charity, the reſidue thereof, *if her daughter dies unmarried*, to the ſiſters of the teſtatrix. The daughter, after the mother's death, marries the plaintiff, has iſſue a daughter, and dies about the age of twenty. The plaintiff, as repreſentative of his wife, and in his own right, brings a bill for an account of the real and perſonal eſtate of *R. B.* and his wife.

IN 1713, on the marriage of *Rupert Billingſley* with *Mary* his wife, he made a ſettlement of ſome exchequer annuities for 99 years, to the amount of 300*l.* *per ann.* in truſt for himſelf for life, remainder to his wife for life, remainder to his children, in ſuch manner as he ſhould appoint; and if no children, to his executors, adminiſtrators, and aſſigns. By this marriage there was only one child, *Bridget.*

Rupert was likewiſe ſeiſed of a conſiderable real and perſonal eſtate, and in 1720 deviſed all his real and perſonal eſtate to his wife and her

her heirs, charged with the payment of 10,000*l.* as a portion for his daughter, payable at the age of 18 years; and in caſe his wife ſhould marry again, that then the eſtate ſhould ſtand charged with a further ſum of 5000*l.* for his daughter.

Soon after the death of *Rupert*, *Mary* made her will, and thereby deviſed all her real and perſonal eſtate to her daughter and her heirs; but in caſe ſhe ſhould die *before ſhe was of age to diſpoſe thereof*, then ſhe gave the ſame to truſtees for raiſing the ſum of 6000*l.* for founding an hoſpital for ſeamens widows; *the reſidue thereof*, in caſe her daughter ſhould die unmarried, to go to the ſiſters of the teſtatrix of the whole blood.

Mary died ſoon after ſhe made her will, leaving *Bridget* her daughter, an infant between eleven and twelve years of age. In a few years after her mother's death, *Bridget* marries *William Bellaſis*, by whom ſhe had one daughter, and died, being then about the age of twenty.

The plaintiff, as adminiſtrator to his wife, and alſo in his own right, together with his infant daughter, bring a bill againſt the ſiſters of the teſtatrix *Mary*, and againſt the truſtees of the charity, praying an account of the real and perſonal eſtate of *Rupert* and *Mary*.

Lord Chancellor: The firſt point that has been made in this caſe is, Whether *Bridget* was intitled to theſe annuities under the ſettlement, though there was no appointment of them to her by the father, or whether the whole intereſt therein was not veſted in the father, and the daughter not intitled to the ſame without an appointment in her favour by the father.

I am of opinion the daughter was intitled under the ſettlement (which was recited to be made in purſuance of marriage articles) to the exchequer annuities, as an intereſt veſted in her, and that the father had only a power reſerved to him of making ſuch diſpoſition thereof among his children as he thought proper, and there being only one child that ſhe was intitled to the whole, and the plaintiff her huſband intitled thereto in her right.

The daughter intitled under the ſettlement to the exchequer annuities, as an intereſt veſted in her, and the father had only a power of diſpoſing thereof among his children as he thought proper, and there being only one child, ſhe is intitled to the whole.

Another point has been made, whether the 10,000*l.* deviſed by the father to *Bridget*, ſhould be taken to be in ſatisfaction of theſe annuities, and ſo the annuities be conſidered as part of the father's perſonal eſtate, which he had a right to diſpoſe of by his will.

The 10,000*l.* deviſed by the will of the father to the daughter, ſhall not be taken to be in ſatisfaction of the annuities.

I am of opinion it cannot be taken to be in ſatisfaction, but that *Bridget* is intitled to both as a double portion; and though there are a great many caſes where the court inclines againſt them, yet regard is always to be had to the circumſtances of the caſe: As for inſtance, where there is an eldeſt ſon, or more children, and the demand is

Though the court leans againſt double portions, yet regard muſt be had to circumſtances; as where there is an only child.

an eldeſt ſon, or more children, and the demand would be to their prejudice, but here it is

made of ſuch double portion to their prejudice; but it is otherwiſe here, the caſe of an only child, and the queſtion, whether this ſhall be implied a ſatisfaction, when it is not ſo expreſſed by the father.

The thing given in ſatisfaction muſt be of the ſame nature, and attended with the ſame certainty, as that in lieu of which it is given, and land is no ſatisfaction for money, nor *vice verſâ*; and though they are both of the ſame nature here, yet the legacy of 10,000*l.* is ſubject to a contingency of her arriving at eighteen, and a mere contingency ſhall not take away a portion abſolutely veſted, eſpecially in the caſe of an only child.

In reſpect to the doctrine of ſatisfactions, when a bequeſt is taken to be by way of ſatisfaction for money before due, the thing given in ſatisfaction muſt be of the ſame nature, and attended with the ſame certainty as the thing in lieu of which it is given, and land is not to be taken in ſatisfaction for money, nor money for land. It is true, here they are both of the ſame nature, both perſonal eſtates; but the legacy of 10,000*l.* is ſubject to a contingency, and not payable unleſs *Bridget* ſurvived the age of eighteen years, and beſides ſhe might have lived till the annuities were run out, as ſeveral of the years were already gone; and as the 10,000*l.* legacy might never have become payable, it will be hard to ſay that a mere contingency ſhall take away a portion abſolutely veſted, eſpecially in the caſe of an only child. If indeed the father had diſpoſed of theſe annuities to any other perſon, it might have been a queſtion whether the 10,000*l.* ſhould not be taken to be in ſatisfaction, and whether upon thoſe circumſtances *Bridget* ought to be allowed to inſiſt on both demands?

As a perſon at the age of 14 may diſpoſe of perſonal eſtate, as the law now ſtands, the daughter was intitled at that age to all the perſonal eſtate deviſed to her by her mother; and as ſhe made no diſpoſition, it will go to the husband. The word *thereof* muſt be conſtrued *reddendo ſingula ſingulis*, as applied to perſonal or real eſtate.

Another queſtion is made, whether the huſband is intitled in the right of his wife to all the perſonal eſtate deviſed to her by *Mary* her mother, *in caſe ſhe ſhould die before ſhe is of age to diſpoſe thereof?* As at the age of 14 ſhe might have diſpoſed of the perſonal eſtate, as the law now ſtands, it muſt be the intention of the teſtatrix that ſhe ſhould at that age have it abſolutely; and as ſhe made no diſpoſition, it is proper it ſhould go to the huſband, as the repreſentative of his wife, eſpecially as ſhe lived to be 20. The word *thereof* muſt be conſtrued *reddendo ſingula ſingulis*, as it is applied to the perſonal or real eſtate; and with regard to the latter deviſed by the mother's will, the huſband's claim of tenancy, by the curteſy therein, is not to be ſupported, in regard *Bridget* died before ſhe was in a capacity of diſpoſing of the real eſtate, and the contingency therefore happening on which the 6000*l.* was given to the charity, that muſt take place.

The reſidue of the mother's real eſtate, after the charity, ſhall go to the daughter, and ſo to the husband, as tenants by the curteſy, as the contingency on which it is given over has never happened, and in doubtful caſes the heir is always to be preferred.

But then it has been ſaid a queſtion might be made as to the ſurplus of the real eſtate after the charity provided for; *the words are, The reſidue thereof, in caſe her daughters ſhould die unmarried, to go to the teſtatrix's ſiſters, &c.* And I think that might go to *Bridget*, and ſo to the plaintiff her huſband, as tenant by the curteſy; becauſe the words may be taken, that if *Bridget* die unmarried, then the reſidue to go to the ſiſters: But as the contingency never happened, and as in doubtful caſes the heir is always to be preferred, *Bridget* is intitled as heir at law to her mother.

His

His Lordſhip declared that the plaintiff, as adminiſtrator of his late wife, was intitled to the reſidue of the perſonal eſtate of her mother, and to an account of the perſonal eſtate of *Rupert Billingſley* her father; and if the perſonal eſtate be not ſufficient to pay the 10,000*l.* it ſhall be conſidered as a charge upon his real eſtate. He directed the long annuities to be aſſigned to the plaintiff as adminiſtrator of his wife, and as to the real eſtate deviſed by *Rupert Billingſley* to *Mary* his wife, and afterwards deviſed by the will of *Mary*, declared the ſame liable to anſwer the 6000*l.* given to charitable uſes, and ſubject thereto, the plaintiff is intitled to it for his life as tenant by the curteſy, and his daughter after his death intitled to the real eſtate in fee.

Vide title *Dower and Jointure.*

(E) What Words paſs an eſtate tail.

May the 2d 1738. Eaſter Term.

Jonathan Ivie an infant, by *George Rooke* his next friend, Plaintiffs.
John Ivie, *Belfield*, *Strange*, *Buck*, and *George Ivie*, — Defendants.

Caſe 195.

A. by his will deviſes to his eldeſt ſon *Jonathan* a real eſtate for life, remainder to his ſons in tail male, remainder to teſtator's ſecond ſon *John* for life, remainder to his ſons in tail male, remainder to plaintiff's father *George Ivie* for life, remainder to his ſons in tail male, remainder over. And alſo gave to three truſtees two long annuities of

JONATHAN IVIE, the plaintiff's grandfather, by will dated the 7th of *March* 1717, deviſed to his eldeſt ſon *Jonathan Ivie*, his manor of *Bearford*, with the advowſon thereto belonging for life, remainder to his ſons in tail male, remainder to the teſtator's ſon *John Ivie* for life, without impeachment of waſte, remainder to his ſons in tail male, *remainder to the plaintiff's father* George Ivie *for life, remainder to his ſons in tail male*, remainder over, and alſo gave to defendants *Strange*, *Buck*, and *Belfield*, two long annuities of one hundred pounds each, *in truſt* as to one for the plaintiff's father for life, and then to the plaintiff for life, remainder to the iſſue male of his body, with divers remainders over. And as to the other, *in truſt* for his ſon *Robert* for life, and in default of iſſue male, remainder to the ſaid *John Ivie* for life, remainder to his iſſue male, in tail male, remainder to the ſaid *George Ivie* for life, remainder to the plaintiff for life, remainder to the plaintiff's iſſue male, with divers remainders over; and appointed *John Ivie* his executor, who poſſeſſed the perſonal eſtate, together with the title deeds to the real, and the tallies

100*l.* each. in truſt as to one for the plaintiff's father for life, and then to the plaintiff for life, remainder to the iſſue male of his body, remainder over; and to the other, in truſt for teſtator's ſon *Robert* for life, and in default of iſſue male, remainder to *John Ivie* for life, remainder to his iſſue male in tail male, remainder to *George* for life, remainder to plaintiff for life, with divers remainders over, and appointed *John* his executor, who poſſeſſed himſelf of the title deeds of the real eſtate, and tallies belonging to the annuities.

Jonathan Ivie is dead without iſſue, *Robert* likewiſe without iſſue male, and the ſon of *John Ivie*, born after teſtator's death, is ſince dead, and his father has adminiſtred.

In 1720 *John* joined with *George* in ſale of the annuity deviſed to *George* for 3250*l.* and the purchaſe money was paid to *George*.

The plaintiff, the ſon of *George*, brings his bill to have the deeds and writings relating to the real eſtate depoſited in court; and as to the annuity deviſed to *John* and to the plaintiff in remainder, to have ſecurity given for the payment of it, when his intereſt therein ſhould take effect in poſſeſſion.

And as to the other annuity, to have a ſatisfaction againſt *John* for the breach of truſt, in concurring in the ſale thereof to the plaintiff's prejudice, and for an equivalent upon the death of his father *George Ivie*.

and orders belonging to the annuities; and in 1720, without the conſent of the truſtees, ſubſcribed them all into the ſtock of the *South Sea* company.

Robert Ivie, after the death of the teſtator, died without iſſue male; *Jonathan Ivie*, the teſtator's eldeſt ſon, died ſeveral years ſince without iſſue, and *John Ivie* had a ſon, who died ſince the teſtator, and the father has adminiſtred to him, and is now without any children. In the year 1720, the truſtees declining to accept the truſt, *John* joins with his brother *George* in the abſolute ſale of the annuity deviſed to *George* for 3250*l.* and all the purchaſe money is accordingly paid to *George*.

The plaintiff inſiſts, that by the death of *Robert* without iſſue male, he is intitled to have the lands ſettled according to the will, and the produce of the long annuities; and therefore the bill is brought for an execution of the truſts in the will of *Jonathan Ivie* his grandfather, and that the deeds and writings relating to the real eſtate may be depoſited in court, for the mutual benefit of all parties intitled thereto, and againſt his father and his uncle *John*. As to the annuity deviſed to *John* and to plaintiffs in remainder, to have ſecurity given for the payment of this annuity to him, when his intereſt therein ſhould take effect in poſſeſſion; and as to the other annuity, to have a ſatisfaction againſt *John* for the breach of truſt in concurring in this ſale to the prejudice of the plaintiff, and that an equivalent might be provided for him to have the benefit of, upon the death of his father, when the annuity would have come to him, if no ſuch ſale had been made thereof.

Lord Chancellor of opinion, as to the annuity deviſed to *Robert*, and afterwards to *John* for life, *&c.* that there being words of limitation annexed, ſuch as would create an eſtate tail in the caſe of a real eſtate upon the birth of the ſon of *John*, the whole intereſt in remainder veſted in ſuch ſon; and that *John*, as adminiſtrator to his ſon, is abſolutely intitled to it; and as to this demand, diſmiſſed the bill.

Lord Chancellor was clearly of opinion, that as to the annuity deviſed to *Robert*, and afterwards to *John* for life, *&c.* that there being words of limitation annexed, ſuch as would create an eſtate tail in the caſe of a real eſtate, upon the birth of the ſon of *John*, the whole intereſt in remainder after the death of *John* veſted in ſuch ſon, and that the defendant *John Ivie* is abſolutely intitled to that annuity as adminiſtrator to his ſon, and therefore as to this demand, he ordered the bill ſhould ſtand diſmiſſed.

Where a truſtee has been corruptly guilty of a breach of truſt, the court will compel ſuch truſtee to make ſatisfaction to the utmoſt; but as to the annuity ſold by *John*, as it was at the inſtance of *George*, and the money received by *George*, he would not charge *John* with the price the annuity was ſold at, but decreed that *George* and *John*, or one of them, do, at their own charge, purchaſe an exchequer annuity of 100*l.* a year for 99 years, and aſſign the ſame to truſtees, to be approved of by the Maſter, and the truſts thereof declared according to the limitations in the will.

As to the other demand, he ſaid, when a truſtee had, in a corrupt or unfair manner, been guilty of a breach of truſt, the court will ſometimes compel ſuch truſtee to make a ſatisfaction to the utmoſt; yet as *John* was induced in this caſe to come into a ſale of this annuity at the preſſing inſtance and requeſt of his brother, in order to raiſe money, and the money was in fact received by *George*, he would not

charge the defendant *John* with the price of the annuity, as it then ſold, but decreed that *George Ivie*, and *John Ivie*, or one of them, do at their, or one of their own charges, purchaſe an Exchequer annuity of 100*l.* a year for 99 years, of the like nature and value of the Exchequer annuity which was ſold, and aſſign the ſame to truſtees to be approved of by the Maſter, and that the truſts thereof be declared according to the limitations in the will; and further declared, that it appearing by proofs in the cauſe, the ſaid annuity was ſo ſold at the requeſt of the defendant *George Ivie*, the tenant for life thereof, and that the purchaſe money came to his own uſe, the defendant *John Ivie* ought to be indemnified by *George*, from the expence he may be put to by being obliged to purchaſe ſuch annuity, and that in caſe *John* ſhall purchaſe ſuch annuity, and aſſign the ſame to ſuch truſtees, or ſhall be at any expence in the purchaſe thereof, he ſhall be at liberty to proſecute this decree againſt *George Ivie* in the plaintiff's name, to compel *George* to purchaſe ſuch annuity, and aſſign the ſame as aforeſaid, in order to oblige *George* to reimburſe *John* the principal money, which ſhall have been ſo laid out by him, in and about the purchaſe of ſuch Exchequer annuity, and the intereſt thereof, and all ſuch expences as he ſhall have been put to as aforeſaid; and that till *George* ſhall have ſo done, ſuch growing payments of the annuity which ſhall be ſo purchaſed by *John*, as ſhall accrue during the life of *George Ivie*, be paid to *John* towards ſuch indemnity, and directed the defendants *George* and *John*, to pay the plaintiff his coſts as to this part of the cauſe.

His Lordſhip refuſed to direct the *deeds and writings* to be depoſited in court, becauſe the plaintiff's intereſt in the real eſtate was too remote to warrant it, and is never done but in the caſe of a remainder man, whoſe intereſt is expectant on a mere tenancy for life.

As to that part of the plaintiff's bill which prayed the deeds and writings of the real eſtate, which were in the hands of *John* the tenant for life, might for the better ſecurity of the plaintiff, in whom the inheritance was lodged, be taken out of his hands, and depoſited in court; his Lordſhip agreed this to be the common practice in the caſe of a remainder man, whoſe intereſt was expectant on a mere tenancy for life, but as there was a contingent limitation here to all the ſons of *John*, and after that an eſtate for life in *George* the plaintiff's father, he thought the plaintiff's intereſt too remote to warrant ſuch a proceeding, and that as ſuch limitations are extremely frequent; if ſuch a practice ſhould be ſuffered to prevail, the title deeds of half the eſtates in the kingdom might be brought into court; beſides in the preſent caſe, the firſt tenant for life is not the heir at law, but takes by the will as well as the remainder man, ſo that there is no danger of deſtroying the deeds, as there might be in caſe he was heir, in order to better his eſtate, and as there is no precedent for any thing of this kind, he declared he would not make one; and therefore, as to ſo much of the plaintiff's bill as ſeeks to have the title deeds depoſited in this court, his Lordſhip ordered the bill to ſtand diſmiſſed.

Eaſter

Eaſter term 1738.

Wyld v. *Lewis.*

Caſe 196. *R. W.* by his will deviſed to his wife *Elizabeth* all his lands, &c. not ſettled in jointure, and then ſays, if it ſhall happen that ſhe ſhall have *no ſon nor daughter* by me, for want of ſuch iſſue, the ſaid premiſſes to return to my brother (the plaintiff) if he ſhall be then living, and his heirs for ever, paying to *A.* and *B.* 150 *l.* within a year after *Elizabeth*'s death.

Decreed to be an eſtate tail in *Elizabeth*, becauſe where preceding words are proper to create an eſtate tail, the legal operation of them cannot be controuled by ſubſequent proviſions.

RICHARD Wyld by his will "deviſed to his wife *Elizabeth*, now the wife of the defendant, all his lands, &c. not ſettled in jointure generally," and then follow theſe words, "If it ſhall happen that my ſaid wife *Elizabeth ſhall have no ſon nor daughter* by me begotten on the body of the ſaid *Elizabeth*, *and for want of ſuch iſſue*, then the ſaid premiſſes to return to my brother *John Wyld*, if he ſhall be then living, and his heirs for ever, only paying to his two brothers (*A.* and *B.*) the ſum of 150 *l.* within one year after the deceaſe of the ſaid *Elizabeth*."

Elizabeth had a daughter born after the death of the teſtator, and ſince dead. The bill was now brought by *John Wyld* the brother of the teſtator, and who is likewiſe his heir at law, to reſtrain the defendants from committing waſte; and the queſtion was, What eſtate *Elizabeth* took by the will, whether in tail, or for life only?

Mr. *Brown* for the plaintiff inſiſted ſhe took for life only, that the words in the will (*if ſhe has no ſon or daughter*) would certainly not raiſe an eſtate tail by implication, and the ſubſequent words, (*for want of ſuch iſſue*) will not enlarge the eſtate, the word (*ſuch*) reſtraining the word (*iſſue*,) to mean only *ſuch ſon or daughter*; that the word *iſſue* received ſuch a reſtrained conſtruction for the ſame reaſon, in the caſe of *Popham* v. *Banfield*, Salk. 236. *for there the deviſe was to* A. *for life, remainder to the firſt ſon of* A. *in tail male, and ſo on to the* 10*th ſon, and if* A. *die without iſſue male, remainder over; it was inſiſted* A. *had an eſtate tail, but the court held otherwiſe, and conſtrued the words, dying without iſſue male, a dying without ſuch iſſue male.*

That it was the intent of the teſtator, that *Elizabeth* ſhould take for life only, appears farther from the limitation in the will to *John if he ſhould be then living*; ſo likewiſe from the direction for paying the money within a year, and to the two brothers, particularly naming them, which proviſions ſeem to imply plainly an intention in the teſtator, that the eſtate of *John* ſhould commence, if at all, on the death of *Elizabeth*, and was not intended to wait till an eſtate tail ſhould be ſpent. That the limitation here to *John* was merely contingent, and ſuch contingency never happening, becauſe *Elizabeth* had a daughter, the plaintiff *John* does not claim under this deviſe, but as heir at law to the teſtator, is intitled to the reverſion in

fee expectant on the eſtate for life, limited to the wife under the will.

Mr. *Fazakerley e contra.* To prove this an eſtate tail, cited *Newton* v. *Barnardine*, *Moore* 127. and *Byfield*'s caſe, *Hil.* 42 & 43. *Eliz.* cited by *Hale* Chief Juſtice, in *King* v. *Melling*, 1 *Ventr.* 231. *there the deviſe was to* A. *and if he dies, not having a ſon, then to remain to the heirs of the teſtator. Son was there taken to be uſed as* nomen collectivum, *and held an entail.* He likewiſe cited 2 *Vern.* 766. *Pinbury* v. *Elkin*, it is ſaid there, *if he die, not having a ſon*, that theſe words create an eſtate tail. To inforce this conſtruction, Mr. *Fazakerley* inſiſted on the abſurdity which would otherwiſe follow, that ſuppoſing *Elizabeth* not tenant in tail, but for life only, with a contingent limitation to any ſon or daughter of her's, if ſuch ſon or daughter ſhould die in the life of the mother, though leaving iſſue, ſuch iſſue could never take within the words of the will, which can never be preſumed to be the intent of the teſtator.

Mr. *Wilbraham* on the ſame ſide, ſaid in the caſe of *Popham* v. *Bamfield*, the foundation the court went on in conſtruing that an eſtate for life only was the expreſs deviſe for life to the firſt deviſee, for the words are, " there is a mighty difference between a deviſe to " *A.* and if he die without iſſue, to *B.* and a deviſe to *A.* for life, " and if he die without iſſue, then to *B.*

Mr. *Brown* in reply ſaid, if the teſtator by his will had made a certain and abſolute diſpoſition of the whole fee, the objection that the grandchildren would by this conſtruction be excluded, would be ſtrong againſt us, but here a contingent diſpoſition only, is made of the inheritance to *John*, which contingency has not taken effect, and the eſtate deſcends as was intended by the teſtator, if ſuch contingency ſhould not happen, ſo that no excluſion of the grandchildren could poſſibly be.

Lord Chancellor: It ſeems clear from the words of the will, (as to all my worldly eſtate) which introduce the diſpoſing part of the will, that the teſtator intended to make an abſolute diſpoſition of his whole eſtate by his will, and not ſuffer any part to deſcend as undiſpoſed of, in caſe of any contingency; and as he intended a diſpoſition of the whole by his will, the objection that the grand children by this conſtruction are liable to be excluded, is a very ſtrong argument for conſtruing this an eſtate tail, and the inclination to avoid this abſurdity has been the principal reaſon for conſtruing words of the ſingular number, and which are properly deſcriptive of particular perſons only, in a collective ſenſe, as including the deſcendants of the firſt taker, and was the governing reaſon, in the caſes of *Dubber* v. *Trollop*, *in B. R.* and *Shaw* and *Weigh*, 28th *April* 1729. *in Dom. Proc. Eq. Caſ. Abr.* 185. The caſe cited in *Ventris* is full as ſtrong as the preſent; here is no difference in the conſtruction of the deviſe of a real eſtate, between a proviſion, that if deviſee dies, not having a ſon, as it is there, or if the deviſee has not a ſon as *here.*

In *Popham* v. *Bamfield*, an expreſs eſtate for life is limited to the deviſee, which has always had a great influence in the conſtruction of

a will, when the queſtion has been, Whether tenant for life, or in tail?

If *Elizabeth* has no ſon nor daughter, muſt be underſtood having no iſſue, and the words, for want of ſuch iſſue, amount to the ſame, as if he had ſaid for want of ſuch iſſue generally.

Great ſtreſs has been laid by the plaintiff's counſel upon the word *ſuch*, as if it reſtrained the word *iſſue* to mean only *ſuch* ſon or daughter, and that the precedent words, if *Elizabeth* has no ſon nor daughter, will not raiſe an eſtate tail by implication; but in *Wild*'s caſe, 6 *Co.* 16. *b.* it was reſolved, "that if *A.* deviſeth his lands to *B.* "and his children or iſſue, and he hath not any iſſue at the "time of the deviſe, that the ſame is an eſtate tail, for the intent of "the deviſor is manifeſt and certain, that his children or iſſues "ſhould take, and as immediate deviſees they cannot take, becauſe "they are not *in rerum natura*, and by way of remainder they can-"not take, for that was not his intent, for the gift is immediate; "therefore, there ſuch words ſhall be taken as words of limitation, "*viz.* as much as children or iſſues of his body, for every child or "iſſue ought to be of the body." And I am of opinion here, the words *ſon nor daughter* muſt be taken in the ſame ſenſe, as having no iſſue, and then the word *ſuch* will have no weight, but will amount to the ſame thing, as if he had ſaid, for want of iſſue, and the words, having no iſſue, or dying without iſſue, have been always conſidered in the ſame light, both in law and equity.

The direction for the payment of the 150 *l.* within a year, are very proper circumſtances in general to be made uſe of, to induce the conſtruction contended for by the plaintiffs, and what may ſeem to imply an intent in the teſtator, that the intereſt of *John Wyld* under the will ſhould, if at all, commence on the death of *Elizabeth*, but if the preceding words are proper to create an eſtate tail, the legal operation of them cannot be controuled by thoſe ſubſequent proviſions. The bill muſt therefore be diſmiſſed.

(F) Of things perſonal, as goods and chattels, &c. by what deſcription, and to whom good.

February the 27th 1738.

The Attorney general v. *Pyle.*

Caſe 197. *A.* deviſes a freehold meſſuage at *Rumford*, to the charity ſchool there, and directs the rents and profits to be applied for the benefit of the ſchool, *ſo long as it ſhall be endowed with charity.*

"*A.* Deviſes a freehold meſſuage at *Rumford* to the charity ſchool there, and directs the rents and profits ſhall be applied for the benefit of the ſaid ſchool, *ſo long as it ſhall continue to be endowed with charity*," and afterwards he deviſes in theſe words, "Whereas there is now owing to me from *John Stephenſon* and company, now reſiding at *Oporto*, the ſum of 1000 *l.* I do hereby give the ſaid ſum to the worſhipful company of the coopers, to build almshouſes at *Rumford*."

And by the ſame will reciting a debt of 1000 *l.* to be owing to him, gives the ſaid ſum to the Coopers company to build almshouſes.

The debt deviſed by the will, inſtead of 1000 *l.* amounted to 365 *l.* 16 *s.* 7 *d.* only.

The freehold eſtate being deviſed to a charity, ſo long as it continues to be endowed with charity, is only given *quouſque*, and when it ceaſes as a gift of real eſtate, it ſhall revert for the benefit of the heir of teſtator.

Though the debt deviſed by the will amounts only to 365 *l.* 16 *s.* 7 *d.* yet the wrong deſcription, and falling ſhort, will not defeat the legacy.

The teſtator alſo appointed the intereſt of the 1000 *l.* to be paid yearly, in ſeveral proportions, and for ſeveral purpoſes. At the time of the teſtator's death, the ballance of the account from *Stephenſon* and company amounted only to 365 *l.* 16 *s.* 7 *d.* The information was brought at the relation of the coopers company, to have the directions of the court with regard to theſe deviſes, and for the eſtabliſhment of the charity.

Lord Chancellor: Where a ſum of money is given to a charity, ſo long as it ſhall continue to be endowed with charity, it is only given *quouſque*, and when it ceaſes, if it is a gift of real eſtate, it ſhall fall into the inheritance for the benefit of the heir, if perſonal, into the *reſiduum*.

Where a perſon gives a debt by his will to a corporation, they may recover it in the eccleſiaſtical court.

Where a perſon gives a debt of 1000 *l.* which was due to him, to a corporation, it veſts in them in law, and they might have recovered it in the eccleſiaſtical court. The only queſtion that remains then, is, as to the truſt of this legacy; the general intention of the teſtator was, to give a charity to the town of *Rumford*, and the coopers company; but if the truſt cannot be ſatisfied in the very terms intended by the teſtator, yet a wrong deſcription and falling ſhort will not defeat the legacy; for there are many caſes where a truſt for charity cannot take place according to the ſtrict intent of the teſtator,

and ſtill the charity ſhall not intirely fail, but the court will direct the application of it as far as they can, to carry the intent of the teſtator into execution, or at leaſt neareſt to the intent; and I will in this caſe endeavour to apply the legacies in ſuch a manner as will be moſt agreeable to the teſtator's deſign, *and do therefore declare, that the rents and profits of the freehold meſſuage at* Rumford *ought to be applied to the benefit of the charity ſchool at* Rumford, *ſo long as the ſaid charity ſchool ſhall continue to be endowed with charity, and decree the defendant* Lewis *the heir at law of the teſtator, to convey the ſaid meſſuage to the other defendants the truſtees of the charity.*

And let the ſum of 365 l. 16 s. 7 d. *be placed out at intereſt, and let the intereſt ariſing therefrom, be from time to time diſtributed among the alms people belonging to the almſhouſes of the coopers company, for the increaſe of their allowance, over and above what is now allowed them by the donor of the ſaid almſhouſes.*

(G) What words paſs a fee in a Will.

December the 6th 1739.

Sarah Cheeſeman, widow, —— —— Exceptant.

Francis Partridge, clerk, —— —— Reſpondent.

Caſe 198. *T. C.* by will gives *to the Latin ſchool of* Yeovill, five pounds, to be paid him yearly, for teaching and inſtructing 3 boys.

As it is not a gift to a particular ſchoolmaſter, but to the ſchool itſelf, it is a perpetuity, and the general words for inſtructing 3 boys, means 3 in ſucceſſion, one after another.

THOMAS Cheeſeman by will dated the 20th of *March* 1730. deviſed in the words following, I give to the charity ſchool of *Yeovill*, to be paid 12 months after my deceaſe, *the full and whole ſum of* 50 *l.* "*Item*, I give unto the Latin ſchool, if any man is poſſeſſed "of it, that teacheth boys, and is richly grounded in the Latin "tongue, the ſum of five pounds, to be paid him yearly for teach- "ing and inſtructing three boys. *Item*, I give to the poor of *Yeo- "vill* fifty ſhillings a year, to be paid every *Eaſter* after my deceaſe, "out of my eſtate of *Homer*, to be paid by my executrix. *Item*, I "give my wife *Sarah Cheeſeman*, that eſtate in *Homer* in the pariſh "of *Trent*, and alſo that at *Wandell* in the pariſh of *Mudford*, to "her and her heirs for ever, and made *Sarah* executrix.

Mr. *Partridge* was ſchoolmaſter, but 5 *l.* a year hath not been paid to him.

The commiſſioners named under a commiſſion of charitable uſes ordered, that *Sarah* ſhould within one month after notice pay to the defendant *Partridge* the ſaid 10 *l.* &c. and that the proprietor of the lands called *Homer*, for the time being, ſhould for ever pay unto ſuch perſon, as ſhould be ſchoolmaſter, the yearly ſum of five pounds, by equal half yearly payments at *Michaelmas* and *Lady Day*, and decreed that the lands called *Homer*, were charged with the payment of 5 *l.* for ever.

To which decree Mrs. *Cheeſeman* took exceptions, inſiſting that ſhe is not, nor ought to be bound thereby.

Firſt, For that the meſſuage, tenement and premiſſes, called *Homer*, deviſed to her, are not by the will charged with the payment of 5 *l.* a year, to ſuch perſon, and for ſuch purpoſes, as in and by the decree hath been adjudged.

Secondly, For that if the ſaid tenement and premiſſes were charged with the five pounds a year, the ſame was not by the will *made a perpetual charge thereon*, nor payable at ſuch times, and in ſuch proportions, as by the ſaid decree is likewiſe adjudged.

Lord Chancellor: The will is ſo inaccurately penn'd, that I believe this man made it himſelf, but though it cannot take place according to the words, I muſt make ſuch conſtruction as is moſt agreeable to the intention.

There ſeems to be two intentions of this teſtator.

Firſt, To give his money legacies independant of his annuities, and in groſs ſums; for the firſt legacy is the full and whole ſum of fifty pounds, *to be paid a twelvemonth after his death.*

Secondly, An annuity of five pounds, and another of fifty ſhillings to be paid yearly every year after his deceaſe.

The queſtion is, Whether the annuity of five pounds is a charge upon the eſtate at *Homer*.

In the firſt place, What is to be the continuance of this five pounds *per ann.* and that will determine in ſome meaſure the other queſtion, Whether the eſtate at *Homer* will be liable to anſwer it.

Now I am of opinion, that this was intended by the teſtator as a perpetuity, for he did not give it to a particular ſchoolmaſter, but to the ſchool itſelf, which is like the old caſe of a gift to the pariſh church of St. *Andrew, Holbourn*, which was conſtrued to be a gift to the parſon and pariſhioners of St. *Andrew*, and their ſucceſſors for ever.

A gift to the pariſh church of *A.* has been conſtrued a gift to the parſon and pariſhioners of *A.* and their ſucceſſors for ever.

Another circumſtance, that it is in general words, for the inſtruction *of three boys*, which muſt be underſtood to mean three boys in ſucceſſion.

There can be no queſtion as to the charging his eſtate at *Homer*, for he has made it liable in expreſs terms, and the calling his wife executrix in this clauſe, is only another deſcription of her, for the words immediately following, give the inheritance to the wife in this eſtate.

I am of opinion it cannot be charged upon teſtator's perſonal eſtate, becauſe the real eſtate is expreſly ſet apart to anſwer the annuities; for what the teſtator means by his reſpective legacies, are the pecuniary ſums, or ſums in groſs, that are before given in other parts of his will.

The next queſtion is, As the fund intended for the ſchool is not ſufficient, Whether the eſtate at *Homer* be liable to make up the deficiency.

Item in a will a conjunctive in the ſenſe of *and* or *alſo*, and is only made uſe of to diſtinguiſh clauſes.

Item ought to be conſtrued as a conjunctive in the ſenſe of *and*, or *alſo*, to connect the two ſentences together, and make the eſtate at *Homer* as much liable to one annuity as the other. For *Item* has never been conſtrued a disjunctive, but is only made uſe of to diſtinguiſh the clauſes in the will; the caſes of *Cole* v. *Rawlinſon*, 1 *Salk.* 234. and *Hopewell* and *Ackland*, 1 *Salk.* 239. are in point for this purpoſe.

Where a will directs payments out of land yearly, at a particular time, it cannot be altered to half yearly payments.

The time of payment is at *Eaſter*, and as it is directed to be paid yearly, which naturally intends taxes, this court cannot alter it to half yearly payments, and clear of taxes.

I do therefore order that the exceptions be over-ruled, ſave as to the time for payment of the five pound a year, and as to that, the ſaid exceptions muſt be allowed, and that ſo much of the ſaid commiſſioners decree, as directs the five pounds *per ann.* to be paid half yearly at *Michaelmas* and *Lady Day*, be reverſed, and I do order that the arrears be forthwith paid to the reſpondent, and that the five pound for the future be paid yearly at *Eaſter*, ſubject to the land tax, and I affirm the reſt of the decree.

For more of deviſes, *Vide* title *Bill*, *under the diviſion*, *Bills of Diſcovery*.

Vide title *Expoſition of Words*.

Vide title *Dower and Jointure*.

Vide title *Legacy*.

Vide title *Legacy*, *under the diviſion*, *Ademption of a Legacy*.

Vide title *Conditions and Limitations*.

CAP. XLI.

Diſtribution.

Vide title *Executors and Adminiſtrators*, *under the diviſion*, *Who are entitled to a Diſtribution*.

Vide title *Expoſition of Words*.

CAP.

CAP. XLII.

Dower and Jointure.

(A) What ſhall be a good ſatisfaction, or good bar of dower, and how far a dowreſs ſhall be favoured in equity.

(B) Of making good a deficiency out of a husband's aſſets.

(C) Of what eſtate of the husband's, with reſpect to the nature and quality thereof, ſhall a woman be endowed.

(A) What ſhall be a good ſatisfaction, or good bar of dower, and how far a dowreſs will be favoured in equity.

June the 2d 1739.

Glover v. *Bates.*

Caſe 199. A proviſion for a wife, in articles before marriage, declared to be in full ſatisfaction of dower, or any claim or right by Common law, cuſtom of the city, *or any other uſage, law or cuſtom notwithſtanding* the wife ſurvived the husband, and accepted of the terms mentioned in the articles. This demand of the wife may be extinguiſhed by agreement, but as ſhe was an infant when the articles were ſigned, had her election at her husband's death, which ſhe has made by accepting what was deſigned as a ſatisfaction for dower.

IN articles made before marriage, it was expreſly provided, that the terms therein mentioned ſhould be to the wife, in full ſatisfaction and recompence of all right and claim of dower, or any claim or right by Common law, cuſtom of the city, *or any other uſage, law or cuſtom notwithſtanding*.

The wife lived ſome time after the death of her huſband, who died inteſtate, and ſhe accepted of the terms mentioned in the articles. Upon her death her repreſentative brought a bill to have her diſtributory ſhare of the huſband's eſtate, notwithſtanding theſe articles.

Lord Chancellor: The firſt queſtion is, If the wife is bound by theſe articles.

This demand of the wife, (if ſhe had in her life demanded it) tho' not properly the ſubject matter of a releaſe, yet may certainly be extinguiſhed by agreement; ſhe was an infant at the time of entring into this agreement, therefore at the death of the husband, ſhe had her election, and ſhe has made it by accepting what was deſigned by

the articles as a ſatisfaction, which plainly ſhews her ſenſe of the articles.

The words in the articles, *any law, uſage, or cuſtom notwithſtanding*, extend to the huſband's perſonal eſtate, and bar the wife of her ſhare under the ſtatute of diſtributions.

The next queſtion is, If upon the conſtruction of this agreement it can extend to bar her diſtributory ſhare? And it is objected that this proviſo was only to leave the eſtate in the power of the husband to diſpoſe of, in caſe he had made a will, and ſo this claim not inconſiſtent; and indeed, with reſpect to the cuſtom of *London*, it generally is thus underſtood; but where ſuch expreſs words are uſed as here, *any law, uſage, or cuſtom notwithſtanding*, it is plain he intended his eſtate ſhould go to his relations, excluſive of any claim of the wife, and as ſhe muſt claim under the ſtatute of diſtributions, which is a law, it is expreſly provided againſt.

His Lordſhip therefore ordered the plaintiff's bill to ſtand diſmiſſed, with coſts, according to the courſe of the court.

N. B. The caſes of *Badcock* v. *Lovell*, in *M. T.* 1726, and *Davila* v. *Davila*, before Lord Chancellor *Cowper*, 2 *Vern.* 724. and *Lockier* v. *Savage*, in the court of Exchequer, were cited by Mr. Attorney general for the defendants, where the words *or otherwiſe* were held to extend to bar the diſtributory ſhare.

(B) Of making good a deficiency out of a huſband's aſſets.

May the 11th 1739. Eaſter Term.

Probert v. *Morgan* and *Clifford.*

Caſe 200.

A bill by the plaintiff, to have the deficiency of her jointure made good out of the aſſets of her huſband and his father, and alſo for 1000*l.* left her by her huſband, payable with intereſt from three months after his death, and likewiſe to have her *paraphernalia* made good.

THIS was a bill brought by the plaintiff to have the deficiency of her jointure ſupplied out of the aſſets of her huſband and his father, and alſo for 1000*l.* left her by her huſband, payable with intereſt from three months after his death, and likewiſe to have her *paraphernalia* made good.

And his father, and alſo for 1000*l.* left her by her huſband, payable with intereſt from three months after his death, and for her *paraphernalia*. Where the father and ſon are parties to the marriage contract, ſhe has a lien both upon the eſtate of the father and ſon. An account of aſſets was decreed, and that the deficiency ſhould be made good out of the ſon's eſtate, it appearing that he received moſt of the fortune.

On the marriage of *Robert* the ſon with the plaintiff, the father and ſon, both covenanted that the lands ſettled upon her for her jointure were worth 300*l. per ann.* part of which lands were woodlands, but the whole original income was not worth 300*l.*

Lord Chancellor: In marriage contracts, when the fortune of the wife is paid to the father, or to clear incumbrances, or to the ſon; and the father and the ſon are parties to the marriage contract, the wife has a lien both upon the eſtate of the father and ſon.

As to the woodland part of the eſtate, it appearing that notwithſtanding a valuation was made of what aroſe from the felling of timber

ber and cutting wood every year, a deficiency ſtill remained to ſatisfy the jointure. An account of aſſets was decreed, and that the deficiency in the jointure ſhould be made good out of the ſon's eſtate, as it appeared that he received moſt, if not all, of the fortune.

Lord Chancellor held, that the legacy of 1000*l.* given by will to the wife, ought not to be conſidered in this caſe as a ſatisfaction for the deficiency of her jointure, becauſe that did not ariſe till after his death, and therefore could not at that time be in his conſideration; and as the jointure lands are covenanted by the marriage ſettlement to be worth ſo much clear of all reprizes, the teſtator plainly intended the 1000*l.* as a bounty to her.

The 1000*l.* given by the will to the wife, cannot be conſidered as a ſatisfaction for the deficiency of her jointure, for as the jointure lands are covenanted to be worth ſo much clear of all repriſes, the teſtator intended the 1000*l.* as a bounty.

There was another queſtion, Out of what fund this legacy was to be paid? For by the marriage ſettlement the huſband had a power to charge the eſtate with 2000*l.* after the death of his wife, and a term of years was raiſed for that purpoſe.

The words of the huſband's will were, *Firſt, I charge all my real eſtate*, &c.

Lord Chancellor: If a man has a *power* to charge an eſtate, it is not neceſſary, in the execution of it, he ſhould refer to the deed out of which the power ariſes; for in a court of equity it is enough that his intent appears, and if in the execution he ſufficiently deſcribes the eſtates he had a power to charge, the eſtate is certainly bound, eſpecially where the perſon charging is a purchaſer of the power.

If a perſon in the execution of a power ſufficiently deſcribes the eſtate he had *a power* to charge, the eſtate is bound, though there is no reference to the deed out of which the power ariſes.

He has indeed miſtaken a circumſtance with reſpect to the time of raiſing it, but that will not make it void.

It is inſiſted for the plaintiff, that as the huſband by his will left her the 1000*l.* payable with intereſt, the intereſt ſhould be made good till it amounted to the ſum of 2000*l.* which he had a power to raiſe.

But his Lordſhip ſaid, as to that the 1000*l.* being the only charge upon the eſtate, he was of opinion that the intereſt ſhould not be made good out of the power, for that is to charge the eſtate with a principal ſum of 2000*l.*

With regard *to the paraphernalia*, it was ſtrongly inſiſted upon by the counſel for the defendant, that the wife cannot ſtand in the place of bond creditors; and the caſe of *Tipping* v. *Tipping*, 1 *Wms.* 729. was cited for that purpoſe.

Lord Chancellor: Where there are real eſtates deſcended, the wife may be intitled to her *paraphernalia*; but otherwiſe in this caſe, where the real eſtates came by the huſband, and ſaid the caſe in 2 *Vern.* 246. had been carried full far enough, for though it is there laid down that where *A.* dies inteſtate, or by will doth not diſpoſe of the jewels, his wife may claim, in caſe there be no debts, the jewels ſuitable to

Where there are real eſtates deſcended, the wife may be intitled to her *paraphernalia*, but otherwiſe in this caſe, where the real eſtates came by the huſband.

her quality to be worn as the ornaments of her perſon; yet by the old law they were abſolutely in the power of the huſband: And if he by will deviſed away the jewels, ſuch deviſe ſhould ſtand good againſt the wife's claim of *paraphernalia*. *Cro. Car.* 343. and 1 *Roll. Abr.* 911. *ſec.* 9.

(D) Of what eſtate of the husband's, with reſpect to the nature and quality thereof, ſhall a Woman be endowed.

June the 22d 1738. At the Rolls.

Sneyd v. *Sneyd.*

Caſe 201.

The plaintiff's father, being ſeiſed in tail male of ſeveral manors and lands, and in poſſeſſion of great part thereof, and having purchaſed ſeveral others, intermarried with the defendant the plaintiff's mother, and in *October* 1733 died inteſtate. The plaintiff, as eldeſt ſon and heir in tail, brings a bill to ſet aſide the aſſignment of dower for partiality, upon a ſuggeſtion that part of the eſtate was copyhold, and not liable thereto.

If the huſband became intitled to the copyhold eſtates by copy of court roll, and granted them out again by copy of court roll, his wife is not intitled to dower; but if he became intitled otherwiſe than by copy of court roll, and did not grant them out again by copy of court roll, ſhe is intitled to dower out of thoſe eſtates.

THE plaintiff's father, *Ralph Sneyd*, being, by virtue of two ſettlements, ſeiſed in tail male of ſeveral manors and lands, and in poſſeſſion of great part thereof, and having purchaſed ſeveral others, intermarried with the defendant the plaintiff's mother, but no ſettlement was made in conſideration of the marriage; and on the 18th of *October* 1733 he died inteſtate, leaving the plaintiff *Dryden Sneyd*, his eldeſt ſon, whereby the lands in the ſettlement, and the eſtates purchaſed by the father, became veſted in the plaintiff, as the eldeſt ſon and heir in tail.

The defendant claiming dower out of the plaintiff's eſtate, obtained judgment in a writ of dower againſt him, and dower was afterwards aſſigned by the ſheriff; and the preſent bill is brought for an account of the rents of the real eſtate, and to ſet aſide the ſheriff's aſſignment of dower for partiality, part of the eſtate being copyhold, and not liable to dower, and yet eſtimated upon the writ of inquiry for aſcertaining of dower.

The defendant inſiſted the copyhold was properly eſtimated, becauſe *Ralph Sneyd*, her huſband, had the freehold of the purchaſed copyhold eſtates in him as lord of the manor, which contained as well copyhold as freehold, and by him not granted out, and that ſhe is therefore dowable of the ſaid copyhold, or that if he did grant them out, the inſtantaneous ſeiſin in the huſband, at the time of the purchaſe, was ſufficient to intitle her to ſuch dower, and that no after act of his could give away that right which was once attached in her.

*The Maſter of the Rolls**: Though no caſes have been cited of either ſide, and ſeems to be a new point, yet I ſhould think that this inſtantaneous ſeiſin of the freehold of the purchaſed copyhold eſtates in the huſband, will not intitle the defendant's wife to her dower; for notwithſtanding there may be no caſe of the ſame nature with this, yet it may be governed by reaſon and general rules of law: As for inſtance, *the conuſee of a fine is not ſo ſeiſed as to give his wife a title to dower*; and in the caſe of a uſe, the widow of a truſtee has been determined to have no claim of dower from ſuch a momentary ſeiſin.

* Sir *Joſeph Jekyll.*

A wife is not intitled to dower out of an inſtantaneous ſeiſin.

The conuſee of a fine is not ſo ſeiſed as to give the wife a title to dower; nor in the caſe of a uſe has the widow of a truſtee any claim of dower from ſuch a momentary ſeiſin in the husband.

I do therefore in the firſt place decree, *that the aſſignment of dower by the ſheriff be ſet aſide*, and that it be referred to a Maſter to inquire, whether the inteſtate became intitled to the copyholds in queſtion, by virtue of ſurrenders from the tenants by copy of court roll, or not? And whether he granted thoſe eſtates out again by copy of court roll, and not by leaſe for years or lives? *And if the inteſtate became intitled by copy of court roll, and granted them out again by copy of court roll, then I am of opinion that the defendant* Anne Sneyd *is* not *intitled to dower out of thoſe eſtates.*

And as to the lands whereon the leaſes for lives or years were renewed by the inteſtate, I do order the Maſter to inquire which of thoſe leaſes were actually expired at the time of ſuch renewal, and which not; *and am of opinion, that the defendant* Anne *is not intitled to dower out of an inſtantaneous ſeiſin, but that ſhe is intitled to dower out of thoſe lands where the Maſter ſhall find that the leaſes were* actually expired.

November the 12th 1739, and *July* the 21ſt 1740.

Hervey v. *Hervey.*

Vide title *Power, under the diviſion, Of the right Execution of a Power, and where a Defect therein will be ſupplied.*

CAP. XLIII.

Ejectment.

Vide title *Jointenants and Tenants in Common.*

CAP.

CAP. XLIV.

Eſtate Tail.

May the 2d 1738.

Ivie v. *Ivie.*

Vide title *Deviſe, under the diviſion, What Words paſs an Eſtate Tail.*

CAP. XLV.

Evidence, Witneſſes, and Proof.

(A) What will be admitted as evidence, and will amount to ſufficient proof.

(B) Where parol, or collateral evidence, will or will not be admitted to explain, confirm, or contradict what appears on the face of a deed or a will.

(C) Of examining witneſſes de bene eſſe, and eſtabliſhing their teſtimony in perpetuam rei memoriam.

(D) Of the ſufficiency or diſability of a witneſs.

(E) Rules the ſame in equity as at law.

(A) What Will be admitted as evidence, and Will amount to ſufficient proof.

May the 5th 1737.

Graves v. *Euſtace Budgel*, Eſq;

Caſe 202. This court will allow the proving of exhibits *vivâ voce* at the hearing, but not to let in other examinations, and this only at the application of the party who is to make uſe of the exhibits, but no inſtance where it is allowed at the application of the contrary party.

IT was moved on the defendant's behalf, that certain witneſſes of the plaintiff's, who were to prove exhibits, might be examined *vivâ voce* at the hearing of the cauſe; and that an order of the late Chancellor, for a commiſſion to examine them in the country, might be diſcharged.

The motion was founded on two things.

Firſt,

Firſt, The great importance of theſe exhibits to the merits of the cauſe, being receipts of the defendant, which he inſiſted were forged, and had denied in his anſwer.

Secondly, The ill ſtate of health of the defendant diſabling him to go down into the country to attend the commiſſion, in ſupport of which an affidavit of his phyſician was read.

On theſe matters it was prayed that the witneſſes might be examined *vivâ voce* at the hearing, that the defendant might have an opportunity of croſs examining them, and ſifting their evidence; and a caſe of the Dutcheſs of *Newcaſtle* was mentioned by Mr. *Fazakerley*, where it was ſo allowed. This was alſo prayed in honour of the defendant, he having denied the receipts.

Lord Chancellor: I cannot allow the motion; the conſtant and eſtabliſhed proceedings of this court are upon written evidence, like the proceedings upon the civil or canon law. This is the courſe of the court, and the courſe of the court is the law of the court; and though there are caſes of witneſſes being ſo examined, yet they have been allowed but ſparingly, and only after publication, where doubts have appeared in their depoſitions, and the examination has been to clear ſuch doubts, and inform the conſcience of the court.

There never was a caſe, where witneſſes have been allowed to be examined at large at the hearing; and though it might be deſirable to allow this, yet the fixed and ſettled proceedings of the court cannot be broke through for it.

The utmoſt latitude the court have taken in this, is to allow the proving of exhibits *vivâ voce* at the hearing, but not to let in other examinations; and this is allowed only where the application is by the party who is to make uſe of the exhibits: But there never was a caſe where it was allowed on the application of the contrary party, if he is ſuſpicious of fraud, he has notice, and may croſs-examine the witneſſes.

Eaſter term 1737.

Fry v. *Wood.*

Caſe 203.

Where a perſon has been examined here, his depoſition may be read at law between the ſame parties.

AGreed in this caſe, where a perſon has been examined in Chancery, that in a cauſe at law between the ſame parties, his depoſition may be uſed in evidence, if it can be proved that the witneſs is dead, or by reaſon of ſickneſs, *&c.* is not able to attend, or that he is out of the kingdom, or otherwiſe not amenable to the proceſs of the court.

In Michaelmas vacation 1737.

Goodier v. *Lake.*

Caſe 204.

Where an original note is loſt, and a copy of it is offered in evidence, you muſt ſhew the original note was genuine, before you will be allowed to read the copy.

WHERE an original note of hand is loſt, and a copy of it is offered in evidence to ſerve any particular purpoſe in a cauſe, you muſt ſhew ſufficient probability to ſatisfy the court that the original note was genuine, before you will be allowed to read the copy.

June the 18th 1737.

Medcalf v. *Ives.*

Vide title *Award and Arbitrament, under the diviſion, For what Cauſes ſet aſide.*

Michaelmas term 1744.

Omichund v. *Barker.*

Vide title *Alien.*

December the 4th 1749.

Ramkiſſenſeat v. *Barker.*

Vide title *Alien.*

May the 23d 1747.

Eade v. *Thomas Lingood*, and others.

Vide title *Bankrupt, under the diviſion, Rule as to Examinations taken before Commiſſioners.*

Evidence. Vide *title Power.*

Hilary

Hilary term 1737.

Boden and others, aſſignees of *Dellow*, a bankrupt, v. *Dellow* and others.

Vide title *Bill, under the diviſion, Bills of Diſcovery*, &c.

(B) Where parol, or collateral evidence will or will not be admitted, to explain, confirm, or contradict, what appears on the face of a deed or a will.

Vacation after Trinity term 1737.

Taylor v. *Taylor.*

Vide title *Copyhold, under the diviſion, In what Caſes a defective Surrender, or the Want of it, will be ſupplied in Equity.*

March the 4th 1737.

Hutchins v. *Lee.*

Caſe 205. Bill brought to ſet aſide an aſſignment of a leaſehold eſtate, &c. upon ſuggeſtion that it was not intended as an abſolute aſſignment, but ſubject to a truſt for the plaintiff's benefit.

BILL brought to ſet aſide an aſſignment of a leaſehold eſtate, and all other the eſtate and effects of the plaintiff, upon a ſuggeſtion that the ſame was never intended as an abſolute aſſignment for the benefit of the defendant, but made only to eaſe the plaintiff of the trouble and care of managing his own concerns at that time, (being then under great infirmities of body and mind,) and ſubject to a truſt for the benefit of the plaintiff, if he ſhould afterwards be in a capacity of taking care of his own affairs.

Though no expreſs truſt in the deed, yet as it might be collected from circumſtances ariſing out of the aſſignment itſelf, inconſiſtent with an abſolute diſpoſition: *Lord Chancellor* admitted parol evidence to explain this tranſaction.

No truſt of any kind appeared on the face of the aſſignment, but upon the whole circumſtances of the caſe, (*viz.*) the annuity reſerved to the plaintiff, being by no means equivalent to the eſtate ſo diſpoſed of, the recital in the deed of aſſignment, that the plaintiff was under a diſability at that time, of taking care of his own affairs, all the effects in general being aſſigned as well as the leaſehold eſtate,

and after a general covenant in the deed from the defendant, to indemnify the plaintiff againſt any breach of covenant in the original leaſe, and a ſpecial reſervation to the plaintiff of all the timber, *&c.* and he to ſet out, and allow timber for the repair of the eſtate (a circumſtance principally relied on by *Lord Chancellor*, as not at all reconcileable with an abſolute diſpoſition of the whole intereſt to the defendant,) and other cirumſtances raiſing a ſtrong preſumption of a truſt intended.

Tho' there can be no parol declaration of a truſt ſince the 29 *Car.* 2. yet parol evidence proper in avoidance of fraud.

Lord Chancellor admitted parol evidence to explain this tranſaction *viz.* declarations by the defendant at the time the deed of aſſignment was executed, and afterwards amounting to an acknowledgement of ſuch a truſt as the plaintiff now inſiſted on; and his Lordſhip ſaid, ſuch evidence was conſiſtent with the deed, as there was all the appearance of an intended truſt upon the face of it; but however tho' there can be no parol declaration of a truſt, ſince the ſtatute of the 29 *Car.* 2. yet this evidence is proper in avoidance of fraud, which was here intended to be put on the plaintiff, for the defendant's deſign was abſolutely to deprive the plaintiff of all the benefit of his eſtate.

July the 28th 1739.

Whitton v. *Ruſſel.*

Caſe 206. A perſon left *A.* 20 *l. per ann.* by a codicil to his will, and after talking of making another codicil and leaving him 15 *l.* more, the attorney told *him*, that if *B. C.* and *D.* whom he had made deviſees of his eſtate, would give him a bond to pay him 15 *l. per ann.* it would be ſufficient; *B.* being preſent, promiſed that he and the deviſees would, and a draught was prepared, but not executed; teſtator lived 5 weeks after, and *A.* remained 9 years without demanding the performance of the promiſe or draught to be perfected, and then brings his bill, diſmiſſed at the Rolls, and upon appeal, decree of diſmiſſion affirmed.

THE teſtator left *A.* 20 *l. per ann.* by a codicil to his will, and after talking of making another codicil, and leaving him 15 *l. per ann.* more, the attorney told him, that if *B. C.* and *D.* whom he had made deviſees of his eſtate, would give *A.* a bond to pay him 15 *l. per ann.* it would be ſufficient, accordingly *B. one of the deviſees preſent promiſed that he and the deviſees would*, and a draught was prepared but not executed. The teſtator lived five weeks after this tranſaction, and *A.* remained nine years without demanding the performance of the promiſe, or inſiſting to have the draught perfected, and then brought his bill. The defendant denied the promiſe, and the plaintiff's bill was diſmiſſed at the Rolls, who thereupon appealed; the caſes cited for the plaintiff were *Oldham* v. *Litchfield*, 2 *Vern.* 506. *Thynn* v. *Thynn*, 1 *Vern.* 296. *Deveniſh* v. *Baines*, *Prec. in Chan.* 3. and *Blacket* v. *Blackett*, *July* 20th 1720.

Defendant by his anſwer inſiſted on the ſtatute of the 29 *Car.* 2. for prevention of frauds and perjuries.

Lord Chancellor: Theſe caſes upon the ſtatute of frauds are to be proceeded on with the greateſt caution: The preſent plaintiff does not appear to be any relation of the teſtator, and I think there is no ground on the parol evidence to decree for the plaintiff in the preſent caſe, though the caſes cited go a great way.

The preſent attempt is in effect to add a legacy to a will and codicil in writing, by parol proof, which if relating to perſonal eſtate only, ought not to be allowed; but this goes further, and ſeeks to charge lands with an annuity of 15 *l. per ann.* without writing, expreſly againſt the ſtatute of frauds; and in the next place to have a ſpecifick performance of an agreement not in writing, which this court will not do.

This court will not add a legacy to a will upon parol proof, tho' it concerns the perſonal eſtate only; *a fortiori* where it tends to charge lands.

Neither is there, in the preſent caſe, any ground for relief on the head of accident or fraud: At the time of making the will, the teſtator talks only with one of the deviſees of giving 15 *l. per ann.* more to the plaintiff.

The teſtator lived *five* weeks afterwards, when it was always in his power, but does nothing towards it, therefore there was no accident to prevent it, nor is it in the power of this court to relieve againſt accidents, which prevent voluntary diſpoſitions of eſtates; nor is there any clear fraud: Every breach of promiſe is not to be called a fraud, nor does it appear that the teſtator was drawn in by this promiſe not to add the legacy to this codicil.

It is not in the power of the court to relieve againſt accidents, which prevent voluntary diſpoſitions of eſtates.

As to the precedents cited, *Thynn* v. *Thynn*, and *Oldham* v. *Litchfield*, they do neither of them come up to the preſent caſe. *Blacket* v. *Blacket* depended on the reaſon of younger children unprovided for, yet that went a great way. I cannot come into the reaſon of this caſe, unleſs for the younger children.

But here the great opportunity the teſtator had of doing this in a much ſhorter way than by bond, if he thought fit; the draught was imperfect, it not being inſerted what the undertaking of the obligor ſhould be, and the length of time before the bill brought, are material facts.

Demands of this kind ſhould be purſued very recently, for the danger of perjury intended to be prevented by the ſtatute, increaſes much more after length of time, and therefore are ſtrong objections.

The undertaking and promiſe is not by all the perſons intereſted, but by one only; the caſes cited are where the promiſe is made by the perſon ſolely intereſted, and therefore a decree to make the eſtate liable, would be to affect perſons no way concerned in the firſt tranſaction, and to charge him who made the promiſe, would not be conſiſtent with the intent of the teſtator, who meant only to charge the lands.

Therefore I am of opinion, the decree at the Rolls was cautiouſly made, and ought to be affirmed.

(C) Of examining witneſſes de bene eſſe, and eſtabliſhing their teſtimony in perpetuam rei memoriam.

Auguſt the 9th 1739.

The Earl of *Suffolk* v. *Green* et al'.

Caſe 207. Bill brought to perpetuate the teſtimony of witneſſes to a bond charged to be uſurious, and alledging that the defendant *Green*, whom the plaintiff wanted to examine, was very aged and infirm.

THE plaintiff brought his bill to perpetuate the teſtimony of witneſſes to a bond, entred into by the plaintiff's anceſtor, charging that the defendant *Green*, whom the plaintiff wanted to examine, was very aged and infirm, and inſiſted in his bill, that the bond was entred into on a uſurious contract, the defendant being to have 10 *l. per cent.*'

Green, who was a *nominee* only in the bond, demurred, as the bill ſought to ſubject him to a penalty, and alſo as plaintiff does not offer to pay what is really due.

If demurrer had ſtopt at the firſt part, it would have been good, but as it goes to the perpetuating the teſtimony, it is bad, and over ruled, but without prejudice to the defendant's inſiſting on the ſame thing by way of anſwer.

The defendant demurred, for that the bill ſought to ſubject him to a penalty, and that on the plaintiff's own ſhewing, there was a great ſum really lent, but the plaintiff does not offer to pay what is really due to the defendant.

For the plaintiff was cited the caſe of *Shirley* v. *Earl Ferrers*, 3 *Wms.* 77. where a bill was brought to perpetuate the teſtimony of a witneſs for fear he ſhould die during a long vacation, and he was ordered to be examined *de bene eſſe*, where the thing examined into, lay only in the knowledge of the witneſs, and was a matter of great importance, *tho' the witneſs was not proved to be old and infirm.*

The defendant *Green* was only a *nominee* in the bond, and the beneficial intereſt in one *Peers.*

Lord Chancellor: So far as the preſent bill prays the defendant to put in an anſwer, ſo far it is a bill of diſcovery, for the anſwer muſt neceſſarily go to the uſury charged in the bill.

The defendants have demurred to ſo much of the bill as ſeeks any diſcovery, and to perpetuate the teſtimony.

A truſtee has as much the benefit of the pleading of this court, as he that has the equitable intereſt, and *ceſtique* is intitled to have the privilege maintained by the truſtee.

As to the firſt part, that it would ſubject the defendants to a penalty, the demurrer is proper, and if it had gone no further, muſt have been allowed as an uſual caſe. For as to the objection, that the defendant *Green* will loſe nothing by the diſcovery, as he has no intereſt; a truſtee has as much the benefit of the pleading of this court, as he that has the equitable intereſt, nay, the *ceſtique truſt* is intitled to have the privilege maintained by the truſtee.

But

But as to the other part of perpetuating the teſtimony, the demurrer is bad, for the plaintiff is intitled to perpetuate teſtimony, notwithſtanding his not offering to pay; and there is no certain diſtinction laid down, where a man is forbid to perpetuate teſtimony, as to perſonal demands againſt himſelf. So far as this, if proved, relates to the loſs of the debt, ſo far it may be called a penalty; but a man may bring a bill to perpetuate teſtimony in many caſes, where he cannot bring a bill for relief, without waiving the penalty; *as in waſte*, or *in the caſe of a forged deed*, or in the caſe of inſurances after commiſſions to examine witneſſes beyond ſea, as to fraudulent loſſes, and yet in many caſes fraudulent loſſes are ſubject to a penalty, even ſometimes felonious. This bill is to perpetuate teſtimony to a plain fact; what the conſequence of that fact is, is of another conſideration.

A plaintiff is intitled to perpetuate the teſtimony of witneſſes to an uſurious contract, notwithſtanding his not offering by the bill to pay.

A man may bring a bill to perpetuate teſtimony in many caſes, where he cannot bring a bill for relief without waiving the penalty as in waſte, &c.

This demurrer being bad in part, muſt be over-ruled, for it is not like a plea, which may be allowed in part; but a demurrer bad in part is void *in toto*, and cannot be ſeparated.

His Lordſhip therefore held the demurrer to be inſufficient, and ordered the ſame to be over-ruled, but without prejudice to the defendants inſiſting by way of anſwer, againſt making any diſcovery touching the uſurious contract, charged and ſuggeſted by the bill.

A demurrer bad in part, is void *in toto*, otherwiſe as to a plea.

November the 15th 1738.

Brandlyn v. *Ord.*

Vide title *Purchaſe, under the diviſion, Of Purchaſers without Notice.*

(D) Of the ſufficiency or diſability of a Witneſs.

Trinity term 1738.

Cotton v. *Luttrell.*

Caſe 208.

THE plaintiff's counſel objected to the evidence of Sir *John Cheſhire*, as his wife is charged with fraud and male practices, as his teſtimony might be ſuppoſed to go in favour of his lady, by palliating and excuſing her conduct, in relation to the procuring her huſband to be made a truſtee of the whole legal eſtate under the late Mr. *Cotton*'s ſettlement; and beſides, if the court ſhould be of opinion ſhe has been guilty of a fraud, ſhe will be liable to coſts, and his evidence will be favourable to her with reſpect to coſts, and will be in ſome meaſure againſt the rule, that a husband ſhall not be examined for or againſt his wife.

Tho' a wife is a defendant, and charged with fraud and male practices, yet the evidence of the huſband ſhall be admitted where the intereſt of a third perſon ſhall be concerned.

Mr. *Fazakerley* for the plaintiff inſiſted, that there is no caſe extant, where the rule laid down here ought more ſtrongly to prevail, eſpecially where there is ſuch clear evidence of fraud againſt lady *Cheſhire*. It cannot be diſputed if ſhe is liable, but that the husband, where the wife is concerned, muſt be likewiſe liable, and that as every remainder to truſtees to preſerve contingent remainders, is a veſted one, or elſe would be bad, Sir *John Cheſhire* is concerned, for if the court ſhould determine in favour of the plaintiff, he, as having the legal eſtate, muſt be decreed to convey.

The objection will hold ſtill ſtronger againſt lady *Cheſhire*'s evidence, becauſe ſhe is concerned in intereſt in the event of the ſuit, as ſhe may, or may not be liable to coſts, according as the court ſhall determine upon the merits of the caſe.

The counſel for the defendant ſaid, the principal queſtion is, Suppoſing that Sir *John Cheſhire* ought not to be examined where the wife is concerned, yet whether the evidence, both of him and lady *Cheſhire* ſhould not be read, as here is a third perſon who is greatly intereſted under the ſettlement of Mr. *Cotton*, and can produce no evidence ſo material as Sir *John Cheſhire*'s, who had the framing and peruſing of the whole conveyance.

The chief caſe relied upon for the defendants was *Tyrrel* v. *Holt*, where *Ward* and *Wilbraham* truſtees through the whole eſtate, (Sir *John* being *Cheſhire* only a truſtee to preſerve contingent remainders) were charged with fraud, and yet the court of King's Bench, upon an iſſue of fraud, directed out of Chancery, admitted them upon ſolemn debate to be examined.

A perſon who at law is put into the *ſimulcum* may be admitted as a witneſs, that he may not be made a defendant, only to take off his evidence; but if ſtrong proof that he is *particeps criminis*, he will be excluded from being a witneſs.

Lord Chancellor: The reaſon, why perſons who at law are put into the *ſimulcum*, are yet admitted as witneſſes, is, that they may not be made parties to a cauſe only to take off their evidence, but notwithſtanding this, if there is a ſtrong evidence againſt the *ſimulcum* man, that he is *particeps criminis*, the court will exclude him from being a witneſs.

When this objection was firſt ſtarted, I muſt confeſs I was very doubtful, whether the depoſitions of Sir *John Cheſhire*, and lady *Cheſhire* ought to be read, but upon the matters being fully diſcuſſed, I am of opinion that the objection goes only to their credit, and not their competency.

As to lady *Cheſhire*, the objection depends upon theſe conſiderations, Whether ſhe has been properly made a defendant; now I will not ſay, ſhe has improperly been made a defendant, becauſe it was neceſſary in order to a diſcovery; but it was improper ſhe ſhould be brought to a hearing, for ſhe is no ways concerned in intereſt in the event of this ſuit, as ſhe was barely an agent for Mrs. *Luttrel*, and conſequently no decree can be made againſt her.

I will not ſay but there might be a caſe, where it was neceſſary to bring ſuch a perſon to hearing, as ſuppoſe *A.* ſhould by fraud obtain a conveyance for his own benefit, where it ought to have been in truſt only, there might be a decree againſt ſuch a perſon.

But this is a bill brought merely to have a reconveyance from the perſon, to whom it is alledged the eſtate is fraudulently and illegally conveyed.

But if there is no decree againſt lady *Cheſhire*, how is it poſſible that coſts ſhould be given againſt her, for if ſhe is no way concerned in intereſt, there can be no decree.

The conſequence of this is, that the objection goes only to her credit, and not to her competency.

The next conſideration is as to Sir *John Cheſhire*, and as I am of opinion that my lady *Cheſhire*'s depoſition ſhould be read, the reading his depoſition is a conſequence of it; for it would be very ſtrange to reject his teſtimony, when there is not the leaſt colour to ſay, that he is concerned in the fraud.

I do not know any caſe in this court, where a feme covert has been guilty of a fraud ſolely, without the husband, and where he has no benefit at all from it, that he ſhould ſuffer, it would be extremely hard to ſay, that he ſhould pay coſts; I know of no precedent, nor do I believe the court would do it.

Where a feme covert has been guilty of a fraud ſolely without the husband, no precedent of the court's making him pay coſts.

The depoſitions of Sir *John* and lady *Cheſhire* read accordingly.

(E) Rules the ſame in equity as at law.

Michaelmas term 1737.

Manning v. *Lechmere.*

Caſe 209.

LORD Chancellor: The rules as to evidence are the ſame in equity as at law, and if *A.* was not admitted as a witneſs at the trial there, becauſe materially concerned in intereſt, the ſame objection will hold againſt reading his depoſition here.

The rules as to evidence, are the ſame in equity as at law.

There are many caſes where leaſes are granted to perſons, in which poſſeſſion upon that leaſe, and payment of rent, ſhall be a preſumption of right in the leſſor, till a better is ſhewn, but when two leaſes are ſet up you cannot read one of them, till you have proved poſſeſſion under that leaſe.

Where two leaſes are ſet up, you cannot read one of them, till you have proved poſſeſſion under that leaſe.

Receipts for rent are not a ſufficient evidence of a title in the leſſor, unleſs he proves actual payment, eſpecially where the perſon who has ſigned the receipt is living, for he ought to have been examined in the cauſe.

To ſhew a title in the leſſor, he muſt prove actual payment of rent, receipts alone will not do.

Where there are old rentals, and bailiffs have admitted money received by them, theſe rentals are evidence of the payment, becauſe no other can be had.

Bailiffs rentals are evidence of payments.

After Hilary Term 1736.

The Dutcheſs of *Marlborough* v. Sir *Thomas Wheat.*

Caſe 210. Maſters in Chancery in reports are only to ſtate bare matters of fact.

LORD Chancellor laid it down in this caſe, that Maſters in Chancery in reports which are ſpecial, are not to ſet forth the evidence with their opinions upon it, but only to ſtate the bare matter of fact, for the judgment of the court, in the ſame manner as in courts of law, they only ſtate the facts allowed by both ſides in a ſpecial verdict, but never meddle with any part of the evidence on either ſide.

CAP. XLVI.

Executors and Adminiſtrators.

(A) Who are intitled to a diſtribution.
(B) Of adminiſtration, to whom to be granted.
(C) Of remedies by one executor or adminiſtrator againſt another, and how far the one ſhall be anſwerable for the other.
(D) What ſhall be aſſets.
(E) Rule where a bill is brought againſt an executor of an executor.

(A) Who are intitled to a diſtribution.

June the 30th 1738.

Caſe 211. Aunts and nephews in the ſame degree of relation to an inteſtate, and equally intitled under the ſtatute of diſtributions. No right of repreſentation here, but muſt take *per capita*, and not *per ſtirpes*.

Durant and *Frances* his wife, adminiſtratrix of *Anne Preſtwood*, deceaſed —— —— } Plaintiffs.

Thomas Preſtwood and *Charlotte Anne Preſtwood* infants, by their mother and guardian, and *Ambroſe Rhodes* and *Elizabeth* his wife, } Defendants.

ANNE Preſtwood died inteſtate, and letters of adminiſtration were granted to the plaintiff *Frances* as her aunt, and one of her next of kin, who would have diſtributed the perſonal eſtate to the inteſtates next of kin, according to their intereſts, without ſuit; but defendants

feudants inſiſting they are ſeverally intitled to the whole, the bill is brought in order that an account may be taken of the inteſtate's perſonal eſtate, and that the ſhares of all perſons may be aſcertained, and the plaintiffs in right of *Frances* claim one third of the perſonal eſtate for their own uſe.

The defendants *Ambroſe Rhodes*, and *Elizabeth* his wife inſiſted that in caſe the plaintiffs, in right of *Frances*, are intitled to a third, they in right of the defendant *Elizabeth* are intitled to a like ſhare, ſhe being the plaintiff *Frances*'s only ſiſter.

The defendants *Thomas*, and *Charlotte*, *Anne Preſtwood*, who are the only children of *Thomas Preſtwood* deceaſed, who was the only brother to the inteſtate, inſiſt that they, as repreſentatives of their father, and neareſt of kin to the inteſtate, are intitled to the whole perſonal eſtate.

Lord Chancellor: As by our computation the aunts and nephews are in equal degree of relation to the inteſtate, they are equally intitled under the ſtatute of diſtributions, and no right of repreſentation can be here allowed, and according to the authority of many caſes, they are to take *per capita*, and not *per ſtirpes*, and therefore his Lordſhip directed, after the ſatisfaction of debts, the clear ſurplus of the inteſtate's perſonal eſtate to be divided into four equal parts, one fourth to the plaintiffs, one fourth to the defendant *Thomas Preſtwood*, one fourth to defendant *Charlotte Anne Preſtwood*, and the remaining fourth to the defendant *Rhodes*, and *Elizabeth* his wife.

Horrel v. *White, in the court of Exchequer, and Grainger* v. *Grainger before Lord* Talbot, *were cited.*

May the 14th 1739.

Hans Stanley, Eſq; and *Elizabeth*, *Anne*, and *Sarah Stanley*, (his ſiſters) infants, by *Edward Hooper*, Eſq; their next friend, —— —— } Plaintiffs.

Phillippa Stanley, widow, and *Anne Stanley*, widow, Defendants.

Caſe 212.

William Stanley, and *Ann* his wife, had 2 ſons, *George* and *Hoby*, who

WILLIAM Stanley and *Anne* his wife had two ſons, *George* and *Hoby*, who ſeverally married in their father's life-time; *William* the father dies, *Anne* his wife ſurvives him, *George* afterwards dies, ſeverally married in their father's life-time; *William* the father dies, *Ann* his wife ſurvives him. *George* afterwards dies, and leaves ſeveral children, who are ſtill living, then *Hoby* dies inteſtate, leaving *Phillippa* his wife poſſeſſed of a very large perſonal eſtate.

The children of *George* bring a bill againſt *Phillippa*, who has adminiſtred to her huſband, and alſo againſt *Anne* their grandmother, inſiſting, that as the repreſentatives of their father, they were intitled with their grandmother to one half of the moiety of the inteſtate's eſtate, the wife being intitled to the other moiety, by the 22 & 23 *Car.* 2. *c.* 10.

The reſidue of the inteſtate's eſtate, after ſatisfaction of debts, directed to be divided into 4 equal parts, two fourths thereof to be retain'd by *Phillippa* the inteſtate's widow, one other fourth part to be paid to *Anne Stanley* the inteſtate's mother, and the remaining fourth part to be laid out in South Sea annuities, in the name of the accomptant general, ſubject to the order of the court, for the benefit of the children of *George*, equally to be divided.

and

and leaves ſeveral children, who are ſtill living; then *Hoby dies inteſtate* (leaving *Philippa* his wife) poſſeſſed of a very large perſonal eſtate.

The children of *George* bring this bill againſt *Philippa*, who had adminiſtred to her husband, and alſo againſt *Anne* their grandmother, inſiſting that, as the repreſentatives of their father, they were intitled with their grandmother to one half of the moiety of the inteſtate's eſtate, the wife being intitled to the other moiety by 22 & 23 *Car.* 2. *cap.* 10.

It was inſiſted for the plaintiffs, that by the ſtatute of 1 *Jac.* 2. *cap.* 17. *ſec.* 7. it is enacted, that if after the death of the father any of his children ſhould die inteſtate, without wife or children in the life of the mother, every brother and ſiſter, and the repreſentatives of them, ſhall have an equal ſhare with the mother.

In this caſe there is a wife left, but the intent of the act was to put the inteſtate's brothers and ſiſters, and their repreſentatives, in the ſame light and condition with the mother; ſo that whenever the mother was intitled, the brothers and ſiſters, and their repreſentatives, *(per ſtirpes)* were to have an equal ſhare with her, and cited the caſe of *Keilway* v. *Keilway*, 2 *Wms.* 344. *Paſch.* 12 *Geo.* which was as follows: The plaintiff was the widow and adminiſtratrix of one that died inteſtate having no children, but left a mother, a brother and ſiſter, and brother's children, and it was decreed the wife ſhould have a moiety, and the other moiety equally to the mother, brother and ſiſter, and brother's children, (as repreſentatives of the father *per ſtirpem)* which caſe is exactly the ſame with the preſent in every circumſtance, except that in the preſent caſe the inteſtate had no brother and ſiſter living at his death, which is not material, in regard that the children of the brother take by way of repreſentation.

It was inſiſted for the defendant, the inteſtate's mother, that theſe ſtatutes are to receive a favourable conſtruction to exclude repreſentations in a remote degree, in reſpect of collaterals, agreeable to the caſe of *Carter* v. *Crawley*, *Raym.* 496. and that the words in the ſtatute of *James* are in the conjunctive, and require a brother or ſiſter to be *in eſſe*, as well as repreſentatives of brothers and ſiſters to make a caſe within that ſtatute.

Where an inteſtate leaves brothers or ſiſters children, and no brother or ſiſter, they take *per capita* as next of kin, and not by repreſentation: So if he died, leaving aunts and nieces, and no brother or ſiſter, they would all take *per capita*; but if the father of the nieces had been living, he would have taken the whole.

It has been determined that when the *inteſtate* leaves brothers or ſiſters children, and no brother or ſiſter, ſuch children take *per capita*, as next of kin, and not by repreſentation, *Eq. Caſ. Abr.* 249. *Walſh* and *Walſh*; and that the conſtruction of the ſtatute was the ſame if a man died leaving aunts and nieces, and no brother or ſiſter, ſuch aunts and nieces would all take *per capita*, and the nieces could not take *per ſtirpes*; and yet if the father of the nieces had been living, he would have taken the whole, and this was determined in the caſe of *Durant* and *Preſtwood*, *June* 30 1738. *

* *Vide ante.*

And from hence it was argued, that as there was no brother or ſiſter of the inteſtate living, if the plaintiffs in this caſe took any thing, it muſt be neceſſarily *per capita*, and not by repreſentation; that when brothers children take *per capita*, they muſt neceſſarily take as next of kin, becauſe as they are not in equal degree with the inteſtate's mother, they could not otherwiſe take at all.

And it was further urged, that if they were intitled by repreſentation, it might be carried to the fourth or fifth generation, for there was nothing to reſtrain it in this act, as there was in the ſtatute of diſtributions, which would create great confuſion and fractions in the eſtates of *inteſtates*.

Lord Chancellor: There are two queſtions in this caſe.

Firſt, Whether the plaintiffs, who are the nephews and nieces of the inteſtate, ſhall ſhare with the inteſtate's mother, there being a widow of the inteſtate?

Secondly, Suppoſing they may ſhare, notwithſtanding that objection, whether they can come in, in reſpect that there is no *brother or ſiſter* of the inteſtate living?

As to the firſt, it is directly within the caſe of *Keilway* and *Keilway*, and I am ſatisfied with the reaſon of that caſe. It depends upon the conſtruction of the proviſo in the ſtatute of *James*, which is very incorrectly penned, and ſo is the ſtatute of diſtributions; and therefore a conſtruction is to be made upon the ſecond ſtatute, according to the intent and meaning of the legiſlature.

The ſtatute of diſtributions, and the ſtatute of *Jac.* 2. very incorrectly penned, and therefore the latter is to be conſtrued according to the intent of the legiſlature.

Upon the ſtatute of diſtributions, the deſcending line excluded all collaterals, and afterwards went to the next of kin; ſo that the father or mother would take all. As ſuppoſe a rich citizen died *inteſtate*, his ſhare would all go to the mother; therefore the ſubſequent ſtatute intended ſhe ſhould have a proviſion only equal with a brother and ſiſter of the inteſtate.

As to the ſecond queſtion, it is a new one; for the inteſtate has left no brother or ſiſter for the mother to collate, or ſhare equally with.

The caſe of *Walſh* v. *Walſh* is grounded upon the ſtatute of *Car.* 2. *ſec.* 5. The words of the act do ſuppoſe that there muſt be ſome perſons to take in their own right, and others in right of repreſentation; but the ſtatute of *James* 2. is of a different kind, and lets in another perſon.

Here is a mother takes an original ſhare in her own right, and the brothers and ſiſters children take as if the brother and ſiſter were living; for the word *and*, immediately preceding the words *the repreſentatives*, muſt be conſtrued in the disjunctive.

The word *and* in the 7th ſection of 1 *Jac.* 2. *c.* 17. immediately preceding the words *the repreſentatives*, muſt be conſtrued in the disjunctive.

As to the objection, that ſuch repreſentation might be carried to ſeveral generations, I think that conſequence does not follow, for the

The proviſo in the ſtatute of *James* is to be incorporated into the ſtatute of *Charles*, where it ſays, that repreſentations ſhall not be carried beyond brothers and ſiſters children. The rule is, that ſtatutes made *pari materia* ſhall be conſtrued into one another.

proviſo in the ſtatute of *James* is to be incorporated into the ſtatute of *Charles*, which expreſly ſays, that repreſentations ſhall not be carried beyond brothers and ſiſters children; and this is agreeable to the rule my Lord *Hale* lays down in 1 *Ventr.* that ſtatutes made *pari materia* ſhall be conſtrued into one another.

I think the ſtatute of *James* intended to let in the rule of the civil law, which contained three lines, aſcending, deſcending, and collateral; the deſcending line abſolutely excluded all others, the aſcending excluded all collaterals except brothers and ſiſters, and they took alike.

His Lordſhip therefore ordered the reſidue of the inteſtate's eſtate, after ſatisfaction of debts to be divided into four equal parts, and two fourth parts thereof to be retained by the defendant *Philippa* the inteſtate's widow, and one other fourth part to be paid to the defendant *Anne Stanley*, the inteſtate's mother, and the remaining fourth part to be laid out in *South Sea* annuities, in the name of the accomptant general, ſubject to the order of this court, for the benefit of the plaintiffs the infants, equally to be divided.

(B) Of adminiſtration, to whom to be granted.

May the 18th 1737.

Charles Humphrey, adminiſtrator of the goods unadminiſtred of his ſiſter *Mary Scarlet*, widow of *William Scarlet*, and formerly the wife of *John Osborne*, deceaſed, } Plaintiff.

Thomas Bullen, and *Anne* his wife, adminiſtratrix of the ſaid *William Scarlet*, who was adminiſtrator of the ſaid *Mary Scarlet*, — — — } Defendants.

Caſe 213.

A. ſurvives her firſt huſband, who left her a legacy; ſhe dies, the legacy being unreceived by the ſecond huſband during her life, but after her death he adminiſters, and dies before the legacy came to his hands; his adminiſtrator gets it in, and the adminiſtrator *de bonis non* of the wife brings this bill for the legacy.

A. Survives her firſt huſband, who left her a legacy, and intermarries with *B.* She dies, the legacy being unreceived by *B.* during her life, but after her death he took out adminiſtration to her, but died himſelf before the legacy came to his hands, and his adminiſtrator gets it in, and the adminiſtrator *de bonis non* of the wife brings his bill to have this legacy, received by the adminiſtrator of the huſband, paid over to him as the legal repreſentative of the wife.

Equity conſiders the adminiſtrator *de bonis non* as a truſtee for the adminiſtrator of the huſband, who having an abſolute right by ſurviving his wife, his adminiſtrator ought to have the benefit of it.

During the coverture, huſband and wife are but one perſon; but when ſhe dies, he has a right to adminiſter excluſive of all other perſons.

Mr. Attorney General for the plaintiff contended, that a huſband and wife in law are but one perſon, and conſequently no relation, nor intitled to adminiſter.

Lord

Lord Chancellor: During the coverture, they are but one perſon; but when that coverture is diſſolved by the death of the wife, the huſband is certainly the next friend and neareſt relation, and has a right to adminiſter excluſive of all other perſons. At common law no perſon at all had a right to adminiſter, but it was in the breaſt of the ordinary to grant it to whom he pleaſed, till the ſtatute of the 21ſt of *Hen.* 8. which gave it to the next of kin; and if there were perſons of equal kin, which ever took out adminiſtration was intitled to the ſurplus; and for this reaſon the ſtatute of diſtribution was made, in order to prevent this injuſtice, and to oblige the adminiſtrator to diſtribute.

The queſtion here is, Whether the adminiſtrator *de bonis non* of the wife, or the adminiſtrator of the huſband, is intitled to this legacy?

I think clearly it was a veſted intereſt in the husband, and therefore his adminiſtrator, as his repreſentative, is intitled to it, without being obliged to make diſtribution; for the husband is not within the equity of the ſtatute, and it is explained beſides by the laſt clauſe in the ſtatute of frauds and perjuries, *ſec.* 25. "And for the explaining an act of this preſent parliament, *intitled*, An act for the better "ſettling of inteſtates eſtates, be it declared, that neither the ſaid "act, nor any thing therein contained, ſhall be conſtrued to extend "to the eſtates of feme coverts that ſhall die inteſtate, but that their "husbands may demand, and have adminiſtration of their rights, "credits, and other perſonal eſtates, and recover and enjoy the ſame, as "they might have done before the making of the ſaid act."

Notwithſtanding by the rules of the common law the adminiſtrator of the wife is intitled to it, being a *choſe in action*, not received or got in by the husband in his life-time, yet equity will conſider ſuch adminiſtrator as a truſtee for the adminiſtrator of the husband, for the husband having an abſolute right to it by ſurviving his wife, his adminiſtrator ought to have the benefit of it; and therefore the plaintiff's bringing this bill is a breach of truſt, and I diſmiſs it with coſts, and decreed accordingly. For the plaintiff was cited *Burnet* v. *Kinaſton**, and for the defendant *Huntley* v. *Griffith*. †.

* *P. in Chan.* 118. and in 2 *Vern.* 401. † *Mo.* 452.

(C) Of remedies by one executor or adminiſtrator againſt another, and how far one ſhall be anſwerable for the other.

November the 7th 1737.

Hudſon v. *Hudſon.*

Caſe 214. The plaintiff and *W. H.* adminiſtrators to *J. H.* empower the defendants by letters of attorney to get in the inteſtate's effects in *Flanders*. *W. H.* afterwards ſettles the account with them, receives the balance, gives a general releaſe, and then dies. The plaintiff, as

JOHN Hudſon dying inteſtate, and unmarried, letters of adminiſtration to him were granted to the plaintiff and one *William Hudſon*, who prevailed on the plaintiff to join and execute ſeveral letters of attorney to the defendant *Benjamin Hudſon*, then in *Flanders*, and alſo to another defendant *Joſeph Hudſon*, then in *London*, impowering them to get in the effects of the inteſtate. After the defendants had received ſome of the inteſtate's eſtates and effects, *William Hudſon*, joint adminiſtrator with the plaintiff, ſettles an account with the defendants, who were his ſons, receives the balance, and gives them a general releaſe, and then dies; afterwards the ſurviving adminiſtrator filed his bill to ſet aſide the defendant's ſtated account and the releaſes, and to have ſatisfaction, ſuggeſting that they ought not to bind him, being ſettled without his privity. The defendants, in their anſwer, inſiſted on the ſtated accounts and releaſe; and the queſtion was, If the releaſe would bar the ſurviving adminiſtrator?

ſurviving adminiſtrator, prays the ſtated accounts and releaſes may be ſet aſide, as being ſettled without his privity. One adminiſtrator cannot releaſe a debt ſo as to bind his fellow, otherwiſe as to an executor, for each intirely repreſents the teſtator; but the releaſe of one adminiſtrator may bar both, if releaſee is accountable to them in their own right, and not as adminiſtrators. The releaſes here being unfairly obtained, though effectual in law, were ſet aſide in equity.

Lord Chancellor: There are two queſtions in this caſe which are merely matters of law.

Firſt, Whether a releaſe of a debt, or conveyance of a term by one adminiſtrator, will bind his companion where there is a joint adminiſtration granted?

Secondly, Whether the defendants acting, and collecting part of the eſtate under a letter of attorney from both the adminiſtrators, will vary the caſe?

As to the firſt point, I am of opinion that one adminiſtrator cannot releaſe a debt, or convey an intereſt, ſo as to bind the other, and that the caſe of an adminiſtrator differs from that of an executor.

It is certain that executors have ſuch a power, and the reaſon is, that each executor is conſidered as intirely repreſenting the teſtator. If an action is brought againſt joint executors, who plead different pleas, ſome books ſay, that plea ſhall be received which is moſt for the benefit of the teſtator's effects, and this ſhews each executor may plead in right of his teſtator.

But the caſe of executors differs eſſentially from that of adminiſtrators; executors receive all their power and intereſt from the teſtator, and though before they can maintain an action they muſt prove the will, yet the probate is only a declaration of the proper court that they are executors, which by the law of *Scotland* is called confirming the executors to the teſtator, and is the ſame in effect as is done here, and ſtill the intereſt ariſes not from the probate, but from the teſtator; therefore an executor may releaſe a debt, or aſſign a term before probate, and if after probate he ſues for the ſame, the precedent act done by him may be pleaded in bar: If an executor appoints another to be his executor, and dies, he is immediate repreſentative to the firſt teſtator, but on the death of an adminiſtrator, his whole intereſt determines, and adminiſtration *de bonis non, &c.* muſt be granted.

The intereſt of an executor ariſes not from the probate, but from the teſtator, therefore he may releaſe a debt, or aſſign a term before probate.

So if a creditor makes his debtor his executor, the debt is totally extinguiſhed, and cannot be revived, though the executor ſhould afterwards die inteſtate, and adminiſtration *de bonis non, &c.* of the firſt teſtator ſhould be granted: But if a debtor be appointed adminiſtrator, that is no extinguiſhment of the debt, but a ſuſpenſion of the action, and his repreſentative on his death would be chargeable at the ſuit of the adminiſtrator *de bonis non, &c.* of the firſt inteſtate, *Salk.* 299. 8 *Co.* 135. Theſe caſes evince the different foundations on which the rights of executors and adminiſtrators depend, the power of the latter ariſing wholly from the ordinary, of the former from the teſtator.

If a debtor be made executor, the debt is totally extinguiſhed, otherwiſe if he be appointed adminiſtrator, for it is no extinguiſhment of the debt, but a ſuſpenſion of the action, and his repreſentative chargeable at the ſuit of the adminiſtrator *de bonis non, &c.* of the firſt inteſtate.

The rights of executors and adminiſtrators depend on different foundations, the latter ariſing from the ordinary, the former from the teſtator.

The right of an adminiſtrator is expreſſed ſo differently in the books, as if they were at a loſs how to deſcribe it. In 8 *Co.* 135. *b.* it is called an authority, becauſe the adminiſtrator has nothing to his own uſe; in *Vaughan* 182. it is with greater propriety called a private office of truſt, for it is more than a bare authority, and leſs than the intereſt of an executor, which ſeems to have been the foundation of Lord *Cowper*'s opinion in 2 *Vern.* 514.

An adminiſtration properly defined, a private office of truſt, being more than a bare authority, and yet leſs than the intereſt of an executor.

If therefore an adminiſtration be in the nature of an office, what will the conſequence be in the preſent caſe? for if an office is granted to two, they muſt join in the executing the acts of the office, and one cannot act unleſs in the name of both, and on this kind of reaſoning the preſent caſe will depend.

There has been no caſe cited except *Dyer* 339. and *Co.* 143. *b.* which turns on the repeal of letters of adminiſtration, but I have the opinion of a very great man, Lord *Bacon* in his *Elements*, *4th Vol. new Edit. p.* 83. which ſeems to correſpond with mine as to the nature of the different rights of executors and adminiſtrators, therefore I think the releaſe of one adminiſtrator will not bar the other.

The next queſtion is of another conſideration, whether the defendants having acted under the letters of attorney of both adminiſtra-

tors, and being therefore accountable to themſelves in their own right, and not as adminiſtrators, the releaſe of one may not bar both, and I think it may.

A perſon acting under a letter of attorney from adminiſtrators may be ſued by them in their own right as a bailiff or receiver, and need not name themſelves adminiſtrators.

The caſes conſider them as repreſenting the inteſtate, and ſuing in that right, where they muſt name themſelves adminiſtrators, and ſo ſays Lord *Bacon*; but here both adminiſtrators execute a letter of attorney, to impower the defendants to collect the effects, and receive the inteſtate's debts, and ſo far as they have acted under that authority, they are anſwerable to the adminiſtrators in their own right, and might be charged as their bailiffs and receivers, and they need not name themſelves adminiſtrators, and if nonſuited, they muſt pay coſts as ſuing *in jure proprio*.

If there is a joint debt owing to two, and one releaſes, the action is gone, whether it ariſes on bond, or ſimple contract.

Though adminiſtrators in trover may name themſelves ſo, yet they need not do it, for they may ſue in their own right.

It has been ſaid, that ſome part of the inteſtate's eſtate has been received by the defendants in ſpecie, upon which the right of adminiſtration ſhould ſubſiſt, but I apprehend in ſuch caſe the releaſe of one adminiſtrator would be a bar, for thoſe things were in effect delivered to them by the adminiſtrators themſelves, for which they muſt ſue in their own right, and therefore the releaſe of one bars the other; for though in trover they may name themſelves adminiſtrators, yet they need not do it.

Then the queſtion is, What a court of equity will do with a releaſe that is effectual at law? If it was unfair and colluſive, a court of equity ought to ſet it aſide, and upon the evidence here, the releaſes appearing to be unfairly obtained, were ſet aſide.

And as to the defendants *Benjamin* and *Joſeph Hudſon*, his Lordſhip declared that the plaintiff is not bound by the accounts ſtated, and the releaſes executed by their father, from demanding an account againſt them in a court of equity, and therefore an account was directed accordingly.

Where one adminiſtrator dies, the right ſurvives without new letters of adminiſtration.

N. B. When this caſe of *Hudſon* v. *Hudſon* came before Lord *Talbot*, on a plea of a ſtated account, and the releaſe, he held, that if one adminiſtrator dies, the right of adminiſtration would ſurvive without new letters of adminiſtration. *Vide* 2 *Vern.* 514.

(D) What

(D) What ſhall be aſſets.

Michaelmas term 1737.

Fox v. *Fox.*

Caſe 215. *A.* mortgaged his eſtate to *B.* who paid no money, but gave a bond for 130 *l.* *A.* afterwards makes *B.* his executor. The debt not extinguiſhed in equity.

A. Mortgaged his eſtate to the defendant, who paid no money in conſideration of the mortgage, but gave *A.* a bond for 130 *l.* *A.* afterwards makes the defendant his executor: The heir of *A.* brings his bill to have the real eſtate exonerated, conſidering this bond as aſſets in the hands of the defendant.

Lord Chancellor: Notwithſtanding at Common law the making an obligor executor extinguiſhes his debt, yet in this caſe the bond ſhall be conſidered as aſſets in the hand of the defendant the executor, and applied after the payment of funeral expences and legacies, to the exoneration of the real eſtate in favour of the heir.

November the 13th 1738.

Nugent v. *Giffard* and others.

Caſe 216. An executor aſſigns over a mortgage term of his teſtator to *A.* as a ſatisfaction of a debt due to *A.* from the executor, this is a good alienation, and *A.* ſhall have the benefit of it againſt the daughters of the teſtator, who were creditors under a marriage ſettlement.

THE bill was brought againſt ſome of the defendants, as truſtees of a mortgage term for an aſſignment, and againſt others to diſcover what intereſt they had in the premiſſes.

It appeared that the mortgage in queſtion, was a mortgage term to truſtees in truſt for Sir *Richard Billings* the teſtator, and Mr. *Arundell* executor of Sir *Richard* had aſſigned this mortgage term to the plaintiff, as a ſatisfaction for a debt due from Mr. *Arundel* to the plaintiff.

The queſtion was, If ſuch aſſignment was good againſt the daughters of Sir *Richard Billings*, who were creditors under the marriage ſettlement, and alſo to whom the truſtees ſhould aſſign the legal eſtate.

Lord Chancellor: The queſtion is, If the two daughters, who are allowed to be creditors, are intitled to follow this mortgage term (in the hands of the plaintiff as aſſignee of it) as ſpecifick aſſets.

I am of opinion they are not, but that the plaintiff is intitled to the benefit of ſuch aſſignment by the executor.

At law an executor may alien the aſſets of a teſtator, and when aliened, no creditor can follow them, and where the alienation is for a valuable conſideration, this court ſuffers it as well as at law.

At law the executor has a power to diſpoſe of, and alien the aſſets of the teſtator, and when they are aliened, no creditor by law can follow them, for the demand of a creditor is only a perſonal demand againſt the executor, in reſpect of the aſſets come to his hands, but no lien on the aſſets: This court will indeed follow aſſets upon voluntary

luntary alienations by colluſion of the executor; but if the alienation is for a *a valuable conſideration*, unleſs fraud is proved, this court ſuffers it as well as at law, and will not controul it, for a purchaſer from an executor, has no power of knowing the debts of the teſtator; and if this court, upon the appearance of debts afterwards would controul ſuch purchaſers, no body would venture to deal with executors.

It is objected firſt, That theſe were the equitable aſſets of Sir *Richard Billings*, and that the plaintiff purchaſed nothing but an equitable intereſt, burthened with all the equity in the hands of the perſon from whom he purchaſed.

No difference in this court between the power of an executor to diſpoſe of equitable and legal aſſets.

But that is a rule only where there is a lien on the thing itſelf, and I know no difference in this court, between the power of an executor to diſpoſe of equitable and legal aſſets.

The *ſecond objection* is, That the aſſignee took this aſſignment with notice, that it was the teſtamentary aſſets of Sir *Richard Billings*.

But if this was ſufficient to affect it, it would affect every purchaſe from an executor, becauſe every ſuch purchaſer muſt have ſuch notice.

The *third objection* is, That this is a *devaſtavit*, becauſe the conſideration was a debt of the executor's own.

An aſſignment by an executor of a teſtator's aſſets to a perſon who has a ſum of money *bonâ fide* due, is as valuable a conſideration as for money paid down.

But I know no rule in this court to warrant *that*, neither is there any difference between this and money paid down, provided it be done *bonâ fide*, a ſum of money *bonâ fide* due, is as good and valuable a conſideration as any.

The only authorities relied on are *Crane* v. *Drake*, 2 *Vern.* 616. and *Paget* v. *Hoſkins*, *Prec. in Eq.* 431. the firſt greatly differs from the preſent caſe, there being expreſs notice of a debt from the teſtator, ſtill unſatisfied, and a contrivance between the purchaſer and the executor, to defeat a juſt debt, and as *Lord Chancellor* ſaid, the defendant was a party to, and contriving a *devaſtavit*.

Here was no notice of any debts due from the teſtator, for it is ſworn in the anſwer, that Sir *Richard Billings* died worth 40,000 *l.* and this was a debt under a ſettlement, which is a private tranſaction in the family.

As to the caſe of *Paget* v. *Hoſkins*, that was a groſs ſum computed by the wife as her ſhare of her former huſband's eſtate, according to the cuſtom of *London*, and taken by the huſband, ſubject to that account.

Theſe are the only authorities, and both different from the preſent caſe, this I think therefore is a good alienation, and the plaintiff ought to have the benefit of it.

November the 30th 1739. At the Rolls.

John Hinton and others, creditors of *Edward Toye*, Plaintiffs.

Henry Toye, *William Broughton* the elder, *William Broughton* the younger, *Sarah Broughton*, and *Anne Broughton*, Defendants.

Case 217.

Before the marriage of *Edward Toye* with *Mary Broughton*, it was agreed, that 300 *l.* till it could be laid out in the purchaſe of lands, ſhould be ſettled in truſt for *Edward Toye* for life, for *Mary Broughton* for life, and in direct or appoint to ſuch charitable uſes

BY articles of agreement dated the 20th of *April* 1723, before the marriage of *Edward Toye* with *Mary Broughton*, it was declared and agreed that 300 *l.* part of 450 *l.* charged upon an eſtate of doctor *Broughton*, and deviſed by him to the ſaid *Mary* his daughter, ſhould remain a charge upon the land, till it could be laid out in the purchaſe of lands of inheritance, which ſhould be ſettled in truſt for *Edward Toye* for life, and after his deceaſe, in truſt for *Mary Broughton* for life, in augmentation of her jointure, with other limitations for the benefit of the younger children of *Edward* and *Mary*, and for want of ſuch iſſue, to the uſe of ſuch perſon and perſons, and for ſuch eſtates as the ſaid *Mary Broughton* the younger, ſhould by any deed in writing direct or appoint, and for want of ſuch direction, to the right heirs of *Mary Broughton* for ever.

default of iſſue, to the uſe of ſuch perſon, and for ſuch eſtate as ſhe ſhould by any deed or appoint, and for want of ſuch appointment, to her right heirs for ever.

Mary by deed poll appoints the 300 *l.* to be paid to her huſband, to be employed by him to ſuch charitable uſes, or other intents and purpoſes as he ſhould think fit.

Edward Toye by will deviſes to the defendants *William*, *Sarah*, and *Anne Broughton*, 100 *l.* apiece, being the money charged on the eſtate of his wife's father, and declared in his will, that ſuch diſpoſition was in purſuance of her directions.

The creditors of *Edward Toye* bring their bill to have the 300 *l.* applied to the payment of his debts, as a part of his aſſets.

This is not a naked power only to convey to charitable uſes, but ought to be conſidered as a part of the aſſets of *Edward Toye*, and applied in payment of his debts.

After marriage, *Mary* the wife of *Edward Toye*, by deed poll dated the 4th of *May* 1736, did appoint the 300 *l.* to be paid to her husband the ſaid *Edward Toye*, *to be employed by him to ſuch charitable uſes, or other purpoſes and intents as he ſhould think fit.*

Edward Toye, there being no iſſue of the marriage, by his will, after other bequeſts, deviſes to the defendants, *William Broughton* the younger, *Sarah Broughton*, and *Anne Broughton*, one hundred pounds apiece, being the money charged on the eſtate of *William Broughton* his brother in law, and ſettled on the teſtator by his late wife, and declared in his will, that ſuch diſpoſition was in purſuance of the direction of his dear wife.

On the 10th of *Nov.* 1736, *Edward Toye* died, leaving *Henry Toy* his only ſon and heir, the deviſees of the 300 *l.* are the three children of a poor clergyman unprovided for, and brother to *Mary* the wife of the teſtator.

The creditors of *Edward Toye* brought this bill to have the three hundred pounds applied to the payment of his debts, as a part of his aſſets.

The defendants inſiſted that *Edward Toye* had only a naked power to convey this ſum to ſome charitable uſes, purſuant to the appointment of the wife, and that the will ſhall be taken as an execution of ſuch power, and is a diſpoſition to a charity according to that appointment, and not liable to pay the teſtator's debts.

(*a*) Mr. *Verney.*

There are only 3 ways of property, enjoying in one's own right, transferring that right to another, and the right of repreſentation.

Maſter of the Rolls (*a*): The queſtion is, Whether *Mary* the wife of *Edward Toye* conſidered him as a truſtee of the 300 *l.* and a bare inſtrument to convey to other perſons, or whether he had the *ownerſhip*? If it be his own property, certainly no act of his could diſpoſe of a creditor's right: If a man has the uſe of a thing, (and he plainly was intitled to it for his life in all events) and the power of giving it to whom he pleaſes, he is undoubtedly the owner of it, which power *Edward Toye* very plainly had, for there are but three ways of property, enjoying in one's own right, transferring that right to another, and the right of repreſentation; here it is given to be employed in ſuch purpoſes as the husband ſhall think fit; can there be any purpoſe in the world but he may employ it in?

The only doubt is upon the words, *charitable uſes*, and indeed they do intimate that the wife had ſome wiſh, that her husband would ſo employ the 300 *l.* or at leaſt recommended it to him to diſpoſe of it to charity, but has not tied him down to it, for the latter words leave it abſolutely to his diſcretion, to diſpoſe of it *to any purpoſes or intents, as he ſhould think fit.*

In the caſe of *Laſſells* v. *Lord Cornwallis*, *Prec. in Chan.* 232. A. *on his marriage creates a term in truſt to raiſe* 6000 l. *of which* 3000 l. *was for his younger children, and the other* 3000 l. *as he ſhould appoint, after he appoints the* 3000 l. *as a collateral ſecurity to* J. S. *and by will deviſes it and the other* 3000 l. *to his daughter, and yet held, that it ſhould be aſſets to ſatisfy a bond creditor.*

A man cannot by an expreſſion in his will alter the nature of his eſtate, and diſappoint his creditors.

In the caſe now before me, there is the ſame uncontrouled power as in the other, nor does there want any precedent act to make this exiſt in the husband, for the money is actually directed to be paid into his hands, could he not therefore have laid it out on a mortgage, or lent it upon a bond, or even thrown it into the ſea, ſo that no ſtronger inſtance can be given, than the preſent, to prove ownerſhip and property, and though he ſays indeed in his will, it was *in purſuance of the direction of his dear wife*, yet a man cannot by any expreſſion in his will alter the nature of his eſtate, and diſappoint his creditors who have no occaſion to reſort to his will, but claim by an intereſt precedent, *viz.* the deed of appointment by his wife, whereby they ſhew that their right commences from the wife's execution of the power given her by the marriage articles.

No inſtance of a conſtruction in favour of legatees to the prejudice of creditors, unleſs the creditors found their right under the will itſelf.

There is no inſtance in this court of a conſtruction in favour of legatees to the prejudice of creditors, unleſs the creditors found their right under the will itſelf, which they do not in the preſent caſe.

His

His honour therefore declared, *that the* 300 *l. is to be conſidered as part of the teſtator's aſſets, and ought to be applied in payment of his debts, and decreed the real and perſonal eſtate to go in payment of his debts, and if ſufficient, then to pay the legacies, if not ſufficient, the legatees to abate,* except as to the three legacies of 100 *l.* each to *William, Sarah,* and *Anne Broughton,* which are to be paid them preferably to the other legacies.

February the 26th 1736.

Partridge v. *Pawlet.*

Caſe 218.

IN this caſe *Lord Chancellor* laid down the following rules.

Where a huſband is left ſole executor, he is intitled to the ſurplus, and it ſhall not be conſtrued as a reſulting truſt. Rule where a huſband is left ſole executor.

If two tenants in common put out money as joint executors, it ſhall not ſurvive, but ſhall go reſpectively to thoſe perſons who are the proper repreſentatives of each. Rule as to ſurvivorſhip.

A deviſe of the rents and profits of an eſtate to the husband for life, without impeachment of waſte, ſhall not be conſidered as annual profits only, but will impower him to cut timber. Rule upon a deviſe for life, without impeachment of waſte.

Tenant for life pays one third of intereſt upon debts and legacies, and reverſioner two thirds. Rule as to payment of intereſt.

Vide title *Aſſets.*

(E) Rule where a bill is brought againſt an executor of an executor.

Michaelmas term 1739.

Huet v. *Fletcher.*

Caſe 219.

THE father of the plaintiff dies inteſtate, the mother poſſeſſes herſelf of all his perſonal eſtate, the ſon acquieſced for 40 years after the death of his father, and upon the mother's dying, accepts of a legacy under her will, in value at leaſt equal to two thirds of what his father left, and was contented for ſome time, but brings his bill now againſt the executor of the mother to account for all the perſonal eſtate of the father, which came to her hands. The plaintiff's father died inteſtate, the mother adminiſtred, 40 years after the father's death, the ſon who had accepted of a legacy under the mother's will, equal to two thirds of what his father left, brings this bill againſt the mother's executor, to account for the father's perſonal eſtate come to her hands.

To deter others from ſuch frivolous ſuits, his Lordſhip diſmiſſed the bill with coſts.

Lord Chancellor: Theſe are a ſort of bills that deſerve the utmoſt diſcouragement from this court, to oblige an executor to account for a perſonal eſtate, which, through the great length of time, he is utterly incapable of doing, beſides too, a perſonal eſtate of a third perſon, and that did not belong to his teſtatrix, and where the plaintiff himſelf alſo has accepted of a legacy under the will of his mother, and acquieſced for a conſiderable time, and therefore to deter others from ſuch frivolous and vexatious ſuits, I will diſmiſs the bill with coſts.

After Hilary term 1736.

Jefferies v. *Harriſon*, executor of Sir *Thomas Travel.*

Caſe 220. The rule in relation to coſts to be paid by an executor defendant, is the ſame in the court of Chancery as at law.

LORD Chancellor ſaid in this cauſe, that when an executor is defendant at law, and fails in his defence, the rule is, that he muſt pay coſts *de bonis teſtatoris, ſi non, de bonis propriis*; and as in this caſe the executor has miſbehaved himſelf, by paying ſimple contract debts, preferable to a bond creditor, with notice, the court of Chancery have no occaſion to vary it from the common courſe.

Vide title *Jointenants.*

Vide title *Bonds and Obligations.*

Vide title *Creditor and Debtor.*

Vide title *Bankrupt.*

CAP. XLVII.

Expoſition of Words.

June the 7th 1739.

Harding v. *Glyn.*

Caſe 221.

NICHOLAS Harding in 1701. made his will, and thereby gave "To *Elizabeth* his wife all his eſtate, leaſes, and intereſt in his "houſe in *Hatton Garden*, and all the goods, furniture, and chattels "therein at the time of his death, and alſo all his plate, linnen, jewels, "and other wearing apparel, *but did deſire her, at or before her* "*death, to give ſuch leaſes, houſe, furniture, goods and chattels, plate* "*and jewels, unto and amongſt* ſuch of his own relations, *as ſhe ſhould* "*think moſt deſerving and approve of*," and made his wife executrix, and died the 23d of *January* 1736, without iſſue.

N. H. by will gives to *Elizabeth* his wife all his eſtate, leaſes, and intereſt *in his houſe in Hatton Garden*, and all the goods and furniture therein at the time of his

death, and alſo all his plate, jewels, *&c. but deſired her, at or before her death, to give ſuch leaſes*, &c. *unto ſuch of his own relations as ſhe ſhould think moſt deſerving.*

Elizabeth, by her will, gave all her eſtate and intereſt to *H. S.* in the ſaid houſe in *Hatton Garden*, and after ſeveral legacies, the reſidue of her perſonal eſtate to the defendant and two other perſons, and made them executors; but neither gave, at or before her death, the goods in the ſaid houſe, or her huſband's jewels to his relations.

The Maſter of the Rolls was of opinion that *Elizabeth*, under the will of *N. H.* took only beneficially during her life, and that ſo much of the houſhold goods in *Hatton Garden*, not diſpoſed of by her according to the power given her by the will of *N. H.* in caſe the ſame remain in ſpecie, or the value thereof, ought to be divided equally among ſuch of the relations as were his next of kin at the time of her death.

Elizabeth his widow made her will on the 12th of *June* 1737, "and thereby gave all her eſtate, right, title, and intereſt to *Henry* "*Swindell* in the houſe in *Hatton Garden*, which her huſband had "bequeathed to her in manner aforeſaid; and after giving ſeveral le- "gacies, bequeathed the reſidue of her perſonal eſtate to the defendant "*Glyn* and two other perſons, and made them executors," and ſoon after died, without having given at or before her death the goods in the ſaid houſe, or without having diſpoſed of any of her husband's jewels to his relations.

The plaintiffs inſiſting that *Elizabeth Harding* had no property in the ſaid furniture and jewels but for life, with a limited power of diſpoſing of the ſame to her husband's relations, which ſhe has not done, brought their bill in order that they might be diſtributed amonſt his relations, according to the rule of diſtribution of inteſtates effects.

Maſter of the Rolls: The firſt queſtion is, If this is veſted abſolutely in the wife? And the ſecond, If it is to be conſidered as undiſpoſed of, after her death, who are intitled to it?

As to the firſt, it is clear the wife was intended to take only beneficially during her life; there are no technical words in a will, but the

The words *willing* or *deſiring* in a will have been frequently conſtrued to amount to a truſt.

manifeſt intent of the teſtator is to take place, and the words *willing* or *deſiring* have been frequently conſtrued to amount to a truſt, *Eacles & ux.* v. *England & ux.* 2 *Vern.* 466. and the only doubt ariſes upon the perſons who are to take after her.

Where the uncertainty is ſuch that the court cannot poſſibly determine who are meant in a will, it may be conſtrued only as a recommendation to the firſt deviſee, and make it an abſolute gift to him. Where there is a deviſe to *relations* in a will, the ſtatute of diſtributions is a good rule to go by, in conſtruing who are meant by that word.

Where the uncertainty is ſuch, that it is impoſſible for the court to determine what perſons are meant, it is very ſtrong for the court to conſtrue it only as a recommendation to the firſt deviſee, and make it abſolute as to him; but here the word *relations* is a legal deſcription, and this is a deviſe to ſuch *relations*, and operates as a truſt in the wife, by way of power of naming and apportioning, and her non-performance of the power ſhall not make the deviſe void, but the power ſhall devolve on the court; and though this is not to paſs by virtue of the ſtatute of diſtributions, yet that is a good rule for the court to go by. And therefore I think it ought to be divided among ſuch of the relations of the teſtator *Nicholas Harding*, who were his next of kin at her death; and do order, that ſo much of the ſaid houſhold goods in *Hatton Garden*, and other the perſonal eſtate of the ſaid teſtator *Nicholas Harding*, deviſed by his will to the ſaid *Elizabeth Harding* his wife, which ſhe did not diſpoſe of according to the power given her thereby, in caſe the ſame remains in ſpecie, or the value thereof, be delivered to the next of kin of the ſaid teſtator *Nicholas Harding*, to be divided equally amongſt them, to take place from the time of the death of the ſaid *Elizabeth Harding*.

February the 20th 1737.

Leeke v. *Bennett*.

Caſe 222.

Sir *J. L.* gives, by a codicil to his will, to *E. M.* during her natural life, his houſe in *Greenwich*, *with* all the houſhold goods that ſhall be found therein at the time of his deceaſe.

The word *with* ſo conjoins the deviſe of the houſe and houſhold goods, that the deviſee can have no larger intereſt in the latter, than was expreſly limited as to the former.

The word *with* would have had the ſame effect in the caſe of a grant.

SIR *John Leeke*, by his will, deviſes in theſe words: "I give to "my nieces *Elizabeth Martin* and *Hannah Martin*, or which "ſhall be living at the time of my death, all my houſhold goods (par-"ticularly mentioned) in my houſe at *Maze-Hill*, *Greenwich*."

By a codicil afterwards he ſays, "I give to my niece *Elizabeth* "*Martin*, during the time of her natural life, my houſe on *Maze-*"*Hill* in *Greenwich*, *with* all the houſhold goods that ſhall be found "therein at the time of my deceaſe."

There were only ten years to come in the houſe; both the nieces were living at the time of the teſtator's death, but the defendant ſurvived the other. Part of the goods given in the codicil were excepted in the will, as gilt hangings, and ſome other things, and an

additional 100 *l.* a year given to his niece *Elizabeth Martin*, now *Bennet* by the codicil, and then he deviſes as before mentioned.

Lord Chancellor: The queſtion is, Whether this be an abſolute deviſe to *Elizabeth*, or for life only?

The firſt conſideration is, what ſhe would have taken under the will.

It is plain the nieces would have taken as jointenants, and only the particular goods ſo bequeathed, for the goods excepted they could not, though in the houſe at *Greenwich*; and the ſurvivor would have taken the whole.

The codicil has made a total alteration in two reſpects; inſtead of a joint intereſt, it is made a ſole intereſt, inſtead of an abſolute property, an intereſt for life; and *Elizabeth* likewiſe takes the goods excepted, and conſequently it is a revocation of the will, and an entire new bequeſt. If the codicil had ſtood alone, it would have been plainly a gift of the goods for life only; and the word *with* being made uſe of, it ſo conjoins the deviſe of the houſe and houſhold goods, that the deviſee can have no larger intereſt in the houſhold goods, than was expreſly limited as to the houſe. If the words *during her natural life* had been ſubjoined to the deviſe of the houſe, it had not been ſo clear a caſe, though I think that would not have varied the law of the caſe neither; but thoſe words being put before the deviſe, muſt operate equally on both parts of the ſubſequent deviſe, and the ſame intereſt paſs in both. The word *with* would have had the ſame effect, and been conſtrued in the ſame manner in the caſe of *a grant*.

His Lordſhip took notice of a caſe in 1 *Rolls Abr.* 844. *letter M. No.* 2. If a man deviſes *Blackacre* to one in tail, and *alſo Whiteacre*, the deviſee ſhall have an eſtate tail in *Whiteacre* likewiſe, for this is all one ſentence, and conſequently the words that make the limitation of the eſtate go to both. *Trin.* 40 *Eliz. B. R.* He cited too the caſe of *Cole* v. *Rawlinſon* *, where the word *alſo* had the like effect, and the ſame conſtruction put upon it. * Salk. 234.

Mr. *Fazakerley*, who was of counſel for the plaintiff, inſiſted upon the defendant's giving ſecurity for the goods, as the court had determined ſhe had only an intereſt for life.

Lord Chancellor ſaid he never knew it done, and therefore would not oblige the defendant to do it in this caſe, but directed an inventory to be made by the defendant *Bennett*, and ſigned by him and his wife, and to be delivered to the plaintiff.

A tenant for life of goods is not obliged to give ſecurity for the goods, but to ſign an inventory only to the perſon in remainder.

May the 18th 1737.

Champion v. *Pickax.*

Caſe 223.

A. deviſes ſeveral leaſehold eſtates to two truſtees, in truſt; if his grandaughter married without their conſent, to convey the premiſſes to two other truſtees, in truſt for her ſeparate uſe during her life, and after her death for the uſe and benefit of her iſſue.

HENRY Pierce, by his will, deviſed ſeveral leaſehold eſtates to two truſtees, in truſt to aſſign them to his grandaughter *Mary Pigott*, at her age of 21 years or marriage, if ſhe married with the conſent of them, or the ſurvivor of them; but if ſhe married without ſuch conſent, then they were to convey the premiſſes to two other truſtees and their heirs, in truſt for the ſole uſe and benefit of the ſaid *Mary Pigott*, excluſive of any power and controul of her huſband, for and during the term of her natural life, and after her deceaſe, *for the uſe and benefit of her iſſue.* She married without the conſent of the truſtees, and they, in purſuance of the power in the will, conveyed the premiſſes to two other truſtees, in truſt for her during her natural life, and after her deceaſe, for the uſe and benefit *of all and every her child and children.*

Though ſhe has no children by the firſt huſband, ſhe has only a right for her life, for the iſſue by any huſband are provided for by this ſettlement.

Her firſt huſband died, and had no iſſue by her; ſhe married the preſent plaintiff, and they brought their bill againſt the defendant, who was the ſurviving executor of the ſurving truſtee, to have him join in a ſale of the truſt eſtate, ſuggeſting that the intent of the will was, for providing for the iſſue by the firſt huſband only, and he dying without iſſue, ſhe had now an abſolute right and title to the premiſſes.

It was decreed ſhe had *only* a right for her life, for ſhe might have iſſue by any huſband, who are provided for by the ſettlement, and would take by purchaſe.

The bill diſmiſſed.

Vide title *Deviſes.*

Vide title *Remainder.*

Vide title *Jointenancy.*

Vide title *Deviſe, under the diviſion, What Words will paſs a Fee in a Will.*

Vide title *Bankrupt, under the diviſion, Rule as to Aſſignees.* Primroſe *v.* Bromley.

Vide title *Dower and Jointure.* Glover *v.* Bates.

CAP.

CAP. XLVIII.

Extent of the Crown.

March the 28th 1751.

Ex parte Marſhall, and others.

Vide title *Bankrupt, under the diviſion, Rule as to an Extent of the Crown, page* 262.

CAP. XLIX.

Fines and Recoveries.

(A) What eſtate or intereſt may be barred or transferred by a fine or recovery.

(B) What eſtate or intereſt is not barred by a fine or recovery.

(A) What eſtate or intereſt may be barred or transferred by a fine or recovery.

May the 12th 1739.

Robinſon v. *Cuming*.

Caſe 224.

A limitation in a will to *C.* and his heirs, to the uſe of him and his heirs, in truſt to pay debts, and after in truſt for *D.* and the heirs of his body, and in default of heirs of the body of *D.* remainder to *C.* and his heirs, on condition he married *M.*

THE limitation in a will was to *C.* and his heirs, to the uſe of him and his heirs, in truſt to pay debts, and after in truſt for *D.* and the heirs of his body, and in default of heirs of the body of *D.* remainder to *C.* and his heirs, on condition he married *M.*

to pay debts, and after in truſt for *D.* and the heirs of his body, and in default of the heirs of the body of *D.* remainder to *C.* and his heirs.

The recovery of *D.* barred the remainder to *C.* as being a remainder of *the truſt*, for a remainder of a legal eſtate cannot be barred by the recovery of a *ceſtuique truſt*.

D. ſuffers a recovery, and the queſtion was, Whether this recovery barred the remainder to *C.*?

Lord Chancellor: The queſtion depends upon this point, Whether the remainder to *C.* be a remainder of a legal eſtate, or of a truſt?

For a remainder of a legal eſtate cannot be barred by a recovery of *ceſtuique truſt*, but all the remainders of the truſt are.

It has been ſaid that it is impoſſible for a man to be a truſtee for himſelf; but that is not the point here, for as the legal eſtate and uſe is wholly in *C.* by virtue of the firſt part of the deviſe, the remainder cannot be in him, for that is part of the eſtate he had before, and unleſs the tſtator had given *C.* the remainder of the truſt, it would have reſulted to his heirs at law: He has therefore given him an intereſt diſtinct from either the legal eſtate or the uſe, which is the remainder of the truſt, and he has given him that *on a condition* which would be intirely defeated, if he had taken the remainder of the legal eſtate by the former part of the deviſe; and therefore his Lordſhip decreed that the recovery of *D.* barred the remainder to *C.*

July the 13th 1738.

Oliver v. *Taylor.*

Caſe 225.

A common recovery ſuffered in the Common Pleas will not paſs copyhold lands; otherwiſe as to cuſtomary freeholds.

IF lands are copyhold, a common recovery ſuffered in the court of Common Pleas will not paſs ſuch lands; but if lands are cuſtomary freeholds, and paſs by ſurrender in a borough court, yet a recovery in the Common Pleas of ſuch lands may be good. The caſe of *Baker* v. *Waſe*, in Lord *Macclesfield*'s time, cited.

(B) What eſtate or intereſt is not barred by a fine or recovery.

February the 24th 1738.

Willis v. *Shorral.*

Caſe 226.

T. A. by proviſo in a marriage ſettlement, gives his wife a power to diſpoſe of 100*l.* by will to ſuch perſon as ſhe ſhall appoint, to be paid to the wife within one year after his death, and in default of ſuch payment, *J. M.* is impowered to make a leaſe of particular lands to raiſe this ſum. The wife makes an appointment of the 100*l.* but never received it while living; the heirs of the huſband mortgaged the eſtate to *B.* who then had no notice of this power. Afterwards, on *B.*'s purchaſing the eſtate, the heirs of the huſband levy a fine to him, and convey the equity of redemption as a collateral ſecurity, who then had notice of the power. Five years incurred after levying of the fine, and no claim on the part of the appointees of 100*l.* but they now bring their bill to be paid this ſum.

The plaintiffs are intitled to 100*l.* and intereſt, from the end of one year after the death of *Anne Brickley* the wife of *T. B.*

THOMAS Brickley, by a proviſo in his marriage ſettlement, in caſe he dies without iſſue, gives his wife *Anne Brickley* a power to diſpoſe of one hundred pounds by will to ſuch perſon as ſhe ſhall appoint, ſuch hundred pounds to be paid to the wife within one year after his death, and in default of ſuch payment, *John Moreton* is impowered to make a leaſe of lands called *Sayes's Farm*, to raiſe this ſum, and when raiſed the leaſe to be void. The wife, after the year

expired

expired from the death of her huſband, makes an appointment of the hundred pounds, but never received it while ſhe was living, the heirs of the husband mortgaged the eſtate to *B.* who at that time had no notice of this power in the marriage ſettlement, afterwards upon *B.*'s purchaſing the eſtate abſolutely, the heirs of the husband levied a fine to him, and in the next place by way of collateral ſecurity, conveyed the equity of redemption to *B.* who then had notice of the power; five years incurred after levying of the fine, and no claim on the part of the appointees of the hundred pounds, who have now brought their bill to be paid this ſum.

Mr. *Fazakerley* for the plaintiff inſiſted, that nothing can be barred by a fine and non-claim, but what is firſt deveſted, that according to the reſolution in *Zouch* and *Stoley*'s caſe in *Plowden's Commentaries*, a bare naked power as the preſent caſe is, and a mere future intereſt only, cannot be barred by a fine; the ſame doctrine is laid down in *Cro. Eliz.* 226. that conſidering it as a truſt, it cannot be barred, for it is expreſly admitted, that the buyer had notice of it, and though he was a purchaſer for a valuable conſideration, yet notice makes him a truſtee only, and for this purpoſe mentioned, 2 *Vern.* 194. "A. *ſeiſed in fee in truſt for* B. *for full conſideration con-* "veys *to* C. *the purchaſer having notice of the truſt, and afterwards* C. "*to ſtrengthen his own eſtate, levies a fine.* B. *the* ceſtuique truſt *is* "*not bound to enter within* 5 *years, for* C. *having purchaſed with* "*notice, notwithſtanding any conſideration paid by him, is but a truſ-* "*tee for* B. *and ſo the eſtate not being diſplaced, the fine cannot bar.*"

Mr. *Wilbraham* for the defendant ſaid, that courts of equity govern themſelves with regard to fines, as they do at law, for this reaſon, becauſe they are the common ſecurity to eſtates, and therefore if he ſhould admit this to be an equitable intereſt in the eſtate, it is equally barred as if it had been a legal intereſt, and that it is laid down in Sir *Nicholas Stourton*'s caſe, by Lord Chief Juſtice *Hale*, that a fine, and non-claim, is a good bar to an equity of redemption. Cited in *Lingard* v. *Griffin*, 2 *Vern.* 189.

Lord Chancellor: The firſt queſtion is, Whether this, which is a mere collateral power in the land can be barred, and will depend on the force and effect of the fine.

Here is, in point of law, a power veſted in *John Moreton*, to create a term for years for raiſing the 100 *l.* in default of payment by the heirs or aſſigns of the teſtator within one year after his death, the plaintiff therefore had an equitable intereſt till the ſame was paid: Conſider then what effect the fine has either upon the power or the intereſt.

The mortgagee took, as a collateral ſecurity, the conveyance of the equity of redemption after the fine levied; generally ſpeaking, *ſome right* that a perſon has in an eſtate, muſt be diſplaced to give a fine any force.

A bare naked power is not barred by any of the ſtatutes of fines, otherwiſe as to an *intereſſe termini*.

A greater force too has been given to fines by ſtatutes than they had at law, as by the ſtatute of non-claim, *&c.* but I do not find in any of theſe ſtatutes, that a power is barred by them, but only ſuch *right*, *claim* and *intereſt*, which ſtrangers had at the time of the fine levied, unleſs they purſue their title, claim and intereſt, by action or lawful entry, within five years after the proclamation made and certified.

How can a ſtranger, as *John Moreton* was, that has no intereſt, make an entry, he who had barely a naked power, and conſequently could not be affected by a fine, for the conſtruction of the ſtatute of 4 *H.* 7. in *Bro. Abr. title Fine, ſect.* 123. as to what a fine will bar, does not at all relate to powers.

But then it may be ſaid, the leſſee of *Moreton* might have entred, for he had a right by virtue of the leaſehold eſtate, and to be ſure *Saffyn*'s caſe, 5 *Co.* 123. *b.* comes very near this caſe, for nothing can be more like a power than an *intereſſe termini*. "*A man made* "*a leaſe for years of certain land, to begin after the end of a term for* "*years then in being, the firſt years determined, the ſecond leſſee did not* "*enter, but he in the reverſion entred and made a feoffment, and levied* "*a fine of the land with proclamations, according to the* 4 H. 7. c. 4. "*and five years paſſed without entry or claim made by the ſecond leſſee,* "*and the queſtion was, Whether the leſſee for years was barred by the* "*fine, and the act of* 4 H. 7. *Adjudged that his term and intereſt* "*was barred, and both within the letter of the act, and the miſchief* "*intended to be provided againſt thereby.*"

The next conſideration is, What effect the fine will have upon the equitable intereſt?

And no doubt the rules of this court with relation to fines have been taken by analogy from the rules at law, and the effect is the ſame with regard to an equitable intereſt, if of ſuch a nature, that turned into a legal intereſt, it would have been barr'd.

But I need not labour this point, for ſuppoſing the equitable intereſt is barred, yet I am of opinion the power is ſtill ſubſiſting in *John Moreton*, and he may make a leaſe till the hundred pound is raiſed.

I do therefore declare the plaintiffs are intitled to a ſatisfaction for the ſum of one hundred pounds, and intereſt from the end of one year after the death of *Anne Brickley*, and do therefore decree the defendants the heirs at law of *Thomas Brickley*, to pay the ſame to the plaintiffs accordingly, with intereſt at the rate of 4 *l. per cent.*'

Vide title *Agreements*, &c. *under the diviſion, When to be performed in Specie.*

Vide title *Forfeiture.*

CAP.

CAP. L.

Fixtures.

(A) What ſhall be deemed ſuch.

Auguſt the 15th 1750.

Ex parte Quincy.

Caſe 227. A mortgage of a brewhouſe with the appurtenances, will not carry the utenſils, but the things only belonging to outhouſes.

IN 1745 *Robinſon* ſells the utenſils of a brewhouſe, and lets a leaſe of the brewhouſe to *Brerewood*, and in 1746 mortgages his brewhouſe with the appurtenances, *&c.* to *J. S.* *Brerewood* after this ſells his leaſe and utenſils to *Warner*, who for a ſum of money in 1748 mortgages the whole to *Robinſon*, afterwards *Robinſon* becomes a bankrupt, and his effects are veſted in the petitioner as aſſignee under the commiſſion, who, as ſtanding in the place of the bankrupt, is intitled to the mortgage from *Warner*, and by virtue thereof claims the utenſils.

J. S. the mortgagee of the brewhouſe in 1746 inſiſts the fixtures paſſed by his mortgage; this petition preferred therefore for a delivery of all the utenſils.

Mr. Attorney general for the mortgagee, cited *Owen* 71. under title *Heir and Anceſtor*.

Lord Chancellor: This is a caſe for a mere action at law, and might be determined by action of trover or detinue.

I am inclined to think it was not the intent of *Robinſon* to mortgage the utenſils; for there is ſome deſcription generally of things in a brewhouſe.

The manner of deſcribing the parcels ſhews he did not at all mean to mortgage utenſils, for the word *appurtenances* ſeems to intend only things belonging to outhouſes.

An executor cannot enter to take away fixtures, without being a treſpaſſer.

The rule as to fixtures, as between an heir and executor is another thing. The freehold deſcending on the heir, the executor cannot enter to take away fixtures without being a treſpaſſer.

A tenant during the term may take chimney pieces, and even wainſcot, if after, he is a treſpaſſer.

But there is another rule between landlord and tenant: During the term a tenant may take away chimney pieces, and even wainſcot, which is a very ſtrong caſe, but not after the term, if he did, he would be a treſpaſſer.

A mortgage, ſays *Mr. Attorney general* is a purchaſe, but then it is a redeemable one.

How does it ſtand between a purchaſer and a vendor?

By the ſale of a brewhouſe, the utenſils will not paſs.

If a man ſells a houſe where there is a copper, or a brewhouſe where there are utenſils, unleſs there was ſome conſideration given for them, and a valuation ſet upon them, they would not paſs.

But then another queſtion will ariſe after poſſeſſion is delivered, what action you can bring? for where things are fixed to the freehold, an action of trover will not lie for them.

Beds faſtened to the cieling with ropes, or even nailed, are not fixtures, but may be removed.

Several ſorts of things are often fixed to the freehold, and yet may be taken away, as beds faſtned to the cieling with ropes, nay, frequently nailed, and yet no doubt but they may be removed.

The difficulty with me is the poſſeſſion of the mortgagor, but that is cleared up, becauſe it was the expreſs agreement between the parties, that the mortgagor ſhould not be prevented from coming on the brewhouſe.

I apprehend the ſale of the utenſils was a defeaſible ſale, to revert to the bankrupt at the end of the term, and if ſo, there is an equity in the grantor, and therefore as to the mortgagee, a poſſeſſion in the bankrupt.

Let it ſtand over to the next day of petitions, and let the mortgagee produce all deeds and writings, and aſſignee at his expence to take copies if he pleaſes.

CAP. LI.

Forfeiture.

November the 15th 1738.

Brandlyn v. *Ord.*

Vide title *Purchaſe, under the diviſion, Of Purchaſers without Notice.*

Vide title *Cuſtom of London.*

CAP. LII.

Freeman of London.

January the 22d 1739.

Ex parte Carrington.

Vide title *Bankrupt, under the diviſion, Who are liable to Bankruptcy.*

CAP. LIII.

Fraud.

Michaelmas vacation 1737.

Nicholls v. *Nicholls.*

Vide title *Deeds and other Writings, under the diviſion, Deeds and Inſtruments entred into by Fraud, in what Caſes to be relieved againſt.*

Vide title *Bill.*

CAP.

CAP. LIV.

Guardian.

(A) What acts of his with regard to the infant's eſtate ſhall be good.

July the 28th 1739.

Pierſon v. *Shore.*

Caſe 228. *A.* who had a biſhop's leaſe to her and her heirs during three lives, deviſes the ſame to her daughter an infant, and directs the guardian and truſtees to make purchaſes for the benefit of the infant. The guardian upon the deceaſe of one of the three lives, took a new leaſe for three new lives. The infant dies. The leaſe ſhall go to the heirs of the infant *ex parte Paterna*; for the new leaſe is to be conſidered as a new acquiſition, and to veſt in the infant as a purchaſe.

A. Who had a biſhop's leaſe to her and her heirs during three lives, deviſes the ſame to her daughter who was an infant, and directs the guardian and truſtees appointed by her will, to make purchaſes for the benefit of the infant. After the death of the mother, the guardian, upon the death of one of the three lives, took a new leaſe for three new lives, and the infant being now dead, the queſtion before the court was, Whether this new leaſe ſhould go to the old uſes? To the heirs *ex parte Maternâ*, as the firſt leaſe would have done, or whether to the heirs of the infant *ex parte Paternâ*.

Lord Chancellor: This is a deſcendible freehold, and if nothing had been altered, would have gone to the heir *ex parte Maternâ*; but the new leaſe is to be conſidered as a new acquiſition, and to veſt in the infant as a purchaſer; how then will this go, conſidered as a new purchaſe?

The reaſon why an infant's perſonal eſtate turned into real, is ſtill conſidered as perſonal, is on account of the different ages at which the infant may diſpoſe of his perſonal, and his real, and not in favour to one repreſentative more than another

If the infant had lived till full age, and then had ſurrendred the old leaſe and taken a new one, this certainly would have gone to the heirs *ex parte Paternâ*; ſo if all the lives had died, and the guardian had renewed the leaſe, it would likewiſe have gone to the heirs on the part of the father; and this is not like the caſe of an infant's perſonal eſtate turned into real, for the reaſon of that's being ſtill conſidered as perſonal eſtate, is, becauſe of the different ages at which the infant might diſpoſe of his perſonal, and his real eſtate, and not out of favour to any one repreſentative more than another. *Indeed in the caſe of a leaſe in truſt, whatever new alterations are made, it is ſtill ſubject to the old truſt.*

It has been objected, that this was an act done by a guardian only during the minority, and ought not to prejudice any who take by repreſentation, it being an act merely voluntary, and not out of neceſſity.

If this indeed had been wantonly done by the guardian, without any real benefit to the infant, it would have been proper to come into a court of equity to be relieved againſt it; but here was a juſt and reaſonable occaſion for what the guardian has done, for he was directed by the mother to make purchaſes for the benefit of the infant. Here one life being dead, ſurrendring the old, and taking a new leaſe, was the moſt beneficial purchaſe for the infant that could be, and therefore ought to have the ſame conſequence as if done by the infant herſelf at full age, *and go to the heirs ex parte Paternâ.* The caſe of *Maſon* v. *Day*, is exactly in point with the preſent, *Prec. in Chan.* 319. " A feme purchaſes a church leaſe to her and her heirs " for three lives, and dies, leaving an infant daughter, two of the " lives die, the infant's guardian renews the leaſe, *this is a new ac-* " *quiſition, and ſhall go to the heirs on the part of the father.*

His Lordſhip therefore diſmiſſed the bill brought by the heir *ex parte Maternâ.*

The act of a guardian where a reaſonable one will have the ſame conſequence as if done by the infant at full age, otherwiſe if wantonly done by the guardian, without any real benefit to the infant.

CAP. LV.

Habeas Corpus.

May the 12th 1742.

Ex parte Lingood.

Vide title *Bankrupt, under the diviſion, Rule as to a Certificate from Commiſſioners to a Judge*, 240.

CAP. LVI.

Heir and Anceſtor.

(A) Where charges and incumbrances on the lands ſhall be raiſed, or ſhall ſink in the inheritance for the benefit of the heir.

(B) Where the heir ſhall have the aid and benefit of the perſonal eſtate.

(A) Where charges and incumbrances on the lands ſhall be raiſed, or ſhall ſink in the inheritance for the benefit of the heir.

Vide title *Conditions and Limitations, under the diviſion, In what Caſes a Gift or Deviſe, upon condition not to marry without conſent ſhall be good and binding, or void, being only* in terrorem. Hervey *v.* Aſton, *page* 361.

Eaſter term 1738.

Prowſe v. *Abingdon.*

Caſe 229.

T. C. deviſed all his lands to *T. C.* and *J. P.* and their heirs in truſt, that they ſhould ſell his lands in *M.* and *P.* and out of the purchaſe money pay his debts, and as to the reſt in truſt, to receive the rents, and to make leaſes for 99 years, determinable, *&c.* and

THOMAS Compton, by will dated the 13th of *Auguſt* 1718, deviſes all his lands in general words to *John Clement*, and *John Prowſe*, and their heirs in truſt, and to the uſes, intents and purpoſes following, *viz.* that they ſhould ſell all his lands lying in *Mindford*, and *Pinard*, and out of the purchaſe money ariſing from ſuch ſale ſhould pay and ſatisfy the teſtator's debts, as far as the ſame will go, and as to the reſt of the lands, *&c.* the will declares that the truſtees ſhould ſtand ſeiſed of them, in truſt to receive the rents, iſſues, and profits thereof, and to make leaſes of the ſame, for the term of 99 years determinable on three lives, and therewith to pay all the teſtator's debts and legacies, that then they ſhould ſtand ſeiſed to the uſe of *Iſabella Abingdon*, wife of *Charles Abingdon*, and ſiſter of the teſtator for life, remainder to the iſſue male and female of her body, remainder over, *&c.* and makes the truſtees executors of his will. He bequeaths likewiſe a legacy of 500 *l.* to his nephew *Thomas Prowſe*, to be paid at his age of 21, or marriage.

therewith to pay his debts and legacies, then to the uſe of *J. A.* wife of *C. A.* for life, remainder to the iſſue male and female of her body, and makes the truſtees executors; He likewiſe gives a legacy of 500 *l.* to his nephew *Thomas Prowſe*, to be paid at 21, or marriage, who died before 21.

Perſonal eſtate of the value of 700 *l.* the lands in *M.* and *P.* not ſufficient to pay the debts.

Bill brought by the adminiſtrator of *Thomas Prowſe*, to have the 500 *l.* raiſed. The *Lord Chancellor* of opinion, as the legacy was charged upon the real as well as perſonal eſtate, it could not be raiſed, as the legatee died before the time of payment, and diſmiſſed the bill.

The nephew died before he attained the age of 21, and unmarried.

The perſonal eſtate of the teſtator was about the value of 700 *l.* the eſtates in *Mindford* and *Pinnard*, were not ſufficient to pay the teſtator's debts.

The bill is now brought by the adminiſtrator of *Thomas Prowſe* to have the ſum of 500 *l.* raiſed againſt the defendant, who claims the lands under *Iſabella*, ſubject to the payment of teſtator's debts and legacies, upon a ſuppoſition that *Thomas Prowſe* had an intereſt veſted in this legacy, tranſmiſſable to his repreſentative, though the legatee died before the time of payment came.

Mr. *Chute* for the plaintiff inſiſted, that this caſe was very different from that of a deviſe of lands to a third perſon, charged with the payment of legacies out of it, that the lands here deviſed to the truſtees for the payment of debts and legacies, muſt be conſidered as the perſonal eſtate of the teſtator according to the general doctrine of a court of equity, which often conſiders land as money, and *vice verſâ*, according to the nature of the caſe, and the intention of the party who directs the diſpoſition of the one or the other, that the truſtees might in fact have entred here, and continued in poſſeſſion till they had received money enough by the rents and profits, and fines taken upon granting long leaſes, according to the power given by the will, to pay off all the debts and legacies; and in ſuch caſe, as the fund out of which this legacy would be payable, would be perſonal eſtate, the contingency of the legatee's dying before the age of 21, or marriage, not being annexed to the deviſe of the legacy itſelf, but to the time of payment, the plaintiff would be intitled.

Secondly, It muſt however be admitted that this legacy was chargeable upon the perſonal as well as the real eſtate, and as the perſonal eſtate is the primary and natural fund to be charged, and the real eſtate comes in only in aid of the perſonal eſtate, and as a ſecurity only for payment of the money, the real eſtate here ought to be ſubject to the ſame rules with the perſonal, and ſubſervient to the ſame purpoſes, and more eſpecially ſo, ſince in order to avoid that confuſion which muſt otherwiſe follow, if in determining whether this legacy was due or not, *regard* ſhould be had to the different reſolutions which prevail in caſes of this kind, where the perſonal eſtate only, or the real eſtate only, is charged with the payment of legacies.

Thirdly, That admitting this legacy was chargeable only on the real eſtate, yet the rule which has prevailed, for portions to ſink into the eſtate for the benefit of the heir at law, will not extend to the preſent caſe, nor is this within the reaſon of thoſe caſes of portions, which have always been determined on this foot, that children dying before they could want their portions, there could be no occaſion for raiſing them, nor is it to be ſuppoſed the teſtator could intend to have ſuch ſum raiſed merely in prejudice of any other child, who ſhould have the eſtate, when no proviſion of that kind was now wanted. He cited the caſe of *Jackſon* v. *Farrand*, 2 *Vern.* 424.

Mr.

Mr. *Fazakerley* on the ſame ſide inſiſted, that the truſtees to whom this deviſe is made being likewiſe executors, the eſtates deviſed muſt be conſidered as perſonal legal aſſets in their hands, and governable by the ſame rules as if the teſtator had actually left perſonal aſſets in ſpecie to that value. He cited for this purpoſe 1 *Lev.* 224. and relied on what is there ſaid by Mr. Juſtice *Twiſden*, and alſo *Dyer* 264. *b. No.* 41. He likewiſe inſiſted, that it appeared there were ſufficient perſonal aſſets left in ſpecie to ſatisfy this legacy, as the other creditors and legatees had an undoubted right to take their remedy againſt the land for a ſatisfaction of their debts and legacies, and if the plaintiff cannot be intitled to this legacy, ſuppoſing it to be chargeable on the land, this court will ſo marſhal the aſſets as will make every part of the will effectual, and charge the perſonal eſtate only with the payment of this legacy. He relied likewiſe much on the caſe of *Jackſon* v. *Farrand.*

Money ariſing from the ſale of a real eſtate is legal aſſets only, where it is ſold under a bare power given to ſell, not where the intereſt in the eſtate paſſes by the will to the deviſees; and making the truſtees executors does not alter the caſe.

Lord Chancellor, before they began for the defendant, interpoſed, and ſaid he was clearly of opinion the eſtates deviſed could not be conſidered as perſonal aſſets at law, in the hands of the truſtees; that by the deviſe in general of all his lands to them and their heirs, here was plainly a diſpoſition of the eſtate to them, and a truſt created in them for the payment of debts; and that money ariſing from the ſale of a real eſtate was legal aſſets only, where the eſtate was ſold under a *bare* power given to ſell, and not where the intereſt in the eſtate paſſed by the will to the deviſees as it did here, and that making the truſtees executors likewiſe, could not alter the caſe.

A deviſe to *A.* and *B.* and their heirs till ſuch a ſum be raiſed, for payment of debts, does not create a fund of legal aſſets, but is proper only to give the deviſee an intereſt in the lands ſpecifically, not to turn them into perſonal eſtate.

That the other part of the deviſe, whereby the deviſees are directed to receive the rents, *&c.* could with much leſs colour admit of the conſtruction contended for, but was in the nature of the thing plainly intended as a truſt; and taking notice likewiſe of what had been ſaid by Mr. *Fazakerley*, that as to this part of the caſe it might be conſidered as a deviſe to them of the legal eſtate, *quouſque* they ſhould have received ſufficient out of the real, *&c.* to anſwer the purpoſe, and that then the eſtate ſhould veſt in *Iſabella* by way of executory deviſe; *his Lordſhip* ſaid, ſuppoſing ſuch a conſtruction ſhould be ſuffered to prevail, yet there is no colour for ſaying the rents, *&c.* ſo received would be legal aſſets, and put the caſe of a deviſe to *A.* and *B.* and their heirs, till ſuch a ſum ſhould be raiſed for the payment of debts and legacies, would that create a fund of legal aſſets? At that rate a legatee might ſue *A.* and *B.* under thoſe circumſtances in the eccleſiaſtical court; but ſuch a juriſdiction in a caſe of that kind was certainly never thought on, nor can it poſſibly be maintained: But a proviſion of that ſort is proper only to give the deviſee an intereſt in the eſtate ſpecifically, not to turn the lands into perſonal eſtate, and make them legal aſſets in the hands of the deviſee.

Mr. Attorney general for the defendant, inſiſted on the ſettled diſtinction between legacies charged on the real, and thoſe charged on

the perſonal eſtate. Where a legacy is charged on the perſonal, and made payable at a future day, and the legatee dies before the day of payment, the court has in compliance with the rule of the civil law, and in order to make the proceedings in this and the eccleſiaſtical court (as they have a concurrent juriſdiction) uniform and conſiſtent, has determined ſuch legacy ſhall not be conſidered as a lapſed legacy, but ſhall go to the repreſentative. But that rule has never been extended to charges on a real eſtate; that there was no ground whatever for the diſtinction taken between a legacy as here, and money given to a child by a parent as a portion, nor is it ſupported by any authority; but the only queſtion in ſuch caſe is, upon what fund the charge is laid, whether on the real or perſonal eſtate? That the caſe of *Jackſon* v. *Farrand*, as appears by the report of it in *Prec. in Chanc.* 109. turned intirely upon this; that the legatee there died after marriage, and *that* therefore having happened, which was the cauſe of the portion, it ſhould be raiſed after her death.

That it was not at all material here; that the legacy was charged on a mixed fund, or real and perſonal eſtate too; that ſo it was in the caſe of *Jackſon* v. *Farrand*; but this objection was not ſo much as made; ſo it was in the caſe of the Duke of *Chandos* v. *Talbot*, in Lord Chancellor *King*'s time, *Mich.* 5 *Geo.* 2. where a ſum of money was by will charged on the real and perſonal eſtate of the teſtator, payable at the age of 21, it was held in that caſe that the legatee dying before the age of 21, his repreſentative was not intitled, but the bill was diſmiſſed, and the *Lord Chancellor* in that caſe cited the caſe of *Jennings* v. *Lukes*, in the time of the Lords Commiſſioners, exactly to the ſame purpoſe, 2 *P. Wms.* 276. Mr. Attorney general cited the caſe of *Yates* v. *Fettyplace*, 2 *Vern.* 416. *Carter* v. *Bletſoe*, 2 *Vern.* 617. and Mr. *Floyer* of the ſame ſide cited *Smith* v. *Smith*, 2 *Vern.* 92.

Lord Chancellor ſaid the only inducement he had to ſuffer ſo long a debate in this court by the bar, was in order to receive ſatisfaction as to the point, which had been inſiſted on in relation to this legacy being chargeable on a mixed fund, conſiſting of real and perſonal eſtate too.

He ſaid, that was a difficulty which always ſtuck with him, and it was ſomething very extraordinary that the real eſtate, which was only an auxiliary fund to the perſonal, ſhould in caſes of this kind be chargeable in a different manner, and not be made liable to the ſame rules and determinations with the primary ſecurity the perſonal eſtate; but he ſaid he found the reſolutions ſo ſtrong, that there was no difference between a charge on the real eſtate only, and a charge on the real and perſonal eſtate too; that he could not, at this time of day, think of determining in a different manner.

Such ſtrong reſolutions that there is no difference between a charge on the real eſtate only, and a charge on the real and perſonal eſtate too, they are not to be ſhaken now.

He ſaid it was very clear that charges on land, payable at a future day, could not be raiſed, if the party died before the payment; that

Whether a charge on land be created by deed or will, whether given by way of portion for a child, or merely as a legacy by collateral relations, or others, if the party dies before the day of payment, cannot be raiſed.

there was no difference at all whether that charge was created by deed or will, nor whether it was provided by way of portion for a child, or given merely as a legacy by collateral relations, or others; and this was the caſe in the Duke of *Chandos* v. *Talbot*, and *Jennings* v. *Lukes*, in which he was counſel, for in neither of them was the proviſion made by a parent.

As to what is ſaid, that the aſſets may be ſo marſhalled as for the preſent plaintiff to receive a compleat ſatisfaction out of the perſonal eſtate, though the executors were not before the court, and ſo impoſſible to make any decree on that foot, yet if they thought it would be material, he would retain the bill with liberty to make the executors parties; but he ſaid he conceived that point could by no means be maintained, for that rule of marſhalling aſſets in the manner before mentioned, would hold only where it was proper to be done at the time the legacy firſt took place, and not where it was owing to a fact, which happened ſubſequent to the death of the teſtator, and to a mere accident, as here, the death of the legatee before 21.

The authority of *Jackſon* v. *Farrand*, 2 *Vern.* 424. much weakened by the ſubſequent reſolution in *Carter* v. *Bletſoe*, 2 *Vern.* 617.

He ſaid the reſolution in the caſe of *Jackſon* v. *Farrand* was founded on a ſingle circumſtance, the marriage of the legatee, which being the foundation of that judgment, implies plainly if the caſe had ſtood only on the deviſe to the legatee at the age of 21, and ſhe dying before that time, that the court would in that caſe have determined againſt the plaintiff, if they could not have laid hold on the circumſtance of marriage; beſides, the authority of that caſe ſeems to be much weakened by the ſubſequent reſolution in *Carter* v. *Bletſoe*.

I have often heard it ſaid, that the reaſon why legacies, *&c.* charged on land, payable at a future day, ſhall not be raiſed if the legatee dies before the day of payment, though it is otherwiſe in the caſe of a charge on the perſonal eſtate, is this, that the heir is a favourite of a court of equity, and ought to have the preference of the repreſentative of a legatee, and likewiſe that the court will go as far as they can in keeping the real eſtate intire, and as free from incumbrances as poſſible.

The true reaſon why legacies, *&c.* charged on land, payable at a future day, ſhall not be raiſed if legatee dies before the day of payment, is, that this court governs itſelf by the rules of the common law; for there if *A.* covenants to pay money to *B.* at a future day, and *B.* dies before the day, the money is not due to his repreſentative.

But I think the court has never gone upon ſuch reaſon, but the true reaſon I take to be this, that the court will govern themſelves as far as is conſiſtent with equity by the rules of the common law. In the caſe of perſonal eſtate, the rule is the ſame here as in the civil law, that there may be an uniformity of judgments in the different courts; but in the caſe of lands, the rule of the common law has always been adhered to: As ſuppoſe a perſon ſhould covenant to pay money to another at a future day, if the covenantee dies before the day of payment, the money is not due to his repreſentative. The ſame rule holds in the caſe of a promiſe to pay money, *&c.*

The bill diſmiſſed.

(B) Where the heir ſhall have the aid and benefit of the perſonal eſtate.

February the 7th 1737.

Bartholomew v. *May.*

Caſe 230.

THE teſtator, *May*, deviſes his lands at *Hadlow* to *Richard May* in tail, remainder over, *&c.* then in mortgage for 1300*l.* and deviſed other lands to *Thomas May*, ſubject however to the payment of his debts, in caſe his perſonal eſtate and other eſtates deviſed for that purpoſe, ſhould not prove ſufficient to ſatisfy all the debts.

A. deviſes lands to *R. M.* in tail then in mortgage for 1300*l.* and deviſed other lands to *T. M.* ſubject to the payment of his debts, in caſe his perſonal eſtate ſhould not prove ſufficient.

Lord Chancellor: I am of opinion that the 1300*l.* muſt be paid as a debt of the teſtator out of the perſonal eſtate, or if that proves deficient, out of the real eſtate ſo deviſed; for wherever there is a mortgage made by a perſon who is owner of the eſtate, that mortgage is looked upon as a general debt, and the land only as a ſecurity, and therefore the perſonal eſtate ſhall be applied in diſcharge of the 1300*l.* though there may be younger children of the mortgagor who may be no otherwiſe provided for: But I think clearly the caſe would be otherwiſe, if the conteſt was between *Richard May* and any creditors of the teſtator, who would loſe their debts if the mortgage was ſo paid off out of the perſonal aſſets, or the money ariſing from the ſale of lands deviſed for that purpoſe.

The 1300*l.* muſt be paid as a debt out of the teſtator's perſonal eſtate, and if deficient, out of the real eſtate ſo deviſed to *T. M.* Where a mortgage is made by a perſon who is owner of the eſtate, that mortgage is looked upon as a general debt, and the land only as a ſecurity; and therefore perſonal eſtate ſhall be applied in diſcharge, but if the conteſt lay between *R. M.* and creditors of the teſtator, it would have been otherwiſe.

In the caſe of *Lovel* v. *Lancaſter*, 2 *Vern.* 183. it is laid down otherwiſe, that the deviſee of the mortgaged eſtate ſhall take it *cum onere*; but I do not pay any great regard to it, becauſe it does not appear whether there was a ſufficiency of aſſets or not to ſatisfy the reſt of the creditors.

N. B. His Lordſhip ſaid in this caſe, that where a teſtator deviſes expreſly that the timber upon a particular eſtate ſhall be cut down for payment of debts, it is a hardſhip upon the firſt taker of the eſtate; but he muſt ſubmit, for here the timber is deviſed one way, and the eſtate another, for the timber is deviſed to *Richard May* and his heirs upon truſt, to cut down and ſell for diſcharge of debts, *&c.* and this is the ſtrongeſt caſe that can be of the kind, but the deviſee of the eſtate may buy, and ſo prevent the defacing of the eſtate.

His Lordſhip declared that the mortgage for 1300*l.* on the teſtator's eſtate at *Hadlow*, and intereſt thereof, is a debt of the teſtator's to be ſatisfied out of his perſonal eſtate and truſt eſtate.

Vide title *Portions, under the diviſion, At what Time they ſhall be raiſed*, &c.

Vide title *Real Eſtate.*

Vide title *Reſulting Truſts.*

Vide title *Conditions and Limitations.*

Vide title *Legacies, under the diviſion, Of a lapſed Legacy by Legatees dying.*

Vide title *Creditor and Debtor.*

Vide title *Catching Bargain.*

Vide title *Papiſt.*

Vide title *Tenant by the Curteſy.*

CAP. LVII.

Husband and Wife.

Vide title *Baron and Feme.*

CAP. LVIII.

Infants.

(A) How far favoured in equity.

(B) What acts of infants are good, void, or voidable.

(A) How

(A) How far favoured in equity.

Hilary term 1737.

Morgan v. *Morgan.*

LORD Chancellor: Where any perſon, whether a father or a ſtranger, enters upon the eſtate of an infant, and continues the poſſeſſion, this court will conſider ſuch perſon entring as a guardian to the infant, and will decree an account againſt him, and will carry on ſuch account after the infancy is determined; but from the inconveniency of ſuch long accounts whenever it comes in proof, that the infant, after being of age, has waived ſuch account, this court will lay hold of any ſuch thing to put an end to it; though indeed in the caſe of a father, the court is not ſo ſtrict, as imagining the parental authority might hinder the bringing any bill or ejectment to recover the poſſeſſion.

Caſe 231. Where any perſon enters upon an infant's eſtate and continues the poſſeſſion, this court conſiders him as a guardian and will decree an account, and to be carried on after the infancy is determined, unleſs the infant after being of age waived ſuch account.

May the 31ſt 1738. *Lincoln's Inn Hall.*

Anon.

THERE is no inſtance of appointing a receiver of the rents and profits of an infant's eſtate, where there is no bill depending in this court, if it were only filed there might be an application for this purpoſe on behalf of the infants.

Caſe 232. The court will not appoint a receiver of an infant's eſtate where there is no bill filed.

(B) What actions of infants are good, void, or voidable.

June the 26th 1739.

Smith v. *Low.*

RICHARD Lloyd deviſed ſome land and houſes built thereon to his ſix children, the mother acting as guardian to the children, who were all infants, demiſed the premiſſes on a building leaſe for forty-

Caſe 233. *R. L.* deviſed ſome land and houſes built thereon to his 6 children, the mother as guardian to the children, who were all infants, demiſed the premiſſes on a building leaſe for 41 years. The eldeſt ſon joined in making the leaſe, and covenanted that the reſt of the children when of age ſhould confirm it.

They all attained 21, and accepted the rent for above ten years after the youngeſt came of age, and then brought their ejectment againſt the leſſee, who by his bill prays to have his leaſe eſtabliſhed.

Under the circumſtances of this caſe, and particularly the acceptance of the rent for ſo long a continuance, the court decreed the leaſe to be eſtabliſhed during the reſidue of the term.

Where a perſon is of age when he makes a leaſe, and has nothing in the premiſſes, but they after deſcend to him, the leaſe ſhall enure by way of eſtoppel, otherwiſe if he had been an infant.

one years; her eldeſt ſon, who was about 19 years of age, joined with her in making the leaſe, and covenanted that the leſſee ſhould have quiet enjoyment, and that the reſt of the children when of age, ſhould confirm the leaſe; the children all arrived at age, and accepted the rent for above ten years after the youngeſt came of age, under this leaſe, after ſuch acceptance brought their ejectment againſt the leſſee; and the bill is brought to have the leaſe eſtabliſhed.

Lord Chancellor: The chief queſtion is, if this leaſe is good, and ought to be eſtabliſhed in a court of equity, under the circumſtances of this caſe; and it is not material in the preſent queſtion, whether the leaſe be, or be not good in law, as againſt the infant who ſigned it, for as the plaintiff comes into equity, it muſt be ſuppoſed bad, though as to one ſixth part it is certainly good, as againſt him, by acceptance of the rent, and yet as to the other two parts which deſcended on him, I think it will not be good by way of eſtoppel; for notwithſtanding where a perſon of age makes a leaſe, and has nothing in the premiſſes, but they after deſcend to him, this leaſe ſhall enure by way of eſtoppel, yet that ariſes from the deed, and ſo cannot act as an eſtoppel againſt an infant, whoſe deed is never good.

An infant bound in this court by a marriage contract, eſpecially if ſhe accepts pin-money, or after the huſband's death, a jointure under the contract.

Whatever is ſufficient to put a party on an inquiry, is good notice in equity to that party.

But here the leaſe is to be made good upon equitable circumſtances, and it appears to be for a valuable conſideration, rent reſerved, and covenants for the leſſee to leave it in good repair, and it is mentioned by the mother, who acts as guardian, to be for the benefit of the infants; there is no fraud or colluſion proved in the leſſee, and the husband of the leſſor, and father of the infants died in bad circumſtances, unable to repair the premiſſes, which were houſes, and a mill, therefore the conſideration of the leſſee's repairing them, is a beneficial one for the infants, and that is ſworn to be done; and there are ſeveral caſes where this court binds infants to contracts made in their behalf, as marriage contracts, eſpecially if the wife accepts pin-money, or after the husband's death accepts the jointure under that contract, and here the great point is, the acceptance of the rent for ſo long a continuance, the youngeſt having been of age ten years, and notice of this leaſe is to be preſumed in all this time. They found a perſon in poſſeſſion of their eſtate, and that was ſufficient to put them to inquire, and what is ſufficient to put the party upon an inquiry, is good notice in equity.

His Lordſhip therefore declared that the plaintiff, under the circumſtances of the caſe, is intitled to have the leaſe eſtabliſhed during the reſidue of the term, and decreed accordingly; and as it was againſt conſcience to bring ejectments after theſe tranſactions, ordered that the plaintiff ſhould have coſts at law, and in equity.

Vide title *Guardian.*

Vide title *Deviſes, under the diviſion, Of Deviſes of Lands for Payment of Debts.*

Vide title *Will.*

Vide title *Plantations.*

Vide title *Marriage, under the diviſion, Where it is Clandeſtine.*

Vide title *Injunction.*

CAP. LIX.

Injunction.

(A) In what cáſes, and when to be granted.
(B) Rule as to injunáions where plaintiff is a bankrupt.

(A) In What caſes, and When to be granted.

February the 12th 1738.

Anon.

A Bill brought for an injunction to ſtay a ſuit in the eccleſiaſtical court for a legacy, becauſe that court cannot make a legatee refund in caſe of a deficiency of aſſets, and this being the day for ſhewing cauſe why the injunction ſhould not be diſſolved, the counſel for the plaintiff relied on the caſe of *Knight* v. *Clark*, cited in the caſe of *Noel* v. *Robinſon*, 1 *Vern.* 93. where *Lord Chancellor* ſaid, there was a difference between a ſuit for a legacy in the Spiritual court, and in this court; if in the Spiritual court they would compel an executor to pay a legacy, without ſecurity to refund, there ſhall go a prohibition.

Caſe 234. Where there is a truſt, or any thing in nature of a truſt, notwithſtanding the eccleſiaſtical court have an original juriſdiction in legacies, yet this court will grant an injunction.

Lord Chancellor continued the injunction till the hearing, becauſe the plaintiff is an executor in truſt only, for where there is a truſt, or any thing in the nature of a truſt, notwithſtanding the eccleſiaſtical court have an original juriſdiction in legacies, yet this court will grant an injunction, truſts being only proper for the cognizance of this court.

The rule in this court now is varied ſince the caſe in *Vernon's Reports*, for legatees are not obliged to give ſecurity to refund upon a deficiency of aſſets.

His Lordſhip mentioned a caſe where a woman an infant was intitled to a legacy upon her marrying, the husband inſtituted a ſuit in the eccleſiaſtical court for it, which he might do, but upon the executors bringing a bill, and ſuggeſting this matter to the court; an injunction was continued till the hearing of the cauſe, and the ſame order was made in the preſent caſe.

Where the huſband of an infant inſtitutes a ſuit in the eccleſiaſtical court for her legacy, upon the executor's bringing a bill, and ſuggeſting this matter to the court, an injunction will be continued to the hearing.

(B) Rule

(B) Rule as to injunctions where plaintiff is a bankrupt.

November the 10th 1748.

Anon.'

Vide title *Bankrupt, under the diviſion, Bankruptcy no Abatement.*

Vide title *Marriage, under the diviſion, Where it is Clandeſtine.*

Vide title *Will, under the diviſion, The Power of this Court over the Prerogative Court.*

CAP. LX.

Inſolvent Debtor.

Auguſt the 7th 1746.

Ex parte Green.

Vide title *Bankrupt, under the diviſion, Rule as to the Inſolvent Debtors Act under Commiſſions of Bankruptcy.*

CAP. LXI.

Jointenants and Tenants in Common.

Hilary Term 1737.

Prince v. *Heylin.*

THE teſtatrix in this caſe being a leſſee for a term of years, of two houſes in *London*, deviſed the ſame *to her nephew* John Prince, *pewterer, and* John Heylin, *clerk*, generally, and then the will goes on thus, "*and my will and meaning is, that the rents of "my ſaid two houſes ſhall be equally ſhared and divided between them, "the ſaid* John Prince *and* John Heylin, *clerk, as aforeſaid.*" The teſtatrix ſoon after dies.

Caſe 235. A teſtatrix deviſes two houſes to *J. P.* and *J. H.* generally, and then ſays, my meaning is, that the rents of my two houſes ſhould *be equally ſhared* between *J. P.* and *J. H.* The deviſees ſhall take as *tenants in common*, and not as jointenants.

John Prince ſurvived the teſtatrix, and died in 1721, ever ſince the premiſſes have been enjoyed by the defendant as the ſurvivor.

This bill is now brought by the adminiſtrator of *Prince*, to have an account of the rents and profits.

The queſtion was, Whether by the words in the will, a jointenancy, or a tenancy in common was created.

It was agreed clearly, that if the words *equally ſhared* had been annexed to the thing itſelf, they would have created a tenancy in common, but inſiſted upon at the ſame time, that the former are plainly words of jointenancy, and the ſubſequent amount only to a direction in what manner the profits ſhould be received during the lives of the deviſees, *viz.* to each of them an equal ſhare, which is ſaying no more than what otherwiſe the law would direct.

Lord Chancellor: I am clearly of opinion, the deviſees were tenants in common, that had the teſtatrix expreſly directed the rents to be ſhared during the joint lives of the deviſees, it might admit of ſome doubt, but with regard to the time, the latter part of the deviſe was as general as the former, and the word *rents* will as properly paſs the intereſt in the houſes, as any other word whatever. This is therefore a plain tenancy in common.

With regard to the time the defendant is to account for the rents and profits, there having been no entry made or demand of the rents, *&c.* It has been inſiſted on for the defendant, he ought to account only from the time of the bill filed: Now in the caſe of jointenants or parceners, there is a mutual truſt between them, and

J. H. having on the death of *J. P.* taken poſſeſſion of the two houſes as ſurvivor, and enjoyed them ever ſince, muſt account for the rents as far back as the death of *J. P.* and not from the filing of the bill.

they are accountable to each other, without regard to the length of time; it is otherwiſe in the caſe of tenants in common, and this is an adverſary poſſeſſion maintained by the defendant againſt the plaintiff ever ſince the death of his inteſtate: However the ſtatute of limitations is a bar to any demand further back than 6 years, and by the 4 *Ann. c.* 16. *ſ.* 27. an action of account lies for one tenant in common againſt another, and ſuch action is expreſly mentioned in the ſtatute of limitations, and as there is no remedy at law, there can be no reaſon for any in equity.

Ejectment not maintainable by one tenant in common againſt another, without an actual ouſter.

I am of opinion the defendant muſt account for rents and profits from the death of the inteſtate, the nature of the eſtate deviſed not admitting of an adverſary poſſeſſion, in regard of the privity that is between tenants in common: An ejectment is not maintainable by one tenant in common againſt another, without an actual ouſter: No advantage can be now taken of the ſtatute of limitations, it not being pleaded by the defendant, or inſiſted on by his anſwer, which in all caſes is neceſſary, in order to have the benefit of ſuch bar to the plaintiffs demand, though indeed the court ſometimes, when there is a very ſtale demand, notwithſtanding the ſtatute is not pleaded, will in it's diſcretion reduce that demand to a reaſonable time, and makes uſe of the ſtatute of limitations as a proper rule to go by in the exerciſe of that diſcretion.

If the ſtatute of limitations be neither pleaded, nor inſiſted on by the anſwer, you cannot have the benefit of ſuch bar.

March the 2d 1738.

Owen v. *Owen.*

Caſe 236. A deviſes all the reſidue of her eſtate to her two nieces *Mary* and *Elizabeth*, daughters to her nephew *William Owen*, and *Anne* his wife, whom ſhe deſires to be truſtees for their children, to take care of their legacies, and then ſays, *My will is, that my eſtate be equally divided between* Mary *and* Elizabeth, *whom I appoint my executrixes accordingly:* One of the nieces died in the life of the teſtatrix, and all the next of kin had ſmall legacies, except one.

The deviſe to the two nieces is not a jointenancy, for the words *equally divided*, though not annexed to the clauſe which gives the reſidue, can relate to that only, and if they had been both living at the death of the teſtatrix, they would have taken as tenants in common.

THE teſtatrix after ſeveral legacies, bequeaths in theſe words, "All the reſt and reſidue, *&c.* I give and bequeath to my "two nieces, *Mary* ahd *Elizabeth*, daughters to my nephew *Wil-* "*liam Owen*, and *Anne* his wife, whom I deſire to be truſtees for "their children, to take care of their legacies for them, they being "of tender age, and my will is, that my eſtate be equally divided "between my two nieces, *Mary* and *Elizabeth*, whom I nominate "and appoint my executrixes accordingly."

One of the nieces died in the life of the teſtatrix.

The queſtion was, Whether *William Owen*, and *Anne* his wife, ſtand in the light of truſtees of a moiety of the reſidue for the next of kin, and whether the teſtatrix was to be conſidered as dead inteſtate in reſpect to that moiety, or whether the deviſe to the two nieces was a jointenancy, and *William Owen* and *Anne* his wife are truſtees for the ſurviving niece only.

N. B.

N. B. *All thoſe who were next of kin, and intitled under the ſtatute of diſtributions, had ſmall legacies left them, except one.*

For the plaintiffs the next of kin were cited, the caſes of *Page* v. *Page* before Lord Chancellor *King*, 2 *Wms.* 489. and *Holderneſs* v. *Rayner*, before Lord *Hardwick*.

Mr. *Brown*, for the defendant the ſurviving niece, urged the rule of Civil law, that where heirs were inſtituted, (which words are of the ſame import, as legatees in our law) and one dies, the legacy goes to the reſt by way of accretion, becauſe the ſame perſon cannot die teſtate and inteſtate as to the ſame thing: He relied much on the authority of *Hunt* v. *Berkeley*, at the Rolls the 24th of *June* 1731, before Sir *Joſeph Jeykll* *.

Lord Chancellor: The firſt queſtion that hath been made in this cauſe is, Whether theſe two nieces, if they had ſurvived the teſtatrix, would have been tenants in common.

It is clear to me, that if both of the nieces had been living, the words *to be equally divided* would certainly have made a tenancy in common, for though, as hath been truly ſaid, theſe words in a ſtrict ſettlement at Common law have never been determined, barely of themſelves to make a tenancy in common, yet in a will it is ſettled that theſe words will make a tenancy in common, both with regard to real and perſonal eſtate.

Though the words *equally to be divided* in a ſtrict ſettlement at Common law have never been determined, barely of themſelves to make a tenancy in common, yet it is ſettled they do ſo in a will, both with regard to real and perſonal eſtate.

The only diſtinction attempted by the defendants counſel in this caſe is, that the words *equally divided* are not annexed to the clauſe that gives the reſidue, and therefore muſt be relative to the ſubſequent clauſe which nominates the two nieces executrixes.

But the conſtruction would be abſurd, becauſe as executors there can be no diviſion of their intereſt, or authority, for though a man may appoint executors in ſuch a manner, that their authority may commence or determine at different times, yet he cannot nominate perſons executors, and confine one of them to one branch of his eſtate, and another to another, for they have a joint authority, which extends to the teſtator's whole eſtate, and cannot be divided into diſtinct and ſeparate powers, and therefore theſe words muſt be applied to the gift of the beneficial intereſt: If therefore they are tenants in common, what is the conſequence of the death of one in the life of

The intereſt and authority of executors is joint, and cannot be divided into diſtinct powers, but they may be ſo appointed as that their authority may commence or determine at different times.

* *Mary Berkeley* poſſeſſed of a perſonal eſtate on the 8th of *December* 1720 made her will, whereby ſhe gave both ſpecifick and pecuniary legacies to her brother *Francis Woolmer*, and to her two ſons in law the defendants, and likewiſe gave legacies to a child of each of them, and alſo legacies to other perſons, and then gives all the reſt and reſidue of her perſonal eſtate to her before-mentioned brother and ſons in law, to be equally divided among them, and makes them executors: In *January* 1722 *Francis Woolmer* died, afterwards in *March* 1725 the teſtatrix died. The queſtion was, Whether the third part of the *reſiduum* deviſed to *Francis Woolmer*, ſhould go to the next of kin, or to the ſurviving executors; and the Maſter of the Rolls decreed for the executors.

the

the teſtatrix? Why, clearly where it is either a pecuniary legacy, or of a real eſtate, that is given to two perſons, to be equally divided between them, and one of them dies in the life-time of the teſtatrix, it is a lapſed legacy, and the ſhare of the perſon ſo dying in the preſent caſe ought to be conſidered as ſuch.

The next queſtion is, Whether this ſhall go to the ſurviving executrix, or be diſtributed amongſt the next of kin, as an undiſpoſed moiety.

The legal intereſt in a *lapſed legacy* is in the executor, but the beneficial in the *next of kin* of the teſtator.

There are two things to be conſidered in regard to this moiety, the legal intereſt, and the equitable intereſt. By the maxims of law, a legal intereſt of a lapſed legacy certainly paſſes to the executor; but in the judgment of this court, the truſt and beneficial intereſt is given likewiſe, and according to the caſes determined here ſince *Foſter* and *Munt*, in 2 *Vern.* 473. muſt go to the next of kin, tho' in all thoſe caſes, the legal intereſt was unqueſtionably allowed to be in the executor.

Page v. *Page* in 2 *Wms.* 489. is a ſtrong caſe, *Where one* deviſed the reſidue of his perſonal eſtate to ſix perſons, to each a ſixth part, and made them executors, and one of them dying in the life-time of the teſtator, Lord Chancellor *King* was of opinion the legacy did not ſurvive, and decreed his ſhare to the next of kin: This caſe on the 29th of *Auguſt* 1734 was cited before Lord *Talbot*, and followed by him, and by me afterwards in the caſe of *Holderneſs* v. *Reyner*.

As an heir does not take real eſtate by the intention of his anceſtor, but *by act of law*, ſo with regard to perſonal, the next of kin take in ſucceſſion *ab inteſtato*, and not by the intention of the teſtator.

Sir *Joſeph Jekyll* late Maſter of the Rolls, in *Hunt* v. *Barkley*, differed intirely from *Page* v. *Page*, but this is only one caſe againſt many, and the reaſon he went on there is not ſufficient to ſupport the doctrine of that caſe; for the next of kin in this reſpect are ſimilar to an heir at law, and as he does not take by the intention of his anceſtor, but in his own right by act of law; ſo with regard to the perſonal eſtate, the next of kin take it in like manner in ſucceſſion *ab inteſtato*, and not by the intention of the teſtator, but as caſt upon them by the law: Therefore I am of opinion the plaintiffs are intitled to a diſtribution.

No perſon can be a truſtee in law, unleſs he has a veſted intereſt in the thing given.

William Owen and *Anne* his wife, the father and mother of the two nieces, are no more than natural guardians to take care of this legacy, for they cannot be in law truſtees, unleſs ſome intereſt in the thing given were actually veſted in them.

February the 26th 1736.

Partridge v. *Pawlet.*

Vide title *Executors and Adminiſtrators, under the diviſion, What ſhall be Aſſets.*

Vide title *Partition.*

CAP. LXII.

Jointure.

Vide title *Dower and Jointure.*

CAP. LXIII.

Judge.

May the 12th 1742.

Ex parte Lingood.

Vide title *Bankrupt, under the diviſion, Rule as to a Certificate from Commiſſioners to a Judge.*

CAP. LXIV.

Landlord and Tenant.

March the 2d 1738.

Benjamin Charlewood, —— —— Plaintiff.

The Duke of *Bedford*, *Smith* and *Bever*, —— Defendants.

THE plaintiff as aſſignee of a leaſe, being intitled, during the remainder of a term therein, to a houſe in *Covent Garden*, with offices, and alſo to a ſtable and coach houſe, with a room over the ſame, and to the uſe of the yard adjoining to the coach-houſe, the defendant *Smith*, the late Duke of *Bedford*'s ſteward, and the plaintiff (who was deſirous to continue in the houſe beyond the term in the ſaid leaſe) on the 26 of *May* 1731 came to an agreement, that in conſideration of the plaintiff's ſurrendring the ſtable and coach-houſe, with the room over the ſame, and his right to the yard, in order to accommodate Mr. *Rich*, who was then building a new play-houſe, he ſhould have 30*l.* allowed him for the then remainder of

Caſe 237. The bare entry of a ſteward in his lord's contract book with his tenants, is not an evidence of itſelf, that there is an agreement for a leaſe between the lord and a tenant.

the term therein, and have the ſame term in the reſidue of the premiſſes made up to him 21 years from that day at 60 *l. per ann.* and that a leaſe ſhould be executed to the plaintiff accordingly, and for which he ſhould pay the Duke 80 *l.* which agreement he delivered *Smith* to be entred in his Grace's contract book with his tenants; that ſome ſhort time after, Mr. *Rich* entered into and poſſeſſed the ſtables, coach-houſe, *&c.* and took down and demoliſhed part thereof to build his playhouſe.

Smith, on the death of the late Duke, being continued ſteward, declared to the plaintiff that he muſt ſtand to the agreement, and ſhould have a further leaſe according to the terms of that agreement, on which the plaintiff began to repair and fit up the houſe, and laid out ſeveral hundred pounds in needful repairs, and alterations beyond what he was obliged to by any covenants in the old leaſe.

At *Lady Day* 1736 the leaſe expired, and no new one hath been made to the plaintiff according to the agreement, though he has offered to pay the fine; but the defendant the Duke of *Bedford* doth not only refuſe to make a new leaſe to the plaintiff, but hath actually made a leaſe of the ſaid premiſſes to the defendant *Bever*, and given the plaintiff notice to deliver the poſſeſſion, or to pay double rent.

The bill therefore is brought to have ſuch further leaſe decreed him, and the ſum of thirty pounds paid him, and that if the defendant *Smith* made the agreement without ſufficient authority, that he may make ſatisfaction to the plaintiff for the damages he may ſuſtain thereby.

The Duke of *Bedford* by his plea, which on arguing was ordered to ſtand for an anſwer, inſiſted that by the ſtatute of frauds and perjuries, " All leaſes, *&c.* or term of years, or any uncertain intereſt in " any meſſuage, lands, *&c.* made by parol, *and not put in writing*, " *and ſigned by the parties* ſo making the ſame, or their agents, law- " fully authorized by writing, ſhall have the force and effect of leaſes " at will only, and ſhall not, either in law or equity, be deemed or " taken to have any other or greater force or effect, *any contract for* " making any ſuch leaſe, or any former law to the contrary not- " withſtanding;" and avers that the pretended agreement for a leaſe to be made to the plaintiff of the premiſſes, *was not put into writing and ſigned by the defendant*; and doth alſo aver that the ſame was not ſigned by his late brother in his life-time, *or by any agent* of his brother, or himſelf, *thereunto lawfully authorized by writing*, and that if the agreement was made by *Smith*, the ſame was never approved of by his brother, nor himſelf, nor did the plaintiff make any application for the leaſe, till the defendant had directed a leaſe to be made to *Bever*, and which he admitted he made in *June* 1733, to commence from the expiration of the former leaſe at *Lady Day* laſt.

And the defendant, the preſent Duke, by his anſwer, inſiſted that the agreement, though *reduced into writing*, yet was made ſubject to the late Duke's approbation, and had been never approved by him,

or ſigned by him, or any agent of his lawfully authorized, nor by the plaintiff or the defendants.

Lord Chief Baron *Cummins*, ſitting for *Lord Chancellor*: I cannot ſee that *this* agreement ſhould be carried into execution, though, to be ſure, there are caſes where agreements have been carried into execution, which have not literally purſued the ſtatute of frauds and perjuries.

In this caſe there does not appear to be any certain agreement between the parties, for the bare entry of a ſteward in his Lord's contract book with his tenants, is not an evidence of itſelf that there is an agreement for a leaſe between the Lord and one of his tenants, unleſs it is ſupported by other proof.

Where a plaintiff has brought a bill for a ſpecifick performance of an agreement, and declines, as the preſent does, reading the anſwer of the defendant, it is a ſtrong ſuſpicion that the anſwer does not come up to the caſe he would make by his bill.

It does not appear whether this is a true copy of the writing that is entred in the contract book, but may be only heads for an agreement; and in caſe a leſſor, by writing an agreement for a leaſe in a book, ſhould be ſaid to ſubſtantiate the leaſe, it would be giving too large a power to him, and would intirely fruſtrate the deſign of the ſtatute of frauds, *&c.* for it would be too great a temptation to perjury.

It was urged by the plaintiff's counſel, that if an agreement be made in part, and executed on one ſide, that this is a foundation for equity to eſtabliſh the agreement, eſpecially where there has been an expence to one of the parties.

A performance only of one ſide is not a diſpenſation of the ſtatute of frauds and perjuries, but *caſus omiſſus*, againſt which there is no proviſion

But in all caſes where there is a performance only of one ſide, that is not a diſpenſation of the ſtatute, but *caſus omiſſus*, againſt which there is no proviſion made.

The court declared that the plaintiff ought to be relieved againſt the payment of the double rent, and ordered the injunction granted for ſtay of the defendant's proceeding at law for double rent be continued; and that the plaintiff's bill, as to all other matters, be diſmiſſed without coſts, except as to the defendant *Bever*, and as to him with forty ſhillings coſts.

CAP. LXV.

Lapſed Legacy.

Vide title *Conditions and Limitations.*

Vide title *Jointenants and Tenants in Common.*

CAP.

CAP. LXVI.

Leaſe.

Vide title *Statute of Frauds and Perjuries.*

CAP. LXVII.

Legacies.

(A) Of veſted or lapſed legacies being to be paid at a future time; or certain age, to which the legatees never arrived.
(B) Where legatees ſhall, or ſhall not, have intereſt.
(C) Of ſpecifick and pecuniary legacies, and here of abating and refunding.
(D) Ademption of a legacy.
(E) Of a lapſed legacy, by legatee's dying in the life-time of the teſtator, and here in what caſes it ſhall be good, and veſt in another perſon to whom it is limited over.

(A) Of veſted or lapſed legacies being to be paid at a future time, or certain age, to which the legatees never arrived.

Trinity Vacation 1737.

Atkins v. *Hiccocks.*

Caſe 238.
A teſtator deviſes to his daughter *E. H.* 200*l.* to be paid her at the time of marriage, or within 3 months after, provided ſhe marry with the approbation of his two ſons.

A Teſtator deviſes in theſe words, "I deviſe to my daughter *Eli-*
"*zabeth Hiccocks*, the ſum of 200*l.* to be paid her at the time
"of her marriage, or within three months after, provided ſhe marry
"with the approbation of my two ſons *William* and *Samuel Hiccocks*,
"or the ſurvivor of them; and my will is, that my ſaid daughter
"*Elizabeth* ſhall yearly receive, and be paid, until ſuch time as ſhe
"ſhall marry, the ſum of twelve pounds, free and clear of all taxes
"and impoſitions whatſoever." And willed, that his leaſehold eſtate called , ſhould ſtand charged with the payment of the ſaid

E. H. died after twenty one, but without being married. Bill brought by her repreſentative for

12*l. per ann.* and likewiſe with the payment of the 200*l.* when the ſame ſhould become due, and deviſed the ſaid leaſehold premiſſes, and his whole perſonal eſtate, to his two ſons, and made them his executors.

Elizabeth died after 21, but without being married; and the preſent plaintiff, as her adminiſtrator, brought a bill againſt the executors of *Hiccocks* for the 200*l.*

The general queſtion, Whether the legacy veſted in *Elizabeth*, and whether it ſo veſted as to be tranſmiſſable to her adminiſtrator?

Lord Chancellor: I am of opinion this was not a veſted legacy; in the common caſes of legacies to be paid at the age of 21, there is a certain time fixed, not to the thing itſelf, but to the execution of it, and the time being ſo fixed, muſt neceſſarily come: but when the time annexed to the payment is merely eventual, and may or may not come, and the perſon dies before the contingency happens, I can find no inſtance in this court, where it has been held that the legacy at all events ſhould be paid. The rule as to the veſting is founded upon another rule, *certum eſt quod certum reddi poteſt*, and it is plain that the teſtator did not regard the point of time, but the fact that was to happen, *the marriage*, which makes it a legacy on a condition, and cannot be demanded till the condition be ſatisfied.

It has been argued by Mr. Attorney general, that this bequeſt differs not from a legacy given *to be paid at* 21, which veſts immediately, and the time of payment only is poſtponed.

But it has been always held, with regard to ſuch a limitation of payment at 21, that it is *debitum in præſenti, ſolvendum in futuro*, and the payment poſtponed merely on account of the legatee's legal incapacity of managing his own affairs till that age; and this has been the eſtabliſhed rule of this court ever ſince *Cloberie*'s caſe, 2 *Ventris* 342.

In the *Digeſt*, *lib.* 35. *tit.* 1. *lex* 75. *de conditionibus*, *&c.* it is held that *dies incertus conditionem in teſtamento facit*, and theſe are the words of the text, and not of the commentator; ſo that a time abſolutely uncertain is put on the ſame footing as a condition; but as the civil law is no further of authority than as it has been received in *England*, let us ſee what our own authors ſay. *Swinbourn*, *part* 4. *ſec.* 17. *page* 267. *old edition*, makes a difference between a certain and an uncertain time, and lays it down, that if a legacy is given to be paid at the day of marriage, and the legatee die before, the legacy is loſt. *God. Orp. Leg.* 452. is to the ſame effect.

It has been inſiſted, that the teſtator's giving 12*l. per ann.* to *Elizabeth* till the contingency of her marriage, is in the nature of intereſt for the 200*l.* and that from thence it appears to be his intention, that the legacy ſhould veſt in the mean time; but whenever this doctrine has been allowed, the payment of the principal hath been certain, and ſo not ſimilar to the preſent caſe, becauſe here this is not meant as intereſt, for it is an annuity of 12*l. per ann.* charged upon, and iſſuing out of an eſtate.

The caſe in 1 *Salk.* 170. *Thomas* v. *Howell*, was plainly a condition ſubſequent, and being made impoſſible by the act of God, it was adjudged that the condition was not broken, and conſequently ſhould not deveſt the eſtate out of the deviſee.

The ſecond point is very ſtrong againſt the tranſmiſſableneſs, which is her marrying with the conſent of her two brothers, and ſhews plainly the teſtator intended a condition precedent, *that if ſhe married ſhe was to have* 200*l. for her portion*; but if ſhe died before, there was no occaſion to have it raiſed for the benefit of a ſtranger.

In all caſes, where the condition of marrying is annexed, it is neceſſary there ſhould be marriage to veſt the legacy.

It is true indeed, as there is no deviſe over, the clauſe of conſent might be only *in terrorem*; but in all caſes, where the condition of marrying is annexed, it is neceſſary that the condition, as to the marrying at leaſt, ſhould be performed, though ſhe is not obliged to marry with conſent.

I am the more ſatisfied, becauſe it appears to be the intention of the teſtator, that this 200*l.* ſhould be in the nature of a marriage portion, for he has taken it out of a leaſehold eſtate; and if ſhe did not marry, it was manifeſtly his deſign that it ſhould ſink in that eſtate for the benefit of his ſons: Therefore I think this bequeſt is to be conſidered as a condition precedent, which not being performed, the legacy did never veſt, and conſequently the adminiſtrator can make no title to it. The bill diſmiſſed.

November the 8th 1738.

Hall v. *Terry.*

Caſe 239.

M. T. being intitled to the reverſion of an eſtate after the death of his wife, deviſed it to *C. D. and his heirs, ſo as he ſhould pay to his ſiſter Elizabeth Oades* 100*l.* within ſix months after the reverſion came into his poſſeſſion.

MICHAEL Terry, being intitled to the reverſion of an eſtate after the death of his wife, "deviſed it to *C. D.* and his heirs, "ſo as he ſhould pay to his ſiſter *Elizabeth Oades* the ſum of one "hundred pounds, within ſix months after the reverſion came into "his poſſeſſion, and *deviſed the reſt and reſidue of his perſonal eſtate, "all his debts and legacies before bequeathed being firſt deducted, to* "C. D. and another, whom he made his executors."

Elizabeth Oades died in the life-time of the wife, and *Elizabeth*'s repreſentative brings the bill againſt *C. D.* for the 100*l.*

The legatee dying before the time for raiſing the 100*l.* was come, her repreſentative is not intitled.

Elizabeth Oades died in the life-time of the wife, and ſhe likewiſe being now dead, the repreſentative of *Elizabeth Oades* brings this bill againſt *C. D.* to have the 100*l.* paid to him.

Mr. *Fazakerley* for the plaintiff inſiſted, that this is a veſted legacy, and that the legatee might have aſſigned it, or releaſed it; and if it was tranſmiſſable in her life-time, it is, after the death of legatee, equally tranſmiſſable to her repreſentative, and was not intended as a contingent payment, but the time of payment only was poſtponed.

He relied chiefly on the caſe of *King* v. *Withers*, *T. T.* 1735. *Caſ. in Eq.* in the time of Lord Chancellor *Talbot*, 117. but if the court ſhould be of opinion againſt the plaintiff in this point, he ſubmitted it, that the 100*l.* might be raiſed out of another fund, the perſonal eſtate, as the defendant allows he has aſſets in his hands, and that by virtue of the laſt words in the will, all his debts and legacies before bequeathed being firſt deducted, it was an original charge on the perſonal eſtate, and therefore ought to follow the ordinary rule of pecuniary legacies.

The *Attorney general* for the defendant inſiſted, that on the face of the will, it is plainly no legacy, but only a charge upon the eſtate, and is nothing more than a gift of the real eſtate, ſo as the deviſee pay ſuch a ſum of money; that a charge upon a real eſtate was never ſubject to the juriſdiction of the Spiritual court, and by their rules it is a veſted legacy only, that is tranſmiſſable to the repreſentative; that the law does not look upon a charge on a real eſtate, as a veſted legacy till the day of payment comes, and this court have always governed themſelves in theſe caſes, by the authority of *Pawlet* v. *Pawlet*, 2 *Ventr.* 366, 367 *.

Mr. *Brown* of the ſame ſide ſaid, to make the perſonal eſtate liable, this legacy ought to be a general charge, which is not the preſent caſe, becauſe it is particularly charged upon a real eſtate, which has never been conſtrued a legacy, but merely a teſtamentary gift, by impoſing terms and conditions on the perſon who takes the eſtate.

Where there is an abſolute legacy, and the future time *muſt* come for the payment, by the civil law, it is tranſmiſſable, but here are no words that can make a gift of the money, nor can he claim it as abſolutely given, for it is only annexed as a condition to a deviſe of lands to another perſon, and he relied on the caſe of *Carter* v. *Bletſoe*, 2 *Vern.* 617 †.

Lord Chancellor: Theſe are caſes upon which there have been great variety of determinations, and they are not very eaſily to be diſtinguiſhed.

The queſtion is, Whether the plaintiff is intitled to have the 100*l.* paid to him, which is given under the will of *Michael Terry* to *Elizabeth Oades*.

---

* A term limited by a ſettlement to raiſe portions for younger children payable at 21, or marriage; one of them dies under 21, and unmarried, her portion ſhall not be raiſed for the benefit of the adminiſtratrix.

† *A.* deviſed lands to *B.* his ſon and his heirs, and declares that out of the lands, he ſhall pay 200*l.* to his daughter at her age of 21, ſhe marries and dies under age; *per cur.* There is no veſting clauſe in the will, the direction, that the ſon pays to the daughter at her age of 21, veſts nothing until ſhe attains 21, and ſhe dying before, it never ariſes.

The

Where money is given to be paid out of real eſtate at a future time, if the perſon dies before the time, it ſhall ſink in the eſtate; the ſame as to perſonal eſtate, where the time of payment is annexed to the legacy.

The general rule is, where money is given to be paid out of real eſtate at a future time, that if the perſon dies before the time, it ſhall ſink into the eſtate, and this has been eſtabliſhed ever ſince the caſe of *Pawlet* v. *Pawlet*, in 2 *Ventr.* and ſo likewiſe as to perſonal eſtate, where the time of payment is annexed to the legacy, if the perſon dies before the time, it cannot be raiſed.

There are other legacies under the will of the teſtator, to which the words, *his legacies before bequeathed being firſt deducted*, are properly applicable, and therefore no argument can be drawn from hence, that the 100 *l.* was intended as an original charge upon the perſonal eſtate.

It is inſiſted by the plaintiff's counſel, that the legacy is veſted, and only the time of payment poſtponed for the convenience of the eſtate, as it was a dry reverſion.

But I am of opinion, that the gift of the ſum of money is only by the direction for the payment, and that it cannot be ſaid this is an original gift, ſo as to veſt the legacy, and the payment only poſtponed to a future time.

Another diſtinction has been attempted, that the time of payment was not taken from the nature of the legacy, or the circumſtances of the legatee, but from the nature of the eſtate, and that therefore *this* is different from all the caſes.

Whether a ſum of money be given as a portion, or as a legacy, if charged upon land, and the party dies before the time, it cannot be raiſed.

But I doubt if I ſhould give into this reaſoning, I ſhould overturn the caſes of portions, or of other ſums bequeathed; for of late years it has been held, that where a ſum of money is given by way of portion, or as a general legacy, charged upon land, if the party dies before the time, it cannot be raiſed.

In the preſent caſe here is no contingency, the time is ſingle, within 6 months after the death of tenant for life, when the reverſion came into poſſeſſion, ſo that it never could be raiſed, becauſe the perſon died before the time for raiſing.

As to the caſe of *King* v. *Withers*, Lord *Talbot* ſaid, that though the contingency, on which the ſums there given were payable, had not happened, yet that the time on which theſe ſums were directed to be paid, had happened, and therefore held *them* to be veſted.

A truſt upon lands for raiſing and paying a ſum of money, within ſix years after the death of the father, to the ſecond ſon, who dying within the time, conſtrued to be for maintenance only, and not tranſmiſſable.

The caſe of *Bright* v. *Norton*, determined by Lord *Talbot*, is a very ſtrong authority in the preſent caſe; *that was a truſt upon lands, for raiſing and paying a ſum of money, within ſix years after the death of the teſtator, to the ſecond ſon, who died within the time, held to be intended for his maintenance only, and not tranſmiſſable to his executor, unleſs he had lived to the end of the ſix years.*

Upon the whole, I muſt direct the bill to be diſmiſſed, but without coſts.

(B) Where legatees ſhall, or ſhall not have intereſt.

Michaelmas term 1737.

Palmer v. *Maſon.*

Caſe 240.

A. gave 500*l.* to his grandaughter to be paid at 21, or marriage, and if ſhe died before either contingency, then it is deviſed over to *B.*

Bill brought for intereſt upon the legacy, and to ſecure the principal.

As it is given over, nothing veſts in the grandaughter, and therefore neither intitled to intereſt, nor to have the principal ſecured.

A ſpecifick deviſee of land ſhall not contribute upon an average with the heir at law, towards ſatisfaction of creditors.

JOSEPH Palmer by will gave 500*l.* to his grandaughter, *to be paid at* 21, *or day of marriage*, and if ſhe died before either of the contingencies happened, then the teſtator deviſes the legacy over to another.

A bill brought for intereſt upon the legacy, and that the principal may be ſecured to the plaintiff, who is an infant, till the contingencies happened, the caſe of *Acherley* v. *Vernon*, in 1 *Wms.* 783. was cited for this purpoſe.

Lord Chancellor: I am of opinion, as the legacy is given over, that nothing veſted in the grandaughter the legatee, and that ſhe is not intitled to intereſt, or to have the principal ſecured.

There was another point in the cauſe between a ſpecifick deviſee of land under the will, and the heir at law of the teſtator, whether the former ſhall contribute equally with the latter, in the payment of debts, where the perſonal eſtate is not ſufficient.

Lord Chancellor: Where there is a ſpecifick deviſe of lands, the ſpecifick legatee ſhall never contribute upon an average with the heir at law towards ſatisfaction of creditors, while the real aſſets of the heir are ſufficient.

January the 28th 1737.

Green v. *Belcher.*

Caſe 241.

On ſettlement before marriage, a proviſo, that if a huſband and wife die, leaving iſſue unprovided for, that then the truſtees might enter upon an eſtate, and take the rents thereof, till they had received 200*l.* for the benefit of ſuch unprovided children, in ſuch manner and proportion, as the ſurvivor of the huſband and wife ſhould appoint: The wife ſurvived, and appointed the 200*l.* for a daughter, the plaintiff's wife, being an unprovided child: Bill brought to have the 200*l.* raiſed.

Sir *Joſeph Jekyll* decreed the 200*l.* and intereſt by way of maintenance, from the death of the mother; defendant appealed from that part which allows intereſt, and decree affirmed.

ON the intended marriage of *Henry Payne*, the *Caſtle Inn* at *Kingſton* was veſted in truſtees, and the truſt thereof declared to one *Elizabeth Stidd* for life, remainder to *Anne Payne*, mother of *Henry Payne* for life, remainder to *Henry Payne* for life, remainder to his intended wife for life, remainder to his firſt and other ſons in tail: And in the deed of ſettlement, there is a proviſo to this effect, that if *Henry Payne* and his wife ſhould die, leaving any iſſue unprovided for, that then it ſhould be lawful for the truſtees to enter and receive the rents

and profits of this eſtate, until they had received the ſum of 200 *l.* and the premiſſes are afterwards declared to be chargeable, and to ſtand charged with the raiſing this ſum, for the benefit of ſuch children ſo unprovided for, in ſuch manner, and in ſuch proportions, as the ſurvivor of the huſband or wife ſhould appoint: The wife ſurvived the huſband, and according to the power under the proviſo, appointed the 200 *l.* to be paid to her daughter the wife of the plaintiff, the only child *not provided for* in the life of the father and mother.

The bill was brought againſt the defendant, who purchaſed the premiſſes of the eldeſt ſon of the marriage, in order to have the 200 *l.* raiſed.

(*a*) Sir *Joſeph Jekyll.*

The Maſter of the Rolls (*a*) decreed the principal ſum of 200 *l.* to be raiſed for the plaintiff, and likewiſe intereſt by way of maintenance for the plaintiff's wife from the time of the death of the mother, which happened about a year before the filing of the bill.

From that part of the decree relating to the allowance of intereſt, the defendant appealed to *Lord Chancellor.*

Lord Chancellor: The defendant in this caſe being a purchaſer with notice of the charge upon the eſtate, is to be conſidered in the ſame light, as if the bill had been brought againſt the perſon under whom he claims.

The queſtion in this caſe will be, Whether the 200 *l.* is to be conſidered as a ſum to be raiſed by receipt of the annual rents and profits, or as a ſum in groſs by a determinate time.

It is plain by the ſettlement, that this 200 *l.* was intended for the children's portions, and what is material too, for ſuch as were otherwiſe unprovided for, and therefore if no maintenance was allowable in the mean time, the eſtate not being above 50 *l. per ann.* the 200 *l.* muſt neceſſarily be exhauſted greatly in bare ſubſiſtence of ſuch children, before the whole ſum could be raiſed.

Wherever the words to be raiſed by rents and profits are uſed in a deed, unleſs there are other words to make it annual, the court have always made a liberal conſtruction, in order to obtain the end which the party intended by raiſing the money, and have allowed a ſale.

Such a conſtruction therefore ought not to be made, unleſs the words are extremely plain, which is not the preſent caſe: That part of the proviſo, impowering the truſtees to enter and receive the rents, *&c.* ſeems to mean the annual rents and profits, though in general, where money is directed to be raiſed by rents and profits, unleſs there are other words to reſtrain the meaning, and to confine them to the receipts of the rents and profits as they accrue, the court, in order to obtain the end which the party intended by raiſing the money, has by the liberal conſtruction of theſe words, taken them to amount to a direction to ſell, and as a deviſe of the rents and profits will at law paſs the lands, the raiſing by rents and profits, is the ſame as raiſing by ſale.

The ſubſequent words, by which the premiſſes are declared to be charged with this 200 *l.* if they ſtood alone, would certainly warrant a ſale or mortgage, and they ought certainly to have their proper force, and ought not to be controlled by the preceding words, ſuppoſing them to mean annual rents only.

The

The words of the appointment of the 200 *l.* being in ſuch manner, and in ſuch proportions, as the ſurvivor of the father and mother ſhall direct, are very material, for theſe words not only include a power of raiſing it by mortgage or ſale, but a certain *determinate time for raiſing it*, and as there is no time limited by the ſettlement for payment of the money, the father or mother might no doubt have made the 200 *l.* payable at any time, as at the age of 21, or marriage, and in ſuch caſe, intereſt by way of maintenance would certainly be allowable in the mean time; it being a conſtant rule in equity, that wherever a legacy is given by a father to a child, as a proviſion for ſuch child, though the legacy be payable at a future day, yet the child has an immediate right to the intereſt of the money; if the legatee was *a ſtranger* to the teſtator, it would be otherwiſe. In the caſe of *Ivy* v. *Gilbert* (*a*), there were no words declaring the premiſſes to be charged with, *&c.* as in the preſent, and yet it was held even there, that the words rents and profits, would in general warrant a ſale, though it did not in that particular caſe, by reaſon of the ſubſequent words reſtraining the manner of raiſing the money, by leaſes for one, two or three lives, or for any number of years determinable thereon, or for 21 years abſolutely at the old rent.

The decree affirmed.

The appointment of the 200 *l.* being in ſuch manner, and proportions, as the ſurvivor of father and mother ſhall think fit, the father or mother might have made it payable at any time.

Where a legacy is given by a father to a child as a proviſion, though payable at a future day, yet the child has an immediate right to the intereſt of the money, otherwiſe, if legatee be a ſtranger to teſtator.

(*a*) Prec in Chan. 583. & 2 Wms. 13.

(C) Of ſpecifick and pecuniary legacies, and here of abating and refunding.

Palmer v. *Maſon.*

Vide this caſe in the diviſion immediately preceding.

May the 5th 1738.

Lawſon v. *Stitch.*

Caſe 242.

JOHN *Lawſon* by will dated the 20th of *July* 1733, amongſt other legacies, deviſed to the defendant 500 *l.* to remain and continue at intereſt on ſuch ſecurities, as he ſhould leave at the time of his death, or to be put out on government ſecurities at the election of his executors.

It appeared in fact, that the teſtator had a mortgage for the principal ſum of 500 *l.* on the eſtate of one Mr. *Pope*, and that he had no other ſum out at intereſt, and it was inſiſted by the defendant, that he had ſeveral times declared that he would leave him the ſaid 500 *l.*

There being a deficiency of aſſets to anſwer all the other legacies given by the will, the queſtion is, If this is a ſpecifick legacy? for if it

it is, it would not be liable to any proportionable abatement, with the other pecuniary legatees.

It was inſiſted by the *Attorney general*, that this is a ſpecifick legacy, that it appearing the teſtator had in this mortgage ſufficient to anſwer the charge, and that too appearing to be the only ſecurity the teſtator had, it muſt be preſumed he intended this legacy ſhould be ſatisfied out of this mortgage; that wherever any ſecurity itſelf is deviſed, or any part of the money due on ſuch ſecurity, ſuch legacy is always to be taken as a ſpecifick one, and in ſupport of his argument, he cited the caſe of *Philips* v. *Carey*, at the Rolls the 14th of *May* 1728. "There the teſtator deviſed a legacy of 1000 *l.* "payable at the age of 21, or marriage, *to be retained in the hands of* "Atwell (who had money of the teſtator's in his hands, as his ban-"ker); the Maſter of the Rolls held this legacy ſhould not carry in-"tereſt, only from the time limited for payment, which is the caſe "always of general pecuniary legacies, but that by this manner of "deviſing this 1000 *l.* it was ſevered from the reſt of teſtator's "eſtate, and ſpecifically appropriated for the benefit of this legatee "and that it ſhould carry intereſt immediately."

A deviſe of a ſum of money in a bag, &c. is a ſpecifick legacy and ſhall not abate with pecuniary legatees.

Lord Chancellor: It is pretty difficult to make pecuniary legacies ſpecifick ones; but ſome ſuch there are, as in the caſe of a ſum of money in ſuch a bag, the deviſe of a bond, or other ſecurity, or a deviſe of money out of ſuch ſecurity, and in ſuch caſe there can be no abatement.

But this ſeems to me by no means a ſpecifick legacy, here is no particular charge of the legacy on this mortgage, and the election given to the executor plainly ſhews, the teſtator did not intend to make the mortgage the particular fund, out of which the legacy ſhould iſſue, but only gave the legatee a power of taking part of the mortgage money, if it ſhould happen to be a ſubſiſting mortgage at the time of his death, or if otherwiſe, that part of the teſtator's money, to the amount of 500 *l.* ſhould be laid out in the purchaſe of ſome government ſecurity or other, to that value.

That the caſe at the Rolls was very different, for that was plainly a deviſe only of part of a debt due from *Atwell* to the teſtator, nor did this point come in judgment, or was it at all neceſſary to be determined there, the queſtion only was, from what time the legacy ſhould carry intereſt, and though it was held to carry intereſt immediately, yet it will not follow from thence it was a ſpecifick one, but liable to an abatement with the other legacies, if any deficiency had made that neceſſary.

Where a particular debt is deviſed, and afterwards recovered by teſtator in an adverſary way, it is an ademption of the legacy.

N. B. It was ſaid by the *Attorney general* in this caſe, that where a particular debt was deviſed, or part thereof, and the ſame was recovered by the teſtator in his life-time, in an adverſary way, that will amount to an ademption of the legacy, otherwiſe, if voluntarily paid off by the debtor to the teſtator: It was admitted by the *Chancellor* in this caſe, that diſtinction had prevailed, and that it was the practice of the court.

His Lordſhip declared, that the 500 *l.* given to the defendant, is to be conſidered as a pecuniary legacy, and liable to abate in proportion with the other legatees.

(D) Ademption of a legacy.

October the 28th 1738.

Purſe v. *Snaplin, et e contra.*

Vide title *Deviſes, under the diviſion, Of void Deviſes, by uncertainty in the Deſcription of the Perſon to take.*

July the 27th 1739.

Graves v. *Boyle.*

SIR *Samuel Garth* having, upon his daughter's marriage, entred into a bond to leave at his death 5000 *l.* amongſt her younger children, by will creates a term in truſtees for 21 years, in truſt to apply the rents and profits for a maintenance for the children of his daughter, till they came of age; by the ſame will he gives his perſonal eſtate in truſt, to pay the produce of it to his wife during her life, and after her death to pay 1500 *l.* to *A.* one of the daughters of his daughter, and to pay 3500 *l.* to and among the other younger children of his daughter, in ſuch manner as his daughter ſhould appoint, and if ſhe made no appointment, then equally between them at their ages of 21, or marriage, and declares his will to be, that the legacies ſo given to his daughter's children, ſhall be in full ſatisfaction of the bond.

Caſe 243. Sir *S. G.* having upon his daughter's marriage given a bond to leave 5000 *l.* at his death among her younger children, by *will* creates a term for years, in truſt to apply the rents and profits for maintenance of his daughter's children till 21, and alſo gives his perſonal eſtate in truſt, to pay the produce of it to his wife for life, and after her death to pay 1500 *l.* to *A.* one of the daughters of his daughter, and 3500 *l.* among the other younger children of his daughter, as ſhe ſhall appoint, and if no appointment, equally between them at 21 or marriage, and declares the legacies ſhall be in full ſatisfaction of the bond.

She muſt elect to claim under the will, or under the bond; if ſhe claims under the latter, can take no benefit under the former.

Where a particular thing is by a will given in diſcharge of a demand, and the party inſiſts on it, he muſt not only waive that particular thing, but all benefit claimed under the whole will.

The plaintiff brings her bill to have her ſhare out of the truſt of the term, and likewiſe her ſhare of the 5000 *l.* under the bond.

Lord Chancellor at the hearing of the cauſe had declared, that the plaintiff might chooſe to claim either under the will, or under the bond, but if ſhe claimed under the bond, ſhe muſt take no benefit at all under the will; but next day conceiving a doubt, on account of the deviſe being of a real eſtate, and the bond being a perſonal debt, gave orders to be attended with precedents, and this day

delivered his opinion in ſupport of his former decree, and mentioned the caſe of *Jenkins* v. *Jenkins*, *November* 5, 1736, before Lord *Talbot*, as a caſe in point, where a particular thing was given in diſcharge of a demand, the party inſiſting on his demand, it was decreed he ſhould waive not only that particular thing, but all benefit which he claimed under the whole will. The caſe of *Shepherd* v. *Phillips* at the Rolls, *Dec.* 15, 1738, was determined on a ſimilar point.

Lord *Hardwick* declared he would not extend the conſtruction of deviſes in ſatisfaction, further than they had already gone.

But at the ſame time the Chancellor took notice, that in the preſent caſe the deviſe was expreſſed to be in ſatisfaction of the bond, and when he gave orders to be attended with precedents, declared, he would not extend the conſtruction of deviſes *in ſatisfaction* further than they had already gone. He decreed the children born after the death of the teſtator ſhould have their ſhare under the bond *.

Decreed, the children born after the death of the teſtator ſhould have their ſhare under the bond.

* *Vide* the caſe of *Lingen* v. *Souray*, *Prec. in Chanc.* 400.

(E) Of a lapſed legacy, by legatee's dying in the life-time of the teſtator, and here, in what caſes it ſhall be good, and veſt in another perſon to whom it is limited over.

July the 1ſt 1739.

Van v. *Clark.*

Caſe 244.

M. C. by her will deviſed to *G. C.* his heirs, executors, &c. all that her meſſuage in *Great Lincoln's Inn Fields*, with all her furniture, houſhold ſtuff, &c. and all her real and perſonal eſtate, not otherwiſe diſpoſed of, to the intent that out of the ſaid real and perſonal eſtates, her ſeveral legacies might be paid.

DAME *Mary Craven*, by her will, deviſed "To *Godfrey Clark*, "his heirs, executors and adminiſtrators *all that her meſſuage or tenement in Great Lincoln's-inn Fields*, *with* all her furni- "ture, (pictures excepted) houſhold ſtuff, &c. *and all her real and perſonal eſtate not otherwiſe diſpoſed of*, as alſo all her mortgages, "ſtocks in the bank, or any other company, and the reſidue of her "perſonal eſtate, not otherwiſe diſpoſed of, to the ſaid *Godfrey Clark*, in "truſt for the purpoſes herein after mentioned, *viz. to the intent that out of the ſaid real and perſonal eſtates ſo deviſed, her ſeveral legatees might be paid*;" *viz.* to *Thomas Lewis* ſhe gave 2000*l.* in truſt to and for the uſe and behoof of his daughter *Mary Lewis*, and declared her intent to be, that the ſaid *Thomas Lewis*, his executors and adminiſtrators ſhould, until the ſaid *Mary Lewis* ſhould attain the age of eighteen, or be married, which ſhould firſt happen, place out the 2000*l.* at intereſt upon good ſecurity, to be approved of by the teſtator's ſiſter *Jane Beacher*; and alſo that the ſaid *Thomas Lewis* ſhould

And then gives to *Thomas Lewis* 2000*l.* in truſt for the uſe of his daughter *Mary*; and he, till ſhe attain the age of 18, or be married, to place out the ſame at intereſt, and pay it with the produce thereof to his daughter for her own uſe, on her attaining the age of 18, or marriage, which ſhould firſt happen.

The 2000*l.* directed to be paid to *Thomas Lewis* within one year and a half after her deceaſe, the infant dying before the time of payment to the truſtee, the legacy not raiſable for her repreſentative.

Thomas Lewis died in the life time of the teſtatrix, and *Mary Lewis* half a year after, unmarried. Bill brought by the repreſentative of *Mary* to have the 2000*l.* paid to him.

from

from time to time put out at intereſt, the intereſt of the ſaid ſum, as the ſame ſhould from time to time ariſe to a fit ſum for that purpoſe, which two thouſand pounds, with the intereſt and produce thereof, the ſaid Dame *Mary Craven* directed *Thomas Lewis*, his executors or adminiſtrators, ſhould pay to the ſaid *Mary Lewis*, for her own uſe and benefit, upon her attaining her age of eighteen or marriage, if that ſhould firſt happen, and made *Godfrey Clerk* executor and reſiduary legatee. She likewiſe directed the 2000*l.* to be paid to *Thomas Lewis* the truſtee, within one year and a half after her deceaſe.

Thomas Lewis died in the life-time of the teſtatrix, *Mary Lewis* died about half a year after the teſtatrix, unmarried.

The bill was brought by the plaintiff, as repreſentative of *Mary Lewis*, to have the 2000*l.* paid to him.

The defendant *Godfrey Clark*, the executor and reſiduary legatee of Lady *Craven*, admitted perſonal aſſets ſufficient to pay the 2000*l.* but ſubmitted to the court if the plaintiff was intitled, and his counſel inſiſted that the houſe in *Lincoln's-inn Fields* was in the firſt place charged with this, and that it was not a charge merely on the perſonal eſtate, but on the mixed fund of real and perſonal; and therefore the legatee dying before the day of payment, it ought to ſink according to the caſe of *Pawlet* v. *Pawlet*, 2 *Ventr.* 366. and 1 *Vern.* 204. and 324. and *Smith* v. *Smith*, 2 *Vern.* 92. *Yates* v. *Phettiplace*, 2 *Vern.* 416. *Carter* v. *Bletſoe*, 2 *Vern.* 616. and *Prowſe* v. *Abingdon*, *E. T.* 1738*. that here was no veſting clauſe, only a direction to the executor to pay at a certain day; ſo that the time is annexed to the ſubſtance of the legacy, not merely to the day of payment. *Dyer* 59. *marginal note*. *Swinbourne* 32.

* *Vide ante.*

For the repreſentative of *Mary Lewis* was cited the caſe of *Wilſon* v. *Spencer*, *January* 1732, 3 *Wms.* 172. *where the teſtator ordered all his juſt debts, funeral expences, and legacies, ſhould be diſcharged out of his perſonal eſtate, as far as that would go, and in default of that, ordered his executors to raiſe* 2000l. *out of his real eſtate within twelve months after his deceaſe, which* 1000l. *he gave to* A. *and charged all his real eſtate therewith.* A. *died within the* twelve months, *and yet decreed to be raiſed.*

That if the truſtee had received it in the preſent caſe, it muſt certainly have gone to the repreſentative of *Mary Lewis*, and that it muſt be conſidered as intirely ſeparated from the eſtate, and never to come back to the executor; and cited the caſe of *Pinbury* v. *Elkin*, 2 *Vern.* 766. and *Jones* v. *Weſtcomb*, *Prec. in Chanc.* 716. where a deviſe was held to be good, though the time of payment was uncertain, and the contingency never happened, (in oppoſition to the rule of civil law which had been cited *e contra*, that *dies incerta conditionem facit*) and alſo the caſe *Corbet* v. *Palmer*, *February* 1734, *where the reſidue was to be divided among ſix at the death of the wife of the teſtator, two died before the wife, and held by Lord* Talbot *that the intereſt of the two who died was a veſted intereſt, and tranſmiſſable to their repreſentatives, and did not depend on the legatee's ſurviving the wife*; and *Whalley* and *Cox*,

Reſidue directed by a will to be divided among ſix perſons, at the death of the teſtator's wife, two died before her; held by Lord *Talbot* that the intereſt of the two was a veſted one, and tranſmiſſable, and depended not on ſurviving the wife.

J. S. gives to *R. P.* 300*l.* in truſt to be paid within three years after his deceaſe to his niece *W.* for her ſeparate uſe, and after her deceaſe 200*l.* thereof to her ſon *T.* and the other 100*l.* to her ſon *C. W.* and *T.* both die within the three years. Sir *Joſeph Jekyll* decreed the whole money ſhould be paid, though charged on both funds.

March 1736, *there* J. S. *made his will as follows:* " *I give and bequeath to* R. Plumer 300l. *to be paid within three years after my deceaſe*, in truſt to put the ſame out to intereſt, and to pay the intereſt and profits thereof to my niece *Whalley* for her ſeparate uſe; and after her deceaſe I give 200*l.* thereof to her ſon *T. Whalley*, and the other 100*l.* to her ſon *C. Whalley*. The mother Mrs. *Whalley* and the ſon *Thomas* both died *within the three years*, and yet the Maſter of the Rolls decreed that the whole money ſhould be paid. It was charged on both funds, real eſtate as well as perſonal, but it was admitted *that the perſonal eſtate was ſufficient*.

Lord Chancellor: The infant dying before the time of payment to the truſtee, I am of opinion makes this legacy not raiſable for the benefit of the plaintiff her repreſentative.

Legacy out of perſonal eſtate payable, or given at a certain time, and intereſt in the mean time, is a veſted one; otherwiſe as to legacies out of real eſtate, for if legatee dies before the time is come, it ſinks into the inheritance. The ſame conſtruction where a legacy is given out of a mixed fund of real and perſonal eſtate at a certain time, or *to be paid* at a certain time.

If a legacy is given out of a perſonal eſtate *payable* at a certain time, or if given at a certain time, and intereſt in the mean time, it is a veſted legacy; but the rule of this court as to legacies out of real eſtates is otherwiſe, for if given at a certain time, or *payable* at a certain time, yet if the legatee dies before the time is come, it ſinks into the inheritance; *ſo when a legacy is given out of a mixed fund of real and perſonal eſtate at a certain time, or to be paid at a certain time*, the conſtruction is the ſame as if given out of a real eſtate only. There is but a ſlight difference between the caſes of legacies given at a day, or *payable* at a day, but the diſtinction is adhered to only to give a conſentaneous juriſdiction with the eccleſiaſtical courts; *nor is there any caſe*, that I know of, to warrant a diſtinction between legacies given out of a mixed fund of real and perſonal eſtate, and out of real eſtate only.

If the infant had ſurvived the year and half, though truſtee dead before, ſhe would have been intitled to the legacy; ſo likewiſe if ſhe had died after the time aforeſaid, and before 18, or marriage, her repreſentative would have been intitled.

If the infant had ſurvived the *year and half*, (for the death of the truſtee makes no diſtinction) it would have been extremely clear ſhe would have been intitled to the legacy; or if ſhe had died *after the time aforeſaid*, and before eighteen or marriage, her repreſentatives would have been intitled: But if this had been merely perſonal, as ſhe died *within the year and half*, her repreſentative could not have been intitled, for the whole gift is in the direction of the payment, which makes that the ſubſtance.

Where a legacy charged on real eſtate is clearly intended as a portion, the court goes as far as it can to hinder the raiſing it out of land for the benefit of repreſentatives.

In the preſent caſe it is not a legacy merely out of a perſonal eſtate, but out of both funds, and the real charged in the firſt place by the teſtator's expreſs directions, *viz. her eſtate in Great Lincoln's-inn Fields.* And this conſtruction is more agreeable to the intention of the teſtatrix, as the ſum was intended clearly *as a portion for Mary Lewis:*

And

And the court always goes as far as it poſſibly can to hinder the raiſing portions out of land for the benefit of repreſentatives, and the end of this bill is plainly for this purpoſe.

His Lordſhip diſmiſſed the bill, but without coſts.

Vide title *Conditions and Limitations.*

Vide title *Deviſes, under the diviſion, Where a Deviſe ſhall or ſhall not be in Satisfaction of a Thing done.*

Legacy veſted. *Vide* title *Heir and Anceſtor.*

Vide title *Injunction.*

CAP. LXVIII.

Maintenance for Children.

Eaſter term 1737.

Edward Jackſon, an infant, — — — Plaintiff.

Anne Jackſon, and others, — — — Defendants.

Caſe 245. Where there is a falling of ſtock without the neglect of the truſtee, he is not liable to make good the deficiency, but is anſwerable only as far as the value, eſpecially where it was ſpecifick ſtock.

THE ſum of 3500*l.* had been conveyed to truſtees for the benefit of *Mary* the plaintiff's mother, during her coverture, and for a proviſion for children; and if no iſſue, then the huſband of *Mary*, if his neceſſities required it, with the approbation of the truſtees, might ſell the 3500*l.*

Anne Jackſon, the mother of *Mary*, and her uncle, were the truſtees under the marriage ſettlement, and the 3500*l.* was paid into their hands. *Mary Jackſon* is by the truſt allowed to make a will during the coverture, and to diſpoſe of this money as if ſhe was a *feme ſole*.

Mary Jackſon lived but four years; before her death ſhe made a will, and deviſed the 3500*l.* in truſt for the benefit of her huſband as to the intereſt thereof, during his life; and for the infant as to the principal; and if the infant dies, the whole for the huſband.

Anne Jackſon the mother of *Mary*, paid the intereſt for the 3500*l.* for a conſiderable time.

Inſiſted by her counſel, that as the ſtocks are fallen, ſhe is only anſwerable as far as the value of the ſtock, eſpecially as it was ſpecifick ſtock, and the fortune of her daughter lay in this ſpecifick ſtock, and therefore ought not to be conſidered as money, eſpecially as ſtocks are of ſuch a fluctuating nature, and liable to ſuch frequent change,

and that the money paid to the daughter was only the dividends of the ſtock.

But it appeared in the cauſe, that the receipts from the daughter to the mother were for intereſt generally, and nothing was mentioned in them of ſtock. The ſettlement too recites the daughter to be poſſeſſed of 3500*l.* principal money in her own right.

Lord Chancellor: This is a mere falling of ſtock without the truſtees neglect, and therefore comes under the laſt clauſe of the ſtatute of *Geo.* 1. made for the indemnity of guardians and truſtees, which provides, "That if there be a diminution of the principal, without "the default of the truſtees, they ſhall not be liable."

It has been ſaid, that after the ſtocks fell, the truſtees paid intereſt for 3500*l.* amounting to much more than the produce from the dividends, and therefore to a demonſtration it appears to be a truſt for money.

But it is well known, that during *the golden dream*, people were ſo infatuated as to look upon imaginary wealth as equally valuable with ſo much money.

It has been ſaid, that long after the falling of the ſtock, the defendant *Anne Jackſon* continued paying the ſame intereſt.

But ſtill it does not anſwer either way, for it does not amount to the common rate of intereſt, and yet is more than the dividends of the fallen ſtock; and to compel truſtees to make up a deficiency, not owing to their wilful default, is the harſheſt demand that can be made in a court of equity.

Notwithſtanding antecedent to the marriage, it was agreed by the defendant to take the ſtock at ſeven hundred and fifty, and a transfer made accordingly; yet this court will never oblige a truſtee to acquieſce under ſo hard and unreaſonable a contract.

Mary Jackſon in her will recites the deed of ſettlement, and her power of deviſing.

The counſel for the plaintiff inſiſt the deviſe to the huſband is illegally made, and not purſuant to the power, and have endeavoured to ſhew, from the whole tenor of the marriage articles, ſhe had no power of diſpoſing of any part of the money for the benefit of her huſband, to the prejudice of the infant the plaintiff, and rely principally upon the following proviſo:

"Provided nevertheleſs that no part of the principal money ſhall "be applied to the uſe of the ſaid *Edward Jackſon* without the con- "ſent of the truſtees under hand and ſeal, to the end that this ſum "may be kept intire for the advantage of the infant."

I am of opinion that Mrs. *Mary Jackſon* had no power to diſpoſe of the principal, to the prejudice of the infant, but in one particular circumſtance; therefore the diſpoſition ſhe has made is not purſuant to the power.

His Lordſhip directed, that the defendant *Anne Jackſon* ſhould account for the whole intereſt of the 3500*l.* ſtock from the death of *Mary Jackſon*.

The father of the plaintiff appearing to be ſufficiently competent, his Lordſhip would give no direction with regard to her maintenance, for he ſaid, that whether an infant ſhould have an allowance of maintenance during the life of the father, depends always upon the particular circumſtances of the caſe.

Where a father is ſufficiently competent, the court will give no direction with regard to an infant's maintenance.

Vide title *Portions, under the diviſion, At what Time they ſhall be raiſed*, &c.

Vide title *Cuſtom of London.*

CAP. LXIX.

Marriage.

(A) Where it is clandeſtine.

December the 20th 1737.

Hill v. *Turner.*

A Bill had been brought againſt an executor for an account of a teſtator's eſtate, and alſo prayed that there might be a guardian aſſigned, and maintenance for an infant; the mother was appointed guardian, and 100*l. per ann.* allowed for his maintenance. Caſe 246.

The infant being made drunk at an alehouſe near the *Fleet* priſon, was drawn in to marry a woman in mean circumſtances and of bad character; and upon an application to this court, the wife was committed to the *Fleet*. The infant's mother, as he had no eſtate ſufficient to maintain a wife till of age, has put him out an apprentice to a merchant in *Holland*, upon which the wife immediately inſtituted a ſuit in the eccleſiaſtical court, for alimony and for reſtitution of conjugal rights; a ſentence there that the huſband ſhould cohabit, and if not, that he ſhould pay alimony, and an order made likewiſe by that court, upon the guardian, to pay the ſum of ten pounds to the wife towards alimony, and afterwards a monition to the guardian to pay a further ſum as an increaſe of alimony, and a ſentence of excommunication pronounced againſt her for not obeying the monition, and alſo againſt the infant the husband for not receiving his wife.

Mary Stewart, the mother of the plaintiff, petitioned the court that a prohibition might be granted to ſtay the proceedings upon the decree, and excommunication againſt her in the ſpiritual court.

Lord Chancellor: I have no doubt at all as to the propriety of applying to this court, but the misfortune is, the want of a ſufficient law to reſtrain ſuch clandeſtine marriages, which are not only introductive

of

of great miſchiefs, but put courts of judicature under great difficulties; but notwithſtanding this defect in the law, it is incumbent on this court to prevent, as far as they can, perſons from profiting themſelves by ſuch infamous methods.

Notwithſtanding the wife may have been diſcharged from the order of commitment, yet till ſhe has paid the coſts of the court for the contempt, ſhe is ſtill under the authority and juriſdiction of this court, though ſhe goes at large.

The ſentence of the eccleſiaſtical court cannot be reverſed in a ſummary way, but by appeal only to proper judges; nor can a prohibition to that court be granted upon a petition; by motion and a proper ſuggeſtion it may.

I cannot reverſe the ſentence which has been pronounced in the eccleſiaſtical court, *that* can be only done by appeal to the proper judges, for it cannot be reverſed in a ſummary way, nor can I upon a petition grant a prohibition to the eccleſiaſtical court, for that can only be upon ſhewing they have no juriſdiction, which muſt be done by motion, and a proper ſuggeſtion: Beſides, there is no colour to ſay the eccleſiaſtical court want juriſdiction, for the authority they exerciſe in matrimonial caſes is the general law of the land, and extends to perſons not only of full age, but under, provided they are old enough to contract matrimony.

An injunction does not deny, but admits the juriſdiction of the court of common law; and the ground on which it iſſues is, that they are making uſe of their juriſdiction contrary to equity. So where a truſtee is ſuing in the eccleſiaſtical court for payment of *ceſtuique truſt*'s legacy into his own hands; or in the caſe of a portion, where the huſband is ſuing for it there, before a ſettlement made; this court will, upon the ſame grounds, reſtrain them from proceeding.

But the queſtion will be, Whether this is not a particular caſe, and ſo circumſtanced as to give me an authority to reſtrain the perſon, without meddling with the juriſdiction of the eccleſiaſtical court? For an injunction when awarded does not deny, but admits the juriſdiction of the court of common law; and the ground upon which it iſſues is, that they are making uſe of their juriſdiction contrary to equity and conſcience. The ſame with regard to the eccleſiaſtical court in caſe of a legacy left in truſt, where the truſtee is ſuing for payment into his own hands, the court will reſtrain him, out of regard to the intereſt of *ceſtuique truſt*; and will do it likewiſe in the caſe of a portion deviſed to a daughter upon marriage, where the huſband is ſuing for it before he has made an adequate ſettlement.

It is upon this footing I ſhall proceed, for if I was not to reſtrain the wife, all the care the court has exerciſed with regard to the eſtate and perſon of the infant, would be vain and uſeleſs: It has been rightly ſaid that this court will not only take care of the infant's maintenance and education, but that he does not marry likewiſe to his diſparagement, and though there is no particular order to reſtrain, yet the marriage is a contempt of the court.

The power of this court over infants reſulted back to them again, upon the diſſolution of the court of wards and liveries, by the 12 *Car.* 2.

This court hath the care and ordering of infants, and though by act of parliament the court of wards had a particular power over them and lunaticks, yet in every other reſpect, the law as to infants continued as before, and as the ſtatute of the 12 *Car.* 2. *c.* 24. has

diſſolved the court of wards and liveries, the power of this court over infants is reſulted back to them again: The law of *England* is favourable to infants, no decree ſhall be had againſt them here, but what they may ſhew cauſe for, when they come of age; this court will make ſtrangers accountable to infants, in caſe they take upon them to receive the profits of their eſtates; this court can alſo aſcertain the *quantum* of an infant's maintenance, and to whom it ſhall be paid; and this is concluſive to all parties.

The allegation of faculties is, a term in the eccleſiaſtical court, in regard to the ability of an infant to allow alimony, and is according to the quality of the perſon, and the quantity of the maintenance; it is this makes them judges of the application of the maintenance, and incroaches upon the juriſdiction of this court; and for whom have they now interpoſed? for the benefit of a wife, who has in a ſcandalous manner inveigled an infant, and ſtoln him away from this court; but though I cannot upon a petition prohibit the eccleſiaſtical court, yet I will reſtrain the wife from proceeding either upon the excommunication pronounced againſt the infant, or upon the excommunication againſt the mother the guardian of the infant; for as there is a certain ſum allotted for his maintenance, the guardian is to be conſidered as very little more than the hand of this court; for if the guardian applies it to other purpoſes, it is a miſapplication, and ſhe would be liable to the cenſure of the court.

Though this court cannot on petition prohibit the eccleſiaſtical court, yet they will reſtrain a perſon who has married a ward of this court clandeſtinely, from proceeding on an excommunication, either againſt the infant, or his guardian.

Suppoſe this woman had even married the infant in a fair way, and with the conſent and approbation of friends, ſtill there ought to have been an application to *this court* for an increaſe of maintenance, and I have known ſuch inſtances, and it is highly improper to inſtitute a ſuit in the eccleſiaſtical court for that purpoſe.

Though a ward of the court is married with the conſent of his friends, yet there muſt be an application *here* for an increaſe of maintenance.

His Lordſhip ordered, that *Mary Hill* who ſeduced the plaintiff the infant by ill practices to marry her, while he was under the care of this court, in contempt thereof, be reſtrained from proceeding in the Spiritual court againſt the petitioner the guardian of the infant, for payment of alimony, and that ſhe be alſo reſtrained from proceeding there againſt the infant himſelf, for reſtitution of conjugal rights and alimony.

And on motion or other application to be made to the Spiritual court on the behalf of the infant, or his guardian, or either of them, to abſolve them or either of them, from the ſentences of excommunication awarded againſt them or either of them; *His Lordſhip* ordered, that *Mary Hill* do conſent thereto in the Spiritual court, to the end that ſuch ſentence or ſentences may be effectually removed out of the way.

Vide title *Conditions and Limitations, under the diviſion, In what Caſes the Breach of a Condition will be relieved againſt.*

Vide title *Agreements, Articles, and Covenants.*

CAP. LXX.

Maſter and Servant.

(A) What remedy they have againſt each other.

November the 26th 1739.

Argles v. *Heaſeman.*

Caſe 247. The plaintiff's ſon was put apprentice to the defendant for ſeven years, but quitted him on being miſuſed, and on defendant's proceeding at law on a bond given by the plaintiff, he brings a bill for an injunction, and for the delivery of the bond.

BY indenture of apprenticeſhip of the 28th of *Auguſt* 1732, the plaintiff's ſon put himſelf apprentice to the defendant a *Mercer* for ſeven years, and he, in conſideration of twenty pounds, covenanted to inſtruct the plaintiff's ſon in his trade, and the plaintiff agreed to pay the defendant 20 *l.* more, if his ſon lived to the 24th of *June* 1734, and gave the defendant a bond for it, on ſuch contingency. After the 24th of *June* 1734, the plaintiff's ſon quitted the defendant upon being miſuſed and evil treated, in being compelled by the defendant to take care of his horſes, and to do other ſervile offices, and upon the defendant's proceeding at law againſt the plaintiff upon the bond, he brings a bill for an injunction, and for the delivery of the bond.

A court of equity has no juriſdiction in matters of this nature, but belongs to juſtices of peace, and therefore the plaintiff ordered to pay coſts at law, and in this court.

Lord Chancellor: A very unneceſſary ſuit in this court, and if I ſhould take upon me to determine it here, it would be a vaſt expence to the maſters and apprentices, and would be aſſuming a juriſdiction which does not at all belong to me, but by the ſtatute of *Eliz.* * is left intirely to juſtices of the peace, as a matter moſt proper for their determination.

* 5 Eliz. cap. 4. ſec. 35.

Miſuſer of an apprentice is not a foundation for coming into equity, for if an action is brought by a maſter againſt the father of an apprentice, for a breach of covenant in quitting his ſervice, if *miſuſer* appears, this is no breach.

The only pretence for bringing it into equity, is the *miſuſer*, and why cannot this be as well determined at law, for if an action is brought by a maſter againſt the father of an apprentice, for a breach of covenant in the ſon's quitting his ſervice, and it ſhould appear there has been a *miſuſer* of the apprentice, I ſhould certainly direct a jury, that this is no breach, for an apprentice may leave his maſter upon *miſuſer*.

The only queſtion is, Whether the *miſuſer* is a diſcharge of the apprentice, which is a mere matter of law, nor is there the leaſt pretence for coming into this court.

But with the conſent of the defendant, *his Lordſhip* decreed, that the injunction already granted, be made perpetual, and that the bond be delivered up to the plaintiff to be cancelled, and at the ſame time he ordered the plaintiff to pay the defendant his coſts at law, on the action upon the bond, and alſo his coſts in this court.

CAP. LXXI.

Meſne Profits.

Vide title *Occupant.*

CAP. LXXII.

Money.

February the 12th 1738.

Anon.'

WHERE money by an order of this court is paid into the *accountant general's* hands, to be placed in the bank, till it can be laid out according to the directions of a decree, if you move for an application of this money, you muſt not only have a certificate that the money was paid into the bank, but that it is actually in the bank at the time of the motion made. Caſe 448.

CAP. LXXIII.

Mortgage.

(A) Of cancelled ones.
(B) What will or will not paſs by it.
(C) Where a perſon who wants to redeem, muſt do equity to the mortgagee before he will be admitted.

(A) Of

(A) Of cancelled ones.

November the 25th 1738.

Harriſon v. *Owen.*

Caſe 249. If a mortgage is found cancelled in the poſſeſſion of mortgagee, it is as much a releaſe as cancelling a bond.

THIS cauſe went off to an iſſue, to try whether certain mortgages were fairly cancelled by the mortgagee, or whether they were fraudulently and by ſtealth, carried away by the mortgagor, and the ſeals cut off by him.

Lord Chancellor ſaid in this cauſe, that if a mortgagee cancels a mortgage, and it is found ſo in his poſſeſſion, it is as much a releaſe as cancelling a bond, but it does not convey or reveſt the eſtate in the mortgagor, for that muſt be done by ſome deed.

(B) What Will, or Will not paſs by it.

Auguſt the 15th 1750.

Ex parte Quincy.

Vide title *Fixtures, under the diviſion, What ſhall be deemed ſuch.*

(C) Where a perſon who wants to redeem, muſt do equity to the mortgagee before he will be admitted.

November the 9th 1739.

Sir *Hugh Smithſon* v. *Thompſon.*

Caſe 250. Where a firſt incumbrancer by judgment, has likewiſe a mortgage, though there is another judgment prior to the mortgage, yet if the mortgagee had no notice of it, the court will not direct a ſale of the eſtate, in favour of the creditor upon the ſecond judgment, unleſs he will pay off principal and intereſt both of the firſt judgment and mortgage.

THE defendant has a prior judgment, and a mortgage likewiſe upon the eſtate of *B.* A ſubſequent judgment creditor, but prior in time to the mortgage, brings his bill in this court, and prays a ſale of the mortgagor's eſtate, who is likewiſe willing and deſirous to ſell.

Lord Chancellor: In *Churchill* and *Grove*, 1 *Cha. Ca.* 35, 36. which has been cited by the plaintiff's counſel, the defendant's purchaſe was ſubſequent to plaintiff's ſecurity; but here the defendant is not a ſubſequent incumbrancer buying in a prior, but is the firſt of the incumbrancers who has advanced more money upon a ſecond incumbrance.

Where *the firſt incumbrancer* by judgment has likewiſe a mortgage upon the eſtate, notwithſtanding there is another judgment, prior in time to the mortgage, yet if the mortgagee had no notice of ſuch judgment, the creditor upon the ſecond judgment ſhall not come into a court of equity, and pray a ſale of the eſtate ſo mortgaged, without paying off the principal and intereſt, both of the firſt judgment and the mortgage, for it would be very hard, if the defendant ſhould be in a worſe condition, with a prior incumbrance in his favour, than a mortgagee without notice of a prior judgment would be in this court.

Therefore I will not decree a ſale of the mortgagor's eſtate, unleſs the plaintiff will ſubmit to theſe terms, and if he does not like them, he may take his remedy at law, by extending the eſtate.

Vide title *Tenant by the Curteſy.*

Vide title *Heir and Anceſtor.*

CAP. LXXIV.

Ne exeat Regno.

January the 12th 1738. Firſt Seal before Hilary term.

Anon'.

Caſe 251.

A writ of *ne exeat regno* originally confined to ſtate affairs, but now very properly uſed in civil caſes.

UPON a motion for a *ne exeat regno*, *Lord Chancellor* ſaid, this was originally confined to ſtate affairs, and the intent of it was to prevent any perſon from going beyond ſea, to tranſact any thing to the prejudice of the King or his government, but now it is very properly uſed in civil caſes; but then ſaid *his Lordſhip*, to induce the court to continue it to the hearing of a cauſe, it is neceſſary for the plaintiff to ſhew that the debt ſhe demands againſt the defendant, is certain.

But in this caſe here is nothing more than a demand of a wife againſt her huſband, by virtue of a marriage agreement, in which the defendant obliged himſelf to ſecure 1700 *l.* out of his eſtate real and perſonal to the wife, as a proviſion in caſe ſhe ſurvived him; but this is a contingency that may never happen, for the huſband

may ſurvive her; and beſides, if it was not ſo, this court would have buſineſs enough, if they interpoſed wherever a marriage ſettlement is ſuggeſted to be a hard bargain, and a ſurprize on the wife; perſons ſhould take the proper care before they marry, and therefore *his Lordſhip* denied the motion.

CAP. LXXV.

Next of Kin.

Vide title *Jointenants and Tenants in Common.*

CAP. LXXVI.

Notice.

(A) Plea of a purchaſer without notice over-ruled.

March the 19th 1736-7.

Kelſall v. *Bennett.*

Caſe 252. *A.* deviſes the eſtate in queſtion to *B.* in tail, remainder to *C.* in fee, the bill brought by the heir of the body of *B.* for deeds and writings, and poſſeſſion.

The defendant pleads he is a purchaſer for a valuable conſideration, from *C.* and had no notice of plaintiff's title.

Where defendant claims under a conveyance, in which there is an eſtate tail prior to the eſtate under which he purchaſed, it is incumbent on him to ſee if that eſtate is ſpent, and therefore over-ruled the plea.

THE bill ſet forth, that *A.* made his will, in which he deviſed the eſtate in queſtion to *B.* in tail, remainder to *C.* in fee, and is brought by the heir of the body of *B.* againſt the defendants, for deeds and writings, and to have poſſeſſion of the eſtate.

The defendant pleads, that he is a purchaſer for a valuable conſideration from *C.* that the plaintiff's father lived in *Virginia* at the time of the purchaſe; that *C.* was in poſſeſſion of this eſtate, and that he had no notice of the plaintiff's title; for that *C.* at the time of the purchaſe, made affidavit that *B.* was dead abroad without iſſue, and therefore inſiſts he is a purchaſer without notice, who may protect himſelf by plea.

Mr. Attorney general for the plaintiff. Both parties claim under one will, and it appears by the plea, that the defendant knew the plaintiff's father was alive, or that the plaintiff himſelf, if there was ſuch a perſon, muſt of courſe be intitled.

Beſides, it is a denial only of the knowledge of the plaintiff's being in *eſſe*, not of his title, which they were bound to take notice of at their peril.

Lord Chancellor: If the defendant claims under a conveyance, where there was an eſtate tail prior to the eſtate, under which he purchaſed, it is incumbent on him to ſee if that eſtate is ſpent. The queſtion here is therefore, Whether a purchaſer can protect himſelf by plea, without denial of notice of the plaintiff's title. *Denial of notice* is what gives him power of protecting himſelf by plea.

Plea over-ruled.

Vide title *Conditions and Limitations, under the diviſion, Who are to take advantage of a Condition, or will be prejudiced by it.*

Vide title *Fines and Recoveries.* Willis *v.* Shorral.

CAP. LXXVII.

Oath.

Vide title *Evidence, Witneſſes, and Proof, under the diviſion, Of examining Witneſſes* de bene eſſe, *and eſtabliſhing their Teſtimony* in perpetuam rei memoriam.

Vide title *Alien.*

CAP. LXXVIII.

Occupant.

Hilary term 1737.

Norton v. *Frecker.*

Caſe 253. A being ſeiſed of a church leaſe to him and his heirs during 3 lives, by ſettlement before marriage, limited it to the uſe of himſelf for life, and to the firſt and every other ſon in tail male; a perſon may take ſuch eſtate ſo granted in fee, determinable on lives by way of remainder, as a ſpecial occupant.

RICHARD Norton was ſeiſed of the manor of *Ixworth* in the county of *Suffolk*, in fee ſimple, and of a church leaſe in the manor of *Alford*, in *Hampſhire*, and a farm called *Lanham* farm, lying in the ſaid manor, to him and his heirs during three lives, granted by the biſhop of *Wincheſter*.

Richard being ſo ſeiſed, and having iſſue one ſon *Daniel*, intermarried with a daughter of Lord *Say* and *Seale* in 1657, and by indenture dated the firſt of *March* in that year ſettled all the premiſſes, to the uſe of himſelf for life, then as to the manor of *Ixworth* and *Lanham* farm, to the uſe of his firſt and every other ſon in tail male, remainder to his own right heirs: And as to the manor of *Alford*, to the uſe of ſuch child or children of the ſaid marriage, and for ſuch eſtates as he ſhould by deed or will appoint, and for want of ſuch appointment, to the firſt and every other ſon in tail male, remainder to his own right heirs.

There were ſeveral children of this marriage, and *Richard* was the eldeſt, and upon his marriage with *Elizabeth Butler*, an indenture was made by *Richard* the father, dated the 3d and 4th of *Oct.* 1673, which recited, that by the marriage articles, previous to the marriage, the ſon had agreed to ſettle this eſtate, and thereupon *Richard* the father ſettled the premiſſes in truſt for himſelf for life, remainder to *Richard* the ſon for life, and if he ſhould die without iſſue male of his body, then in truſt for raiſing portions for daughters, remainder in truſt for ſuch uſes as *Richard* the younger ſhould by his will or deed direct, and in default thereof, in truſt for ſuch uſes as *Richard* the elder ſhould appoint, and for want of ſuch appointment, in truſt for the heirs, executors and adminiſtrators of *Richard Norton* the elder; this deed was executed likewiſe by *Richard Norton* the ſon.

Some time after *Richard* the father died; in 1708 *Richard* the ſon likewiſe died without iſſue, and neither of them made any appointment.

Upon the death of *Richard* the ſon, the heir at law of *Richard* the father by the firſt venter, whoſe name was *Richard* likewiſe, entred into thoſe lands.

The plaintiff was grandſon of old *Richard* by his ſecond marriage, and under the deed of 1657, had nothing further been done, would have

have been intitled to the premiſſes: In 1721 he applied to the heir at law of old *Richard*, that the church leaſe might be renewed for the benefit of him and his ſon, upon his paying the fine, which was accordingly granted; and in 1722 *Richard* the heir at law delivered a deed to the plaintiff, declaring the truſt of this leaſe to be for himſelf for life, remainder to the plaintiff for life, remainder to his eldeſt ſon.

In 1732 *Richard* the heir at law died, and on his death the plaintiff entred on the premiſſes, and now brings his bill againſt the adminiſtrator, with the will annexed of *Richard* the heir at law, in order to have an account of the rents and profits; the defendants by their anſwer inſiſted on the ſtatute of limitations, but that bar being now removed by a particular act of parliament of the laſt ſeſſion, the queſtion upon the whole was, Whether the plaintiff was intitled to any relief?

Lord Chancellor: I am of opinion the plaintiff was, by virtue of the remainder, limited to the firſt and other ſons in the deed of 1657, intitled to the manor of *Alford*, and *Lanham* farm, if nothing had been done ſubſequent to that, to bar his right.

In the caſe of *Waſteneys* and *Chapple* in the houſe of Lords in 1712, it was determined, that in reſpect to eſtates thus granted in fee determinable on lives, a perſon may take by way of remainder, as a ſpecial occupant, but that as ſuch an eſtate tail is not within the ſtatute *de donis*, nor barrable properly by a recovery as an eſtate tail, any limitations depending thereupon are intirely in the power of the firſt taker in tail, and may be deſtroyed by any conveyance, or even articles in equity, and was ſo determined in the caſe of the Duke of *Grafton* v. Lord *Euſton* in 1722, in which I was council myſelf.

The deed in 1673 amounted to a good diſpoſition, by *Richard* the younger, of all the intereſt claimable by him, or any other in remainder after him, and clearly ſo with regard to *Lanham* farm, the tenant for life, and the remainder man in tail of an intereſt veſted, having joined in the conveyance, and limited the eſtate to other uſes: And as to the manor of *Alford*, though no remainder was veſted in *Richard*, yet the father and ſon both joining, amounted to a good diſpoſition of it: I am likewiſe of opinion, that the deed of 1673 would, in a court of equity, operate as an execution of the power which old *Richard* had, of limiting the uſes to his children by the deed of 1657, and ſo the uſes of the deed of 1657 were deſtroyed that way likewiſe; and with regard to the tranſaction in 1721, there is no evidence of any concealment, or ſuppreſſion of the plaintiff's title.

The plaintiff's bill for an account of rents and profits is improper and premature, the poſſeſſion never having been recovered againſt *Richard* the defendant's anceſtor, and in this reſpect the proceedings in equity are the ſame as at law, where treſpaſs will not lie for *meſne* profits, till the poſſeſſion is recovered by ejectment: That even ſuppoſing

The rule in equity is the ſame as at law, as treſpaſs will not lie for *meſne* profits till poſſeſſion is recovered, ſo neither can a bill be brought for an account thereof till then.

poſing the court ſhould now have been of opinion that *Richard*, the heir at law of old *Richard*, had no right, and ought to be conſidered only as a truſtee for the plaintiff; yet as he was in poſſeſſion, claiming the eſtate as his own right, and inſiſting on his own title, this court cannot decree an account of rents and profits, without having any regard to the recovery of the poſſeſſion. The bill diſmiſſed.

N. B. *Lord Chancellor* ſaid in this caſe, no executor was compellable, either in law or equity, to take advantage of the ſtatute of limitations againſt a demand otherwiſe well founded.

CAP. LXXIX.

Office.

December the 22d 1749.

Ex parte Butler and Purnell.

Vide title *Bankrupt, under the diviſion, Rule as to the Sale of Offices under a Commiſſion of Bankrupcy.*

CAP. LXXX.

Papiſt.

March the 18th 1736-7.

Smith v. *Read.*

Caſe 254.

A bill brought to diſcover whether *A.* under whoſe will the defendant claims, was a papiſt at the time of a purchaſe made by *A.* of the eſtate from the plaintiff's anceſtor. Defendant pleads, as to the diſcovery, the ſtatute of the 11th and 12th of *Will.* 3. by which if *A.* was a papiſt, ſhe was diſabled to take.

Under the rule, a man is not obliged to accuſe himſelf, is implied, that he is not to diſcover a diſability in himſelf; and as *A.* would not have been obliged to diſcover, the defendant, who claims under the ſame title, is intitled to the ſame privileges, and takes the eſtate under the ſame circumſtances. The plea allowed.

THE bill was brought for the rents and profits of the eſtate, and to diſcover whether *A.* under whoſe will the defendant claims was a papiſt, at the time of a purchaſe made by *A.* of the eſtate from the plaintiff's anceſtor.

The defendant pleads a title under *A.* and as to the diſcovery, pleads the ſtatute of the 11th and 12th of *William* 3. againſt papiſts, by which ſtatute, if *A.* was a papiſt, ſhe was diſabled to take.

Therefore, as the defendant's counſel inſiſted, this bill ſeeks to diſcover what, if true, would be a forfeiture and a penalty, which no one is bound in equity to diſcover; and as *A.* was a purchaſer, the defendant, as ſtanding in his place, is equally ſo. The law obliges no man to accuſe himſelf, and for this purpoſe they cited 2 *Cha. Ca.* 8. *Molings* and *Molings*, and the *South Sea Company* and *Dolliff*, where a diſability was held equivalent to a penalty, or a forfeiture.

Mr. Attorney general for the plaintiff ſaid, Here the eſtate, if ſhe was a papiſt, never was veſted, or could deſcend; and therefore it is not to be compared to forfeitures.

The caſe of *Molings* and *Molings* is not a determination according to equity, for they claim under one, whom it does not appear but that they had notice could not take.

Mr. *Fazakerley* on the ſame ſide.

This prevents the eſtate coming to them, but does not deveſt it as a forfeiture, and the bill is no more than to diſcover a title.

The eſtate never moved from the grantee.

Lord Chancellor: I think the defendant is not bound to diſcover, for there is no rule more eſtabliſhed in equity, than that a perſon ſhall not be obliged to diſcover what will ſubject him to a penalty, or any thing in the nature of a penalty.

Under the rule, a man is not obliged to accuſe himſelf, is implied, that he is not to diſcover a diſablity in himſelf; and there is no difference between a forfeiture of a thing veſted, and a diſability to take, inflicted as a penalty; and the 11th and 12th of *William* 3. is a penal ſtatute.

If this bill had been brought againſt the perſon himſelf, and there was no other penalty than this, I think he would not have been obliged to diſcover.

Therefore they who claim under the ſame title are intitled to the ſame privileges, and take the eſtate under the ſame circumſtances.

As to its being a defective title only, it is true; but then it is a defect ariſing from a penalty.

The laws of bankrupts are not all penal laws, and in the caſes of aliens baſtards, *&c.* there is a difference where the diſability ariſes from the rules of law, and where it is impoſed as a penalty.

If this plea was not allowed, it would affect numberleſs inheritances, and proteſtants more than papiſts. And where the legiſlature have intended diſcoveries of what is penal, they have put in clauſes for that purpoſe, as in the ſtatute of the 12th of *Anne*, *Ch.* 14. of the livings belonging to papiſts.

The plea allowed.

July the 31ſt 1751.

Thomas Harriſon, and *Elizabeth* his wife, —— Plaintiffs.
Edmund Southcote, and *William Moreland*, Eſqrs. Defendants.

Caſe 255.

The bill ſeeks a diſcovery of the defendant *Moreland*, whether *Southcote* was not a perſon profeſſing the popiſh religion before he conveyed the freehold and copyhold eſtates to the defendant, in the bill mentioned, as a purchaſer thereof.

A plea of the ſtatute of the 11th and 12th of *Will.* 3. for preventing the growth of popery, ſo far as it goes to the diſcovery whether *Southcote* was a papiſt, *allowed.*

THE caſe the plaintiff makes by his bill is, that *Elizabeth* his wife is the only daughter of *George Stiles*, who was the younger brother of *Thomas Stiles*, late of *Watton* in *Northamptonſhire*, and firſt couſin and heir to *Winifred Southcote* deceaſed, formerly *Winifred Stiles*, the only daughter and heir of *Thomas Stiles*.

That *Winifred* being ſeiſed of a freehold eſtate at *Watton*, of the yearly value of 130*l.* and of a copyhold eſtate in *Lincolnſhire*, of the yearly value of 100*l.* which deſcended to her upon the deceaſe of her father *Thomas Stiles* did in 1747 intermarry with the defendant *Southcote*.

That in the marriage ſettlement, dated the 28th of *January* 1747, the ſaid eſtates were limited to the uſe of the defendant *Southcote* and his wife for life, remainder to the iſſue of their two bodies, remainder to the ſurvivor in fee.

That on the 6th of *April* 1749 *Winifred* died without iſſue, upon whoſe deceaſe *Southcote* inſiſted that he became ſeiſed in fee of thoſe eſtates under the ſettlement; but the plaintiffs charge, that *Winifred* was educated in the popiſh religion, and ſo continued to her death, and that the defendant *Southcote* now does, and always hath profeſſed the popiſh religion, ſo that by ſeveral acts of parliaments made for preventing the growth of popery, and to diſable papiſts from taking any new acquiſitions, *Winifred* had not power to make ſuch conveyance of theſe eſtates, and ſettle the ſame in ſuch manner; nor was her husband capable to take any land or eſtate by purchaſe, but all the lands of *Winifred* deſcended, at her death, to her next proteſtant heir at law; and that the plaintiff *Elizabeth*, being the heir at law to *Winifred*, and a proteſtant, the real eſtate of *Winifred*, upon her death, deſcended on her; and the plaintiff *Thomas Harriſon*, in right of his wife, is become intitled to the poſſeſſion of the ſame, and ought to have been let into poſſeſſion, but the defendant *Southcote*, being conſcious of his own diſability of taking theſe eſtates, went to the other defendant *Moreland* the next morning after his wife was buried, and told him the neceſſity he was under of conveying theſe eſtates before the plaintiff *Elizabeth*, as next proteſtant heir, could recover the ſame, or give notice of his claim thereto; and then deſired the defendant *Moreland* to permit theſe eſtates to be conveyed in truſt for him, and

to

to prevent the plaintiffs coming at the ſame, and without any valuable conſideration for ſuch conveyance.

That ſuch agreement being entred into by the defendants, *Southcote* did accordingly convey the freehold and copyhold eſtates to *Moreland*, in fee by ſome deed, but were never duly regiſtred as the act of parliament requires.

That *Southcote* was in ſo great a hurry to convey theſe eſtates, that they were even conveyed before *Moreland* ever ſaw the eſtate, or had any eſtimate made of the ſame, and the conveyance was compleated before the plaintiffs had any account of *Winifred*'s death, and therefore they could not have made any entry upon the eſtates, or have given any notice of their claim.

That from the death of *Winifred* to the execution of the conveyance to *Moreland* was only nine days, during which time the defendant *Southcote* never entred upon, or was in the actual poſſeſſion of theſe eſtates, or appeared amongſt the tenants after the death of *Winifred* to the time of the ſale, or ever received any money on account of the rents thereof, after her death till ſuch ſale.

That the defendant *Southcote* could not be looked on *as the reputed owner* of theſe eſtates, never having been in poſſeſſion thereof; and as the ſame was conveyed to *Moreland*, under ſuch circumſtances, and in a fraudulent manner, and without a conſideration *bonâ fide* paid; and the plaintiff being intitled as aforeſaid, *they filed their bill the 28th of November* 1749, *and prayed that* Moreland *may be decreed to reconvey theſe eſtates to the plaintiffs, and that he and the defendant* Southcote *may account for the rents and profits.*

As to ſo much of the plaintiff's bill as ſeeks to compel the defendant *Moreland* to ſet forth, or diſcover whether *Winifred Southcote* did, at any time during her life, profeſs the popiſh religion; or which ſeeks to compel this defendant to ſet forth or diſcover, whether the other defendant *Edmund Southcote*, did at, or at any time before his conveyance and ſurrender to this defendant, of the freehold and copyhold eſtates in the complainants bill, and herein after particularly mentioned, *profeſs the popiſh religion*, or which ſeeks to compel this defendant to re-convey all or any part of ſuch freehold or copyhold eſtates to the complainants, *or which ſeeks to compel this defendant to diſcover any of his title deeds, or writings relating to the ſaid eſtates, or any part thereof.* This defendant doth plead in bar, and for plea ſaith, that by an act of parliament made in the 11th and 12th years of the reign of his late Majeſty King *William* the third, intitled, An act for the further preventing the growth of popery, it was enacted, " That if any perſon educated in the popiſh religion, or profeſſing " the ſame, ſhould not, within ſix months after he ſhould attain the " age of 18 years, take the oaths of allegiance and ſupremacy, and " alſo ſubſcribe the declaration expreſſed in an act of parliament made " in the 13th year of King *Charles* the ſecond, every ſuch perſon ſhould " in reſpect of him, or herſelf, and to, or in reſpect of any of his " or her heirs, or poſterity, be diſabled, and made incapable to in- " herit or take by deſcent, *deviſe*, or limitation in poſſeſſion, *rever-*

" *ſion*, or remainder, any lands, tenements, or hereditaments, within " the kingdom of *England*, &c. *and that during the life of ſuch per-* " *ſon, or until he or ſhe ſhould take the oaths, and make and repeat the* " *ſaid declaration, the next of his or her kindred, which ſhould be a* " *proteſtant, ſhould have and enjoy the ſaid lands*, &c. *without being* " *accountable for the profits by him, or her, received during ſuch en-* " *joyment.*"

And this defendant for further plea ſaith, *Edmund Southcote* being, or claiming to be ſeiſed in fee, of and in the ſeveral freehold meſſuages, lands and hereditaments herein after mentioned, and to be alſo ſeiſed and well intitled to him and his heirs, according to the cuſtom of the manor of *Watton* in the county of *Northampton*, in divers copyhold meſſuages, and alſo being or claiming to be poſſeſſed of, and well intitled to, ſeveral leaſehold meſſuages for the remainder then to come and unexpired, of a term of years granted by the dean and chapter of *Peterborough*, and being in actual poſſeſſion of the ſaid freehold, copyhold, and leaſehold eſtates, he did, in the month of *April* 1749, apply to this defendant, and propoſe to ſell all the ſaid freehold, copyhold, and leaſehold eſtates, and all his right, title, and intereſt therein to this defendant, for the ſum of 4500*l.* which he then declared was, in his judgment, the real value of the ſaid eſtates; but at the ſame time agreed, that if upon a further view and valuation 4500*l.* ſhould appear to exceed the real and juſt value thereof, he would return ſuch over valuation money, or make an allowance to this defendant for the ſame; and after taking ſome ſhort time to conſider, the defendant did agree to the propoſal, and that he would, upon executing the conveyances, pay to *Southcote* 100*l.* in part, and give him a bond for the payment of 4400*l.* reſidue thereof with intereſt, after the rate of 3*l.* 10*s.* *per cent. per ann.* and *Southcote* in two or three days afterwards, being fully ſatisfied of this defendant's ability to pay 4400*l.* did agree to accept ſuch bond, and by indentures of leaſe and releaſe, dated the 14th and 15th days of *April* 1749, and duly inrolled in the court of Common Pleas, between *Edmund Southcote* of the one part, and this defendant of the other part, in conſideration of 4500*l.* mentioned to be paid, or ſecured to be paid to him the ſaid *Edmund Southcote* by this defendant, he the ſaid *Edmund Southcote* did give, grant, bargain, ſell, releaſe, and convey unto this defendant, his heirs and aſſigns, all that capital or chief manſion-houſe with the appurtenances, ſituate, *&c.* at *Watton* aforeſaid, then in the tenure and occupation of the ſaid *Edmund Southcote*, and all other the lands, *&c.* therein mentioned, *To hold* the ſame unto and to the uſe of this defendant, his heirs and aſſigns for ever, and for the conſideration aforeſaid, he the ſaid *Edmund Southcote* did aſſign to this defendant all and ſingular the lands and tenements of him the ſaid *Edmund Southcote*, in the county of *Northampton*, by leaſe of the dean and chapter of *Peterborough*, to hold the ſame to this defendant, his executors, adminiſtrators, and aſſigns, for the remainder of a term of years, which was then to come and unexpired; and for the conſideration aforeſaid, he the ſaid *Edmund Southcote* did, by indenture of releaſe,

leaſe, covenant with this defendant, that he and his heirs would, with convenient ſpeed, well and ſufficiently ſurrender all his copyhold lands to this defendant and his heirs.

And this defendant for further plea ſaith, that the ſaid *Edmund Southcote* did, on or about the firſt of *May* 1749, duly ſurrender out of court into the hands of the Lord of the Manor of *Watton*, by the hands of the ſteward, all the copyhold eſtates; and this defendant was afterwards duly admitted tenant *to hold* the ſame, to this defendant, his heirs and aſſigns for ever.

And this defendant, for further plea, ſaith, that at or before the time of the execution of the leaſe and releaſe, he the ſaid *Edmund Southcote* delivered to this defendant the title deeds, and writings, relating to the ſaid eſtates; and this defendant, at the time of the execution of the ſaid indentures, did really and actually pay and deliver to the ſaid *Southcote*, a bank note for 100*l.* in part of the conſideration money, and this defendant at the ſame time entred into ſuch bond as was before agreed upon.

And this defendant, for further plea, ſaith, that in the beginning of the month of *May* 1749 he entered upon and took poſſeſſion of all the ſaid eſtates; and the ſaid *Edmund Southcote* and the tenants attorned to this defendant, and he hath ever ſince been in the poſſeſſion of the ſaid eſtate, and intitled to receive ſo much of the rents and profits as became due ſince *Lady Day* 1749.

And the defendant afterwards took a view, and made inquiry into the value of the ſaid eſtates, and upon ſuch view and inquiry found that they had been greatly over-valued, and informed the ſaid *Edmund Southcote* thereof, and inſiſted that a very conſiderable abatement ſhould be made him in reſpect of ſuch over valuation out of the ſaid 4500*l.* and *Southcote* being ſatisfied they were not worth more than 3500*l.* did agree to abate or allow to the defendant 1000*l.* out of the principal money ſecured by the ſaid bond, and accordingly by a deed poll, indorſed on the ſaid indenture of releaſe, dated the 25th of *November* 1749, it was declared and agreed between the ſaid *Edmund Southcote* and this defendant, that 1000*l.* ſhould be abated in reſpect of the deficiency in value of the ſaid eſtates, and that the ſaid *Edmund Southcote* ſhould, by an indorſement on the bond, give a diſcharge to this defendant for 1000*l.* part of the money thereby ſecured, and did agree that the ſaid bond ſhould remain a ſecurity for the 3400*l.* and intereſt, and no more.

And this defendant, for further plea, ſaith, that the ſaid 3500*l.* paid, and ſecured to be paid by this defendant to the ſaid *Southcote*, for the purchaſe of the ſaid ſeveral freehold, copyhold, and leaſehold eſtates, was a full and valuable conſideration for the purchaſe of all the ſaid eſtates; all which matters and things this defendant doth plead to ſo much and ſuch part of the complainant's bill as aforeſaid, and demands judgment, whether he ought to be compelled to make any further or other anſwer.

By way of anſwer, the defendant *Moreland* inſiſted, that he had not any intimacy with, or any particular friendſhip for, *Edmund Southcote*,

Southcote, before the time of making the contract, but that the purchaſe was fair and open, and made *bonâ fide*, and not colourable or merely to ſerve the deſigns of *Edmund Southcote*, nor did *Edmund Southcote* ever apply to him, to take or permit any conveyance whatſoever, of all or any part of the eſtates, in truſt for the ſaid *Edmund Southcote*, or upon any truſt or confidence whatſoever, without paying a full and valuable conſideration for the ſame; nor was the conveyance made in truſt for *Edmund Southcote*, or in or upon any other truſt or confidence; nor was any kind of agreement at any time made or entred into, by or between this defendant and the ſaid *Edmund Southcote*, concerning the ſaid eſtates, upon any ſuch truſt or confidence, or with any kind of ſecret or fraudulent deſign whatſoever.

And that *Edmund Southcote*, at the time of the ſale of theſe eſtates, and for a conſiderable time before, was in the occupation of all the eſtates at *Watton* in the county of *Northampton*, and deſiring the defendant to permit him to continue in the occupation thereof as tenant to this defendant, it was thereupon agreed between the ſaid *Edmund Southcote* and this defendant, that the ſaid *Edmund Southcote* ſhould hold and enjoy the ſame from *Lady Day* then laſt, for four years, (it being cuſtomary there to let lands from four years to four years) at the clear yearly rent of 90*l.* and the ſaid *Edmund Southcote* hath ever ſince been in the occupation of all the eſtate at *Watton* under the agreement, but hath not paid the yearly rent of 90*l.* to this defendant, to whom this defendant being indebted as aforeſaid, this defendant hath not required payment thereof.

And that the reſt of the eſtates purchaſed by this defendant are freehold and lie in *Lincolnſhire*, and at the time of his purchaſe was of the yearly value of 86*l.* 15*s.* and is now rented at that rent. And that *Edmund Southcote* was, at the time of the contract, and had, from the death of *Winifred*, been the reputed owner of the ſaid eſtates, which this defendant purchaſed as aforeſaid; and that this defendant doth now, and at the time of making the purchaſe, and at all times hath profeſſed the proteſtant religion, and that he purchaſed the ſaid eſtates merely and for his own benefit.

And that the complainants had not, before the time when the defendant purchaſed the ſaid eſtates, recovered, nor hath ſince recovered the ſaid eſtate, nor had the complainants given any notice whatſoever to this defendant, before the filing of the bill, of any claim or title thereto, for or by reaſon of any kind of diſability or incapacity, or otherwiſe howſoever; neither had the complainants then, or at any time ſince, entred any claim to the ſaid eſtates in open court, at the general ſeſſions of the peace for the county, riding, or diviſion wherein any of the ſaid eſtates lie, though the complainants might have had immediate notice of the death of *Winifred Southcote*, ſhe having been long ill.

And this defendant admits he did not ſee the ſaid eſtates before his purchaſe thereof, but relied on the declaration and agreement of the other defendant.

Mr. Solicitor general for the defendant *Moreland.* *

* Mr. *Murray.*

The queſtion is, Whether *Winifred* the wife was, or the defendant *Southcote* himſelf, a papiſt or perſon profeſſing the popiſh religion, and if this be a bar to the plaintiff's having a diſcovery, or the relief prayed.

The bill is not brought by a proteſtant next of kin, but by the plaintiff ſimply as heir at law of *Winifred*, and thereby intitled to take the lands by deſcent, and ſtates there is a bar in his way, for in conſideration of a marriage of *Winifred* with the defendant *Southcote*, both the freehold and copyhold lands were ſettled on *Southcote* for life, and the wife for life, and to the heirs of their two bodies, and to the ſurvivor in fee, but in order to remove this bar, and to ſet aſide the conveyance, charges at the time of the ſettlement ſhe was a papiſt, and he alſo one, and is ſo now, and being intitled to the fee on ſurvivorſhip, the ſettlement is void.

That *Southcote* conſcious of this, looked out for a proteſtant purchaſer, the defendant *Moreland*, but did not give any conſideration, or at leaſt a valuable conſideration, and that it was a fraudulent tranſaction to defeat the plaintiffs, and therefore pray a reconveyance of the freehold and copyhold lands ſo pretended to be ſold.

The principal queſtion is, Whether *Southcote* ſelling ſo ſoon after the death of *Winifred*, can be ſaid to be ſuch a *viſible owner*, as within the meaning of the act of parliament of the 3 *Geo. cap.* 18. could convey to a proteſtant upon a purchaſe.

The defendant *Moreland* inſiſts that *Southcote* was in poſſeſſion of theſe eſtates a twelvemonth before *Winifred*'s death, and in poſſeſſion alſo from her death till he ſold.

That the plaintiffs never put in any claim at the court of ſeſſions in the county where the lands lie, within a twelvemonth after *Winifred*'s death.

The queſtion then, Whether he has put in a good plea to the diſcovery.

The bill is brought by the plaintiff *Elizabeth* as an heir at law in general, to have a diſcovery of a diſability or incapacity in ſome perſon under whom *Moreland* derives, on this ground only, that there is a flaw in his title, ariſing from this incapacity.

Whether the conveyance from *Southcote* to *Moreland* is a good conveyance, is a mere legal queſtion.

It is clearly ſettled now, that no perſon is obliged to make a diſcovery, which will ſubject himſelf to a diſability under theſe acts, as *for inſtance*, would make him liable to be proſecuted as a papiſt.

I ſhall cite a caſe to ſhew the ſame rule will hold in favour of a purchaſer under papiſts. *Smith* v. *Read*, before Lord Chancellor *Hardwicke* in 1736, (*reported in Viner and Bacon's Abridgments.*) It is laid *down* there, this act muſt be conſidered as a penal law, and there is no one inſtance ſaid the court, where a perſon has been obliged to diſcover, whether he purchaſed under a papiſt.

He cited alſo a caſe of *Jones* v. *Meredith* in Lord Chief Baron *Comyns's Reports* 661.

This is a fact to be made out in evidence at law, and as the rule of law is, *Nemo tenetur prodere ſeipſum*, ſo upon the equity of that rule, no perſon here ſhall be obliged to diſcover what will ſubject him to a penalty, or any thing in the nature of a penalty.

Lord Chancellor: You have not pleaded in bar to the diſcovery of this matter only, but to the diſcovery alſo of title deeds.

Mr. Solicitor general: The bill does not go at all upon the title deeds, for it does not charge title deeds under former ſettlements, where there are intails.

I am allowed to ſuppoſe every word in the plea to be true, becauſe the plaintiffs may reply to a plea, as it is in nature of an anſwer and falſify; then whether it is not a good bar to diſcovery and relief, depends on the conſtruction of the ſtatute of the 3 *Geo. cap.* 18.

The end of the ſtatute of the 11 & 12 *Will.* 3. *cap.* 4. to prevent papiſts having landed property, does not reſtrain them from ſelling, but invites them to change their property, and turn it into money; and to make this act more effectual, the 3 *Geo.* enacts, "That no ſale for a full and valuable conſideration of any manors, "*&c.* or of any intereſt therein by any perſon being reputed owner, "or in the poſſeſſion or receipt of the rents or profits thereof, hereto- "fore made, or hereafter to be made, to or for any proteſtant pur- "chaſer, and merely and only for the benefit of proteſtants, ſhall be "avoided or impeached, for or by reaſon, or upon pretence of any "of the diſabilities or incapacities in the ſaid acts incurred, or ſup- "poſed to be incurred by any of the perſons making or joining in "ſuch ſale, or by any other perſon from, or thro' whom the title "to ſuch manors, *&c.* is, or ſhall be derived, *unleſs before ſuch ſale, "the perſon intitled to take advantage of ſuch diſability or incapacity, "ſhall have recovered ſuch manors by reaſon of ſuch diſability or in- "capacity, and have entred ſuch claim in open court, at the general "ſeſſions of the peace for the county*, &c. *wherein ſuch manors lie or "ariſe, and* bonâ fide, *and with due diligence purſued his remedy in "a proper court of juſtice for the recovery thereof.*"

Averred by the plea, that the plaintiffs had not before the time when the defendant purchaſed the ſaid eſtates recovered, nor hath ſince recovered the ſame.

Nor have they given notice of any claim before the filing of the bill.

Nor have they entred any claim at the quarter ſeſſions.

So that the ſaving clauſe is out of the caſe, and muſt reſt intirely upon *this* being or not being a truſt, that is, Whether a purchaſe merely for the benefit of a proteſtant purchaſer, or a truſt for *Southcote.*

The legiſlature meant to encourage the papiſt to ſell as faſt as he could, that before the proteſtant could put in his claim, he might get rid of his eſtate out of hand; therefore thoſe parts of the bill, ſuggeſting

ſuggeſting a precipitate ſale, and that there was no regular ſurvey, are immaterial.

I am at liberty under this act, for argument ſake, to admit *Moreland* knew him to be a papiſt, for it is no flaw in the title: The words of the act indeed are *for a full and valuable conſideration*, but if *Moreland* ſhould have bought for one year's purchaſe leſs than the eſtates in the neighbourhood ſell for, it would not upon account of theſe words make it void; in a caſe of *Wildgooſe* v. *Moore*, before *your Lordſhip*, this point was ſettled.

The annual value 263*l.* as charged by the plaintiffs bill, and that the eſtate is part freehold, part copyhold, and part leaſehold.

But it is inſiſted by the defendant *Moreland*, the annual value is but 176*l.* and that 3500*l.* was paid for it, and has ſworn it was abſolutely a purchaſe for his own benefit, and no truſt.

I allow *Southcote* ſold on purpoſe to prevent a proteſtant claim, for the act itſelf encourages papiſts to ſell; but if ſelling a popiſh eſtate a year and half under value, ſuppoſing it was ſo, was to defeat this purchaſe, it would be attended with this bad conſequence, that it would effectually diſcourage proteſtants from purchaſing.

Mr. *Hoſkins* of the ſame ſide argued, that *Smith* v. *Read* was a weaker caſe than the preſent, for the defendant there was a deviſee under the will of one Mrs. *Paine*, who was charged to be a papiſt, and therefore could not deviſe, and Mrs. *Read* was only a volunteer as claiming under a will.

The plea covers the title deeds in general, but it is not a plea to the diſcovery of conveyances to the defendant *Moreland* himſelf; he has ſworn too, in the very words of the act, that he paid, or ſecured to be paid, a ſum of money as for *a full and valuable conſideration*, and the only reaſon why no ſum of money hath been paid ſince, is the bringing of this bill.

Let a papiſt come to an eſtate by purchaſe, or by deviſe, he never could diſpoſe of it to any other perſon, becauſe he could not make a title, and therefore this act of parliament of the 3 *Geo. cap.* 18. came in aid of the ſtatute of the 11 & 12 *Will.* 3. and is a very uſeful one for the publick, and if *Southcote* was a viſible owner of the eſtates, then *Moreland* is clearly within the act, for he bought of a papiſt in ſuch a ſituation as is deſcribed there; and conſidering the whole nature of the eſtate, 20 years purchaſe, at which rate *Moreland* paid, is a full and valuable conſideration.

Lord Chancellor, before the counſel went on for the plaintiffs, aſked if they could diſtinguiſh this caſe from *Smith* v. *Read*; for if they could not, he would not differ from himſelf, and ſaid, that whether the point of colluſion between the two defendants comes out to be fact or not, he ought not to compel *Moreland* to diſcover what would defeat his title.

The diſtinction between this and the caſe of *Smith* v. *Read*, as taken by plaintiff's counſel is, that in *that* caſe, there was a bill barely to diſcover whether the deviſor was a papiſt, and capable of deviſing, therefore the defendant *Read*, by diſcovering that Mrs. *Paine* the

teſtatrix was a papiſt, would have ſubjected herſelf to a forfeiture, becauſe of a diſability in the deviſor; but here the defendant *Moreland* may ſafely diſcover that the vendor *Southcote* was a papiſt, and yet not forfeit, for the act of parliament protects him, as being a *proteſtant purchaſer* from a papiſt.

Lord Chancellor ſaid, he thought there was a diſtinction between the two caſes, and bid the counſel for the plaintiffs go on.

M. *Noel* for the plaintiffs.

The defendant *Moreland* has not paid one farthing of the purchaſe money, except 100 *l.* at firſt, *Southcote* appears to be ſtill in poſſeſſion, for it is not pretended that any rent has ever been paid to *Moreland*.

He inſiſts that he is a purchaſer under the act of parliament made in the third year of the late King.

That act was never made to protect ſuch a purchaſer, for it is impoſſible *Southcote* could be the reputed owner in ſo ſhort a time as eight or nine days after the death of his wife, and therefore no perſon who might have a claim upon this eſtate, could in that time give the notice required by the ſtatute, and ſuch a popiſh vendor muſt not only be *the viſible* and reputed owner of the eſtate, but muſt alſo be in the actual receipt of the rents and profits of ſuch eſtate.

Mr. *Clarke* of the ſame ſide.

The ground ſuch a plea goes upon is, the defendant's ſubjecting himſelf to a penalty, and the caſe of *Smith* v. *Read* turned altogether upon this; the diſcovery here could not directly, or indirectly, ſubject the defendant *Moreland* to a penalty, and therefore is not within that caſe.

The 3 *Geo.* 1. *cap.* 18. *ſect.* 4. plainly ſuppoſes the perſon ſelling to be under ſuch an incapacity, as is within the 11 & 12 *Will.* or any other of the recited acts.

Southcote and *Moreland* lived a hundred miles diſtant, the one in *Kent*, the other in *Northamptonſhire*; it is ſtated by the bill, that *Southcote* was an intire ſtranger to *Moreland*, and the purchaſer does not pretend there was any ſurvey before he bought, nor that he or any agent for him ever ſaw it.

Suppoſe it was *a plea of a purchaſe for a valuable conſideration without notice*, he could not poſſibly protect himſelf under ſuch a plea, but for money actually paid, *ſecured to be paid* is not ſufficient, and the plea would have been over-ruled, independent therefore of the vendor's being a papiſt, the defendant here could not ſupport his plea, being money only *ſecured to be paid*, and on the circumſtances of the preſent caſe, as *Moreland* has never had any poſſeſſion, or ever received any rents, and as *Southcote* is ſtill the owner, he could not, on ſuch a plea of a purchaſer without notice, to a bill brought by any perſon ſtanding in the place of *Southcote*, ſupport ſuch a plea.

Mr.

Mr. *Evans* of the ſame ſide.

The fifth clauſe of the 3 *Geo.* 1. (which recites a part of the 11 & 12 *Will.* 3. and enacts, that the recited part of the ſaid act of parliament ſhall not be hereby altered or repealed, but the ſame ſhall be and remain in full force, as if this act had never been made) ſhews clearly it was not intended to give any advantages to papiſts, or to alter the diſabling ſtatutes, becauſe here is an expreſs ſaving to thoſe ſtatutes, and therefore is merely an interpoſition in favour of the proteſtant purchaſers.

In the caſe of *Jones* v. *Meredith*, there was a plea and demurrer by a mortgagee, and both over-ruled; and for this very reaſon, becauſe ſuch a diſcovery could not prejudice him, the ſame reaſoning will hold in the preſent caſe, the diſcovery will not ſubject the defendant *Moreland* to a forfeiture.

If there is a private truſt for the benefit of a papiſt, it is clearly not within the meaning of the act of parliament, and ſtrip this *caſe* of the defendant's oath, and nothing can be ſtronger to ſhew this is a truſt; here is no tranſmutation of poſſeſſion, the purchaſe money not to be paid till 1752, by which time they would be able to judge whether the proteſtant heir would put in his claim, a ſecurity only to be given for the purchaſe money, a ſecurity too, the intereſt of which is equal as near as can be calculated, to the rents of the eſtate, *Moreland* put in poſſeſſion, that he may ſet off the rents againſt the intereſt due on his bond; and if ſuch a caſe ſo circumſtanced ſhould prevail, it would greatly encourage ſchemes to evade this act of parliament.

Mr. Solicitor general's reply.

It is very odd to ſay that a volunteer from a papiſt ſhould protect himſelf with ſuch a plea, and yet a perſon under a more favourable light, a purchaſer *for a valuable conſideration*, ſhall not.

The allowing the plea does not preclude them from replying, and impeaching the truth of it, and then the court can determine on the evidence of both ſides, whether *Southcote* was a papiſt or not? nor does this preclude them from going into evidence at law, upon an ejectment to ſhew he is a papiſt, and ſuppoſe it ſhould come out there he was not a papiſt, then why ſhould the plaintiff compel a diſcovery which he may obtain at law?

This caſe differs from the common caſe of purchaſers, becauſe the moment the eſtate is ſold, the papiſt has no lien upon it *for the purchaſe money*, and therefore is not within the rule they compared it to, of a plea of a purchaſer for *a valuable conſideration*, without notice.

Lord Chancellor: The rule is, that penal laws are not to be conſtrued according to rules of equity, and if I ſhould allow this plea generally, it would intirely overturn the intention and effect of the act of parliament made in the 3 *Geo.* 1. for the conſequence would

Penal laws are not to be conſtrued according to rules of equity.

would be, a contract might be ſo made and contrived, that if there ſhould be no litigation within the time, that then it ſhould be *a truſt only for the papiſt*; but if a controverſy between the reputed owner, and proteſtant next of kin, then it ſhould be deemed an *abſolute purchaſe*.

That rule, of a man's not ſubjecting himſelf by ſuch a diſcovery to a penalty, is laid down out of great tenderneſs, and the court will not break in upon it, unleſs there is a good foundation.

There hardly can come a caſe before the court, liable to more ſuſpicion than the preſent, as to the fairneſs of the purchaſe.

Here is a perſon, who has no title to the inheritance of the eſtate till after the death of the wife, becauſe the limitation is to the ſurvivor and their heirs: On the 6th of *April* 1749 Mrs. *Southcote* dies, in nine days after, in which it is very difficult to acquire *a reputed ownerſhip*, a ſale is made to the defendant *Moreland*, without any knowledge of the eſtate in the purchaſer, or previous treaty, the contract for 4500 *l.* and only 100 *l.* paid then, by delivering of a bank note, and a mere perſonal ſecurity of a bond to pay the reſidue in a year's time; no mortgage taken of the eſtate, not ſo much as a ſurety joined with *Moreland* in the bond; can any thing appear more colourable? Did any wiſe or prudent man ever ſell his real eſtate for 4500 *l.* and to take only a bond in payment?

Afterwards a ſubſequent tranſaction paſſed, and the purchaſe money reduced from 4500 *l.* to 3500 *l.* which ſhews that the parties lumped it before; it is ſaid this is a circumſtance which gives greater credit to the purchaſe; I think not at all, but the true reaſon was, they found the conſideration was greatly above the value, and concluded that might be an imputation on the fairneſs of the tranſaction, and therefore an abatement is made of 1000 *l.* merely to take off the force of that objection. Another ſuſpicious circumſtance is *Moreland*'s granting a leaſe immediately upon his purchaſe of theſe eſtates to *Southcote* for the term of 4 years.

This is not a plea of a purchaſe *for a valuable conſideration without notice*, and if it had, would not have done, becauſe you muſt plead it was a purchaſe for a valuable conſideration without notice, *upon money actually paid*, or elſe you are not hurt.

The plea here conſiſts of two parts.

1*ſt*, A plea of the ſtatute of 11 & 12 *Will.* 3. *cap.* 4. *ſect.* 4.

2*dly*, Of the ſtatute of the 3 *Geo.* 1. *cap.* 18. *ſect.* 4.

It is not pretended the defendant *Moreland* is a papiſt himſelf, therefore no penalty could fall upon him on that account, but yet he inſiſts, if he ſhould diſcover the perſon under whom he bought was a papiſt, it would defeat his title.

A deviſee from a papiſt by reaſon of the penal law which would attach upon him, from the incapacity in the deviſor to deviſe, is not compelled to diſcover, whether the deviſor was a papiſt.

To be ſure in general, by the determination in the caſe of *Smith* v. *Read*, (which was heard the 18th of *March* 1736, and not in *Trin.* term 1737, the books which take notice of it, being miſtaken as to the time,) it is ſettled, where there is a plea of a title derived

voluntarily, or by a deviſe from a papiſt, and not ſuggeſted to be a colourable truſt, that by reaſon of the penal law which would attach upon him, from the incapacity in the deviſor to deviſe, the defendant ſhall not be compelled to diſcover, whether the perſon under whom he claims is a papiſt.

The diſtinction taken by the plaintiff's counſel in the preſent caſe, and which they inſiſt makes the difference from other caſes, is, that *Moreland* has not pleaded himſelf a deviſee, or volunteer from a papiſt, but a purchaſer for *a valuable conſideration* from the defendant *Southcote*, and that there are not all the averments here, which bring him within the protection of the ſtatute of the 3 *Geo.* 1.

There is, no doubt, a plain diſtinction between the caſes, but I am of opinion ſtill he is not obliged to diſcover whether *Southcote* was a papiſt, for a purchaſer is not to be hurt by any diſcovery, as here, for inſtance, where he might ſuffer a loſs by a penal law, and though the averments of the plea are, that the plaintiff had not given notice of his claim, and obſerved other ceremonies required by the ſtatute, yet it may be diſproved, and come out contrary to the averments of the plea, and if it ſhould appear in evidence, that the plaintiff has made his claim with due diligence, and as ſoon as he had any notice thereof; then if the defendant *Moreland* was to make a diſcovery, that the perſon under whom he purchaſed was a papiſt, he would overturn his conveyance, and though he has actually paid part of the purchaſe money, he never could get it back again, for the law makes ſuch conveyance void, a papiſt not being capable of conveying, and the heir might recover in an ejectment.

The rule of law is, that a man ſhall not be obliged to diſcover what *may* ſubject him to a penalty, not what *muſt* only, and though upon the particular circumſtances of the caſe, it might not poſſibly create a forfeiture, as it does not appear at preſent with certainty, whether ſuch a diſcovery would create a forfeiture, yet eventually it may do ſo; and therefore with regard to ſo much of the plea as relies upon the ſtatute of the 11 & 12 *Will.* 3. it ought to be allowed.

The rule of law is, that a man ſhall not be obliged to diſcover what *may* ſubject him to a penalty, not what *muſt* only.

As a plea may be ſeparated, I am at liberty to apply it to the different parts of the defence: The next queſtion therefore will be as to the other part which obliges the defendant to diſcover his title deeds.

The defendant *Moreland*'s plea to the diſcovery of the title deeds, diſallowed.

I am of opinion there is no ground to allow the plea here, either as to the diſcovery or relief.

Moreland has not pleaded himſelf *a purchaſer for a valuable conſideration without notice*, and therefore there is no pretence for this part of the plea, eſpecially as it goes to the diſcovery of that very ſettlement by which it is averred the heir at law is barred, and every *heir at law* has a right to inquire by what means, and under what deed he is diſinherited.

Every heir at law has a right to inquire by what means, and under what deed he is diſinherited.

The

An heir before he has eſtabliſhed his title at law, may come here to remove terms out of the way, which would prevent his recovering there, and may alſo come here for production and inſpection of deeds and writings.

The next conſideration as to the relief, Though an heir at law is not intitled to come into this court upon an ejectment bill for poſſeſſion, yet he is intitled to come here, to remove terms out of the way, which would otherwiſe prevent his recovering poſſeſſion at law; and has alſo a right to another relief before he has eſtabliſhed his title, namely, that the deeds and writings may be produced and lodged in proper hands for his inſpection, and therefore the plea ſhould not be allowred as to the relief prayed in this reſpect.

Upon the whole, I am of opinion that the plea ought to be allowed, as to the diſcovery ſought by the bill, Whether *Winifred*, or *Edmund Southcote* were not papiſts, or perſons profeſſing the popiſh religion; but as to all other parts of the plea, it muſt be overruled.

CAP. LXXXI.

Paraphernalia.

Vide title *Dower and Jointure.*

CAP. LXXXII.

Parol Agreement.

Vide title *Partition.*

CAP. LXXXIII.

Parol Evidence.

Vide title *Cuſtom of London.*

CAP.

CAP. LXXXIV.

Parſon.

December the 24th 1747.

Ex parte Meymot.

Vide title *Bankrupt, under the diviſion, Who are liable to Bankruptcy.*

CAP. LXXXV.

Parties.

Vide title *Bill.*

CAP. LXXXVI.

Partition.

November the 19th 1739.

Mary Ireland ſole executrix and reſiduary legatee of *Mary Ingram* her aunt, —— —— } Plaintiff.

Suſan Rittle and others, Defendants.

Caſe 256. *Mary* and *Suſan Jackſon*, the daughters and co-heirs of *James Jackſon*, being ſeiſed in fee of certain lands, the former married *Thomas Ingram*, and the latter

JAMES Jackſon, the plaintiff *Mary*'s grandfather, being intitled to the reverſion in fee, of certain copyhold lands, ſurrendred the ſame to himſelf for life, to his wife for life, and after the death of the ſurvivor, to his own reight heirs; the tenant for life died ſoon after, and *James* the reverſioner left a widow and two daughters, *Mary* and *Suſan*, who upon the death of their mother, were admitted as co-heirs of *James*, and the lord of the manor did, in conſideration of 40 *l.* enfeoff and convey the ſame to *Mary* and *Suſan Jackſon*, their heirs and aſſigns for ever; *Mary* intermarried with *William Rittle*, and by a mutual agreement between their huſbands in 1686, a partition was made of the ſaid premiſſes between themſelves, and the heirs of *Mary and Suſan.*

Thomas Ingram, and *Suſan* the plaintiff's mother with *William Rittle*, and having made no partition of the ſaid premiſſes before their intermarriage, *Thomas Ingram* and *William Rittle*, the huſbands of *Mary* and *Suſan*, by a mutual agreement in 1686, made a partition of the ſaid premiſſes between themſelves and the heirs of *Mary* and *Suſan*, by which each of them agreed to take one part thereof, which they did, and entred into poſſeſſion, and *Suſan* now holds a ſhare of the premiſſes ſo divided by vertue of ſuch partition, and *Mary* enjoyed her part till her death, and *Mary*'s ſhare being at the time of the partition, ſomewhat larger than *Suſan*'s, in conſideration thereof, *Mary* paid the taxes, and the levies charged upon both.

The huſbands are both dead, and the bill is brought againſt *Suſan Rittle*, to confirm the diviſion of the ſaid eſtate.

Thomas Ingram died many years ſince without iſſue, leaving *Mary* his widow, and in 1733 *William Rittle* the plaintiff *Mary*'s father died inteſtate, leaving the defendant *Suſan Rittle* his widow, and four children: The bill is brought, among other things, to confirm the diviſion of the ſaid eſtate, and that the defendant *Suſan Rittle* may be reſtrained from proceeding at law againſt the plaintiff to compel a new partition thereof.

The agreement of the huſbands cannot bind the inheritance of the wives.

A parol agreement for an equality of partition of a long ſtanding, by perſons who had a right to contract, and accordingly put in execution, will be eſtabliſhed by this court.

Lord Chancellor: Where there has been long a poſſeſſion under an agreement for *owelty* of partition, this court is ſtrongly inclined to quiet the enjoyment of ſuch eſtates, and I was at firſt of opinion to eſtabliſh this agreement, but it appears now, that it was only an agreement between the two huſbands, which could by no means bind the inheritance of the wives, for the argument of long enjoyment is of no force here, unleſs it had been originally the agreement of the wives, though I do admit a parol agreement of long ſtanding, acknowledged by all the parties to have been the actual agreement, and accordingly put in execution, will be eſtabliſhed by this court, where it appears that the perſons who made ſuch agreements had a right to contract, and I will not at 53 years diſtance, ſuffer either party to controvert the equality of the partition, at the time it was made.

The next conſideration is, Whether *Mary*'s ſhare being larger than *Suſan*'s at the time the partition was made, will induce the court to ſet it aſide.

If a jointenant upon equality of partition, thinks proper to accept of a contingent uncertain advantage, where one moiety of the lands is of ſuperior value to the other, it will not vacate the agreement.

Now ſuppoſing that the agreement was between proper parties, I do not think the objection of a contingent advantage only, to one of the parties upon the partition, is ſufficient to ſet aſide the agreement, for a jointenant upon *owelty* of partition, may, if he thinks proper, accept of a contingent uncertain advantage, where one moiety of the lands is of ſuperior value to the other, as in the preſent caſe; *Suſan* who had the leſs valuable moiety, by way of compenſation or recompence, was to pay no taxes whatſoever, and though ſhe may be diſappointed in her expectations from this contingency, yet that will not vacate the agreement.

But

But upon the particular circumſtances of the preſent caſe, I do declare, that though the defendant *Suſan Rittle* conſented, in the life-time of her huſband, to hold the premiſſes in queſtion, according to *the partition* made between him and *Thomas Ingram*, yet that ſhe is not bound by ſuch agreement; but as ſhe now ſubmits to hold the ſeveral parts of the ſaid premiſſes as they have been already held in *ſeveralty*, I decree that the plaintiff, and the defendant *Suſan Rittle*, do reſpectively hold and enjoy the ſaid ſeveral parts of the ſaid premiſſes, *in ſeveralty*, and that each of them do execute conveyances of the reſpective ſhares thereof to the other, according to their reſpective intereſts therein, and that the plaintiff do pay the taxes of the whole eſtate.

CAP. LXXXVII.

Perſonal Eſtate.

Vide title *Rents.*

Vide title *Real Eſtate.*

CAP. LXXXVIII.

Pin Money.

Vide title *Baron and Feme.*

CAP. LXXXIX.

Plantations.

December the 16th 1738.

Daniel Roberdeau, an infant, by his next friend, Plaintiff.
John Rous, and his wife, —— —— Defendants.

THE bill was brought for the delivery of the poſſeſſion of a moiety of lands in *St. Chriſtophers*, and likewiſe for an account of the rents and profits. Caſe 257.

The defendant demurred to the firſt part, for that this court has no juriſdiction over lands at *St. Chriſtophers*, and likewiſe to the account prayed of rents and profits, for that the plaintiff hath not ſet forth a clear title to them.

This court has no juriſdiction over lands at *St. Chriſtophers*, and a demurrer will lie to a bill brought here, for the delivery of poſſeſſion of lands there.

Lord Chancellor: As to the firſt part of the demurrer, I apprehend it is very right, becauſe this court has no juriſdiction ſo as to put perſons into poſſeſſion, in a place, where they have their own methods on ſuch occaſions, to which the party may have recourſe; the preſent bill therefore is carrying the juriſdiction of this court further than it ever was before. (*Vide* the caſe of *Angus* v. *Angus* 1736. before the preſent *Lord Chancellor.*)

Lands in the plantations are no more under the juriſdiction of this court, than lands in *Scotland*.

Lands in the plantations are no more under the juriſdiction of this court, than lands in *Scotland*, for it only *agit in perſonam*.

The next queſtion is, Whether an account of rents and profits ought to be demanded before the plaintiff has eſtabliſhed his right at law?

No impediment is ſhewn to prevent the plaintiff from bringing his ejectment, for he claims a moiety as tenant in common.

An infant may bring a bill for an account of rents and profits, againſt a perſon who keeps poſſeſſion, after the death of the infant's anceſtor.

As to the general equity, an infant here in *England* may bring a bill for an account of rents and profits againſt a perſon who keeps poſſeſſion after the death of the infant's anceſtor; and as the demurrer is only to the bill, I muſt take it for granted he is reſiant here in *England*.

Demurring for want of juriſdiction is informal and improper; a defendant ſhould plead to the juriſdiction.

The defendant ſhould not have demurred for want of juriſdiction, for a demurrer is always in bar, and goes to the merits of the caſe; and therefore it is informal and improper in that reſpect, for he ſhould have pleaded to the juriſdiction.

The delivery of poſſeſſion may be inforced in perſon, which was the old way; but the writ of aſſiſtance to put perſons in poſſeſſion, as by way of injunction, are of more modern date.

Plantations originally members of *England*, and ſubject to the laws thereof, unleſs in ſome cuſtoms, which they have a power of making.

Plantations were originally members of *England*, and governed by the laws of *England*, and perſons went out originally ſubject to the laws of *England*, unleſs in ſome regulations and cuſtoms, which they have a power of making.

There have been inſtances of plantation eſtates being ſold in this court, and conſequently this court muſt have a power of inforcing a decree for a ſale upon the perſon ordered to convey.

His Lordſhip mentioned the caſe of the widow in *Penſylvania* and *Hamilton*, where there was an order upon *Hamilton* to deliver poſſeſſion.

His Lordſhip held the demurrer to be inſufficient, and therefore ordered the ſame to be over-ruled.

CAP.

CAP. XC.

Plea.

Vide title *Alien.*

Vide title *Anſwers, Pleas, and Demurrers.*

Vide title *Papiſt.*

Vide title *Purchaſer without Notice.*

CAP. XCI.

Policy of inſurance.

December the 6th 1739.

Motteux and others *v.* the Governor and Company of *London* Aſſurance and others.

Caſe 258.

If a policy of inſurance differs from *the label*, which is the memorandum or minutes of the agreement, *it* ſhall be made agreeable to the label.

THE ſhip *Eyles*, as appears by the bill, late in the *Eaſt-India* Company's ſervice, was in 1732 at *Bengall*, at which time the owner employed Mr. *James Halhead* to inſure this ſhip in the *London* inſurance office for 500 *l.* the adventure thereon to commence *from her arrival at Fort St. George*, and thence to continue till the ſaid ſhip, with her ordnance, apparel, *&c.* ſhould arrive at *London*, and that it ſhould be lawful for the ſaid ſhip, in the ſaid voyage, to ſtay at any port or places without prejudice, and that the ſhip was, and ſhould be, rated at intereſt or no intereſt, without further account; in conſideration whereof *Halhead* paid 15 *l.* premium, being at the rate of 3 *l. per cent.* which was the current premium then, upon the ſhip at and from fort *St. George*, and a label of ſuch agreement was, the 7th of *Auguſt* 1733, entred in a book, and ſubſcribed by *Halhead* and two of the directors, and the policy ſhould have been made purſuant thereto; but upon looking into the policy, it appeared, that by a miſtake the policy was made out different from the label, and inſtead of the ſhip's being inſured from the time ſhe ſhould arrive at fort *St. George*, as it ought to have been according to the label, the inſurance is made by the policy to commence only *from the departure of the ſhip from fort St. George to London*; and therefore the Company inſiſting, that in regard the ſhip was loſt in the river of *Bengal*, and not in her voyage from fort *St. George* to *London*, the plaintiffs are not intitled to recover on the policy, and for this reaſon the plaintiffs have

brought their bill againſt the defendants, the Company to be paid 500*l.* with intereſt, having the uſual abatements in caſe of loſs.

The *Eyles* came to fort *St. George* in *February* 1733, in her way to *England*, but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ſhips, *&c.* ſhe ſailed for *Bengal* to be refitted, and after being ſheathed, in her return upon her homeward bound voyage, ſhe ſtruck upon the *Engilee* ſands, and was loſt. Evidence was read on the part of the plaintiffs, to prove that *Bengal* was the moſt proper place for ſhips to refit, and that ſhe went thither for that reaſon, and that this was a voyage of neceſſity, and not a trading voyage, for ſhe took nothing on board but water, proviſion, and ballaſt. It was inſiſted by the plaintiffs counſel, that though the policy in that part of it which is called the riſque, is beginning the adventure *from and immediately following her departure from fort St. George*, yet that it comes within the rule in equity, that a conveyance, if different from articles, ſhall notwithſtanding be made conformable to articles, and no inſtance that articles have been altered to make them ſimilar to a ſubſequent conveyance; and therefore, upon this reaſoning, the policy muſt be made agreeable to the original agreement, or minutes, called *the label*, for merchants rely ſo much upon the label, that the policy is rarely made out in many inſtances, unleſs in a caſe of loſs.

For the defendants, the Company, it was ſaid, that the *Eyles* did not go directly to *Bengal*, but to a place called *Maſſapatan*, which was not in the proper road, but for the benefit of the Captain, who ſtaid there ſix days merely for the ſake of private trading; that the loſs likewiſe was not at fort *St. George*, or on a voyage from thence to *England*; that from fort *St. George* to *Bengal* is a hazardous voyage; a ſhip might much ſafer make the whole voyage from fort *St. George* to *England*, and therefore nothing but the ſtrongeſt neceſſity could warrant ſuch a voyage, and that it is impoſſible but there muſt be timber enough at fort *St. George*, which is undoubtedly the largeſt ſettlement belonging to the *Eaſt-India* Company, to mend a leak, without going ſuch a dangerous voyage merely to refit.

Lord Chancellor: This is properly a queſtion at law, Whether it is ſuch a loſs as is within the terms of the policy?

The firſt conſideration is, What was the real agreement?

2*dly*, Whether there is any breach of this agreement, by a loſs within the terms of the policy?

Now *the label* is a memorandum of the agreement, in which the material parts of the policy is inſerted, the maſter's, the ſhip's name, the premium, and the voyage.

In the label the words are, *at and from*; this certainly includes the continuance at fort *St. George*, and in the firſt part of the policy the voyage is deſcribed in the ſame manner; but in the latter, according to the conſtant form, it points out what ſhall be called the riſque, and the adventure there is confined to the departure only from fort *St. George*.

It has been contended on the part of the plaintiffs, that it ought to be conſtrued equally the ſame, as if the words *at* and *from* were actually inſerted in this part of the policy.

It is pretty difficult to reconcile the firſt part of the policy, and the latter; but *the label* makes it very clear, for that conſiders the voyage and the riſque as the ſame, and therefore it was only the miſtake of the clerk, which ought to be rectified agreeable to *the label.*

As to the ſecond queſtion, Whether there has been a breach, or in other terms, a loſs, this is not ſo properly determinable in equity.

Two reaſons have been aſſigned by the plaintiffs counſel for coming into this court: *Firſt*, that the inſurance is in the name of a truſtee, if the truſtee had refuſed the *ceſtui que truſt* his name in an action at law, there might have been ſome pretence; but upon this general ground only of a truſt, I ſhould at this rate determine all policies, without giving the company the advantage of a trial.

It is not a ſufficient ground for coming into equity, that an inſurance is in the name of a truſtee, unleſs he refuſes the *ceſtui que truſt* his name, in an action at law.

Secondly, That the loſs is plainly and clearly according to the agreement, and if it was ſo, to be ſure I might determine it here; but this is far from being the caſe.

The general principles laid down by the plaintiffs counſel are right, as ſtreſs of weather, and the danger of proceeding on a voyage when a ſhip is in a decayed condition; and in ſuch a caſe, if ſhe went to the neareſt place, I ſhould conſider it equally the ſame as if ſhe had been repaired at the very place from whence the voyage was to commence, according to the terms of the policy, and no deviation.

If a ſhip is decayed, and goes to the neareſt place, it is the ſame as if repaired at the place from whence the voyage was to commence, and no deviation.

It is a very material circumſtance that the Governor ordered the lading to be taken out, to ſhew the neceſſity of the ſhip's being repaired; but there is not a ſyllable of proof why ſhe might not have been equally repaired at fort *St. George.*

But there is one part of this caſe, which differs from all others whatever, and that is, as to the certain time the voyage was to commence. Now the fact is, that the ſhip was loſt in *July* 1733, three weeks before the time of making this policy; ſo that clearly the ſhip was not at fort *St. George* at the time the agreement was made, and therefore it is a material conſideration whether this comes within the agreement.

For the plaintiffs indeed it is inſiſted ſhe was at fort *St. George* the *February* before in her voyage to *England*, and that as ſhe went out of neceſſity to *Bengal* for the ſake of repairing, that circumſtance muſt be laid intirely out of the caſe, and the commencement of the adventure muſt be dated from this *February*, when ſhe came with full intention to proceed for *England.* This obſervation perhaps may be a very material one, but it is proper *merchants* ſhould determine what is uſual in theſe caſes.

A queſtion aroſe upon ſettling the iſſues, Whether the words in the riſque, beginning the adventure from and immediately following her departure

departure from fort *St. George*, could not, according to the natural conſtruction, be referred to her firſt arrival at fort *St. George* in her way to *England?*

Where there are the words *at and from* a place to *England*, *firſt arrival* is implied, and always underſtood in policies.

Lord Chancellor: There was a caſe before me, upon a trial at *Guildhall*, where the owners of this very ſhip *Eyles* were plaintiffs, and the Royal Aſſurance Company defendants; and it was then debated, Whether the words *at* and *from Bengal* to *England* meant the firſt arrival of the ſhip at *Bengal?* And it was agreed the words *firſt arrival* were implied, and always underſtood in policies; *for theſe reaſons his Lordſhip directed the iſſues in the manner hereafter mentioned.*

An agent for the owner of a ſhip, when he fetches the policy, not obliged to compare it with *the label.*

It was inſiſted by the counſel for the Company, that *Halhead*, at the time he came for *the policy*, ſhould have compared it *with the label*, that in caſe of a variation, it might have been rectified upon the ſpot, before he took away the policy; and therefore the difference, though a material one, muſt now prevail.

There is no colour for this objection, becauſe *Halhead* was a mere agent or ſervant to the owner of the ſhip, and not at all neceſſary that he ſhould be ſo exact as to compare *the label and policy* at the time he fetched it.

His Lordſhip ordered the parties to proceed to a trial at law in the court of Common Pleas in *London*, the next term, upon the following iſſues:

Firſt, Whether by the label, whereon the policy was made out, it was agreed or intended, that the adventure on the ſhip *Eyles* ſhould begin from and immediately on her firſt arrival at fort *St. George*, in her homeward-bound voyage, or at any other, and what time?

Secondly, Whether the loſs in *July* 1733 was a loſs during the voyage, and according to the adventure which was agreed upon, or intended to be inſured by the ſaid label or memorandum?

N. B. *On a trial at* Guildhall *the jury found againſt the Company on both iſſues.*

3

CAP.

CAP. XCII.

Portions.

(A) At what time portions ſhall be raiſed, or reverſionary eſtates or terms ſold for that purpoſe.

(B) Rule as to the conſideration.

(A) At what time portions ſhall be raiſed, or reverſionary eſtates or terms ſold for that purpoſe.

Michaelmas term 1737.

Stanley v. *Stanley.*

Caſe 259. Where there is a term for years for raiſing daughters portions, payable at a certain time, and a veſted intereſt, they ſhall not ſtay till the death of father and mother; but the court will lay hold of the ſlighteſt circumſtance in a ſettlement, that ſhews an intention to poſtpone the raiſing them in the life of the father and mother.

IT was in this caſe laid down by *Lord Chancellor*, as a general rule, that if there be a term for years, or other eſtate limited to truſtees for raiſing portions for daughters, payable at a certain time, which is become a veſted intereſt, they ſhall not ſtay till the death of the father and mother, unleſs ſome intention appears to poſtpone it, and if there does, the court will always take notice of ſuch intention, and poſtpone it accordingly; and the latter caſes, as *Broome* v. *Berkley*, 2 *Wms.* 484. and others, ſhew, the court will lay hold of very ſmall grounds, that ſpeak the intent of the parties, to hinder the raiſing the portions in the life of the father and mother. *

* *Corbet* v. *Maidwell*, 2 *Vern.* 640.

It was declared by his Lordſhip, that the three daughters, plaintiffs in the croſs cauſe, are not intitled to have either of their portions of 8000*l.* or intereſt, or maintenance in reſpect thereof, raiſed out of the reverſionary term of 500 years during the life of their mother.

November the 17th 1738.

Edmund Okeden, Eſq; —— —— — Plaintiff.

William Okeden, an infant, and heir apparent of the plaintiff, by his guardian, and ſeveral others, } Defendants.

Caſe 260. Directing a groſs ſum to be raiſed, does not imply that it ſhall be raiſed at once, for it may be raiſed out of the rents and profits, and ſo laid up till it amounts to that ſum.

WILLIAM Okeden deceaſed, being ſeiſed in fee of a conſiderable real eſtate, ſubject to a term of 600 years, created by his marriage ſettlement, and which was veſted in truſtees for raiſing 5000*l.* after his death for his daughter *Mary*, wife of *William Gliſſon*, did, by his will dated the 30th of *January* 1717, direct, "that his "debts, legacies, and funeral expences, and alſo the 5000*l.* ſhould "be raiſed and paid out of his perſonal eſtate, but if that was not "ſufficient, he deviſed to *Walter Bond*, *&c.* and their heirs, his "lands in *Corſe Pool*, *Penlick*, *&c.* in truſt to ſell the ſame, or a "part thereof, to pay his debts, legacies, and funeral expences, and "alſo the 5000*l.* and ſuch part as ſhould not be ſold, he deviſed to "the ſame uſes as his manſion houſe, and which by his will, toge"ther with all other his lands, he deviſed to the ſame truſtees for "500 years, in truſt to receive the rents, iſſues and profits, and to "apply ſuch part thereof as they ſhould think fit yearly in the edu"cation, placing out, and maintenance of his two natural ſons *the* "*plaintiff, and defendant William Okeden, until they attained* 25 *years*, "and for raiſing 5000*l.* the plaintiff's portion, if he ſhould live to that "age, and to apply yearly ſuch ſums as are neceſſary for the ſupport "of the manſion-houſe, *&c.* and to pay *Mary Morgan* 50*l.* a year "for life; and after the expiration of the term, he deviſed the ſaid "premiſſes to the defendant the plaintiff's brother in ſtrict ſettle"ment, remainder to the plaintiff in the ſame manner, remainder "in fee to his own right heirs, and made the truſtees executors."

The teſtator died in *September* 1718, leaving *Mary Gliſſon* his only legitimate iſſue, who, with her huſband, died ſoon after inteſtate; and upon their ſo dying, their two daughters became intitled, as their repreſentatives, to the ſaid 5000*l.* and intereſt from the teſtator's death, and alſo the reverſion in fee of the real eſtate.

The bill charges that the plaintiff hath applied for payment of his 5000*l.* and that the defendant *Okeden*, being let into poſſeſſion of the truſt eſtate by the truſtees of the 500 years term before his age of 25, had ever ſince applied the rents and profits thereof to his own uſe, and refuſes to conſent to a ſale to ſatisfy the plaintiff's demand, and therefore prays that ſuch part of the ſaid eſtate may be ſold as will ſatisfy his demand, and that the defendants the daughters of *Mary Gliſſon* may be paid, and the eſtate diſcharged of their demands.

The principal queſtion was, Whether upon the conſtruction of this will the court can decree a ſale of the truſt eſtate?

Lord Chancellor: The intention of the teſtator is clear to me, that the ſum of 5000*l.* was to be raiſed out of the rents and profits, and

not

not from an abſolute ſale, unleſs from mere neceſſity, and what the court would do in ſuch a caſe, is another conſideration.

The directing the truſtees to pay yearly, money for the repairs of the manſion houſe, farm houſes, plantations, &c. is a ſtrong indication that the truſtees ſhould keep poſſeſſion, till the defendant *William Okeden* arrived at his age of 25.

I do not think that the directing a groſs ſum to be raiſed, will neceſſarily imply, that it ſhall be raiſed at once, and this was ſettled in the caſe of *Evelyn* v. *Evelyn*, 2 *Wms.* 291. for it may be raiſed out of the rents and profits, and ſo laid up till it amounts to that ſum.

The age of 25 in this will, is the time fixed for the payment, but I do not think it the time fixed for the raiſing, for the teſtator has directed, if there ſhould be any ſurplus, that it ſhould be paid to the reverſioner, and the natural conſequence would have been, if *William Okeden* had died before 25, that what had been received out of the rents, would have been the money of the reverſioner, and muſt have been paid over to him.

Whether the teſtator computed right as to the value of this eſtate, is not material, for the view and intention is to be regarded only.

The conſideration is, how far this court will controul the original and natural import of the teſtator's words, ſo as to decree a ſale.

There have been a great many ſtrong caſes cited to this purpoſe, but they do not come up to the preſent caſe; the firſt, the caſe of *Brooks* v. *Banks*, the ſecond, *Ivy* v. *Gilbert* and others, *Prec. in Chan.* 583. and 2 *Wms.* 13. *Jones* v. *Warren*, before Lord Chancellor *King*, *Trafford* v. *Aſton*, *Barry* v. *Askham*, 2 *Vern.* 26. The caſe of *Sheldon* v. *Dormer* goes upon the point of neceſſity, that the annual rents and profits would not, in a vaſt tract of time pay the money; beſides, in that caſe the very ſale of the eſtate itſelf would not anſwer the 4000 *l.* charged upon it.

Ivy v. *Gilbert* is not a caſe in point for the defendant the reverſioner, and indeed it is impoſſible that theſe caſes ariſing upon wills ſhould tally in every reſpect, yet it certainly is a very ſtrong caſe in favour of the reverſioner.

This court lays great ſtreſs upon a particular time being appointed for the payment of a portion, and have enlarged the power of truſtees to raiſe it within the time.

It has been truly ſaid, that this court have laid great ſtreſs upon a particular time being appointed for the payment, and have enlarged the power of truſtees, in order to raiſe the money within the time.

Therefore here the ſurplus profits over and above the 50 *l. per ann.* annuity, and the maintenance to *Edmund*, ſhall be applied towards the diſcharge of the 5000 *l.* but if the ſurplus profits will not be ſufficient to anſwer the purpoſe, then I ſhall be ſtrongly inclined that the eſtate ſhall be ſold to make up the deficiency.

It is abſurd to ſuppoſe that the defendant *William Okeden* was intitled to be let into poſſeſſion before he attained his age of 25, as both he and his brother were to have a maintenance till that age, and therefore the truſtees, by letting him into poſſeſſion of the rents and profits before that age, have abuſed their truſt; for as they have managed, how was it

poſſible

poſſible that the 5000 *l.* could be raiſed by the time the plaintiff came to the age of 25.

I will not immediately decree a ſale, till the truſtees have accounted for the ſurplus rents and profits, for it is hard the reverſioner ſhould ſuffer by the ſale of the eſtate, when it might have been quite cleared, if the truſtees had faithfully executed their truſt.

His Lordſhip ordered it ſhould be referred to a Maſter, to take an account of the rents and profits of the truſt eſtate deviſed to the truſtees for the term of 500 years, accrued from the death of the teſtator *William Okeden*, until the defendant *William Okeden* attained 25 years, that have been received by the truſtees, or by the defendant *William Okeden*, and *his Lordſhip* declared that the defendants the truſtees are anſwerable for ſo much thereof as have been received by the defendant *William Okeden*.

November the 24th 1738.

Philadelphia Boycot, *Sophia Cotton*, *Heſter Maria Cotton*, and *Sidney Arabella Cotton*, the four ſurviving daughters of Sir *Thomas Cotton*, baronet, deceaſed, and *Dame Philadelphia* his wife, —— } Plaintiffs.

Sir *Robert Saliſbury Cotton*, *Linch Saliſbury Cotton*, *Cotton King*, and *John Crew*, —— —— } Defendants.

Caſe 261. Where there is a power to charge an eſtate with a groſs ſum, it implies a power to charge an eſtate with intereſt likewiſe.

BY indenture of the 27th of *July* 1687, Sir *Robert Cotton* and *Dame Heſter* his wife did covenant to levy a fine to truſtees, and their heirs, of the copyhold meſſuage of *Lewenez*, and lands thereunto belonging, and of ſeveral eſtates in *Denbighſhire* therein mentioned, to the uſe of Sir *Robert* and *Dame Heſter* for their lives, and the life of the ſurvivor, without impeachment of waſte, remainder to *Thomas Cotton* their ſecond ſon, remainder to truſtees to preſerve contingent remainders; to the firſt and other ſons of *Thomas* in tail male, and after divers remainders, to the uſe of *Dame Heſter* and her heirs, with a proviſo that it ſhould be lawful for *Thomas Cotton*, or any other tenant in tail in poſſeſſion, after the death of Sir *Robert* and *Heſter*, by any deed or will executed by them reſpectively, in the preſence of three or more witneſſes, to limit any part of the ſame lands, not exceeding 500 *l.* a year, to a wife for life, for her jointure, and a power alſo for *Thomas Cotton*, and the other tenants in tail in poſſeſſion, to charge any part of the lands not exceeding 500 *l.* a year, for portions for his younger children, ſubject to a power of revocation in Sir *Robert* and *Dame Heſter*, and the ſurvivor of them by deed or will.

About 1690 *Thomas Cotton*, then become the eldeſt ſon of Sir *Robert*, intermarried with *Philadelphia Lynch*, and by indentures of leaſe and releaſe in 1701 Sir *Robert* covenanted that *Heſter* ſhould levy a fine of the premiſſes therein mentioned, to the uſe of *Thomas*

Cotton (afterwards Sir *Thomas*) for life, with power to commit waſte, remainder to truſtees to preſerve contingent remainders, remainder to *Philadelphia* for her jointure, remainder to truſtees for 500 years without impeachment of waſte, remainder to Sir *Robert Cotton* in fee.

The term of 500 years was in truſt, that if *Thomas* ſhould die leaving any daughter or daughters, or younger child, or children by *Philadelphia*, living at his death, it ſhould be lawful for the truſtees, or the ſurvivor, or the executors of the ſurvivor, by rents and profits, or by demiſe, mortgage or ſale of the term, or by felling timber, or by any means they ſhould think fit, or moſt for the advantage of ſuch younger children, to raiſe ſuch ſums of money for the portions, or yearly maintenance of ſuch children, *videlicet*, if there ſhould be a ſon, and but one younger child, 3000 *l.* and if two or more younger children, then 5000 *l.* to be equally divided, to be paid to the daughters at 18 or marriage, which ſhall firſt happen, and to the ſons at 21, and till ſuch portions ſhould be payable, ſhould pay to ſuch younger child, if but one, 60 *l.* a year, and if more, 50 *l.* apiece, at *Lady Day* and *Michaelmas*, provided, if any daughter or daughters ſhould have attained 18, or be married in the life of *Thomas Cotton*, and their portions unpaid, or if any ſon ſhould attain 21, in *Thomas Cotton*'s life-time, and their portions unpaid, then the portion of ſuch child or children ſhould be paid to them in twelve months after the death of *Thomas Cotton*, or as ſoon afterwards as might be, and in the mean time the ſaid 60 *l.* and 50 *l.* yearly, or the intereſt of their portions for a maintenance.

The principal of a portion to be paid to ſons at 21, to daughters at 21 or marriage with intereſt at five *per cent. per ann.* from the death of the father, to the payment thereof.

The intereſt ought not to accumulate till the portions are payable, but to be paid annually, for it is given as a recompence in the mean time, till the principal becomes due.

Dame Heſter died in 1709, and Sir *Robert Cotton* in *Dec.* 1712, without revoking or altering the uſes of the deed of the 27th of *July* 1687, leaving ſeveral children, particularly *Thomas Cotton*, his then eldeſt ſon, who entred upon the eſtates limited in uſe to him, by the deed of *July* 1687, and had 12 children by *Philadelphia*, and being minded to increaſe her jointure, executed a deed poll, dated the 31ſt of *July* 1714, whereby he did limit the capital meſſuage, with the lands and appurtenances in *Lewenez*, and ſeveral other lands in *Denbighſhire*, whereunto the power did extend, and which were then under the yearly value of 500 *l.* to the uſe of *Philadelphia* and her aſſigns, after his deceaſe for life, as a further increaſe of her jointure; and as a further proviſion for his younger children, did execute another deed poll dated the 1ſt of *Auguſt* 1714, reciting the deed of the 27th of *July* 1687, and that of the 31 of *July* 1714, and that he in purſuance of the power given him for raiſing portions for younger children, did charge the reſidue of the meſſuages, lands and premiſſes comprized in the indenture of the 27th of *July* 1687, and *not limited by the ſaid deed poll to his wife*; *and after her deceaſe* did charge the ſeveral premiſſes and appurtenants therein mentioned, with the ſum of 675 *l.* for the portion of his ſon *Stephen*; 675 *l.* for *John Saliſbury Cotton*; 675 *l.* for *Lynch*; 675 *l.* for the plaintiff *Philadelphia Boycot* 675 *l.* for the plaintiff *Heſter Maria*; 675 *l.* for *Sidney Arabella*; and 675 *l.* for *Vere*; ſuch portions to be paid to ſuch children as ſhould have attained 21 before his death, within one

year after his death, and to ſuch child as ſhould be under 21 at his death, *to be paid to his ſons at* 21, and to his daughters at 21, or marriage, which ſhould firſt happen, the reſpective portions *to be paid with intereſt at five* per cent. per ann. *from his death, to the payment thereof.*

Sir *Thomas Cotton* died the 12th of *June* 1715, and appointed *Dame Philadelphia* ſole executrix of his will, and left 9 children, *Robert*, then Sir *Robert*, *Stephen*, *John*, *Lynch*, the plaintiffs, and alſo *Vere*.

In 1716 *Dame Philadelphia* intermarried with *Thomas King*, Eſquire, ſince deceaſed, and by the death of Sir *Thomas Cotton*, the plaintiffs, and alſo *John Saliſbury Cotton*, became intitled to their ſhares of the 5000 *l.* with intereſt from 18, and to the ſum of 675 *l.* apiece, limited to them by the deed of the 1ſt of *Aug.* 1714, with intereſt from the death of Sir *Thomas*.

Philadelphia had two children by Mr. *King*, *Thomas* and *Cotton King*.

In 1727 *Stephen Cotton* died, having made his will, and appointed Sir *Robert Saliſbury Cotton* his brother, ſole executor, and reſiduary legatee.

On the 21ſt of *March* 1728 *John Saliſbury Cotton being above* 26, *died inteſtate and unmarried*, having received very little, if any of the ſaid ſums, and adminiſtration was granted to *Dame Philadelphia* his mother.

About *Sept.* 1730 *Vere Cotton* died inteſtate and unmarried at the age of 16, having received very little, if any, of the ſhares due to her of the ſaid ſeveral ſums, and adminiſtration was granted to *Philadelphia* her mother.

Dame Philadelphia, *Thomas King* the elder, *Lynch Cotton*, and the plaintiffs came to an agreement, dated the 2d of *Oct.* 1734, whereby *Thomas King*, and *Dame Philadelphia*, in conſideration that the plaintiffs had agreed to releaſe all their claim on account of the perſonal eſtate of Sir *Thomas Cotton*, and the rents of the *Denbighſhire* eſtate, received by *Dame Philadelphia* after her marriage, did agree to convey to the plaintiffs all their right and intereſt in the perſonal eſtate of *John Saliſbury Cotton*, and *Vere Cotton*.

Thomas King the elder died about *January* 1734-5, having bequeathed his perſonal eſtate to *Dame Philadelphia*, and appointed her ſole executrix.

In purſuance of the agreement abovementioned, by a deed dated the 28 of *March* 1735, *Philadelphia* aſſigned to the plaintiffs all her parts and proportions of the perſonal eſtates of *John Saliſbury Cotton*, and *Vere Cotton*, which were veſted in her, To hold to the plaintiffs, as their eſtates in equal ſhares, and appointed them her attorneys to receive the ſame.

The plaintiffs having attained the age of 18, have brought their bill againſt Sir *Robert Saliſbury Cotton*, and the truſtees, praying that their portions may be raiſed and paid in purſuance of the deed in 1701, and alſo the 675 *l.* apiece, charged on the eſtate in *Denbighſhire*, with

intereſt from the death of Sir *Thomas Cotton*, and alſo for the plaintiffs ſhares of the eſtate of *John Saliſbury Cotton*, with intereſt from his age of 21, and alſo for their ſhares of the eſtate of *Vere Cotton*.

Lord Chancellor: It is admitted in the cauſe, that the whole of the lands charged, did not amount to above 500 *l. per ann.* that *Vere Cotton*, one of the daughters of Sir *Thomas Cotton*, died at the age of 16, and that *John Saliſbury Cotton*, one of the ſons, died at, or about the age of 27.

The firſt queſtion is, Whether Sir *Thomas Cotton* could charge intereſt?

The ſecond queſtion, Whether he has ſo charged it, that it may be annually received, or whether it muſt be accumulated and paid by way of principal ſum, at the age of 21?

The third queſtion, Whether the ſum of 675 *l.* was tranſmiſſable at the death of Mrs. *Vere Cotton* at 16, or ſinks into the real eſtate for the benefit of the reverſioner?

As to the firſt queſtion, I am of opinion, that Sir *Thomas Cotton* could charge the eſtate with intereſt, for where there is a power to charge an eſtate with a groſs ſum, it likewiſe implies a power to charge it with intereſt, becauſe it may be neceſſary that intereſt ſhould be given by way of maintenance, for there may be no other.

This court has been ſo liberal in their conſtruction, that they have charged land with intereſt, even before the portion has veſted.

It was objected by the counſel for the defendant Sir *Robert Saliſbury Cotton*, that this is a power to charge an eſtate in reverſion only, and it has been truly ſaid, that this court has been very careful, that real eſtate in the hands of the heir ſhall not be overburthened.

But the rule does not prevail in the preſent caſe, becauſe it appears by the ſettlement in 1687, that regard was paid to the preſervation of the eſtate for the reverſioner, the intention being chiefly to make a large proviſion for younger children, and Sir *Thomas Cotton* has ſubſequently charged the whole value of the eſtate for portions.

If Sir *Thomas* could therefore exhauſt the whole eſtate, by charging of principal ſums, then where is the difference, if he exhauſts it by charging partly intereſt, and partly principal, or by principal only.

As to the ſecond queſtion, I am of opinion that the intereſt ought not to accumulate, but to be paid annually, for when it is given at the rate of 5 *per cent.* the natural conſtruction is, that it ſhould be paid annually, and becomes due every day, for it is given as a recompence in the mean time, till the principal is due.

As to the third queſtion, I am of opinion that Mrs. *Vere Cotton*'s ſhare of 675 *l.* ought not to be raiſed, but ought to ſink for the benefit of the heir.

Whether a portion charged *on land*, be given with or without intereſt, by deed, or by will, if the perſon dies before it becomes payable, it ſhall ſink in the eſtate.

It is ſettled now, whether the portion charged upon land be given with, or without intereſt, by deed, or by will, if the perſon dies before the age at which it becomes payable, it ſhall ſink into the eſtate.

The

The caſe of *Cave* v. *Cave*, 2 *Vern.* 508. is intirely miſtaken by the reporter, for as it is ſtated in the Regiſter, which was ſearched by *Lord Chancellor*'s order, it is impoſſible there could be that queſtion in the cauſe, which the book ſtates.

The caſe of *Cave* v. *Cave*, 2 *Vern.* 508. has been much relied on by the counſel for the plaintiffs, in ſupport of their opinion, that the principal ought to be raiſed, notwithſtanding the death of Mrs. *Vere Cotton* at her age of 16; in that caſe Mr. *Vernon* ſtates it, "that *A.* "deviſed 4000 *l.* to his ſon to be paid at his age of 25, and intereſt "in the mean time, and he to have a maintenance, and directs the "4000 *l.* to be raiſed out of a truſt eſtate: The ſon dies under 25, "held by Lord Keeper *Wright*, to be a veſted legacy, and that it "went to his executors."

This caſe, as it is reported in the books, is an authority in point, but I have ordered the Regiſter to be ſearched, and as it is there ſtated, it is impoſſible it could be made a queſtion in the cauſe: I am very ſorry to find that the reports of ſo able a man, ſhould be ſo imperfect, and come out in this manner.

A portion given to one, payable at a certain age, and if he dies, to another, without mentioning any age, if the 1ſt dies before the time of payment, it veſts in the ſecond immediately.

Where a portion is given, payable at a certain age, to one perſon, and if that perſon dies, limited over to another, without mentioning any age, when it ſhould be paid, if the firſt dies before the time of payment, it veſts in the ſecond immediately, for it is as to him a new legacy.

The caſe of *Bruen* v. *Bruen*, in 2 *Vern.* 439. goes a great way to overturn his own authority of *Cave* v. *Cave*, and as it is reported in *Prec. in Chan.* 195. is exactly right. The caſe was, a "term created by a marriage ſettlement to raiſe 3000 *l.* for daughters portions, "within 2 months after the death of the ſurvivor of huſband "and wife: The daughter of the marriage dying at the age of five "years, and the portion being *to be raiſed out of land*, it ſhall not "be *raiſed* for her adminiſtrator, but the intereſt or maintenance the "child was intitled to, ſhall be raiſed.

Jackſon v. *Farrand*, 2 *Vern.* 424. is an anomalous caſe, and Lord *Hardwicke* declared he ſhould lay no ſtreſs upon it.

This comes extremely near the preſent caſe: There is an authority too in Lord *Cowper*, exactly in point: The caſe of *Tournay* v. *Tournay*, *Prec. in Chan.* 290. "There by marriage ſettlement, a term is "created for raiſing 400 *l.* apiece for younger children, to be paid "them within a year after the father's death, and with intereſt from "his death; one of the children dies after the father, *but within a* "*year after his death*, the portion not being raiſed; held by Lord "*Cowper*, that it ſhould ſink in the inheritance and not be raiſed for "the benefit of its repreſentative." *Jackſon* v. *Farrand*, 2 *Vern.* 424. is quite an anomalous caſe, and I lay no ſort of ſtreſs upon it.

There will ſtill a queſtion remain as to the intereſt of Mrs. *Vere Cotton*.

Where there is a power of charging intereſt, it ſhall be conſidered as maintenance.

I am of opinion, as there was a power of charging intereſt, that it ſhould be conſidered as maintenance, for giving of intereſt is the ſame thing as giving an expreſs maintenance, and whoever has maintained the daughter, will be intitled.

If a younger brother has a proviſion under a ſettlement, and lives with the elder, whoſe eſtate is charged with the portion, he ſhall have an allowance for this maintenance, out of the intereſt due.

As to the 6 years Mr. *John Salisbury Cotton* lived with his brother, if Sir *Robert Cotton* inſiſts upon it, I cannot help allowing him ſome-

thing

thing for maintaining him ſo long, for if a younger brother has a proviſion under a ſettlement, and lives with the elder, who is intitled to the eſtate ſo charged, *he* ſhall have an allowance for his maintenance. In this caſe *his Lordſhip* directed Sir *Robert*'s allowance for the maintenance to be paid out of the intereſt due to Mr. *John Salisbury Cotton*, upon his ſhare of 675 *l.*

His Lordſhip declared, that Mrs. *Vere Cotton* dying before ſuch time as her portion becomes payable, the principal ſum of 675 *l.* ought not now to be raiſed, but muſt ſink into the eſtate charged therewith, for the benefit of the defendant Sir *Robert Salisbury Cotton* the heir at law, and did therefore order the plaintiff's bill, as far as it ſeeks to have the 675 *l.* raiſed for the portion of Mrs. *Vere Cotton* to be diſmiſſed.

And as to the reſt of the cauſe, decreed that it be referred to the Maſter to take an account of what is due to the plaintiffs for their original portions of 675 *l.* apiece under the deed of the 27th of *July* 1687, with intereſt for the ſame at 5 *l. per cent.* from the death of Sir *Thomas Cotton*.

An account was directed to be taken likewiſe of what is due for the ſhare of Mr. *John Salisbury Cotton*, of the ſum of 5000 *l.* provided for the portions of the younger children, under the marriage ſettlement of 1701, with intereſt to be computed after the rate of 4 *per cent.* from the time of *John Salisbury Cotton*'s attaining the age of 21, except when he was maintained by his brother, and then the maintenance to be ſet againſt the intereſt.

And it appearing there was no maintenance for Mrs. *Vere Cotton* during her life, except the intereſt directed by the deed of 1687; *his Lordſhip* declared, that a reaſonable allowance ſhould be made for her maintenance during her life, equal to the intereſt of her portion of 675 *l.* at 5 *per cent.* from the death of Sir *Thomas* her father, and did therefore decree the ſeveral ſums before mentioned (Mrs. *Vere Cotton*'s ſhare of the 5000 *l.* excepted) to be raiſed by ſale of the lands and premiſſes, comprized in the deed of the 1ſt of *Aug.* 1714, ſubject to the jointure of lady *Philadelphia*, and out of the money ariſing by the ſale, he decreed that the plaintiffs ſhould be paid their original portions of 675 *l.* together with intereſt for the ſame as aforeſaid, and as to the portion of 675 *l.* given to *John Salisbury Cotton*, he ordered the ſame be divided into ten equal parts.

And as to what ſhall be found due for the ſhare of *John Salisbury Cotton* in the 5000 *l.* provided by the ſettlement of the 17th of *July* 1701; it is decreed that the ſame be raiſed by mortgage, or ſale of part of the eſtate charged with theſe portions, ſubject to lady *Philadelphia*'s jointure.

(C) Rule as to the conſideration.

Auguſt the 1ſt 1744.

Ex parte Marſh.

Vide title *Bankrupt, under the diviſion, The conſtruction of the ſtatute of* 21 Jac. 1. cap. 19. *with reſpect to bankrupt's poſſeſſion of goods after aſſignment.*

Vide title *Conditions and Limitations.*

CAP. XCIII.

Power.

(A) Whether well executed, or not.

(B) Of the right execution of a power, and where the defect of it will be ſupplied.

(A) Whether well executed, or not.

At the Rolls 1739.

Molton v. *Hutchinſon.*

Caſe 262. *J. C.* by will deviſes the produce of 1000 *l.* S. S. ſtock to *F. C.* for life, and gave him a power to diſpoſe of 400 *l.* thereof, by any writing ſigned in the preſence of 3 witneſſes, and if *F. C.* made no appointment, the 400 *l.* was deviſed over to a charity.

F. C. made his will, gave ſeveral legacies, and then deviſes the reſidue of his perſonal eſtate amongſt his neareſt relations; held to be no execution of the power, and that the 400 *l.* did not paſs by the deviſe of the reſidue.

Parol evidence not allowed to prove *F. C.*'s intent to diſpoſe of the 400 *l.*

JOHN Cutler, by his will deviſed the income and produce of 1000 *l. South Sea* ſtock to *Freeman Cutler* for life, and gave him a power to diſpoſe of 400 *l.* thereof, by any writing ſigned in the preſence of 3 credible witneſſes, and in caſe *Freeman Cutler* made no ſuch appointment, he deviſed the 400 *l.* over to a charity: *Freeman Cutler* made his will, and thereby gave ſeveral legacies, and then deviſes *the reſt and reſidue* of his perſonal eſtate among his neareſt relations: *The queſtion was, Whether this* 400 l. *paſſed by that deviſe of the reſidue, and was a good execution of the power.*

Parol

Parol evidence was offered to prove it was the intent of *Freeman Cutler*, that the 400 *l.* ſhould be diſpoſed of by his will, but was not allowed.

The Maſter of the Rolls, though he acknowledged, a man might execute a power or appointment, without particularly reciting it, yet here he held this was not an execution of the power, but the 400 *l.* muſt go over according to the will of the firſt teſtator.

Auguſt the 1ſt 1744.

Ex parte George Caſwall; In the matter of *John Caſwall*, a bankrupt.

Caſe 263. A perſon may execute a power, without reciting it, but neceſſary he ſhould mention the eſtate which he diſpoſes of

SIR *George Caſwall*, the father of the petitioner, and the bankrupt ſurrendred a copyhold eſtate, lying at *Woodford* in *Eſſex*, to *William Billers*, and another perſon, to the uſe of the wife of Sir *George Caſwall* for life, and after his death, to pay the rents and profits to all his children equally, and then in truſt to ſuch uſe or uſes as Sir *George* ſhall by deed or will appoint, and for want of ſuch appointment, then to his ſon *John Caſwall* and his heirs.

Lady *Caſwall* is dead, and Sir *George* upon the 26th of *Aug.* 1742 makes his will in the preſence of three witneſſes, in which there is the following clauſe, " As to all the reſt, reſidue, and re-" mainder of my effects, real and perſonal, of what nature, kind, or " quality ſoever, I give to my ſon *George Caſwall*, in full bar and " ſatisfaction of what he may claim by virtue of the cuſtom of *Lon-" don*, or otherwiſe.

The teſtator died ſoon after, and *John Caſwall* at the time of making the will was dead.

George Caſwall by his petition prays, that *Thomas Clifford* the aſſignee of the eſtate and effects of *John Caſwall*, under the ſeparate commiſſion of bankruptcy iſſued againſt him, may take a proper conveyance of the copyhold lands at *Woodford*, in the petition mentioned from the commiſſioners, and that he might thereupon duly ſurrender and paſs the ſame to the petitioner and his heirs, or as the petitioner ſhould direct and appoint.

Mr. *Brown*, who was council for the petitioner inſiſted, that Sir *George Caſwall* had by will made a proper appointment to the petitioner, and that the aſſignees under the commiſſion againſt *John Caſwall* the eldeſt brother of the petitioner, ought to deliver the poſſeſſion accordingly: He cited Lord *Ferrers*'s caſe, and *Bainton* v. *Ward*, *April* the 24th 1741, to ſhew the preſent is like thoſe caſes, becauſe Sir *George* had a power to diſpoſe of it abſolutely. That it ought to be conſidered as an intereſt or eſtate in Sir *George Caſwall*, and not as any part of the eſtate of *John Caſwall*, and compared it to the caſe of *Carr* v. *Elliſon*, *April* the 6th 1744, where Mr. *Carr* by his will deviſed his eſtate in general words, without particularizing the copyhold, and yet held by *Lord Chancellor* that it paſſed.

Mr.

Mr. Attorney general for the creditors of *John Caſwall*, who became a bankrupt in 1741, ſaid, the caſes cited by Mr. *Brown* were not applicable, becauſe there the power was actually executed.

Lord Chancellor: The caſe of Lord *Ferrers* is a very extraordinary determination, becauſe the known rule of law is, that if a power is executed, the perſons take by virtue of that power only, and not under the appointer, for when he has once appointed, he has nothing more to do with the eſtate, and therefore they need not derive through him.

The inference from the circumſtance of the ſon's being a bankrupt is not to be regarded, for I muſt make ſuch conſtruction as if *John Caſwall* was living, and no bankrupt.

The queſtion is, Whether this be a good execution of the power? What a court in a judicial way may do, is another matter; but in this ſummary way, as I am at preſent adviſed, I am of opinion it is not a good execution of the power.

The material thing is the limitation over of the copyhold in the ſurrender; what is the effect of that? Why, there is an eſtate actually veſted in *John Caſwall*, and nothing but an appointment executed could deveſt it out of him; and this would have been the conſtruction if it had been a legal eſtate, and though it is a truſt eſtate, yet in this court ought to be conſidered and conſtrued in the ſame manner, and therefore is no more than an eſtate for life to Sir *George Caſwall*, remainder in fee to *John Caſwall*, ſubject to be defeated and opened, on a proper appointment, by Sir *George Caſwall.*

Though a man may execute a power without reciting, or taking the leaſt notice of the power, yet it is neceſſary he ſhould mention the eſtate which he diſpoſes of, and muſt do ſuch an act as ſhews he takes notice of the thing which he had a power to diſpoſe of.

Sir *George Caſwall* had other lands on which the deviſe to *George Caſwall* might be ſatisfied.

Freehold lands only will paſs by a deviſe of all his lands, and not copyhold, unleſs a teſtator has nothing but copyhold. *Leaſehold*, if there are no other, will paſs by the words *lands and tenements.*

If a man deviſes all his lands and tenements, only freehold land will paſs, and not copyhold; yet if he has nothing but copyhold lands, they ſhall paſs: So where freehold lands and leaſehold lands are deviſed, if there are no other than leaſehold lands, they ſhall paſs by the words *lands and tenements.*

But here is nothing that is at all deſcriptive of the thing which Sir *George Caſwall* had a power to diſpoſe of, but what is applicable to other eſtates of which Sir *George* was ſeiſed, and of which he could equally diſpoſe.

I do therefore order the petition to be diſmiſſed.

(B) Of the right execution of a power, and where the defect of it will be ſupplied.

November the 12th 1739.

Hervey v. *Hervey.*

Caſe 264.

EDWARD Hervey the father, by a ſettlement made on his own marriage with his firſt wife, the mother of the defendant *Michael Hervey* the ſon, was tenant for life of the family eſtate, which was very large, with a power to make a jointure on a ſecond wife, of 600*l.* *per ann.* remainder in tail to his firſt and other ſons.

It was agreed in conſideration of 5000*l.* of the portion paid to the father of the defendant, on his marriage, that he ſhould be put into immediate poſſeſſion of part of the eſtate; and as to the remainder, it was to be ſettled on the father for life, with a power for him to make a jointure of ſuch of the lands as he thought proper, not exceeding 600*l.* *per ann.* remainder to the ſon in tail, remainder over, and the ſettlement was made accordingly.

On the marriage of the defendant the ſon, it was agreed that a recovery ſhould be ſuffered to bar the uſes of the former ſettlement; that in conſideration of 5000*l.* part of the portion paid to the father, the defendant ſhould be put into immediate poſſeſſion of part of the eſtate, and as to the reſt it was to be ſettled on the father for life, with power for him to make a jointure of ſuch of the lands as he thought proper, not exceeding 600*l.* *per ann.* remainder to the ſon in tail, remainder over, and the ſettlement was made accordingly.

Hervey the father, before his marriage with the plaintiff his ſecond wife, whoſe maiden name was *Mary Carteret*, by his deed, dated the 5th of *May* 1725, conveyed all the premiſſes in the ſettlement contained, limited to him for life, of the yearly value of 900*l.* to truſtees, *in truſt*, in the firſt place, to pay 200*l.* clear, as pin-money, to the intended wife during the coverture; and upon this further truſt, if ſhe ſurvive her huſband, to pay the plaintiff 300*l.* *per ann.* rent charge to his wife for her jointure, and to permit the defendant to take the profits of the eſtate, provided he did not interrupt her in the receipt of the 300*l.* *per ann.* which was declared to be in bar of dower of the wife, or of any jointure on any other land.

By a deed of the 5th of *May* 1725, *Hervey* the father, before his marriage with the plaintiff his ſecond wife, conveys an eſtate of 900*l.* *per ann.* to truſtees, in truſt to pay 200*l.* clear as pin-money to the intended wife; if ſhe ſurvive him, to pay her 300*l.* *per ann.* rent charge for her jointure.

The marriage took effect.

By a ſecond deed *Hervey* the father gives his wife another 300*l.* *per ann.* clear, as a further proviſion by way of jointure.

After marriage, he, by a ſecond deed, gives her another 300*l.* *per ann.* clear.

By a deed of the 15th of *Jan.* 1731, as a further provision for the wife, and in execution of the power, he conveys all the ſaid premiſſes to the ſame truſtees to raiſe the further ſum of 100*l.* for pin-money, and the neat ſum of 600*l.* *per ann.* for her in caſe ſhe ſurvive her huſband, in bar of all other proviſions before made; and in the ſettlement is the following declaratory clauſe: " It is hereby declared and agreed, by and between, *&c.* that it is the intention of this deed, " and of the preceding ones, to ſecure a jointure to his then wife, not exceeding 600*l.* *per ann.*

The plaintiff having ſurvived her husband, brings her bill againſt his ſon, and the truſtees under the ſeveral deeds, to have the benefit of theſe proviſions, all or ſome of them.

The defendant and the truſtees decreed to convey to the plaintiff a jointure, not exceeding 600*l.* *per ann.* but to be made liable to taxes, repairs, *&c.* and to hold and enjoy the ſame againſt the defendant, *&c.* during her life.

And by a deed of the 15th of *January* 1731, as a further proviſion for the wife, and in execution of the power, *Hervey* the father conveyed all the ſaid premiſſes to the ſame truſtees in the former deed, to raiſe, during the joint lives of the huſband and wife, the further ſum of 100*l.* *per ann.* for pin-money, and the neat ſum of 600*l.* *per ann.* as a proviſion for her in caſe ſhe ſurvive her huſband, in bar of all other proviſions before made; and in this ſettlement is the following declaratory clauſe:

" It is hereby declared and agreed, by and between all the parties " to theſe preſents, that it is the intention of this deed, and of the " preceding ones, to ſecure a jointure to his then wife, not exceeding 600*l.* *per ann.*"

No recovery was ever ſuffered in purſuance of the agreement made on the ſon's marriage.

Mrs. *Mary Carteret*, now *Hervey*, ſurvived her husband, and has brought her bill againſt his ſon *Michael Hervey*, and the truſtees under the ſeveral deeds, to have the benefit of thoſe proviſions, all or ſome of them.

Lord Chancellor: The firſt thing to be conſidered is the conſtruction of the power under the deed, between *Edward* and *Michael Hervey*.

It is very plain that this was a power in *Edward Hervey* to ſettle a jointure upon any after wife, and ſo *toties quoties* upon any ſubſequent marriage; it is a power likewiſe to ſettle and aſſure, that is, to convey a legal eſtate; but then it is limited in point of value, for he could not ſettle all the manor, but only ſo much as would amount to 600*l.* a year, and that only during the natural life of ſuch wife.

It is very certain, nor is it denied by the plaintiff's counſel, that Mr. *Edward Hervey*, in point of law, could not, by virtue of this power, ſettle an annuity clear of taxes upon any after marriage, by way of proviſion for the wife.

Let us then conſider in what manner Mr. *Edward Hervey* has executed this power.

In the firſt place, he conveys all the lands which were ſubject to the power to truſtees, not to the intended wife, for raiſing a clear 300*l.* *per ann.*

By the ſecond deed, to raiſe 300*l.* more clear of taxes, *&c.*

And by the third deed, he recites that he intended only to ſecure to her 600*l.* *per ann.* and no more, by all thoſe deeds.

Now upon this ſtate it appears to me, that the execution of the power is abſolutely void in law and equity.

For the power is to ſettle lands for a jointure, or proviſion, not exceeding 600*l per ann.* and he has ſettled 900*l. per ann.*

The words *jointure*, or *proviſion*, are ſynonymous terms; but this is a conveyance to truſtees, which is in point of law no jointure; for to make it ſo, the conveyance ought to be *to the wife* herſelf.

A conveyance to make a jointure ought to be to the wife herſelf, and not to truſtees.

Mr. *Edward Hervey* too has conveyed a clear eſtate of 600*l. per ann.* which is likewiſe contrary to the power.

As this is undeniably void in law, conſider how it will ſtand in equity, and I ſay it is void there too; but when I ſay void there, I do not mean that this court will not go as far as poſſible to ſupply a defect in the execution of ſuch a power.

In the preſent caſe, neither of the parties can poſſibly have what was originally intended them by the power; for in reſpect of Mr. *Michael Hervey* the defendant, it is contrary to what was ſtipulated between him and his father; for here is a clear rent charge iſſuing out of his eſtate, inſtead of being ſubject to taxes, *&c.* and in reſpect to the plaintiff, there is not what was ſtipulated for her, becauſe the power will not extend to give a clear rent charge.

A court of equity will ſupply a defective execution of powers, as well in the caſe of younger children and a proviſion for a wife, as in favour of purchaſers or creditors.

It has been rightly obſerved by the bar, that a court of equity will ſupply a defective execution of powers, as well in the caſe of younger children and a proviſion for a wife, as in favour of purchaſers or creditors.

But the counſel for the defendant inſiſt, that this relief is applicable only to a wife unprovided for, and that here the wife is provided for by the ſettlement previous to the marriage.

But as the whole which has been done in this caſe is directly contrary to the power, ſhe muſt be looked upon as a wife unprovided for.

The caſe of *Smith* and *Aſhton*, 1 *Cha. Ca.* 263. and *Tollet* and *Tollet*, 2 *Wms.* 489. before the late Sir *Joſeph Jekyll*, ſufficiently prove, that where powers are defectively executed, this court will ſupply them notwithſtanding.

Upon theſe authorities, and many more which might be mentioned, there can be no doubt but if a tenant for life, who has ſuch a power, does after marriage execute the power, though *defectively*, yet it ſhall be ſupplied.

I am of opinion here, that the wife cannot have what was ſtipulated for her, previous to her marriage, carried into execution; for if I ſhould ſo decree, it would be breaking in upon the agreement under the deed between *Edward* and *Michael Hervey*.

Then taking it upon this footing, ſhe muſt be conſidered as a wife unprovided for; and if ſo, ſhe is clearly intitled to the relief of this court, accoring to the authorities before mentioned. This caſe, in ſome reſpects, differs from any other that has been cited, *viz. Bath* and *Mountague*, *Select Ca. in Chanc.* 65, *&c.* becauſe in them there was a proviſion, but a defective one.

Then it falls pretty much within the rules of a wife, or child unprovided for, by defective proviſions under a will; and to this purpoſe the

the caſe of *Weeks* and *Urn*, decreed by Lord *Cowper* 1717, is applicable.

One reaſon that weighs greatly with me in the decree I am going to make, is this, That if the wife had claimed the 600 *l. per ann.* without ſetting forth any conſideration, but merely as a voluntary gift from her huſband, there is no doubt but the court would have given it her, and it would be very abſurd to ſay, that becauſe ſhe ſets forth in her bill, a valuable conſideration for a part, therefore ſhe ſhall loſe the whole.

If there had been any proof in this cauſe of her uſing unwarrantable means to inſinuate herſelf into the favour of an old man, and by impoſing upon his weakneſs, had gained any thing clandeſtinely, it might have had ſome weight; but, in the preſent caſe, there is not ſo much as a ſuggeſtion of this kind, and beſides too, ſhe brought a conſiderable fortune in marriage.

The main argument in Lord *Coventry*'s caſe was, that there was a non-execution of the power, but there has always been a diſtinction between a non-execution, and a defective execution of a power.

Here the declaratory clauſe in the laſt deed has ſupplied any defects that might be in the former, and the natural conſequence of this is, that the parties waive all benefit which might accrue to them from the other ſettlements, and are contented with the proviſion that is made purſuant to the power.

That clauſe which impowers the ſon to hold the eſtate, provided he pays 600 *l. per ann.* neat to the truſtees for the wife is not within the power, and conſequently void, and no conveyance can be purſuant to the power, but what is *to the wife* herſelf only.

I muſt therefore decree that *Michael Hervey*, and the other defendants the truſtees, do convey and aſſure to the plaintiff, a jointure not exceeding 600 *l. per ann.* and that the Maſter ſhall out of the manor ſubject to the power, take ſuch lands as ſhall be ſufficient for that purpoſe, but to be made liable to taxes, repairs, *&c.* in the ſame manner with other landed eſtates, and the plaintiff to hold and enjoy the ſaid lands againſt the defendant, and all other perſons during her life.

This cauſe was reheard on the 21ſt of *July* 1740.

Lord Chancellor ſtill continuing of his former opinion, confirmed his decree in *toto*.

Mr. *Noel* council for the defendant *Michael Hervey* argued, That as the portion which the plaintiff brought in marriage, was only 2000 *l.* that the ſettlement of 300 *l. per annum* is much more than adequate to that fortune.

He inſiſted that the firſt ſettlement is ſuch an appointment, both in law and equity, as is a full and abſolute performance of the power reſerved under the ſettlement, made upon the marriage of the defendant *Michael Hervey*, and therefore that the ſecond deed, executed after the marriage of *Edward Hervey* with the plaintiff, ought to be conſidered as merely voluntary.

The conveyance to the intended wife under the firſt deed, was to truſtees; it has been objected that it ought to have been a legal con-

veyance of a legal eſtate to the wife herſelf, and therefore the conveyance to truſtees improper.

To which I anſwer, that by the power the father was to have a liberty of making ſuch a jointure or proviſion, as did not exceed the rents and profits of an eſtate of 600 *l. per annum*, and though, as an expreſs eſtate has not been limited to the wife herſelf for life, it is not properly a jointure, yet in this court, by way of proviſion, it may be conſtrued a due performance of the power.

For, *Firſt*, It is a good execution of the power at law.

Secondly, If not good at law, it is certainly in equity.

Under the deed of 1725, it was agreed between *Edward Hervey* the father, and his intended wife the plaintiff, that after the rent charge of 300 *l.* a year out of an eſtate of 600 *l.* a year, the reſidue of the rents and profits ſhould go to his ſon the defendant *Michael Hervey*.

Therefore, as theſe are parties able to contract in a court of equity, this muſt be conſidered as good, by way of agreement, and any further addition which the wife had after the marriage, muſt be conſidered merely as a bounty, and for ſo much ſhe is only a volunteer.

He cited *Scroop* and *Offley* in the houſe of Lords the 24th of *March* 1735-6, in order to ſhew by that caſe, that the court, where a wife is provided for before, will not aid and aſſiſt the defective execution of a power under any ſecond ſettlement.

I do likewiſe inſiſt, that the truſtees were equally truſtees for Mr. *Michael Hervey* the ſon, as for the wife of *Edward Hervey* the father, and that as the eſtate was then out of the father and in the truſtees, if they had conveyed according to the truſt, it would have been no breach of their duty.

The ſecond ſettlement gives a rent charge of 600 *l.* a year, which is bad in ſubſtance, becauſe it is impoſſible an eſtate of 600 *l. per ann.* in land, can produce a neat ſum of 600 *l.* and where a perſon has exceeded all bounds of his power, I do not know that this court hath, in any inſtance, reduced that exceſs within the true limits of the power, but has been always held a void execution of the power.

It has been objected, that the wife claimed part as a volunteer, and part as a purchaſer, and therefore it would be hard to ſay, in a court of equity, that when a perſon is allowedly a purchaſer for part, this court will not ſupply the defective execution of a power.

To this I anſwer, that under the firſt ſettlement, the plaintiff was certainly a purchaſer for a valuable conſideration, by virtue of her fortune of 2000 *l.* but that the ſettlement of 1731 is ſeparate and independant from the former, and ſhe was there only a volunteer.

The caſe principally relied on by the other ſide is, *Tollet* and *Tollet*, 2 *Wms.* but there is a very material one for the defendant, and which was not mentioned at the former hearing, the caſe of *Layer* and *Cotter*, 2 *Wms.* 623. and heard before Lord Chancellor *King* in 1731, where it is laid down, that equity will aid a defective execution of a power, *provided it is for a valuable conſideration.*

Upon the whole, he inſiſted that the preſent is a new caſe, and no authority whatever cited that comes up to it.

Mr. *Wilbraham* of the ſame ſide.

The queſtion is, Whether the firſt ſettlement is good in law and equity.

Secondly, If it be good in law and equity, whether this court will ſupply a defective execution of a power, under a ſecond or third ſettlement, where they are undeniably bad in law; he cited the caſe of *Newport* and *Savage*, before Lord Chancellor *Talbot*, and *Thwaytes* againſt *Dye*, 2 *Vern.* 80. to ſhew, that where a perſon has a power of charging lands to ſuch of his children, and in ſuch ſhares and proportions, as he by any writing ſhall appoint; he may not only limit the land to any of his children, but may charge the lands with any rent charge, or ſum of money, for any of his children.

80 *l. per ann.* rent charge, is looked upon by conveyancers, as a reaſonable proviſion for a portion of 1000 *l.* and if the ſettlement in the preſent caſe had been 320 *l. per ann.* clear, it would have been double the proviſion that is uſual for it: being four times 80 *l. per annum.*

Mr. Attorney general for the plaintiff ſaid,

That under the ſettlement, in which Mr. *Hervey* the father reſerved this power, he may be called a purchaſer of it from the ſon, the defendant *Michael Hervey*, becauſe he abſolutely gave up an eſtate, in which he had his life, to the ſon immediately in poſſeſſion.

It is admitted by the counſel on all ſides, that the power is not well executed in law, under the ſettlement of 1725, therefore the execution of the power is void, but equity will ſupply a defect in the execution, and cited the caſe of *Kettle* v. *Townſhend*, 1 *Salk.* 187. where it was held, that equity will ſupply a defect, in favour of a ſon or daughter, and that it is not material that ſuch a ſon was provided for before, nor how far.

Mr. *Murray* of the ſame ſide.

This is a power that may be executed piece-meal, part at one time, and part at another.

If a wife had any former proviſion, that is defective under the execution of a power, the counſel for the defendant take it for granted, without producing any inſtance, or even a *dictum* of the court, that equity will not ſupply any defect in a latter proviſion for the benefit of a wife.

He cited the caſe of *Watts* v. *Bullas*, 1 *Wms.* 60. to ſhew that a voluntary conveyance made to a brother of the half blood, though void and defective at law, will be made good by a court of equity; and that as the conſideration of blood would at common law raiſe a uſe, and as before the ſtatute of the 27 *H.* 8. ſuch *ceſtuique uſe* might have compelled an execution of the uſe, in a court

of equity, ſo would this imperfect conveyance raiſe a truſt, and conſequently ought to be made good in equity.

Lord Chancellor: As this caſe is attended with ſome particular circumſtances, I am not ſorry it has been reheard, for if I had ſeen any reaſon to have changed my opinion, I ſhould not have been aſhamed of doing it, but after hearing it fully argued on the part of the defendants, I ſtill continue of the ſame opinion.

I will not repeat what I ſaid before, but rather apply myſelf to give an anſwer to what ſeems to be the principal reaſon urged for a rehearing.

The general argument is, the validity of the firſt ſettlement, at leaſt in a court of equity; but I take it to be clear that the deed of 1731, which is the ultimate attempt towards the execution of the power, is a waver of the former ſettlements, and ſupplies any defects that might be in the other two.

In caſes of aiding the defective execution of a power, either for a wife or a child, whether the proviſion has been for a valuable conſideration, has never entred into the view of the court; but being intended for a proviſion, whether voluntary or not, has been always held to intitle this court to give aid to a wife or child, to carry it into execution, tho' defectively made.

In aiding the defective execution of a power, either for a wife or child, it's being intended for a proviſion, whether voluntary or not, will intitle this court to carry it into execution.

I am of opinion, if this power had been executed in favour of a ſtranger, it would have been good, but being merely an equitable thing, the perſon claiming muſt have come into a court of equity.

With regard to the deed of *May* 1725, it has been ſaid, the power being completely executed, that it cannot be executed *toties quoties*, but I am of opinion, that the power is not executed either in law or equity.

Suppoſing it had been defectively executed, and the parties afterwards execute it properly, there is no doubt but the law would look upon the firſt execution as null and void, and that it might therefore be executed over again.

If there had been words in the firſt ſettlement, which ſhewed that Mr. *Edward Hervey* had fully executed the power, or would have amounted to a releaſe of it, it would indeed have prevented any ſubſequent execution, but there are no words except what are uſually put in by Scriveners, namely, in bar of dower and thirds.

Nothing is to be inferred from the words, *the ſurplus I give to the remainder man*, for they are only of courſe, and if not expreſſed, he would have had the ſurplus by implication.

The caſe of *Scroop* and *Offley* differs *toto cælo*, for there a covenant was entred into by the huſband, for a valuable conſideration upon the firſt marriage, that the iſſue of that marriage ſhould enjoy, free from any incumbrance done, or to be done, ſo that he was tied down by that clauſe.

It has been further urged by the defendant's counſel, that ſuppoſing the 300 *l. per ann.* be not a good and compleat execution of the power, yet it is ſuch an execution of the power, as will induce the court to think a wife in ſome meaſure provided for under it.

This

That a *wife or child*, who come for the aid of this court, to ſupply a defective execution of a power, muſt be totally unprovided for, is not the right rule.

This is relied upon as the ſtrong point, I am of opinion that the rule as laid down by the defendant's counſel, that a wife or child, who come for the aid of this court, to ſupply a defective execution of a power, muſt be intirely unprovided for, is not the right rule of the court.

I think the general rule, that the huſband or a father are the proper judges, what is the reaſonable proviſion for a wife or child, is a good and invariable rule.

And when a father has done any thing extravagant, in either of theſe caſes, the court does not break through this general rule, when they ſet it aſide, but they go upon a collateral reaſon, that this extravagant proviſion, either for a wife or one child only, is a prejudice and injury to the reſt of the family, and that one branch ought not to be improperly preferred to the ruin of the reſt.

In lady *Oxford*'s caſe mentioned in *Smith* and *Aſhton*, 1 *Cha. Ca.* 263. her jointure was decreed good, where the power was not purſued, tho' only a part of her jointure depended on the queſtion.

I will in the next place conſider it, as if the rule laid down by the defendant's counſel was a right one, and then it will come to this queſtion, Whether ſhe is a wife provided for under the ſettlement.

And I am of opinion, that as the court cannot carry it into execution, according to the intent and meaning of the parties, ſhe cannot be ſaid to be a wife provided for.

As this is a power to make a jointure of lands only, not exceeding 600 *l. per ann.* it was not the intent that the whole eſtate ſhould be incumbred, for the remainder man was to have the ſurplus, which he will not have, if the 300 *l. per ann.* rent charge ſhould take place, for then the whole will be liable to anſwer the rent charge, and by that means the remainder-man will loſe his ſurplus.

But then it has been ſaid, the court might have taken 600 *l. per ann.* out of the 900 *l. per ann.* to anſwer this rent charge.

But ſuppoſe this eſtate had lain in the level or marſh grounds, there might have been inundations, and then the part ſo allotted might not even have produced a rent charge of 300 *l.*

This would have been a prejudice too, in reſpect of ſubſequent remainder-men, for ſuppoſing the 600 *l.* a year had, by any accident proved an inſufficient fund, then the arrears of the rent charge would have run on, and the remainder-man at leaſt, who ſtands behind *Michael Hervey*, would have been injured.

I agree, if there had been no ſettlement beſides the deed of 1725, the court would have found out ſome other way to make the proviſion for the wife effectual, and might perhaps have done what Mr. *Noel* has pointed out, allotted ſo much of the eſtate which was ſubject to the power, as would have been ſufficient to have anſwered a clear neat ſum of 300 *l.* annually, making an allowance for landed eſtates being liable to taxes.

But I am of opinion, whatever the court might have done under the deed of 1725, to aid and aſſiſt the wife, if it had ſtood ſingly, and clear

of ſubſequent ſettlements, yet as the caſe is now circumſtanced, if the court cannot give her what is agreed and ſtipulated for, under this deed, they will certainly ſecure to her what is given under the ſettlement of 1731.

And as this is a rent charge, and not ſuch a proviſion as is ſtipulated for the wife, ſhe muſt be conſidered as abſolutely unprovided for, and then ſhe will clearly be intitled according to the rules of equity, to be aided and aſſiſted in carrying a defective proviſion into execution.

As the plaintiff has not the proviſion ſtipulated for her, ſhe muſt be conſidered as totally unprovided for.

It has been ſaid, where there has been an exceſs in the execution of a power, that there are no inſtances where the court have aſſiſted to carry ſuch a caſe into execution, but though there is an exceſs or redundancy in the thing itſelf, yet it muſt be conſidered only as a defect in the legality; and there are many caſes to this purpoſe, and I will put one; ſuppoſe a power to leaſe for 21 years, and the perſon leaſes for 40, this is void only for the ſurplus, and good within the limits of the power.

Where there has been an exceſs in the execution of a power, this is void but for the ſurplus, and good within the limits of the power.

It is ſurprizing to me, how the perſon who drew this ſettlement, could miſtake, when he had ſo plain a power for his guide; but he does not ſeem to have committed blunders ſo much as wilful miſtakes, with a view to try experiments, like ſerjeant *Maynard*'s concluſions, in ſome of the clauſes of his will, *valeat quantum valere poteſt.*

Upon the whole, I am of opinion that the ſettlement in 1725, being drawn in ſuch a manner, as that the wife could not have what was intended for her, did not annul or defeat the laſt ſettlement, and therefore do direct that my former decree ſhall ſtand without any variation.

Vide title *Charity.*

Vide title *Dower and Jointure.*

CAP. XCIV.

Proceſs.

Vide title *Arreſt.*

CAP. XCV.

Prochein Amy.

February the 13th 1737. At the Rolls.

Anon.

Caſe 265. A *Prochein amy* need not be a relation, but then he muſt be a perſon of ſubſtance becauſe liable to coſts.

CAP. XCVI.

Prohibition.

Vide title *Marriage*.

CAP. XCVII.

Purchaſe.

(A) Of purchaſers without notice.
(B) Whether lands purchaſed after a will, paſs by it.

(A) Of

(A) Of purchaſers without notice.

November the 15th 1738.

Brandlyn v. *Ord.*

Caſe 266.

IT was ſaid by *Lord Chancellor* in this cauſe, that a man, who purchaſes for a valuable conſideration, with notice of a voluntary ſettlement from a perſon *who bought without notice*, ſhall ſhelter himſelf under the firſt purchaſer, yet it muſt be the very ſame intereſt in every reſpect.

A man who purchaſes for a valuable conſideration, with notice of a voluntary ſettlement, *from a perſon who bought without notice*, ſhall ſhelter himſelf under the firſt purchaſer.

He likewiſe ſaid, he never knew a man defend himſelf in this court, as a purchaſer for a valuable conſideration under articles only; if he is injured, he muſt ſue at law upon the covenants in the articles.

A man cannot defend himſelf in this court, as a purchaſer for a valuable conſideration, under articles only.

His Lordſhip alſo laid it down as a rule, that where the defendants *plead a former ſuit*, that the court implied there was no title when they diſmiſſed the bill, is not ſufficient, they muſt ſhew it was *res judicata*, an abſolute determination in the court that the plaintiff had no title.

Where defendants plead a former ſuit, they muſt ſhew it was *res judicata*.

He alſo held, that a tenant in tail, out of poſſeſſion, cannot bring a bill to perpetuate teſtimony of witneſſes, till he has recovered poſſeſſion by ejectment; if he does, on the defendant's demurring for this reaſon, the court will allow it.

A tenant in tail, out of poſſeſſion, cannot bring a bill to perpetuate teſtimony.

And that a bill dropped for want of proſecution is never to be pleaded as a decree of diſmiſſion in bar to another bill.

A bill dropp'd for want of proſecution, is never to be pleaded as a decree of diſmiſſion.

And that a fine levied by a termor for years, is a forfeiture; but the reverſioner has five years after the expiration of the term to enter.

November the 30th 1739.

At the Rolls. Anon.'

THE queſtion before the court was, Whether new aſſignees, under a commiſſion of bankruptcy, upon the death or removal of the former, ſhall, on filing a ſupplemental bill, be intitled to the benefit of the proceedings in a ſuit begun in the time of the firſt aſſignees, or muſt begin again by original bill?

Caſe 267.

New aſſignees under a commiſſion of bankruptcy, on filing a ſupplemental bill, ſhall have the benefit of the proceedings in the ſuit commenced by the old aſſignees.

Maſter of the Rolls: In the caſe of an abatement, if you can, you muſt revive; but in the caſe of aſſignees of bankrupts, where ſome die, or ſome are diſcharged, and others are by order of court put in their room, there is no privity between the bankrupt and the aſſignees, or at leaſt but an artificial one, and therefore they cannot revive; and it would be extremely hard if there have been pleadings, examinations, *&c.* in a former ſuit, that the new truſtees ſhould not have the benefit of them by a ſupplemental bill.

Suppoſe the court, upon the death or diſcharge of aſſignees of bankrupts, ſhould ſay that all muſt go for nothing, and you muſt begin again by original ſuit, why then all the charges and expences in the former ſuit are abſolutely thrown away.

In the preſent method, though you cannot come againſt the repreſentative of the former aſſignee, yet by a ſupplemental bill you will have the bankrupt's eſtate liable, at all events, to anſwer the coſts.

A purchaſer of an eſtate, after it has been in controverſy in this court, on filing his ſupplemental bill, comes here *pro bono et malo*, and is liable to all coſts from the beginning to the end of the ſuit.

I will put a caſe that comes very near this, and will ſhew the reaſonableneſs of my preſent determination. Suppoſe an eſtate has been in controverſy for twenty years in this court, and during the ſuit it is purchaſed, the purchaſer, on filing his ſupplemental bill, comes into this court *pro bono et malo*, and ſhall be liable to all the coſts in the proceedings, from the beginning to the end of the ſuit. For theſe reaſons I am of opinion, that the new aſſignees ought to have the benefit of the former proceedings in the ſuit commenced by the old aſſignees.

(B) Whether lands purchaſed after a will paſs by it.

December the 15th 1738.

Green v. *Smith.* On Exceptions.

Caſe 268. If a man covenants to lay out a ſum in the purchaſe of lands, and deviſes his real eſtate before he has made ſuch purchaſe, the money to be laid out will paſs to the deviſee.

A. Articles for the purchaſe of lands, and dies; it happened afterwards that the ſeller could not make a good title to the lands, and the queſtion was between the heir at law, and the executor of *A.* Whether the purchaſe money was to be conſidered as land or perſonal eſtate?

Lord Chancellor, in this cauſe, laid down the following rules:

That agreements to be performed, are often conſidered as performed; for if a man *covenants* to lay out a ſum of money in the purchaſe of lands, generally, and deviſes his real eſtate before he has made ſuch purchaſe, the money *agreed* to be laid out will paſs to the deviſee.

That where a man having made his will, afterwards enters into a contract for the purchaſe of land, the lands contracted for will not paſs by the will, but deſcend to the heir at law.

Where a perſon contracts for a purchaſe of lands after a will made, they will not paſs thereby, but deſcend to the heir at law.

That where an anceſtor, after the making of a will, agrees for the purchaſe of particular lands, the heir at law would have a right to them, provided a good title can be made, otherwiſe if it cannot; but it is going too far to ſay that though the heir at law cannot have the land, yet he ſhall have the money ſo intended to be laid out.

Where after making a will a perſon agrees for the purchaſe of particular lands, if a good title cannot be made, as the heir at law cannot have the land, he ſhall not have the money intended to be laid out.

That if a man gives a portion to his daughter by a will, and afterwards advances her with the like ſum, it ſhall go in ademption of the legacy.

That *the vendor* of the eſtate is, from the time of his contract, conſidered as a truſtee for the purchaſer, and *the vendee*, as to the money, a truſtee for the vendor.

That in bills for ſpecifick performance, this court never gives relief where the act is impoſſible to be done, but leaves the party to his remedy at law.

That where an anceſtor has agreed for the purchaſe of particular lands, but dies before it is quite compleated, if the heir at law brings his bill againſt the deviſees, who claim the real eſtate of the anceſtor by a will made before the purchaſe of thoſe particular lands, the vendor of theſe lands, where he has a doubtful title, muſt be made a defendant to the ſuit; otherwiſe, if his title be clear.

Vide title *Agreements, Articles, and Covenants.*

Vide title *Bankrupt, under the diviſion, Rule as to Aſſignees.* Anon' at the Rolls. M. T. 1739.

CAP. XCVIII.

Real Eſtate.

(A) Where the perſonal ſhall not be applied in exoneration.

November the 4th 1738. At the Rolls.

Miles v. *Leigh.*

Caſe 269.

HENRY Leigh, the plaintiff's father, being ſeized of a meſſuage called *Hills*, and of another meſſuage called *Boreys*, with lands *H. L.* the plaintiff's father, being ſeized in fee of ſeveral lands, deviſes them to his wife for life, and then to his ſon *Robert* and his heirs, *and gives to the plaintiff a legacy of* 150*l. to be paid to her in a twelve-month's time after his ſon* Robert *ſhould come to enjoy the premiſſes*; and if *Robert* died before his mother, then that *Henry*, another ſon, coming to the poſſeſſion thereof, and ſurviving his mother, ſhould pay the plaintiff 200*l.*

in *Somerſetſhire* of 50*l.* a year, and alſo poſſeſſed of perſonal eſtate, made his will the 23d of *March* 1701, and in the outſet thereof ſays, " *All my worldly goods* I give to *Joan* my wife, and the premiſſes " aforeſaid he deviſes to her for life, and then to his ſon *Robert*, bro- " ther of the plaintiff, and his heirs for ever; *and to the plaintiff, by* " *the name of his daughter* Mary, *a legacy of* 150l. *to be paid her in* " *a twelve-month's time after his ſon* Robert *ſhould come to enjoy the* " *premiſſes, and if* Robert *ſhould die before* Joan, *then that* Henry, " *another ſon, and the brother of the plaintiff coming to the poſſeſſion of* " *the premiſſes, and ſurviving his mother, ſhould pay to the plaintiff* " 200l. *and made* Joan *executrix.*

Robert and *Henry* died before the mother, but *Robert* left a ſon the defendant, againſt whom he bill is brought for the legacy.

Robert and *Henry* died before *Joan*, but *Robert* left a ſon, the defendant *Henry Leigh*, and nephew to the plaintiff, to whom ſhe applied for the legacy, and upon his refuſing payment, brought her bill againſt him to pay her what is due for the legacy, or in default thereof, that the defendant may deliver poſſeſſion of the premiſſes.

A decree for the legacy at the Rolls, with intereſt at 4 *per cent.* from a year after the death of the mother, and upon appeal to *Lord Chancellor*, *decree affirmed.*

The Maſter of the Rolls decreed, that it be referred to a Maſter to ſee what is due to the plaintiff, for her legacy of 150*l.* and to compute intereſt at 4*l. per cent.* from a year after the death of *Joan Leigh*, and the defendant to pay what ſhould be found due, or in default thereof, the defendant is to account for the rents of *Hill's tenement*, and that *Hill's tenement* be ſold.

On the 25th of *July* 1739 this cauſe came on before *his Lordſhip*, upon an appeal from the decree of the *Maſter of the Rolls.*

Lord Chancellor: I think the will obſcurely penned, but the conſtruction muſt be agreeable to the intent of the whole will taken together; and upon that conſideration I am of opinion the decree at the Rolls is right.

The words the teſtator uſes in the diſpoſition of his perſonal eſtate, *worldly goods*, are an extenſive deſcription thereof; and then the firſt queſtion will be, Whether, by the words and intent of the teſtator, the legacy is a charge on the real eſtate?

Conditions in wills are often conſtrued ſo, from the nature of the thing itſelf, where the words merely of themſelves are not conditional.

I am of opinion it is, and that no other part of the eſtate, but the real, is charged with it; the teſtator breaks the deſcent, and his ſon *Robert* takes only a remainder under the will, and the clauſe of the legacy to his daughter *Mary* is to be conſtrued juſt as if it had followed the clauſe of the deviſe to *Robert* and his heirs, and therefore is a *condition* annexed to the eſtate, and conditions in wills are often conſtrued ſo from the nature of the thing itſelf, where the words merely of themſelves are not *conditional*, as in the caſe of adverbs of time, and here are adverbs of time directing the particular time of payment, and the word *then* has often been conſtrued *a condition.*

It is objected, *that it is not ſaid to be paid out of the eſtate at Hills*, nor is it ſaid by whom it is to be paid.

But there are many caſes where it is neither ſaid to be paid out of the eſtate, nor by whom, yet has been conſidered as a charge upon the eſtate, where the general intent of the teſtator has appeared; but here the whole will being taken together, the ſubſequent clauſe directing *Henry* to pay, he coming into poſſeſſion, *&c.* is a plain declaration of the teſtator's intent, that the perſon who poſſeſſed the eſtate ſhould pay the legacy.

Though a legacy is not expreſly ſaid to be paid out of an eſtate, nor by whom, yet has been conſidered as a charge thereon, where the general intent of the teſtator has appeared.

The teſtator intended it ſhould come out of both eſtates, and he has charged his ſon, in reſpect of the whole eſtate he was to have; and that is generally the rule of proportion in charging the ſon for younger childrens fortunes, in reſpect of the value of the whole eſtate that is to come to him. The words are, I think, ſufficient to charge the real eſtate; and as to the perſonal, it is given abſolutely and intirely to the mother; ſhe might ſpend it, or do what ſhe pleaſed with it; nor is the legacy given to be paid at the particular time of the death of the mother, ſo that it is impoſſible to imagine that could be the fund intended by the teſtator.

The ſecond queſtion is, Whether the plaintiff's legacy is a contingent charge? For it has been inſiſted on by the defendant's counſel, that it depended on the contingency of *Robert*'s perſonally enjoying the premiſſes; but the conſtruction muſt be, when the deviſe to *Robert* takes effect, and the preſent defendant claims under *Robert*, and the condition will bind the heir, if the deviſe ſo takes effect as that he muſt claim under the anceſtor, as much as if the anceſtor himſelf had taken in poſſeſſion.

A condition will bind the heir, if the deviſe ſo takes effect as that he muſt claim under the anceſtor, as much as if the anceſtor had taken in poſſeſſion.

As to the ſatisfaction ſaid to be received by the plaintiff from the mother, that depends on the queſtion, Whether this was a legacy payable out of the perſonal eſtate? But this never was ſo, nor was the perſonal eſtate liable, for if it had been intended, there would have been no occaſion to poſtpone the payment of the legacy, till the eſtates called *Boreys* and *Hills* came into poſſeſſion.

Decree affirmed.

May the 13th 1738.

Burgoigne v. *Fox* and others.

Caſe 270.

ON the marriage of Lord *Bingley* with a daughter of Lord *Guernſey*, a ſettlement was made of his eſtate in *Yorkſhire*, to the common uſes of a marriage ſettlement, and in caſe of failure of iſſue male, a term of 1000 years was created for raiſing the ſum of 10,000*l.* for daughters portions.

The 10,000*l.* charged by Lord *Bingley*, on the term of 1000 years, ſhall not be paid out of his perſonal eſtate, but the land on which it was originally charged muſt bear the burthen of it.

Lord

Lord *Bingley* afterwards, by leaſe and releaſe, dated the 25th and 26th of *Auguſt* 1714, conveys an eſtate he had in *Hertfordſhire*, called *The Nunnery of Cheſhunt*, to the uſe of himſelf for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail, remainder to *Samuel Benſon* (a near relation) for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail, remainder to the right heirs of Lord *Bingley*, ſubject to a power of revocation by any deed or writing under the hand and ſeal of Lord *Bingley*, and atteſted by two or more witneſſes, ſo as, at the time of ſuch revocation, he ſettles other land in *Yorkſhire*, free from all incumbrances, and of as good or better yearly value than the eſtate at *Cheſhunt*, to the ſame uſes as are mentioned in the deed of 1714.

Lord *Bingley* afterwards, by his will dated the 17th of *June* 1729, "devíſes to the preſent plaintiff an eſtate for life, in the lands, *&c.* at "*Cheſhunt*; and all his lands in *Yorkſhire*, and elſewhere, he deviſes "to truſtees, for the benefit of his daughter and only child, (ſince "married to Mr. *Fox* the defendant) for life, remainder to the firſt "and other ſons in tail, remainder over, *&c.*"

Afterwards Lord *Bingley*, by leaſe and releaſe, of the 29th and 30th of *June* 1730, intended by him as an execution of the power of revocation in the deeds of 1714, conveys an eſtate at *Hatton* in *Yorkſhire*, to the ſame uſes with the deeds in 1714.

But this eſtate was deficient in value, and was likewiſe charged with the term of 1000 years, under a deed in 1703, for raiſing 10,000*l.* for daughters portions.

After the death of Lord *Bingley*, a bill was brought, and decree obtained by conſent, for charging Lord *Bingley*'s perſonal eſtate with this 10,000*l.* portion, which was done to avoid circuity, the teſtator having, by his will, directed his perſonal eſtate, which was very conſiderable, to be laid out in the purchaſe of lands, to be ſettled to the uſes mentioned in his will as to the other lands.

Samuel Benſon died, and *Robert* his ſon refuſing to accept of the eſtate at *Hatton*, under the deed of 1730, and having recovered the *Cheſhunt* eſtate by ejectment, the bill was now brought by the plaintiff, praying, in the alternative, either that *Robert Benſon* may be compelled to relinquiſh his claim to the *Cheſhunt* eſtate, and accept that of *Hatton*, upon a ſuppoſition that the power of revocation was equitably, though not legally purſued; or, that if that ſhould be thought otherwiſe, that the plaintiff may have the *Hatton* eſtate, which appeared to be conveyed to *Robert Benſon*, in lieu of the *Cheſhunt* eſtate, or at leaſt to have a ſatisfaction and equivalent for this deviſe out of the perſonal eſtate of the teſtator, in reſpect of a covenant entered into by him in the deed of 1730 that the *Hatton* eſtate then was, and ſhould continue, during the intereſt of *Samuel Benſon* therein, of the clear value of 120*l. per ann.* which was the value of the *Cheſhunt* eſtate at the time of the ſettlement thereof in 1714.

Lord Chancellor: I am clearly of opinion the power of revocation was not well executed in reſpect of the difference of the value of the

two eſtates, and the term of 1000 years which covered *Hatton*, as part of the *Yorkſhire* eſtate ſettled in 1703.

I am likewiſe clearly of opinion, that the deed of 1730 was a revocation of the will, *quoad* the deviſe of the *Hatton* eſtate, as part of all the teſtator's lands, *&c.* in *Yorkſhire*, mentioned to be deviſed by the will, and therefore *Hatton* could not be ſubject to the particular uſes created by the will. *Vide Shower's Parl. Ca.* 150.

But as it was admitted, that though *Robert Benſon* had the legal eſtate both in *Cheſhunt* and *Hatton* eſtates, the former under the ſettlement in 1714, and the other in 1730, yet as one only was plainly intended him, and he chuſes to adhere to the *Cheſhunt*, *&c.* he muſt be a truſtee as to the other eſtates, for ſome perſon or other who in equity has a right to it, and I think the heir at law of the teſtator will plainly be intitled to this truſt; and the principal queſtion therefore is, as between the plaintiff and the heir at law.

And as the plaintiff claims only under the will, and is therefore a meer volunteer, he is not intitled to any equity of this kind.

That in the caſe of *Noys* v. *Mordaunt*, 2 *Vern.* 581. it is plain Lord *Cowper* went upon this, a proviſion which was thereby to be made by a father for his child; and it is likewiſe in this reſpect diſtinguiſhable, that the diſpute there was between perſons who claimed under the ſame will, here between a deviſee and the heir at law, who is always favoured.

In *Reeve* v. *Reeve*, 1 *Vern.* 219 particular notice taken by the teſtator, in his will, of his apprehenſion that the 3000*l.* charge would be good againſt the jointure. No expreſs intention of any thing of that kind appears in the preſent caſe. Here it was likewiſe to make proviſion for an only daughter, and no inference can be drawn from thoſe reſolutions, in favour of a meer volunteer, as the plaintiff is.

N. B. Held clearly by *Lord Chancellor*, there was no pretence for paying off the 10,000*l.* charged on the term of 1000 years, out of the perſonal eſtate of Lord *Bingley*, but the land on which it was originally charged muſt bear the burthen of it; and what was done by the decree in this caſe could be only matter of agreement between the parties.

His Lordſhip declared he ſaw no cauſe to give the plaintiff any relief in equity, and therefore ordered that the matter of the plaintiff's bill ſtand diſmiſſed without coſts.

CAP. XCIX.

Receiver.

(A) Rule as to appointing him.

May the 31ſt 1738.

Anon.'

Caſe 271. The court will not appoint a receiver of an infant's eſtate, where there is no bill filed.

LORD Chancellor: There is no inſtance of appointing a receiver of the rents and profits of an infant's eſtate, where there is no bill depending in this court; if it had been only filed, there might have been an application for this purpoſe on behalf of the infant.

Vide title *Infant.* May the 31ſt 1738.

CAP. C.

Recoveries.

Vide title *Agreements, Articles, and Covenants, under the diviſion, When to be performed in Specie.*

Vide title *Fines and Recoveries.*

CAP. CI.

Relations.

Vide title *Expoſition of Words.*

CAP.

CAP. CII.

Remainder.

July the 17th 1738.

Eleanor Davenport widow, one of the daughters of *Margaretta Farmer* widow, deceaſed, and *John Davenport* her ſon, and *Mitchel Lodge*, and *Chaplin*, executors of *Margaretta Farmer*, } Plaintiffs.

John Oldis, *John Blake*, *Richard Owen*, and *Margaret Lee*, } Defendants.

Caſe 272. *A.* deviſes lands to his wife for life, and after her deceaſe to his ſon and daughter, *John* and *Margaret*, to be equally divided between them, and the ſeveral and reſpective iſſues of their bodies, and for want of ſuch iſſue, to his wife in fee. This will not create a croſs remainder, which can only be raiſed by an implication abſolutely neceſſary, which is not the caſe here, for the words *ſeveral* and *reſpective*, effectually disjoin the title.

JOHN Owen Eſquire, being ſeiſed in fee of a meſſuage and lands in *Shropſhire*, mortgaged the premiſſes to *Griffith Thomas* for 120 *l.* and being alſo ſeiſed in fee of a meſſuage in the poſſeſſion of *Margaret Humphrys*, did by will deviſe the two meſſuages, with the lands belonging to his wife *Margaret Owen*, for her life, *and after her deceaſe, to his ſon and daughter* John *and* Margaret Owen, *to be equally divided between them, and the ſeveral and reſpective iſſues of their bodies, and for want of ſuch iſſue, to* Margaret Owen *his wife in fee*, and made her ſole executrix: She proved the will, entred on the ſaid meſſuages, and received the rents till her death in *Dec.* 1726, having ſurvived her ſon *John Owen*, who died an infant unmarried.

The widow of the teſtator, after his death, married with *John Farmer* the plaintiff *Eleanor*'s father, and having ſurvived him, made her will, reciting her firſt huſband's will, and deviſed one moiety of the ſaid two meſſuages to *Mitchell*, *Lodge*, and *Chaplin*, in truſt for the ſeparate uſe of the plaintiff *Eleanor* her daughter, during her life, and after her deceaſe, to *John Davenport* the ſon of *Eleanor* for life, and after his deceaſe, to the defendant *Richard Owen* in fee.

The defendant *Margaret*, the daughter of the teſtator *John Owen*, married one *Lee* (who is ſince dead), and the defendant *Oldis* having paid off *Thomas*'s mortgage, took an aſſignment thereof, and being willing to purchaſe the *Shropſhire* eſtate of *Lee*, and the defendant *Margaret* his wife, they by indentures of leaſe and releaſe in 1732, between them and *Oldis*, in conſideration of the ſum therein mentioned, granted to him the ſaid premiſſes, and ſuffered a recovery, and he inſiſts that he has a right to enjoy the ſame, *as ſtanding in*

the place of Margaret Lee, *on whom, upon the death of* John Owen *her brother, the eſtate deſcended by ſurvivorſhip, and that ſhe became intitled thereto by a croſs remainder under the teſtator's will.*

The plaintiffs claim the benefit of their ſeveral deviſes under the will of *Margaretta Farmer*, and have brought their bill, in order that the plaintiff *Eleanor* may, on paying her ſhare of the mortgage, have a conveyance of a moiety of the premiſſes, and that ſhe may be let into the receipt of one moiety of the rent, and that a partition may be made of the ſaid premiſſes, and that ſhe may be quieted in the poſſeſſion of a moiety thereof, in ſeveralty for the plaintiff's benefit.

Lord Chancellor: I am of opinion, that the will in this caſe is not ſo penned, as to create a croſs remainder, which as it is never favoured by the law, can only be raiſed by an implication abſolutely neceſſary, and that is not the preſent caſe, for here the words ſeveral and reſpective, effectually disjoin the title; *his Lordſhip* for this purpoſe cited the caſe of *Comber* and *Hill*, in the King's Bench. *H. T.* 7 *Geo.* 2. 1733*.

The only inſtance wherein this caſe differs, is, that in the caſe of *Comber* and *Hill*, all the deviſees were grand children, in equal degree to the teſtator, and in this caſe the deviſe over was to the wife, who could not claim as heir at law, but yet the preſumption of kindneſs was as ſtrong in favour of a wife, and then this does not differ from the reaſon of that caſe.

Croſs remainders have never been adjudged to ariſe merely upon theſe words, *In default of ſuch iſſue.*

In the caſe of *Holmes* and *Meynell*, *Raymond* 425. a great ſtreſs was laid upon the word *they*, in caſe *they* happened to die, then he deviſed all the premiſſes, nor can there be any caſe cited, where croſs remainders have been adjudged to ariſe merely upon theſe words, in default of ſuch iſſue, and therefore *his Lordſhip* declared, that the plaintiffs *Eleanor Davenport*, *John Davenport*, and the defendant *Richard Owen*, are intitled to the equity of redemption of a moiety of the premiſſes, on payment of a moiety of the principal and intereſt on the ſaid mortgage, and that in caſe either of the plaintiffs, or the defendant *Richard Owen* ſhould redeem the ſaid premiſſes, then he decreed that a commiſſion ſhould iſſue, to divide the premiſſes

---

* *John Holden* being ſeiſed of ſeveral lands in fee, deviſed to his ſon *Richard* for his life, with remainder to his iſſue in tail male, and after his death without iſſue, he deviſed the premiſſes among his three grandchildren in this manner, To his grandſon *Richard* and *Elizabeth* his grandaughter as tenants in common, and to the heirs of their reſpective bodies, and for default of ſuch iſſue, the remainder to his grandaughter *Anne Holden* in fee: *Anne* married, and afterwards *Elizabeth* died without iſſue of her body: The queſtion was, Whether *Richard Holden* and *Elizabeth* took an eſtate in common, with croſs remainders to the heirs of their bodies, for then the eſtate could not veſt in *Anne*, but upon failure of iſſue of both their bodies, or whether this was an eſtate in common, with remainders to the heirs of their bodies generally, for in that caſe, one moiety of the eſtate would veſt in *Anne*, who had the remainder in fee, immediately upon the death of either of them without iſſue: The court were of opinion, that no croſs remainders were created by this deviſe, but that by the death of *Elizabeth* her moiety went over to *Anne*.

premiſſes into moieties, one moiety to go to the plaintiffs *Eleanor*, and *John Davenport*, and the defendant *Owen*, according to their intereſt therein, and the other moiety to the defendant *Oldis*, and after ſuch partition made, he directed proper conveyances to be executed by the ſeveral parties.

March the 12th 1738.

Hopkins alias *Dare* v. *Hopkins.*

HEARD upon the 3d of *March*, and ſtood for judgment this day. Caſe 273.

John Hopkins the teſtator, having a large real and perſonal eſtate, makes a diſpoſition of both by his will, and as to the bulk of his real eſtate, deviſes the ſame to truſtees and their heirs, to the uſe of them and their heirs, upon ſeveral truſts, *viz.* for *Samuel*, the only ſon of his couſin *John Hopkins* for life, and after his deceaſe, in truſt for the firſt and every other ſon of the body of the ſaid *Samuel*, to be begotten ſucceſſively, and the heirs males of the body of every ſuch ſon reſpectively, and for want of ſuch iſſue, *in caſe his couſin* John Hopkins *ſhould have any other ſon*, then for all and every ſuch other ſon for life, with like remainders to their iſſue male, and for default of ſuch iſſue, to the firſt and every other ſon of the body of *Sarah*, eldeſt daughter of his ſaid couſin *John Hopkins* for life ſucceſſively, with like remainders to their iſſue male, and for want of ſuch iſſue, the like remainders to the firſt and every other ſon of *Mary*, ſecond daughter of his ſaid couſin *John Hopkins*, and their iſſue male, and ſo carries on the limitation in like manner, in reſpect of the other daughters of his ſaid couſin, then in being, and for want of ſuch iſſue, in caſe his couſin *John Hopkins* ſhould have any other daughter or daughters, then in truſt for their firſt and every other ſon in like manner, and for default of ſuch iſſue, in truſt for the firſt and other ſons of his couſin *Hannah Dare*, with like remainders to her firſt and every other ſon and their iſſue male, with remainders over to other relations, remainder to his own right heirs.

J. H. deviſed his real eſtate to truſtees and their heirs, to the uſe of them and their heirs, *upon ſeveral truſts therein after mentioned.* Theſe words are declaratory of his intention, that the legal eſtate ſo given, ſhould be uſed to ſupport all theſe truſts and limitations after declared; part of which were to the after born ſons of *J. H.* and the court made ſuch a conſtruction as ſupported the intention, being of opinion it was not inconſiſtent with the rules of law and equity.

Then comes a *proviſo*, that none of the perſons to whom the eſtate was thereby limited, ſhould be in actual poſſeſſion of the whole, or any part thereof, till he or they reſpectively attained his or their age or ages of 21, and in the mean time, the truſtees to make a handſom allowance for the education of ſuch perſons, and the overplus to go to ſuch as ſhould be intitled thereto.

Theſe are the ſeveral limitations and proviſoes, materially relating to the real eſtate.

Then he deviſes all the reſt and reſidue of his perſonal eſtate, in caſe there ſhould be any, after payment of debts, *&c.* to his executors

in truſt, to be, with all convenient ſpeed, laid out in the purchaſe of lands, and to be ſettled to and upon the ſame truſts and purpoſes in his will declared of the real eſtate he was then ſeiſed of, and made the truſtees his executors.

Samuel Hopkins the firſt deviſee died before the teſtator, which after the teſtator's death, occaſioned the bringing two bills, one by *John Hopkins* and his daughter, to have an account, and an execution of the truſt, and *John Hopkins* prayed, that as heir at law, he might have the profits till ſome perſons come in *eſſe*, capable to take under the will, *as part of the truſt undiſpoſed of*; the other was brought by the truſtees, that till a perſon was in *eſſe*, capable of taking, the profits might be accumulated to increaſe the eſtate.

Theſe cauſes were heard before the Maſter of the Rolls in 1733, and it was admitted on all hands, that if *Samuel* had ſurvived the teſtator, he would have taken (at leaſt) an eſtate for life, in the truſt in poſſeſſion, and all the ſubſequent limitations between him and the preſent plaintiff, would in ſuch caſe have been contingent remainders.

But it was inſiſted for the plaintiffs in the original cauſe, that by the death of *Samuel* in the teſtator's life, that deviſe was void, and was to be conſidered as if it had never been inſerted, and that if the ſubſequent limitations could not take effect as contingent remainders, they might, by way of executory deviſe, and that they ſhould operate as they could, *ut res magis valeat quam pereat.*

For the preſent plaintiff it was inſiſted, that by the death of *Samuel*, the eſtate of freehold deviſed to him, became void, and ſo conſequently the contingent remainders, and that the law cannot admit a limitation in its original creation, a contingent remainder, to be by an accident changed into an executory deviſe.

The Maſter of the Rolls was of opinion, " That the limitation to " *Samuel Hopkins* was to be conſidered as if it had never been in the " will, and therefore that the deviſe to after-born ſons being by " future words, in caſe his couſin *John Hopkins* ſhould have any " other ſon, it was now to be conſidered as the firſt deviſe, and might " take effect as an executory deviſe."

Lord Chancellor *Talbot* was of the ſame opinion on the appeal, (*Vide Caſ. in Eq.* in his time, 44.) " and decreed, the truſtees to de- " liver poſſeſſion to the plaintiff *John Hopkins*, (of particular eſtates) " and of the eſtate purchaſed by the teſtator, after the making the " will, and to deliver the deeds and writings to him, and declared " he was intitled to the rents and profits deviſed to the truſtees, ac- " crued ſince the teſtator's death, till ſome perſon ſhould be in be- " ing, intitled to *an eſtate for life in poſſeſſion*, (which makes no dif- " ference in the decree) according to the limitation in the will, and " was intitled to the ſurplus produce of the teſtator's eſtate, after " payment of the annual ſum charged thereon, and directed an ac- " count of both the real and perſonal eſtate, and a like direction as " to the perſonal eſtate for inveſting it in lands: There was no di- " rection given concerning a conveyance of the eſtate, but a general " reſervation

" reſervation, and liberty to apply to the court, as there ſhould be " occaſion."

This was the decree then made, and upon great conſideration, and as to the point on which it was eſtabliſhed, it is not diſputed in this caſe, becauſe the plaintiff here founds himſelf by the preſent bill, expreſly on the foot of that decree.

Since that decree, two new events have happened, which have given riſe to this ſuit.

John Hopkins on the 18th of *June* 1736 had another ſon born, named *William*, who died the 24th of *Dec.* 1737, and on his death the plaintiff, the eldeſt ſon of *Hannah Dare*, having attained twenty-one, brought this bill to have a ſettlement made by the truſtees, and firſt prays an eſtate may be limited to him in poſſeſſion, and alſo an account of the profits during *William*'s life, and that the ſurplus profits may be paid to him.

Mr. *Chute* for the plaintiff.

This is a contingent remainder, and not an executory deviſe, for the eſtate for life in the firſt taker, is a veſted intereſt, and conſequently the contingent remainder veſts at the ſame time. *Pays's caſe*, *Cro. Eliz.* 848.

The teſtator has laboured to give to an un-born perſon, what he apprehends was never given to any unborn perſon before, for he has reſtrained the veſting of the freehold, and ſuſpended it further than any court whatever has attempted to do.

What we contend for is, that admitting this was an executory deviſe in the ſecond ſon of *John Hopkins*, yet after he was born, whatever was executory, was then executed, and the freehold eſtate for life veſted in him, with remainders to his firſt and every other ſon, and as he has died without iſſue male, the contingent remainder takes place in the plaintiff. *Liſle* v. *Gray*.

No difference between the limitation which did come in *eſſe* by the birth of *William*, and the limitation which would have come in *eſſe* immediately, if *Samuel* the firſt ſon of the nephew *John Hopkins*, had ſurvived the teſtator but an hour.

The proviſo in the will, is an abridgment of the power which is given to the firſt taker, of holding an eſtate for life, and is for that reaſon void, as much as if a perſon ſhould appoint one executor, and then reſtrain him from adminiſtring. *Taylor* v. *Brydal*, 2 *Mod.* 289.

The queſtion will be, Whether, notwithſtanding *William* the ſon was born, the whole rents and profits of the teſtator's eſtate, ſhall ſtill accumulate, till the infant would have attained his age of twenty-one, or whether by the birth of *William* the freehold abſolutely veſted in him.

If a man in a will attempts to give ſuch an eſtate as the law does not admit, and endeavours to raiſe ſuch a contingency as it will not allow, they muſt take their fate according to the rules of law.

Reeves

Reeves v. *Long*, 3 *Lev.* 408. *Salk.* 227. the caſe which introduced the ſtatute of King *William*, as to unborn children.

Executory deviſes had their original here, but the reaſon of it was ſo ſtrong, that the courts of law ſoon conformed to thoſe rules.

No body is intitled to take the profits under Lord Chancellor *Talbot*'s addition to Sir *Joſeph Jekyll*'s decree, but *John Hopkins*, and the court is ſilent as to every other perſon.

What is the *terminus a quo* under the laſt decree? Why, until a perſon is born, who is intitled to take an eſtate for life in poſſeſſion, for otherwiſe my Lord *Talbot* would have added, until ſuch perſon arrive at the age of 21 years.

It would be repugnant to ſay, that *John Hopkins* took an eſtate for 21 years, at the very time that his eſtate as *heir at law* ceaſed upon the birth of his ſon.

William was not in *eſſe* at the time of the executory deviſe, and therefore to ſay it is ſtill executory, is carrying this doctrine further than was ever yet attempted, for it will wait longer than the compaſs of one life, for here is the life of *William* who is dead, and the life of a perſon who is unborn.

Mr. *Noel* of the ſame ſide.

The only queſtion, Whether the contingent remainder takes effect in poſſeſſion in the plaintiff, upon the death of the ſecond ſon of *John Hopkins*? Or whether it is ſtill to wait, till the birth of another ſon of *John Hopkins*.

As an executory deviſe was introduced to ſupport and aſſiſt the rules of law, this court will not conſtrue an executory deviſe in ſuch a manner as to overturn the rules of law.

Lord Chancellor: *Pays*'s caſe is likewiſe reported in *Noy* 43. and differently ſtated from what it is in *Cro. Eliz.* 848.

Mr. *Noel*: It was only neceſſity that obliged the court to conſtrue it an executory deviſe, at the time of the decree of Lord Chancellor *Talbot*.

But as here is a ſon of *John Hopkins* born ſince the decree, this neceſſity ceaſes, and *eo inſtante* the eſtate for life veſted in poſſeſſion in the ſon, the contingent remainder veſted in the plaintiff.

The teſtator allowing the truſtees to expend ſuch a ſum upon the birth of the firſt perſon, who ſhould take an eſtate for life in poſſeſſion, by way of education, as is ſuitable to the largeneſs of the eſtate he is intitled to at twenty-one, ſhews the intention of the teſtator, that it ſhould veſt in the firſt taker. *Bate*'s caſe, *Salk.* 254.

Lord Chancellor: The word *immediate* was put in at firſt by Lord *Talbot*, in his decree, in his own hand, but ſtruck out afterwards, and ſtands now as has been before mentioned, *viz.* inſtead of *immediate* eſtate for life in poſſeſſion: *only*, eſtate for life in poſſeſſion.

Mr. *Green* of the ſame ſide, cited *Dyer* 3 & 4. *Pollex.* 430. where it is ſaid by a very high authority, that the intention of a teſtator is to direct

direct the conſtruction of a will, but if that intention, though ever ſo plain, is contrary to law, it is abſolutely void.

The queſtion, if the plaintiff ſhould have a decree, whether he is intitled only to an eſtate for life, or to an eſtate tail by virtue of the limitation to him for life, remainder to the heirs male of his body; he inſiſted for the plaintiff, that theſe are words of limitation, and not of purchaſe.

Mr. *Murray of the ſame ſide.*

This is carried further than the law will ſuffer executory deviſes to wait, for here it muſt wait till the death of the father *John Hopkins*, and the death of the ſon of *John Hopkins*, and the rule is, that it muſt wait only 21 years, or ariſe within the compaſs of one life.

Lord Chancellor *Talbot* in his reaſons for ſupport of his decree ſays, if *Samuel Hopkins* had ſurvived the teſtator, he would certainly have had an eſtate for life, and there can be no diſtinction made between the limitation in the will to *Samuel*, and the limitation to any other ſon to be born of the teſtator's nephew, *John Hopkins*.

That the contingency was to wait till the firſt perſon who ſhould take an eſtate for life, arrives at the age of 21, was never conſidered at all in the hearing before Lord *Talbot*, and never could, becauſe the profits are diſpoſed of by the teſtator himſelf.

In all caſes of property, this court inviolably, and invariably adheres to the rules of law, becauſe they are poſitive, and all the good end of uſes before the ſtatute, are ſtill preſerved in the conſtruction of truſts, ſince the ſtatute for *æquitas ſequitur legem.*

It is contrary to the policy of the law, to ſupport an executory deviſe any longer than till an eſtate for life comes in being, upon which the contingency may veſt: An executory deviſe cannot be extended further, or an eſtate made unalienable any longer than for a life in being, or 21 years after ſuch life. *Stevens* v. *Stevens*, *Caſ. in Eq.* in Lord *Talbot*'s time.

In the Duke of *Norfolk*'s caſe, *Select Caſes in Chancery* 1. it was ſaid by Lord Keeper *North*, that the meaſures of limitation in reſpect to the truſt of a term, and of the legal eſtate of a term are all one, and this court makes no diſtinction any more than the courts of law. *Vide Humberſton* v. *Humberſton*, 2 *Vern.* 637.

Mr. *Attorney general e contra.*

Money directed by a deviſe to be laid out in land, and ſettled in a particular manner, is a mere executory truſt, and muſt be carried into execution by this court, and therefore the perſonal eſtate here is diſtinguiſhed from the real, and liable to the truſt.

Mr. *Brown* of the ſame ſide.

It has been inſiſted for the plaintiff, that the limitation to him, has taken effect to the excluſion of all others, and it is pretended,

that truſts in the caſes of property muſt be governed exactly by the ſame rule as legal eſtates.

There are ſeveral inſtances, where this court have deviated from this rule; as a dowreſs is intitled to dower in a legal eſtate, but cannot be endowed of a truſt, at law a man cannot convey an eſtate to his wife, but in this court he may do it by way of uſe.

As it was impoſſible, at Common law, for a perſon to convey an eſtate, but he muſt part with the whole eſtate at the time; to obviate this inconvenience, the invention of uſes aroſe; as for inſtance, If a man conveyed to *A.* and his heirs, to commence within 4 years, during the intervening time, the freehold is in abeyance, and is a void remainder, but taking it as a ſpringing uſe, the eſtate continues in the feoffor, and is executory till the expiration of the 4 years.

The invention of truſts to preſerve contingent eſtates, was to remedy many inconveniences, and among the reſt, to guard againſt the accident of a ſon's being born after the death of the father.

A general legal eſtate here is conveyed to the truſtees in truſt to preſerve and anſwer the particular purpoſes of his will, and therefore in this caſe, it is a general legal eſtate, and a general truſt.

The teſtator declares, if Mr. *Hopkins* has another ſon, they ſhall be truſtees for that ſon, which muſt mean that they ſhould be truſtees *of the eſtate* likewiſe, for when a thing is given, the means by which it may be obtained, are certainly intended to be given at the ſame time, and it would be harſh to ſay in a court of equity, whoſe chief juriſdiction ariſes out of truſts, that Chancery will limit and reſtrain the power of truſtees, where it is naturally and neceſſarily implied, though not expreſſed in terms. *Vide* the caſe of *Reeves* v. *Long*, 3 *Lev.* 408.

The rule of executory deviſes has been extended in *Stevens* v. *Stevens* ſo far, as till a child ſhall come to the age of 21, and for this reaſon, becauſe no perſon until that age is intitled to convey.

In the caſe upon ſerjeant *Maynard*'s will, the court directed truſtees to preſerve and ſupport contingent remainders, tho' omitted in the will itſelf.

Chapman v. *Bleſſet*, before Lord *Talbot*, after *Hopkins* and *Hopkins*, *Caſes in Equity*, in his time, 145.

It is juſtice, *his Lordſhip* ſaid, in a court of equity to apply the legal eſtate, ſo as to ſupport the truſt eſtate, and *your Lordſhip* will, I do not doubt, preſerve theſe truſts in the ſame manner.

Mr. *Fazakerley* of the ſame ſide.

The arguments which the counſel of the other ſide draw to truſts, from the rules of law, I allow is very right, where they are exactly the ſame in all circumſtances, but where they are not ſimilar, it is otherwiſe; for if the reaſon ceaſes, it would be abſurd to conſtrue them by the ſame rules. *Vide* the rector of *Chedington*'s caſe, 1 *Co.* 148. *b.*

An

An eſtate at law may be in abeyance, but a truſt is not ſo one moment in equity, for if there was a chaſm of ever ſo ſmall a duration, it would revert to the heir at law: In *Salter*'s caſe, *Yelverton, fol.* 9 & 10. a caſe put there by Lord Chief Juſtice *Popham*, and agreed to by all the Judges, and a much ſtronger one than the preſent.

It is not neceſſary that there ſhould be a truſt at all, to preſerve a contingent remainder.

Many inſtances where this court have ſpelt out the intent of a teſtator, though it is not expreſſed in words, for by implication this court have done what the teſtator intended.

Are they in this caſe appointed truſtees for any particular purpoſe, excluſive of another? if they are not, then are they truſtees in general for all the uſes of the will, and among the reſt, are to be conſidered as truſtees to preſerve contingent remainders.

The conſtruction we contend for, will ſupport the whole intention, but what the plaintiffs aim at, will defeat it in the greateſt part of the will, therefore we hope *your Lordſhip* will conſtrue them truſtees for the purpoſe we inſiſt upon, the preſerving the contingent remainders; the caſe of *Maſſenburgh* v. *Aſh* is not exactly ſtated in 2 *Vent.* but in the *octavo edition of Chancery* caſes, it is.

As *to the perſonal eſtate*, where-ever there is an executory truſt, this court will mould it in ſuch a manner, as may beſt anſwer the intention of the teſtator, and therefore I ſhall not trouble *your Lordſhip* with caſes to this point: When they are truſtees for the ſeveral purpoſes in the will, it is abſurd to ſay, that they are not truſtees to preſerve the contingent remainders, which is one of the principal purpoſes of the will, and the teſtator has given the eſtate to truſtees during the life of *John*, and during the life of *Anne* the mother.

Mr. *Chute* by way of reply.

It has been inſiſted by the gentlemen of the other ſide, that the caſe of *Samuel* and *William* are the ſame, and that the contingent remainders ought ſtill to be preſerved.

I never heard, nor ever met with it, that when a tenant for life is born, with remainder to his firſt and every other ſon in tail, that truſtees ever interpoſed any further, *than between ſuch tenant for life, and his iſſue in tail*, and contingent remainders beyond this would be too remote to be at all conſidered in the eye of the law; ſuch a diſtant remainder is not ſo much as aſſets in this court.

Lord Chancellor: This could not be an executory deviſe, becauſe there was an eſtate of freehold before it, and therefore it is a contingent remainder.

Mr. *Chute*: There is no difference between the preſent caſe, and *Humberſton* v. *Humberſton*, but only there ſeveral eſtates for life were limited to perſons not in *eſſe*, and *here* eſtates *tail* are limited to future perſons unborn.

In this caſe, whilſt *John Hopkins* is without a ſon, he enters at the door of his teſtator, and has quiet poſſeſſion, as ſoon as a ſon is born, he

he is turned out again, and if the ſon dies, he enters at the door again.

It has been inſiſted upon, that this is an abſolute eſtate of freehold in the truſtees; I am at a loſs then to conceive how they can ſubdivide this abſolute eſtate, into ſo many particular freeholds, as they muſt do, if they would preſerve the contingent remainders, for I ſubmit to *your Lordſhip*, that upon the birth of *William*, an eſtate for life actually veſted in him, and was not to wait till he arrived at the age of 21, and that at the ſame time the ſubſequent limitations of courſe ceaſed to be executory, and are become veſted remainders, to take place upon the death of *William* without iſſue, and in this reſpect equity too will follow the law; for as uſes, before the ſtatute of uſes, were the ſame as *truſts*, ſo, ſince the ſtatute of uſes, *truſts* are conſidered in the nature of uſes before the ſtatute. *Vide Chudleigh*'s caſe, 1 *Co.* 113. *a.*

Lord Chancellor: For the plaintiff it is argued, that the eſtate veſted in *William* on his birth, and was no longer executory, and conſequently all the ſubſequent limitations became remainders, either contingent, or veſted, according to their reſpective natures, and that thoſe that were contingent not veſting, either during, or *eo inſtante*, that the particular eſtate of *William* determined, are now void, and conſequently the plaintiff, as having the firſt remainder veſted in him, is intitled to the eſtate in poſſeſſion.

For the defendant, this was endeavoured to be anſwered three ways.

Firſt, That there is no neceſſity to conſider the limitations ſubſequent to that, to the ſecond ſon of *John Hopkins*, as contingent remainders, but that they may ſubſiſt as ſo many diſtinct executory deviſes, and if one did not take effect, another might.

Secondly, (And which is moſt relied on) that admitting, that by the eſtates veſting in *William*, the ſubſequent limitations were to be looked upon as remainders, yet ſuch as were contingent, were not deſtroyed by their not veſting during his life, but that the legal eſtate in the truſtees is ſufficient to ſupport them.

Thirdly, That a determinable freehold, in the equitable eſtate deſcended on the heir at law, and that is ſufficient to ſupport the contingent remainders of the truſt eſtate.

Theſe points have been well argued at the bar, and there are, I think, ſome things clear.

Firſt, That if thoſe had been contingent remainders of a legal eſtate, or a uſe executed, and no truſtees inſerted to preſerve contingent remainders, they would have been void.

Secondly, It is clear, that theſe ſubſequent limitations cannot be ſupported as ſo many diſtinct executory deviſes.

In the caſe of *Higgins* v. *Derby* in *Salk.* before Lord *Cowper*, *Mich.* 6 *Ann.* the utmoſt that was ſaid was, that on the limitation of the truſt of a term to the firſt ſon, and the heirs males of his body, which

never took effect, there never having been a ſon, that the limitation over to daughters might poſſibly be good.

But in this caſe the truſt eſtate veſted in *William*, and at leaſt for life, (for it muſt be admitted, that the proviſo did not ſuſpend the veſting), which being a freehold, was capable of ſupporting remainders, and conſequently according to the doctrine in the caſe of *Purefoy* v. *Rogers*, 2 *Saund.* 380. and all the authorities, ought to be conſidered as remainders, and in truth, the ſubſequent remainders are to be conſidered as ſo many parts of the ſame executory deviſe, and when that became veſted in the firſt taker, they remain no longer executory.

The caſe is therefore reduced to this queſtion, Whether the legal eſtate in the truſtees, will ſupport theſe remainders.

Before I proceed to the diſcuſſion of it, I will obſerve that it is not neceſſary, in order to bar the plaintiff from having a conveyance, that all the intermediate contingent limitations, ſhould be *good* ſubſiſting contingent remainders, but it is ſufficient, if ſome of them are *good* by way of contingent remainder, and ſtill ſubſiſting, for then ſo long as they continue, the plaintiff comes too early.

And I am of opinion, that the legal eſtate in the truſtees will ſupport (at leaſt) ſome of theſe contingent remainders, for it is not to be contended that all of them are good, and this on two grounds.

Firſt, Upon the plain intention of the teſtator.

Secondly, That this intention is conſiſtent with the rules of law, and the common principles of equity.

Firſt, As to the intention, the preſent plaintiff certainly comes before the court in a very unfavourable light, for he claims under the will, and the teſtator's bounty, and at the ſame time endeavours to defeat the greateſt part of it; indeed this was retorted on the defendant *the heir at law*, but that is very different, for he does not claim by the will, or the teſtator's intention, but paramount to that, and only aſks that which is not given from him.

The teſtator could not frame a will, that no one ſhould take his eſtate, if he could, it is likely he would have done it.

To conſider therefore, and apply this intention to this point, *Firſt*, He deviſes his real eſtate, to truſtees and their heirs, to the uſe of them and their heirs, (ſo that it is a clear uſe executed by the ſtatute) *upon ſeveral truſts herein after mentioned*: Theſe words were properly and ſtrongly relied on for the defendant, as declaring his intention, that the legal eſtate ſo given ſhould be uſed to ſerve and ſupport all the truſts and limitations after declared: Then he proceeds to limit the truſt, and when he comes to the after-born ſons of *John Hopkins*, he ſays, *In caſe* John Hopkins *ſhould have any other ſon*, then in truſt for all and every ſuch other ſon for life, with like remainders to their iſſue male, *&c.* ſo that he expreſly declares, that they ſhould be truſtees for thoſe after-born ſons, and conſequently the court is to make a conſtruction to ſupport it in ſuch manner as they can: But though this was the plain intention, yet if it is inconſiſtent with the rules of law and equity, it is to be rejected.

Though contingent remainders by law, muſt veſt during, or at the inſtant the particular eſtate determines, yet it does not hold in the caſe of truſts. The ground the law goes upon is, that a freehold cannot be in abeyance, becauſe there muſt be a tenant of the freehold to perform ſervices, and anſwer all writs concerning the realty, but this objection is obviated in the caſe of an equitable eſtate, becauſe the truſtee is the tenant of the freehold to perform ſervices, *&c.*

Therefore, as to the ſecond queſtion, the great objection is, that, by law, contingent remainders muſt veſt during, or at the inſtant the particular eſtate determines; and the only method found out to avoid this ſince *Chudleigh*'s caſe, 1 *Co.* has been to create a particular eſtate of freehold, and veſt it in truſtees to preſerve the contingent remainder; and there is no ſuch limitation in this caſe, and it is ſaid to be a maxim in this court, that truſt eſtates (creatures of equity) are governable by the ſame rules of property as legal eſtates, in order to preſerve one uniform rule and meaſure of property.

And further, that the owner of a truſt has the ſame power over it as he would have was it a legal eſtate, in the ſame intereſt or extent: This is undoubtedly true in general, but affords no juſt concluſion in the preſent caſe.

Firſt, Becauſe the ground and foundation the common law goes upon, in making contingent remainders void in ſuch caſes, does not hold in the caſe of truſts.

Secondly, Becauſe to allow them to be good, will not affect any rightful power of alienation in the *ceſtuique truſt*, which the law allows to owners of legal eſtates, and conſequently do not tend to a perpetuity.

Thirdly, Becauſe to require a new diſtinct limitation of legal eſtate, to ſupport the contingent remainders in ſuch a caſe of a truſt, would be quite nugatory.

As to *the firſt*, the ground on which the common law requires the veſting of the contingent remainders either during, or *eo inſtante*, the particular eſtate determines, is, that a freehold cannot be in abeyance; that there muſt be a tenant of the freehold to perform ſervices, to anſwer to a *præcipe*, and all writs to be brought concerning the realty, or otherwiſe there would be a failure of publick ſervice and publick juſtice.

But this holds not in the caſe of an equitable eſtate, *the truſtee* is tenant of the freehold to perform ſervices, *&c.* but it has been objected there is equal miſchief, if he is not liable to anſwer demands, and to be bound by decrees in this court.

Where there are ever ſo many contingent limitations of a truſt, it is ſufficient to bring the truſtees before the court, together with *him*, in whom the firſt remainder of the inheritance is veſted.

That will not follow, for if there are ever ſo many contingent limitations of a truſt, it is an eſtabliſhed rule, that it is ſufficient to bring the truſtees before the court, together with him in whom the firſt remainder of the inheritance is veſted, and all that may come after will be bound by the decree, though not *in eſſe*, unleſs there be fraud and colluſion between the truſtees and the firſt perſon in whom a remainder of inheritance is veſted; but that is of no weight, for fraud and colluſion will unravel a thing as well at law as equity.

There is a great opinion, that this maxim of the common law that there muſt be a freehold, could not be drawn over to uſes before the ſtatute of *Hen.* 8. *Chudleigh*'s caſe, 1 *Rep.* 135. *per Gawdy*, " That " if a man, *before the ſtatute*, had made a feoffment to the uſe of one " for years, and after to the uſe of the right heirs of *J. S.* this li- " mitation had been good, for the feoffees remain tenants of the " freehold; but ſuch limitation after the ſtatute is void, for then the

" freehold would be in abeyance, for nothing can remain in the " feoffees."

As to the ſecond reaſon, if it tended to a perpetuity, it would be a great objection. Before the ſtatute of *Hen.* 8. the judges of the common law gave uſes very hard names, and called them the product of fraud, *&c.* to remedy thoſe miſchiefs the ſtatute was made, to execute and bring the eſtate to the uſe, that after the ſtatute the *ceſtuique uſe* was ſeiſed of the eſtate at law, as before he was of the uſe in equity; and this the judges profeſſed to adhere to, but notwithſtanding that, the neceſſities of mankind, and reaſonable occaſions in families, obliged them in a little while to give way to uſes.

The ſtatute of uſes was made to execute, and bring the eſtate to the uſe; and after the ſtatute, the *ceſtuique uſe* was ſeiſed of the uſe at law, as before he was of the uſe in equity; but the neceſſities of mankind have obliged judges to give way to uſes notwithſtanding.

Contingent uſes, ſpringing uſes, executory deviſes, powers over uſes, were alſo foreign to the notions of the common law, and could not be limited on common law fees, but were let in by conſtruction, by the judges themſelves, upon uſes, after they became legal eſtates; yet the judges ſtill adhered to the doctrine, that there could be no ſuch thing as *an uſe upon an uſe*, but where the firſt uſe was declared, there it was executed, and muſt reſt for that eſtate: Therefore, on a limitation to *A.* and his heirs, to the uſe of *B.* and his heirs, in truſt for *D. B.*'s eſtate held there to be executed by the ſtatute, and *D.* took nothing.

Contingent uſes, ſpringing uſes, executory deviſes, &c. were foreign to the notions of the common law, but were let in by conſtruction, (by *judges* themſelves) upon uſes, after they became legal eſtates.

Of this conſtruction equity took hold, and ſaid that the intention was to be ſupported. It is plain *B.* was not intended to take, his conſcience was affected. To this the reaſon of mankind aſſented, and it has ſtood on this foot ever ſince, and by this means a ſtatute made upon great conſideration, introduced in a ſolemn and pompous manner, by this ſtrict conſtruction, has had no other effect than to add, at moſt, three words to a conveyance.

It is very true this would not have been indured, if courts of equity had not in general allowed theſe truſt eſtates to have the ſame conſideration in point of policy with legal eſtates, and given the ſame power to *ceſtuique truſts*, with reſpect to alienations, as if it was an uſe executed. Therefore a tenant in tail of a truſt may bar his iſſue by a fine: A tenant in tail of a truſt, remainder over, may dock the remainder by a common recovery; nay, ſome go ſo far as to ſay, he may do it by feoffment only.

Courts of equity have given the ſame power to *ceſtuique truſts* as to alienation, as if it was an uſe executed.

But all theſe are common aſſurances, and rightful methods of conveying eſtates, for it was never allowed that in truſt eſtates, a like eſtate may be gained by wrong as there might be of a legal eſtate; therefore, on a truſt in equity, no eſtate can be gained by diſſeiſin, abatement, or intruſion. It is true, it may happen ſo upon a truſtee, and in conſequence the *ceſtuique truſt* may be affected, but that is on account of binding the legal eſtate; but on a bare truſt, no eſtate can be gained by diſſeiſin, abatement, or intruſion, whilſt the truſt continues.

Upon a truſt in equity, no eſtate can be gained by wrong, as there might of a legal eſtate; therefore on a truſt in equity no eſtate can be gained by diſſeiſin, abatement, or intruſion.

The deſtruction of contingent remainders, by tenant for life, is conſidered as a wrong without remedy, and ſo ſtrongly a tort, that it

is

is a forfeiture of his own eſtate, and therefore works a deſtruction of the remainder. Now if equity never ſuffers any other wrongful act, or any thing ſimilar, to gain or defeat the truſt eſtate, whilſt the truſtee is in poſſeſſion, why ſhould this take place, or the court ſtrive to preſerve a power to *ceſtuique truſt* for life, the execution whereof the law calls a wrong?

There are many inſtances where there would be *Mergers* of legal eſtates, and yet courts of equity have never ſuffered *Mergers* of truſts.

It is in this reſpect to be compared to the caſes of *Merger*, for though it is the doctrine of this court, that the rules of property and convenience hold in the ſame manner with reſpect to truſts as to legal eſtates, to prevent perpetuities; yet in the caſes of *Merger* there are many inſtances where there would be *Mergers* of legal eſtates, and yet courts of equity have never ſuffered *Mergers* of truſts, where the legal eſtate continued in the truſtees, but have been againſt the *Merger* if the juſtice of the caſe required it.

Thirdly, Where the whole fee is in the truſtees, to require a new diſtinct limitation to ſupport contingent remainders, would be wholly vain and nugatory.

Suppoſe, after the limitation to *Samuel* and his iſſue, the teſtator had limited over a remainder to *J. N.* to preſerve contingent remainders, could *J. N.* have taken at law? No, for it would have been *a uſe on a uſe*; nor would he have taken in equity, for the firſt truſtees having the whole eſtate, are *truſtees* for all the *ceſtuique truſts*.

Suppoſe ſuch limitation had been to the firſt truſtees, they could have taken nothing more; ſo that ſuch a new limitation could have no operation.

The principal objection is, "That the legal eſtate in the truſtees, "and the equitable in the *ceſtuique truſts*, are of different uſes, and "cannot draw over the one to ſupport the contingent remainders of "the other, and that a man might as well make uſe of an eſtate ex- "ecuted by the ſtatute of uſes, to ſupport a contingent remainder of "a particular eſtate in a uſe."

Uſes executed, and meer truſts, ſtand on different foundations, and will not be governed by the ſame reaſoning.

I admit they are of different natures, but ſtill the legal eſtate remains in the truſtees to ſerve and ſupport all the truſts; but it is quite otherwiſe on the ſtatute of uſes*. The words of the ſtatute are, "That every perſon that ſhall have any ſuch uſe, *&c.* ſhall from "henceforth ſtand, and be ſeiſed, *&c.* of ſuch lands, *&c.* to all in- "tents, conſtructions, and purpoſes in the law, of and in ſuch like "eſtates, as they had or ſhall have in uſe, truſt or confidence of "or in the ſame." By which the legal eſtate is executed to the uſes, and the *ceſtuique truſt* has the legal eſtate, juſt in the ſame manner as the uſe before; the conſequence whereof is, that as to perſons *in eſſe*, the legal eſtate became veſted immediately as they came *in eſſe*, provided they come ſo in due time, according to the rules of common law; if not, then the eſtate went over immediately to the next remainder-man, as it would in the caſe of a common law fee: So it is conſtrued in *Chudleigh*'s caſe, and if it went over by deed or will, ſo as the party took as a purchaſer, it is never drawn back again.

* 27 *Hen.* 8. *c.* 10.

This ſhews that as to this queſtion, there can be no reaſoning at all from the caſes of uſes executed to meer truſts, but they ſtand on different foundations. Theſe are the reaſons which govern my judgment on this point, and I own I can ſee no inconvenience from it.

It muſt be admitted that the teſtator might have done this, as to part of the remainders, (thoſe that are capable of being ſupported) if he had uſed proper words; and if he has clearly expreſſed his intention, this court (which is to direct a ſettlement according to his intention, as far as it may ſtand with the rules of law) will take the proper method to effectuate this intention.

Where a truſt is in its nature executory, it is incumbent on the court to follow the intention of the parties, as far as the rules of law will admit.

Next as to the caſes, the Earl of *Stamford* v. Sir *John Hobart*, in 1709, (notwithſtanding the diſtinction taken upon it) is a ſtrong authority for this purpoſe. Serjeant *Maynard* "deviſed his eſtate to "truſtees and their heirs, and declared after his wife's death, they "ſhould convey the eſtate to the uſe of, and in truſt for Sir *H. H.* "for life, remainder to the firſt ſon for 99 years, if he ſo long live, "remainder to the heirs male of ſuch firſt ſon, remainder to the "Counteſs of *Stamford* for life, remainder, *&c.* a conveyance was "directed according to the will, *exceptions were taken to the draught "of the conveyance*; Lord *Cowper* declared, that where articles or a "will were improper or informal, the court was not to direct a con-"veyance according to ſuch improper directions, but in a proper "and legal manner, which might beſt anſwer the intention of the "parties, and conceived the intention to be, that the eſtate ſhould "be ſecured ſo far as the rules of law would admit, before croſs re-"mainders ſhould take place, and therefore ordered accordingly."

Upon an appeal to the houſe of Lords, alleging, that this was making a different ſettlement, the order was affirmed upon that principle, *that a truſt eſtate being in its nature executory, it is incumbent on the court to follow the intention of the parties, as far as the rules of law will admit.*

Where the court makes uſe of the words *ſtrict ſettlement* in an order, it implies a direction to the Maſter to have truſtees to preſerve contingent remainders inſerted.

The next is the caſe of *Humberſton* v. *Humberſton*, 2 *Vern.* 737, and *Caſ. in Eq. Abr.* 207. "There the teſtator had made a whimſical "will, deviſing his eſtate to the drapers company and their ſucceſ-"ſors, in truſt to convey to the plaintiff for life, remainder to his "firſt and every other ſon for their lives, and to their heirs males for "life, remainder to about *fifty* other perſons for their lives, and their "ſons for their lives; Lord *Cowper* declared it a vain attempt to "make a perpetuity, but however that there ought to be *a ſtrict "ſettlement*, which implied a direction to the Maſter to have truſtees "to preſerve contingent remainders inſerted," for that is always underſtood by the words *ſtrict ſettlement.*

However improperly a will is penned, if the teſtator intended a ſtrict ſettlement, the court will direct accordingly.

It appears by theſe caſes, that however improperly a will is penned, the court will take notice whether the teſtator intended a ſtrict ſettlement, and direct accordingly, as far as the rules of law will permit.

But a diſtinction was taken between thoſe caſes and the preſent, that they were caſes of executory truſts, where the will itſelf directed a con-

a conveyance; but here is no conveyance directed, but the truſt only declared by the will.

All truſts are executory, and whether a conveyance be directed or not, the court muſt decree one, when aſked at a proper time.

I admit the court has thrown out ſuch ſort of expreſſions, but I think there is no difference. All truſts are executory, and whether a conveyance be directed by the will or not, this court muſt decree one, when aſked at a proper time; but I do not give any concluſive opinion to ouſt that diſtinction.

In this will there is a plain declaration of the teſtator's intention that this ſhould be an executory truſt, and that there ſhould be in due time a ſtrict legal conveyance made by the truſtees.

The firſt clauſe from which ſuch an intention may be collected, is the *proviſo* relating to the profits before the perſons come into actual poſſeſſion, *&c.* till he or they attain 21, and in the mean time the executors to make ſuch handſome allowance for education of ſuch perſons, and the overplus to go to ſuch perſon as ſhall be intitled thereto.

Here is an intention plainly declared, that the truſtees ſhould continue in poſſeſſion of the eſtate and receipt of the rents, till one to whom an eſtate for life is limited ſhould be 21, and the truſtees in the mean time are to make a handſome allowance for the education of ſuch perſons out of the rents, (whether the direction for laying up the ſurplus was to be ſupported or not, is immaterial to this queſtion) and after attaining the age of *twenty one*, ſuch perſon to have the poſſeſſion, (that is) *the eſtate to be conveyed.*

The next clauſe is directing 300*l. per ann.* to *James Hopkins*, one of the truſtees for paſt ſervices, to encourage him in the care of the truſt, *&c.* to be paid him half-yearly, till ſome perſon ſhould come into poſſeſſion, *&c.*

This is ſtill fixing the age of 21 to be the time that ſuch perſon ſhould have the poſſeſſion, and conſequently by conſtruction, intitled to have a conveyance of the legal eſtate.

The next clauſe is *that* where he directs "the reſidue of his perſonal eſtate to be laid out, *&c.* and conveyed to his truſtees upon "the ſame truſts, *&c.*" (*Vide* the clauſe.)

By which is plainly meant to make as ſtrict a ſettlement as poſſible of the lands to be newly purchaſed, and yet he connects them both together upon the ſame truſts.

But be this point as it will, the caſe of *Chapman* v. *Bliſſet*, decreed by Lord *Talbot* in 1735, is a clear authority, "that the legal eſtate "in truſtees will ſupport contingent remainders, even of a truſt de-"clared by a will, *where no conveyance is directed.*"

The legal eſtate in truſtees will ſupport contingent remainders of a truſt declared by a will, where no conveyance is directed.

The caſe was, *J. Bliſſet*, "after ſeveral directions and charges "upon his real eſtate, deviſes all other his real eſtates to truſtees and "their heirs, in truſt to pay his ſon *J. B.* quarterly, 37*l.* 10*s.* during "his life, and if there were any child or children, he gave the reſt "and reſidue of his real eſtate for the education and benefit of ſuch "child or children, and if his ſon married with ſuch conſent as the "will mentions, 100*l. per ann.* to his wife; if without, 10*l. per* "*ann.* and after his ſaid ſon's deceaſe, gave one moiety of the ſaid "truſt eſtate to ſuch child or children, their reſpective heirs, ex-

" ecutors, and aſſigns, the ſurvivor of them, &c. and the other " moiety to the child or children of *Joſeph*, &c. and if *J. B.* died " without iſſue, to ſuch child, &c. of my daughter, &c. with a " remainder over, the teſtator dies. *J. B.* marries and has a ſon, " then died; *Joſeph* (who was the teſtator's grandſon) had no ſon " born at the time of the death of *J. B.* but had a ſon four years " after, and upon this a bill was brought by the heir at law, inſiſt- " ing that theſe limitations were void, particularly to the ſon of *Jo-* " *ſeph*, not being born till four years after the death of *J. B.*"

The firſt queſtion was, Whether it was to be conſidered as a legal eſtate ſubſiſting in the truſtees, or whether it was not a uſe executed by the ſtatute? Lord *Talbot* (and myſelf on a re-hearing) were of opinion, " that the legal eſtate in fee was in the truſtees, and all " the limitations, in the ſubſequent intereſt, were truſts."

The next queſtion was, Whether the limitation to the ſon of *Joſeph* was good? And if ſo, Whether as an executory deviſe or a contingent remainder? Lord *Talbot* " was of opinion, that it might " be good even as an executory deviſe, in a legal limitation, and " the only objection was, that the limitation was *in verba de præſenti*: " but he ſaid the words were to be conſidered as the teſtator meant " them, that he knew *Joſeph* was an infant and young, and deviſing " a moiety to his child, (knowing he had none) muſt neceſſarily in- " tend it future, and therefore it was impoſſible to ſhew an intention " more clearly of children thereafter to be born—But he went on, that " when *J. B.* had a child born, that had a freehold in the truſt during " the life of *J. B.* whether after that, it was to be conſidered as an " executory deviſe, or a contingent remainder, the child of *J. B.* " having a kind of freehold in the truſt itſelf, he held, that if taken " as a remainder, (in caſe of a limitation of legal eſtate) it was clearly " void, for the freehold would be in abeyance for 4 years, between " the death of *the ſon* of *J. B.* and the birth of the ſon of *Joſeph*, but " he ſaid, the reaſon of that rule failed in the caſe of truſts, and was " of opinion, that the firſt eſtate in the truſtees preſerved the whole " truſt, and therefore, whether it was to be conſidered as an exe- " cutory deviſe, or contingent remainder of a truſt, that it was good, " and that the plaintiff was intitled to a moiety."

This reſolution comes up to the preſent in all it's points.

As to the third point, I ſhall not lay much ſtreſs upon it, and I own I took it to be clearly otherwiſe, when mentioned at the bar, but on conſideration, I think there is more to be ſaid in ſupport thereof than I was at firſt aware of.

The objection is, that the particular eſtate, and remainder muſt be created at one and the ſame time, as making parts of the ſame eſtate, and this is undoubtedly the general rule, but it is equally a rule at law, that in caſes where an eſtate is limited to the anceſtor for life, and afterwards to the heirs males of his body, the eſtates are connected, and make an eſtate tail in the anceſtor, where it is by the ſame conveyance: The ſame has been held where it did not ariſe by the ſame conveyance, but by way of reſulting uſe; *Lord Chancellor* inclined to think, that the reſulting truſt of a freehold, to ſupport contingent remainders of a truſt, might connect in the ſame manner with the limitation in tail, though not created together with it.

Where an eſtate is limited to the anceſtor for life,

life,

life, and afterwards to the heirs males of his body, that the eſtates are connected, and make an eſtate tail in the anceſtor, where it is by the ſame conveyance; ſo is *Shelley*'s caſe, and it has alſo been held to connect and make one eſtate tail, where it did not ariſe by the ſame conveyance, but by way of reſulting uſe, and ſo reſolved by three judges in the caſe of *Pybus* and *Mitford*, 1 *Vent.* 373. *A.* covenanted to ſtand ſeiſed of lands, to the uſe of the heirs males begotten, or to be begotten on the body of his ſecond wife, and died at the time of the deed, he had iſſue by her, a ſon *R. Hale*, *Wild*, and *Rainsford* held, that in this caſe, "The "uſe of the freehold returned or reſulted, by operation of law, to "the covenantor for life, which being conjoined to the eſtate limited "to the heirs males of his body, made an eſtate tail, and that this "eſtate for life, ariſing by operation of law, was as ſtrong as if it had "been expreſs."

Now, if an eſtate for life, reſulting to the covenantor, which was part of the old uſe, and remaining in him, might unite and connect with the limitation in tail in the conveyance, why may not the reſulting truſt of the freehold, to ſupport contingent remainders of a truſt, do the ſame, though not created together with it? there doth not ſeem to me to be any greater objection to the one than the other.

My Lord Chief Juſtice *Hale*'s expreſſion in that caſe, is directly applicable, that this is plainly according to the intention of the parties, and if we can by any means ſupport it, we ought to do it as good expoſitors.

But however, as I ſaid before, I would not be underſtood to give any poſitive opinion, but it deſerves to be better conſidered, by reaſon of it's analogy to the caſe of *Pybus* and *Mitford*.

In a limitation to ſupport contingent remainders, it is not material to reſtrain it to the life of tenant for life of the land, provided it be reſtrained to the life of a perſon in being.

Another objection taken for the plaintiff was, that it is impoſſible to frame ſuch an expreſs limitation, as would ſupport theſe contingent remainders, if this was true, it would be very material: It is ſo, as to ſome, but not to all, for as to the ſons of *John Hopkins*, to be born hereafter, the limitation, when the conveyance is to be made, may be ſupported, ſo as to the ſons of the bodies of ſuch daughters as were living at the teſtator's death, for I make a great diſtinction between that limitation, and the limitation to the ſons of *after-born daughters*: As to *John Hopkins*'s after-born ſons, it may be limited to truſtees and their heirs, till he has a ſon born, and ſo after his death, till *Sarah* has a ſon born, and to any other of the daughters that were in *eſſe* at the teſtator's death.

But it has been objected further, that this is a new invented limitation to ſupport contingent remainders, and that it was never yet carried further than during the life of tenant for life of the land, or birth of a poſthumous ſon, and that, to be ſure is the common caſe of ſettlements, but there have been other limitations, and it is not (in my opinion) material to reſtrain it to the life of tenant for life of the land, provided it be reſtrained to the life of a perſon in being.

It has been alſo objected, that all ſuch truſtees on ſuch limitations have hitherto been reſtrained to receive the profits for the benefit of

the tenant for life, but this would be to create a new truſt for the benefit of the heir at law, but this is no more than the common caſe of a reſulting truſt, and it is immaterial, whether it be expreſs or implied, for if it be implied by the will, it muſt be expreſſed in the conveyance.

And ſo it was allowed in the caſe of *Carrick* v. *Errington*, 2 *Wms. Rep.* 361. " *Edward Errington* had made two ſettlements of his " eſtate, one by fine in the life-time of his anceſtor, which (if at all) " could only operate by eſtoppel; he afterwards made another ſettle- " tlement to truſtees, to the uſe of himſelf for life, *&c.* remainder, *&c.* " and by a conveyance executed another day, they (to whom the fee " was limited) executed a declaration of truſt for *Thomas Errington* for " life, without impeachment of waſte, remainder to truſtees to pre- " ſerve contingent remainders, during the life of *Thomas Erring-* " *ton:* In the conveyance were unneceſſarily made truſtees to pre- " ſerve contingent remainders, it being a truſt eſtate; *Edward* " *Errington* died without iſſue, and the whole legal eſtate was ad- " mitted to be in the truſtees: In the ſecond deed they were only " truſtees of the beneficial intereſt, and *Thomas*, who was to take the " firſt eſtate in the truſt was a papiſt, and diſabled by the ſtatute to " take any beneficial intereſt; and it was inſiſted that by the ſtatute, " both the truſt and legal eſtate were void, and therefore the eſtate " to go over by that conveyance to the next remainder-man, who " ſhould be a proteſtant, and capable of taking.

There may be a reſulting truſt, under a truſt to appoint contingent remainders for the heir at law, in the ſame manner as under an executory deviſe.

" Firſt queſtion, Whether the deed was obtained by fraud?

" Second queſtion, Whether the legal eſtate in the truſtees (who " were only truſtees under the firſt deed) was void, becauſe this " remainder-man was a papiſt, and incapable of taking.

" Lord *King*, and afterwards the houſe of Lords held, that the " truſt being not only to receive rents, *&c.* but alſo to preſerve con- " tingent remainders, and poſſibly a perſon capable of taking might " come in *eſſe*, that, *that* was a further truſt, which the ſtatute did " not make void; it had indeed avoided that for life, but as there " was another truſt upon the legal eſtate, which might by poſſi- " bility be capable of being enjoyed, the eſtate ſhould remain in the " truſtees, to ſupport the contingent remainders; and as to the profits " in the mean time, (for the remainder-man could not take them, " nor the truſtees, they being only meer inſtruments) the heir at law " ſhould have them, till ſome perſon came in *eſſe*, capable of taking " under the contingent remainders."

This therefore is a very clear authority, that there may be *a reſulting truſt*, (under a truſt to ſupport contingent remainders) for the heir at law, in the ſame manner as under an executory deviſe: Indeed it was inſiſted in that caſe, that the eſtate ſhould in the mean time go over; but the court held otherwiſe, for then it would have veſted by purchaſe, and could never have come back again.

As to the deviſe of the perſonal eſtate, if I am right in what I have ſaid with regard to the real eſtate, it will hold ſtronger as to the perſonal, that it is a clear executory truſt, and falls within the reaſon of the caſe of *Papillon* v. *Voice*, which is a ſtrong authority on that head.

The conſequence of the whole is, that the preſent plaintiff cannot have ſuch conveyance as he prays by his bill, nor the ſurplus of the profits during the life of *William.*

But it remains to be conſidered, whether he can have any other relief.

I think no conveyance ought yet to be made of this eſtate, but it muſt remain in the hands of the truſtees to ſee whether *John Hopkins*, or any of his daughters, will have a ſon that ſhall attain the age of twenty-one, for ſo long there are truſts to be preſerved, and no *ceſtuique truſt* till then is to come into poſſeſſion.

If a conveyance was to be now directed, it would be proper to conſider what eſtate ought to be limited to the plaintiff; but as I think this is not neceſſary, the bill muſt be diſmiſſed, but without prejudice as to the plaintiffs applying to the court under the former decree for a ſettlement to be made of the truſt eſtate, according to the reſervation in that decree.

CAP. CIII.

Rent.

(A) In what caſes there may be a remedy for rent in equity, when none at law.

May the 19th 1739.

Benſon v. *Baldwyn.*

Caſe 274. A bill may be brought for rent in this court where the remedy at law is loſt, or becomes very difficult, and this court will relieve on the foundation of payment for a length of time.

LORD Chancellor: Where a man is intitled to a rent out of lands, and thro' proceſs of time the remedy at law is loſt, or become very difficult, this court has interfered and given relief, upon the foundation only of payment of the rent for a long time, which bills are called bills founded upon the *ſolet:* Nay, the court has gone ſo far as to give relief where the nature of the rent (as there are many kinds at law) has not been known, ſo as to be ſet forth, but then all the terre-tenants of the lands, out of which the rent iſſues, muſt be brought before the court, in order for the court to make a compleat decree.

3

CAP.

CAP. CIV.

Reſulting Truſts.

Vide title *Aſſets.*

Vide title *Creditor and Debtor.*

Vide title *Truſt and Truſtees*, &c.

CAP. CV.

Rule of the Court.

Vide title *Money.*

CAP. CVI.

Scrivener.

April the 2d 1752.

Ex parte Burchall.

Vide title *Bankrupt, under the diviſion, The Conſtruction of the repealing Clauſe in the 10th of Queen* Anne.

CAP.

CAP. CVII.

Separate Maintenance.

Eaſter term 1737.

Moore v. *Moore.*

Vide title *Baron and Feme, under the diviſion, Concerning Alimony, and ſeparate Maintenance.*

CAP. CVIII.

Specifick Legacy.

November the 24th 1738.

Dun and others v. *Coates* and another.

Vide title *Bill, under the diviſion, Bills of Diſcovery; and herein of what things there ſhall be a Diſcovery.*

Vide title *Legacy, under the diviſion, Ademption of it.*

Vide title *Injunction.*

Vide title *Commiſſion of Delegates.*

CAP. CIX.

Spiritual Court.

Michaelmas term 1737.

Hill v. *Turner.*

Vide title *Marriage, under the diviſion, Where it is Clandeſtine.*

CAP.

CAP. CX.

Statute relating to Creditors.

(A) Rule as to the 13 Eliz. cap. 5.

November the 6th 1745.

Walker and others v. *Burrows.*

Vide title *Bankrupt, under the diviſion, Rule as to Aſſignees.*

CAP. CXI.

Statute of Frauds and Perjuries.

March the 2d 1738.

Charlewood v. The Duke of *Bedford.*

Vide title *Landlord and Tenant.*

Vide title *Agreements, Articles, and Covenants.*

CAP. CXII.

Statute of Limitations.

Vide title *Anſwers, Pleas, and Demurrers.*

CAP. CXIII.

Statute relating to Purchasers.

(A) Rule as to the 27th of Eliz. cap. 4.

November the 6th 1745.

Walker and others v. *Burrows.*

Vide title *Bankrupt, under the division, Rule as to Assignees.*

CAP. CXIV.

Steward.

Vide title *Landlord and Tenant.*

CAP. CXV.

Surrender.

Vide title *Copyhold.*

CAP. CXVI.

Tenants in Common.

Vide title *Jointenants and Tenants in Common.*

CAP. CXVII.

Tenant by the Curteſy.

Hillary Vacation 1737.

Elizabeth and *Mary Caſborne*, —— —— Plaintiffs.

Elizabeth Scarfe, and *Alexander Inglis*, —— Defendants.

Caſe 275.

A. ſeiſed in fee of a freehold eſtate, mortgages it, and afterwards intermarries with *B.* *A.* dies, and the mortgage is not redeemed during the coverture; this is notwithſtanding ſuch a ſeiſin in the wife, as intitles the huſband to be tenant by the curteſy of the mortgaged premiſſes, for in this court the land is conſidered only as a pledge or ſecurity for the money, and does not alter the poſſeſſion of the mortgagor.

THE father of the plaintiffs deviſed to *Anne* his daughter, the plaintiff's eldeſt ſiſter, all his eſtate, freehold and copyhold, in fee, charged with 200*l.* a-piece to the plaintiffs. *Anne*, after her father's death, poſſeſſed the ſeveral eſtates, and afterwards intermarried with the defendant *Inglis*, and ſoon after died, leaving iſſue a ſon, who died an infant and without iſſue, upon whoſe death the plaintiffs, as heirs at law both to the infant and their ſiſter, became intitled to the real eſtate. *Anne Inglis*, before her marriage, mortgaged part of the freehold premiſſes to the defendant *Scarfe* for 900*l.* The bill is brought againſt the mortgagee and the huſband for an account, and for the direction of the court.

The defendant *Alexander Inglis* inſiſted, that having had iſſue by his wife, he was intitled to an eſtate for life, as tenant by the curteſy, in his late wife's freehold premiſſes, ſubject to the mortgage of the defendant *Scarfe*.

On the 5th of *May* 1735, the *Maſter of the Rolls**, on hearing the cauſe, was of opinion, the defendant *Inglis* was not intitled to a tenancy by the curteſy, in the eſtate comprized in the mortgage.

The defendant appealed from this decree to *Lord Chancellor*, and the cauſe came on before his Lordſhip on the 28th of *January*, and 4th of *March* 1737.

For the plaintiffs it was inſiſted, the equity of redemption was no actual eſtate or intereſt in the wife, but only a power in her to reduce the eſtate into her poſſeſſion again, by paying off the mortgage; it was compared to the caſe of a proviſo for a re-entry in a conveyance and no re-entry ever made, and to a condition broken and no advantage ever taken thereof; that the wife was never ſeiſed in fee in law, becauſe the legal eſtate was out of her by virtue of the mortgage, but had only a bare poſſeſſion and was in receipt of the rents and profits; ſo that the mortgagor had merely a right of action, or a ſuit in a court of equity, in order that the eſtate might be reconveyed to her, upon complying with the terms in the mortgage; that it was the laches of the huſband, he did not pay off the mortgage money, which would have re-veſted the eſtate in the wife, but not having done that, there is no more reaſon that he ſhould be a tenant by the curteſy here, than that he ſhould have the benefit of a

* Sir *Joſeph Jekyll*.

ſeiſin in law in the wife, which he cannot have, for there muſt be an actual ſeiſin; for the words of Lord *Coke* in his comment upon the 35 *Sect. of Littleton* are, *A man ſhall not be tenant by the curteſy of a bare right, title, uſe, or of a reverſion, or a remainder, expectant upon any eſtate of freehold, unleſs the particular eſtate be determined or ended during the coverture.* It was likewiſe ſaid, if it be conſidered as an intereſt, it is merely a contingent one, as it is uncertain whether the mortgagor will ever take back the eſtate again, for it was intirely at her election, and ſuppoſing it to be mortgaged to the value, though ſhe had a right to redeem, yet ſhe was under no obligation to do it; and it does not appear in this caſe the wife ever intended it, and if the law ſhould caſt the eſtate on the huſband, he, by never paying the intereſt during his life, might load the inheritance in ſuch a manner, that it would never be of any benefit to the heir.

The Attorney general cited the caſe of *Penville* v. *Luſcombe*, at the Rolls, the 4th of *February* 1728, where *the Maſter of the Rolls* * was ſtrongly inclined to think there could be no *poſſeſſio fratris* of an equity of redemption. He likewiſe cited the caſe of *Reynolds* v. *Meſſing*, at the Rolls, the 20th of *February* 1732 †, where it was held a wife was not dowable of an equity of redemption in the caſe of a mortgage in fee; and in the caſe of *Robinſon* v. *Tongue*, *Michaelmas* term 1730, Lord Chancellor *King* was of the ſame opinion.

* Sir *Joſeph Jekyll.*

† Sir *Joſeph Jekyll.*

Mr. *Fazakerley*, *e contra*, inſiſted, that the huſband's paying off the mortgage would have been buying what the law gives him as a tenant by the curteſy; that though at law a mortgage in fee is a revocation of a will, yet in a court of equity it is otherwiſe; and here a mortgagor is conſidered as having ſtill the ownerſhip of the eſtate, which is only a pledge or ſecurity for the money of the mortgagee, without making any alteration in the property, for the eſtate retains all its former qualities as any other not in mortgage.

That the argument *ab inconvenienti* falls to the ground, for as a tenant for life he will be obliged to keep down the intereſt during life, ſo that there is no danger of his injuring the inheritance: That there is a difference between a tenant by the curteſy, and a tenant in dower *with regard to a truſt*, for there may be a tenancy by the curteſy of a truſt, though a woman is not endowable of it; but what were the grounds of this diſtinction he would not take upon him to ſay, for as both by the decrees of this court, and in the houſe of Lords, it has been ſo determined without giving any reaſons, he would not preſume to offer any. 2 *Vern.* 585. and 680.

That in the caſe of *Penville* v. *Luſcombe*, nothing was therein determined by the *Maſter of the Rolls*, who was very doubtful in the principal point; but Mr. *Fazakerley* ſaid he had a note of a caſe, with the ſame names, determined by Lord *Cowper* in 1716, who held directly the contrary, that there might be a *poſſeſſio fratris* of an equity of redemption, and if ſo, the rule of *æquitas ſequitur legem*, in caſes of property, is certainly the beſt guide; and if this court upon niceties ſhould relax this rule, it would be a precedent to diſpenſe with it in other caſes. He ſaid it was agreed the principal point had never

never been determined, though it is at the ſame time admitted there are many caſes, where after a recovery at law either of dower or tenancy by the curteſy, a truſt term has been laid out of the way for the benefit of dowreſs, *&c.*

Mr. *Murray* of the ſame ſide ſaid, the ſtatute of uſes interpoſes only between a *ceſtuique truſt* and his own feoffee, ſtrictly ſpeaking; that in this court the *ceſtuique truſt* is conſidered as the owner of the land, and the truſtee, like the conuſee of a fine, only the meer inſtrument and no more. That the caſe of Lady *Radnor* v. *Vandebendy* *, was affirmed in the houſe of Lords for this reaſon, becauſe all conveyancers have inſiſted, that where there is a truſt term, it may be ſafely purchaſed without any danger of dower, and is one reaſon for the diſtinction between a dowreſs and a tenancy by the curteſy. * *Show. Parl. Caſ.* 69.

That a mortgage in fee is no more than a charge upon the land, and that in the caſe of *Tabor* v. *Grover*, 2 *Vern.* 367. it was held a mortgage in fee (though two deſcents caſt, and though more was due upon it than the value, and though the mortgagor by his anſwer ſaid he would not redeem) ſhould go to the executor, and not to the heir of the mortgagee, the equity of redemption not being foreclоſed or releaſed. The ſeveral caſes following were likewiſe cited by the defendant's counſel, 1 *Vern.* 329. *Hall* v. *Dunch*, 2 *Vern.* *Amhurſt* v. *Dowling*, and *Strode* v. Lady *Ruſſel* 2 *Vern.* 625. and Lady *Williams* v. *Wray*, 8 *Co.* 96. and *Pawlet* and the *Attorney general*, *Hard.* 467, 469.

After the point had been argued on both ſides, *Lord Chancellor* declared his ſurprize that this matter, as it ſeemed a caſe which muſt frequently happen, ſhould never have been brought before the court till now, and as it was a queſtion of great conſequence and general concern, ſhould take time to give his opinion.

On the 25th of *March* 1738 the cauſe ſtood for judgment.

Lord Chancellor: This queſtion depends on two conſiderations.

Firſt, What ſort of intereſt an equity of redemption is conſidered to be in this court?

Secondly, What is requiſite to intitle the huſband to be tenant by the curteſy?

Firſt, An equity of redemption has always been conſidered as an eſtate in the land, for it may be deviſed, granted, or entailed with remainders, and ſuch entail and remainders may be barred by fine and recovery, and therefore cannot be conſidered as a mere right only, but ſuch an eſtate whereof there may be a ſeiſin; the perſon therefore intitled to the equity of redemption is conſidered as the owner of the land, and a mortgage in fee is conſidered as perſonal aſſets.

An equity of redemption may be deviſed, granted, or entailed, and ſuch entail may be barred by fine and recovery, and the perſon intitled to it is the owner of the land, and a mortgage in fee is conſidered as perſonal aſſets.

By a deviſe of all lands, tenements, and hereditaments, a mortgage in fee ſhall not paſs, unleſs the equity of redemption be foreclоſed *; and if after ſuch deviſe made a foreclоſure is had, yet ſuch eſtate ſhall

If a teſtator, after deviſing all his lands, tenements, and hereditaments

foreclоſes an equity of redemption on a mortgage in fee, ſuch eſtate will not paſs by theſe general words of lands, *&c.* becauſe a foreclоſure is conſidered as a new purchaſe of the land. * 2 *Vern.* 625.

not paſs by thoſe general words of lands, tenements, and hereditaments, becauſe a foreclоſure is conſidered as a new purchaſe of the land.

A mortgage in fee, after a deviſe of the eſtate, is in law a total revocation; in equity *pro tanto* only.

The intereſt of the land muſt be ſomewhere, and cannot be in abeyance; but it is not in the mortgagee, and therefore muſt remain in the mortgagor. *A.* deviſes his eſtate, and after makes a mortgage in fee, though that is a total revocation in law, yet in this court it is a revocation *pro tanto* only.

It is certain the mortgagee is not barely a truſtee to the mortgagor, but to ſome purpoſes, *videlicet*, with regard to the inheritance he certainly is, till a foreclоſure.

Secondly, At common law, four things are neceſſary to intitle the huſband to the tenancy by the curteſy, *marriage*, *iſſue*, *death of the wife*, *ſeiſin in fact*. In this caſe the three firſt concur, but it is objected, that here is no ſeiſin whatever of the legal eſtate in the wife in the conſideration of the law. But that is not the preſent queſtion; the true queſtion is, if there was ſuch ſeiſin or poſſeſſion of the equitable eſtate in the wife, as in this court is conſidered as equivalent to an actual ſeiſin of a freehold eſtate at common law, and I am of opinion there was.

A huſband ſhall be tenant by the curteſy of the equitable eſtate of the wife.

Actual poſſeſſion, cloathed with the receipt of the rents and profits, is the higheſt inſtance of an equitable ſeiſin, both of which there was in this caſe, and that a husband ſhall be tenant by the curteſy of the equitable eſtate of the wife, has been often determined, as in *Sweetapple* v. *Bindon*, 2 *Vern.* 536. which was a much ſtronger caſe than this, for in that caſe there was neither ſeiſin nor land, and in 2 *Vern.* 680, it was held that lands articled for only will paſs by a will.

The principal objections are two.

Firſt, *Laches* and neglect in the husband by not paying off the mortgage.

Secondly, that the rule ought to be equal between dower and curteſy, and that dower cannot be of a truſt eſtate.

As to the firſt, it is not ſimilar to the caſes of laches in the huſband, *viz.* as in a caſe where entry is requiſite, becauſe it is nothing near ſo eaſy to pay off a mortgage as to make an entry; and it holds equally ſtrong in the caſe of a truſt eſtate, for a husband may more eaſily get a decree for his truſtees to convey, than a decree to redeem a mortgage, which is neceſſarily attended with many delays.

An heir at law can oblige a tenant by the curteſy to keep down intereſt, as much as any other tenant for life.

The ſecond objection proves too much, if any thing, and intirely fails by the precedents of this court: If any innovations were to be made, I am of opinion the neareſt way to right, would be to let in the wife to dower of a truſt eſtate, and not to exclude the huſband from being tenant by the curteſy of it, and there can be no inconvenience to the heir at law, for he would have the ſame remedy in this court, to make a tenant by the curteſy, keep down the intereſt as againſt any other tenant for life: For theſe reaſons I am of opinion the defendant is intitled to be tenant by the curteſy, and the decree at the Rolls, as to this part, muſt be reverſed.

December

December the 8th 1738.

Roberts v. *Dixwell, et e contra.*

SIR *Thomas Sandys*, under his will directs his truſtees to convey a full forth part of all and ſingular the freehold lands, *&c.* To the uſe of his daughter *Priſcilla*, for and during the term of her natural life, and ſo as ſhe alone, or ſuch perſon as ſhe ſhall appoint, take and receive the rents and profits thereof, and ſo as her huſband is not to intermeddle *therewith*, and from and after her deceaſe, in truſt *for the heirs of the body* of the ſaid *Priſcilla* for ever.

Caſe 276. Sir *T. S.* by will directs his truſtees to convey a full fourth part of all his freehold lands, *&c.* to the uſe of his daughter *Priſcilla* for life, and ſo as ſhe alone, or ſuch perſon as ſhe ſhall appoint, take and receive the rents and profits thereof, and ſo as her huſband is not to intermeddle therewith, and from and after her deceaſe, in truſt for the heirs of the body of the ſaid *Priſcilla* for ever: This being an executory truſt, the wife took an eſtate for *life* only, and the husband therefore not intitled to be tenant by the curteſy.

The principal queſtion was, Whether this was a truſt executed, or executory, for if executed, *Priſcilla* was then tenant in tail, and her huſband intitled to be a tenant by the curteſy; the contrary, if executory only.

Part of the lands deviſed, being of the nature of gavelkind, and *Priſcilla* having left two ſons, another queſtion was made, Whether theſe particular lands muſt deſcend in gavelkind, or go according to the rule of the Common law.

Mr. *Fazakerley* for the ſons of *Priſcilla.*

The queſtion, Whether the words, heirs of the body, will be conſtrued to give them an eſtate derived from their anceſtor, or whether they take by purchaſe?

He inſiſted, that it appears to be the intention of the teſtator, that the huſband ſhould have no benefit, and therefore cannot be tenant by the curteſy.

The wife married improvidently, and againſt her father's conſent.

She might have diſpoſed of the rents and profits by will, there was not one moment of time, where the huſband had the leaſt right, or ever was in poſſeſſion of any part of the eſtate.

He ſaid, he did not recollect any one caſe, where a huſband can be tenant by the curteſy, unleſs he can ſhew ſeiſin in himſelf in right of his wife; upon the death of *Priſcilla*, the huſband here can have no right at all, for there is no longer a continuation of the wife's eſtate.

He cited *Co. Litt. fol.* 30. *a.* to ſhew, that a huſband muſt have ſome right even in the life-time of the wife, and that it commences in her life-time, and not at her death.

Where the wife has a ſeparate intereſt, the court conſiders her always as a *feme ſole*; if he had nothing during the coverture, how could he intitle himſelf to any thing at the time of her death, when

all her intereſt was gone, and it is expreſly laid down by Lord *Coke*, that a tenancy by the curteſy is initiate in the life-time of the wife.

Mr. *Attorney general* for the defendant.

He inſiſted, where a truſt eſtate is attended with all the ſimilar circumſtances, that there could be in a legal eſtate, to give a huſband a tenancy by the curteſy, this court will make no difference in the conſtruction.

Lord Chancellor: The queſtion is, how this truſt ought to be carried into execution, and in what manner the truſtees ought to convey.

Priſcilla herſelf is dead, and yet it muſt be conſidered, what kind of eſtate the truſtees ought to have conveyed to her, if ſhe had been living.

Firſt, Whether to *Priſcilla* in tail, or to her for life only?

If the conveying an eſtate tail would have anſwered the purpoſe of the teſtator in his will, then this caſe need not have been varied from former caſes.

But I am of opinion, the conveying an eſtate tail here, would have defeated the intention of the teſtator.

To be ſure, where an eſtate has been granted or given by will to *A.* for life, and to the heirs of the body of *A.* ſuch a deviſe has been by the Common law, united ſo in the firſt perſon, as to convey to him an eſtate tail; the ſame conſtruction too has prevailed with reſpect to truſt eſtates.

But in the preſent caſe here are all ſorts of truſts, as to mortgage, ſell, *&c.* but the latter part of the truſt is merely executory, to be carried into execution, after the performance of the antecedent truſts, the whole direction therefore falls upon this court, and they are to direct how the parties are to convey.

This court have taken much greater liberties in the conſtruction of executory truſts, than where the truſts are actually executed: As in the caſe of the Earl of *Stamford* v. Sir *John Hobart*, concerning ſerjeant *Maynard*'s will, which came on upon exceptions to the Maſter's report, *Nov.* the 19th 1709. and the reſolution affirmed in the houſe of Lords. The caſe of *Papillon* v. *Voyce*, 2 *Wms.* 471. and Lord *Glenarchy* v. *Boſville*, *Caſ. in Eq.* in Lord *Talbot*'s time 3.

Theſe caſes ſhew that the court have taken a greater latitude, and the point which has governed them, has been the intention of the teſtator.

The words here in truſt for *Priſcilla*, for and during the term of her natural life, and ſo as ſhe alone, *&c.* have no doubt ſome meaning, and there is a particularity in the expreſſion, becauſe he has given plainly, and expreſly, an eſtate tail to his other daughters in different parts of his eſtates, but I do not think that this alone would have been ſufficient.

Things muſt not only be conſiſtent in executory truſts, according to the intention of the teſtator, but muſt be done according to the form and method of conveyancing: Now I do not know any in-

ſtance, where an eſtate for life conveyed by deed or will to the wife, for her ſeparate uſe, has been conſtrued an eſtate tail in the wife; if the teſtator had intended an eſtate tail, he would have done it by way of remainder.

Some ſtreſs has been laid upon the word *therewith*, as if it related to the laſt antecedent, the rents and profits, but it may be taken in a large ſenſe, and refer to the whole fourth part.

If the wife had been intitled to an eſtate tail, I do not ſee, but the huſband muſt have been tenant by the curteſy.

It is ſaid, this is an executory truſt, and nothing to be conveyed till all the other precedent truſts were executed, and conſequently the eſtate continued in the truſtees, and there was no ſeiſin in the huſband and wife.

But it has been held in a caſe of a truſt eſtate for payment of debts, and in the caſe of an equity of redemption, that a huſband may be tenant by the curteſy, for in the caſe of a truſt for payment of debts, it is only a chattel intereſt in the truſtees, and the firſt taker has a freehold over.

In caſe of a truſt eſtate for payment of debts, or in the caſe of an equity of redemption, a huſband may be tenant by the curteſy of an eſtate deviſed to the wife, for her ſeparate uſe.

If therefore a truſt eſtate is not ſuch a one as is ſufficient to bar the huſband of his tenancy by the curteſy. The next queſtion will be, Whether the deviſe to the wife for her ſeparate uſe, will bar him; I am of opinion it will not, becauſe here is a ſort of ſeiſin in the wife.

Where a truſt is executory, and to be carried into execution by this court, they will direct a conveyance of lands, notwithſtanding they are *gavelkind*, to be made according to the rule of Common law.

My Lord *Coke* ſays, that to make a tenancy by the curteſy, there ought to be a right in the huſband inchoate in the life of the wife, but he does not ſay, that he ſhould be ſeiſed of the rents and profits.

Therefore I think, if this had been an eſtate tail, he would have been intitled to be tenant by the curteſy, notwithſtanding this court by their authority, might have prevented the husband from intermeddling with the rents and profits, during the life of the wife.

But upon the whole, I am of opinion the wife could not take an eſtate in tail, but took an eſtate for life only, and the grounds of thoſe caſes which have been mentioned, do not ariſe from the court's making a different conſtruction upon a truſt, than upon a legal eſtate, but that ſome circumſtance in the will has induced the court to make a narrower conſtruction.

Therefore as it is plainly the intention of the teſtator, that the huſband ſhould have no manner of benefit from the eſtate, either in the life-time of the wife, or after her deceaſe, (for immediately upon the death of the wife, it is conveyed in truſt to the heirs of her body for ever) the husband of conſequence is abſolutely excluded, for a tenancy by the curteſy depends abſolutely upon an eſtate tail.

As this is my determination on the conſtruction of Sir *Thomas Sandys*'s will, the eſtate muſt be conveyed to Mr. *Richard Sandys*, the

the eldeſt ſon of *Priſcilla*, and the heirs of his body, with remainder to the ſecond ſon and the heirs of his body, and not according to the cuſtom of gavelkind, becauſe agreeable to the opinion I have now given, it muſt go according to the rule of Common law, being not a truſt executed, but executory, and to be carried into execution by this court.

CAP. CXVIII.

Tithes.

(A) Of a modus.

January the 28th 1737.

Clifton v. *Orchard*, clerk.

Caſe 277. Iſſues directed by this court, to try a *modus*, though eſtabliſhed by two verdicts, the plaintiff intitled to his coſts at law only, and not in equity.

THERE having been two verdicts in this caſe in favour of the plaintiff in equity, the *modus* was now eſtabliſhed with the coſts at law, but none were given with regard to the proceedings in equity, for *Lord Chancellor* ſaid, the ſuit in this court was meerly for the ſecurity of the plaintiff, and to prevent any farther impeachment of his right to *an exemption* from the payment of tithes in ſpecie, and that this was like the caſe of a bill brought to perpetuate the teſtimony of witneſſes, wherein coſts are never given againſt the defendant: That the plaintiff might have applied for a prohibition, and if he had ſucceeded therein at law, he would have had his coſts, and he ought to have the ſame advantage with regard *to the proceedings at law* directed by this court, but that there was no pretence for any other coſts.

His Lordſhip decreed the *modus* to be eſtabliſhed, and ordered the defendant to pay coſts to the plaintiff, in reſpect to the proceedings at law, to be taxed; but as to coſts in equity, relating to the *moduſſes*, *his Lordſhip* did not think fit to award any to be paid by either of the ſaid parties.

CAP.

CAP. CXIX.

Trade and Merchandize.

May the 18th 1737.

Powell, ſenior and junior, —— —— — Plaintiffs.

Elizabeth Monnier widow, and executrix of *John Monnier*, —— —— —— } Defendant.

THE plaintiffs who were partners, the 3d of *April* 1731, received a bill of exchange from *Charles Newburgh*, then dated and drawn on *John Monnier* for 50 *l.* to the plaintiffs or order, 30 days after date, indorſed by the plaintiffs, and negotiated by ſeveral perſons; on the 15th of *April* it came into the cuſtody of *Lavington* and *Paul* of *Exeter* merchants, who ſent up to *Monnier* the bill of exchange, he received it, and kept it for ten days before the ſame became due, without making any objection, and whilſt he had it in his hands, wrote on the left ſide of the top thereof, N° 84. and at the bottom the 6th of *May*, which the plaintiffs charged were the private mark or number of bills by him accepted, and intended to be paid, and upon the 6th of *May*, the time when payable, *Monnier* on that day ſent it back to *Lavington* and *Paul*, and refuſed to accept it, or allow it as ſo much received by him on their account, whereupon *Lavington* and *Paul* demanded and received the 50 *l.* of the plaintiffs, who can have no ſatisfaction againſt *Newburgh*, he having become a bankrupt and inſolvent, before the return of the bill. Caſe 27.

The bill is therefore brought for 50 *l.* with intereſt due thereon: *Monnier* died after putting in his anſwer, and the cauſe has been revived againſt his executrix.

It was admitted that *Newburgh* acquainted *Monnier* by letter, of his having drawn the 50 *l.* bill, and deſiring him to accept and pay the ſame, to which *Monnier* on the 13th of *April* wrote a letter in anſwer, *that the* 50 l. *bill ſhould be duly honoured and placed to his debit.*

It was inſiſted for the plaintiffs, that if *Monnier* had not intended to accept and pay the bill, he ſhould, according to the cuſtom of merchants, have returned the ſame immediately to *Lavington* and *Paul*, whereby the plaintiffs might have got the 50 *l.* from *Newburgh*, who was then, and ſeveral days after, in good credit, and particularly in ſuch credit with the defendant, that after the plaintiff's bill came to his hands, *Newburgh* drew another bill of exchange on him for 18 *l.* three days after date, which was duly paid.

Mr.

Mr. *Fazakerley* who was council for the defendant inſiſted, that the ſuit here ought not to be proceeded upon any further, but ſhould go off to a trial at law, as it is a mere legal queſtion.

If this court retain bills where it is a legal demand, they muſt judge upon the facts relating to ſuch demand.

Lord Chancellor: If *Monnier* had been living, I ſhould have been of opinion, that the bill ought to have been diſmiſſed, but now he is dead, and the ſuit is revived againſt his executrix, notwithſtanding it is a legal queſtion, the plaintiffs may bring their bill, and by praying ſatisfaction out of aſſets, and a diſcovery of aſſets, it is made a caſe, of which this court takes cognizance, and if they retain bills where it is a legal demand, they muſt judge upon the facts relating to the legal demand, and unleſs thoſe facts are doubtful, will not diſmiſs the bill, and turn it over to a trial at law.

Mr. *Fazakerley* then *upon the merits alledged*, that *John Monnier* kept the 50 *l.* bill till the 6th of *May*, meerly in expectation of receiving money or effects from *Newburgh* to anſwer it, and that in receiving it from indorſees, he entred it in his bill book, as he conſtantly did all bills he received, whether good or bad, and that it was then entred at or againſt N° 84, and therefore wrote that figure on the top of it, and that it did not denote the number of bills accepted or entred to be paid by him, and that writing *the 6th of May* denoted the day the defendant returned the bill, that *Newburgh* not remitting any effects to anſwer it, he returned it to *Lavington* and *Paul*, that at the time of drawing the bill, *Monnier* had not, nor hath ſince had any effects of *Newburgh*'s in his hands, that when *Monnier* returned the bill to *Lavington* and *Paul*, he wrote to them as follows; *You remitted me* Newburgh's *bill, which I do not pay for reaſons, therefore pleaſe to credit me, and note* 50 l. *the ſame being due to-day, and let the indorſees reimburſe you.* And therefore upon all other circumſtances, this is not ſuch an acceptance as will make *Monnier* liable to pay it.

Lord Chancellor: The principal queſtion is, Whether this is a ſufficient acceptance to charge the defendant, and if there was any doubt of it as to the fact, or whether in law, what has been done amounts to an acceptance, it might ſtill be neceſſary to ſend the parties to a trial at law, but I think there is no doubt of either.

If a perſon on whom a bill of exchange is drawn, ſays in a letter to a drawer, *it ſhall be duly honoured and placed to your debit*, this is an acceptance, and will make him liable, for a parol acceptance has been held to be good, and ſo determined in a caſe made for the opinton of the court of King's Bench, in the time of Lord *Hardwicke* Chief Juſtice.

Monnier, when the bill was ſent to him, received it, entred it in his book, as his courſe of trade is proved to have been, under a particular number, and wrote that number under the bill; now it has been ſaid to be the cuſtom of merchants, that if a man underwrites any thing, let it be what it will, that it amounts to an acceptance, but if there was no more than this in the caſe, I ſhould think it of little avail to charge the defendant, becauſe that matter has been fully explained; but what determines me, are *Monnier*'s letters, by which it appears very clearly that he has accepted of it, in one particularly mentions the 50 *l.* bill, and ſays, it ſhall be duly honoured, and placed to the drawer's debit, nor is there in his letters to *Newburgh*, or the indorſees, one expreſſion that ſhews the leaſt ſuſpicion of *Newburgh*'s credit.

I think there can be no doubt, but an acceptance may be by letter, and has been ſo determined, there have been queſtions too, whether a parol acceptance could be good? Lord Chief Juſtice *Eyre* held it might, Lord *Raymond* held the contrary; and there was a like point before me at *Niſi Prius*, in the cauſe of *Lumley* and *Palmer*, and I had a caſe made of it for the opinion of the court of King's Bench, where it was ſeveral times argued, and at laſt ſolemnly determined, that ſuch acceptance is good, much more then muſt an acceptance by letter be good.

As to the plaintiff's being intitled to intereſt, I was at firſt doubtful whether he could demand any; but on reading the ſtatute of the 3d and 4th of Queen *Anne*, *ch.* 9. *ſec.* 4. I think it a clear caſe that he is, though no proteſt for that is made neceſſary by the act, it being requiſite only to intitle a payee to damages againſt a drawer, but does not mention *the acceptor* of a bill of exchange; and all the damage therefore that can be had in ſuch a caſe is the intereſt.

The payee of a note intitled to intereſt againſt the acceptor, though no proteſt, for all the damage that can be had in ſuch a caſe is the intereſt.

Lord Chancellor decreed the defendant to pay to the plaintiffs the ſum of 50*l.* together with intereſt for the ſame from the time of filing the original bill, at the rate of 4*l. per cent.* and further ordered that ſhe ſhould alſo pay to the plaintiffs their coſts of this ſuit, from the time of filing of the bill of revivor, to be taxed.

CAP. CXX.

Truſt and Truſtees.

(A) What acts of the truſtees ſhall defeat the truſt, or be a breach of truſt in them.
(B) Of reſulting truſts and truſts by implication.
(C) Of truſts to attend the inheritance.
(D) Truſtees how to account, and what allowance to have.

(A) What acts of the truſtees ſhall defeat the truſt, or be a breach of truſt in them.

Trinity Term 1737.

Symance v. *Tattam.*

A Bill was brought to compel truſtees to join in a ſale which would deſtroy the contingent remainders, and likewiſe the uſes in a ſettlement made before marriage; the limitations were to the huſband

Caſe 279.

band for 99 years, if he ſo long live, to the wife for her life, remainder to truſtees to preſerve contingent remainders, remainder to the heirs begotten on the body of the wife, remainder to the heirs of the husband; and the firſt declaration under it was, that it was the intention of the ſettlement to make a proviſion for the children of the marriage, and a covenant on the part of the husband that he will not bar the eſtate tail to the wife, but will preſerve the uſes before limited and appointed.

This court will not compel truſtees to join in a ſale, which will not only deſtroy contingent remainders, but all the uſes in a marriage ſettlement, for they are guilty of a breach of truſt in joining to deſtroy contingent remainders, whether the ſettlement be voluntary, for a valuable conſideration, or by will.

Lord Chancellor: There are many caſes in which the court will compel the truſtees to join in ſuch a conveyance as will deſtroy contingent remainders, but then it muſt be in ſome meaſure to anſwer the uſes originally intended by the ſettlement; and has been uſually done in the caſe of old ſettlements only, as in *Winnington* v. *Foley* *, but I believe no inſtance where they have compelled ſuch truſtees to join with the father termor for ninety-nine years, and the ſon to ſell the eſtate.

The old notion was, that theſe truſtees were only honorary; but this has been varied ſince, for in the caſe of *Pigot* v. *Pigot*, Lord *Harcourt* was of a different opinion, *and in Manſell* v. *Manſell*, 2 *Wms.* 610. *Lord Chancellor* King, *aſſiſted by Lord Chief Juſtice* Raymond *and Lord Chief Baron* Reynolds, *was of opinion, that truſtees for ſupporting contingent remainders, joining to deſtroy them, were guilty of a breach of truſt, and that there was no diverſity whether the ſettlement be voluntary, or for a valuable conſideration, or by will only.* But the reaſon of thoſe caſes turned upon what the court ſhould do, after truſtees had actually deſtroyed the remainders; here the caſe is different, for the application to the court is to compel the truſtees to do an act which would deſtroy the remainders.

There is another difficulty beſides, which is the husband's actually covenanting in the ſettlement, that he will not bar the eſtate tail to the wife, but preſerve the uſes before limited, and even though the husband were dead, the wife could not do any act by which ſhe could bar the eſtate tail, notwithſtanding the truſtees ſhould conſent to join with her; for ſhe is abſolutely reſtrained from barring it by the 11th of *Hen.* 7. *Ch.* 20. †

---

* 1 *Wms.* 536. *There*, in a marriage ſettlement, the husband was made tenant for 99 years, if he ſo long lived, remainder to truſtees during the life of the husband to preſerve contingent remainders, *&c.* remainder to the firſt, *&c.* ſons of that marriage in tail male ſucceſſively; a ſon was born, and of age, the wife dead, the ſon being in treaty for a marriage, which appeared to be a beneficial one for the family; Lord Chancellor *Parker* decreed the truſtee ſhould join with the father and ſon in barring this, and making a new ſettlement.

† "If any woman which ſhall hereafter have any eſtate in dower, or for term of "life, or in tail, jointly with her husband, or only to herſelf, or to her uſe, in any "manors, lands, *&c.* of the inheritance, *&c.* of her husband, and ſhall hereafter being "ſole, or with any other after taken husband, diſcontinue, alien, *&c.* or ſuffer a re-"covery of the ſame, ſuch recovery, diſcontinuance, alienation, *&c.* ſhall be utterly "void and of none effect."

If

If it had been an application only to deſtroy the contingent remainders, I ſhould have taken more time to conſider; but here it would overturn all the uſes of a marriage ſettlement, which would be aſſuming too much power, and would be making a decree to compel a breach of the husband's own covenant.

The bill was diſmiſſed.

Eaſter term 1738.

Ivie v. *Ivie.*

Vide title *Deviſes, under the diviſion, What Words paſs an Eſtate tail.*

February the 9th 1739.

Anne Thayer, widow and executrix of *John Thayer*, Eſq; deceaſed, — — — } Plaintiff.

Jane Gould, widow and executrix of *Nathaniel Gould*, Eſq; deceaſed, who was executor of *Humphrey Thayer*, Eſq; deceaſed, and *Stephen Collins*, — — } Defendants.

Caſe 280.

By ſettlement before marriage it was agreed, that 2000*l.* in the hands of a truſtee, ſhould

THE caſe aroſe upon the ſettlement made after the marriage of *Anne Collins*, now the plaintiff *Anne Thayer*, with *John Thayer*, the chief intent of which was to ſecure two ſeveral ſums of 1000*l.* one to be advanced by the intended husband, and the other by Mr. *Collins*, the father of the plaintiff.

be laid out in land, to the uſe of the husband for life, then to the wife for life for her jointure, and to the children equally; and in caſe the husband died without iſſue, to the wife in fee; and if he ſurvived, to him in fee. The husband and wife being neceſſitous, the truſtee paid them 600*l.* on a releaſe, and their joint bond of indemnity, and afterwards 400*l.* more on the like bond, and a new agreement that the remaining 1000*l.* ſhould be laid out in the purchaſe of an annuity, for the ſeparate uſe of the wife during the coverture, and in fee in caſe of ſurvivorſhip. The truſtee afterwards paid the husband this 1000*l.* likewiſe; he is dead without iſſue, and left the wife deſtitute. Bill brought againſt the repreſentative of the truſtee for this breach of truſt in him, and to be paid what ſhould be due to the wife for the 2000*l.* out of his perſonal eſtate.

In *March* 1738 the *Maſter of the Rolls* decreed, that the wife ſhould be paid what ſhould be remaining due to her for the 2000*l.* and intereſt out of the truſtee's perſonal eſtate, in a courſe of adminiſtration.

Upon appeal to *Lord Chancellor*, he recommended it to the parties, from hardſhip on one ſide, and dangerous conſequences on the other, to find out a third way of moderating the affair.

The agreement afterwards of the executrix of the truſtee to pay the wife of the *ceſtuique truſt* an annuity of 100*l.* quarterly, during her life, free of taxes, from *Lady Day* 1737, and the coſts of the ſuit, was made an order of the court.

Mr. *Thayer*'s 1000*l.* was a ſum he was intitled to under a mortgage, Mr. *Collins*'s 1000*l.* was paid in. By the ſettlement it was agreed that the 2000*l.* which was placed in the hands of *Humphrey Thayer*, one of the truſtees, and brother of the husband, ſhould be laid out by him; and the defendant *Stephen Collins*, the other truſtee, and uncle of the plaintiff, in the purchaſe of lands, to the uſe of the husband for life, then to the wife for life for her jointure in bar of dower, and to the children of the marriage, ſhare and ſhare alike;

and

and in caſe of the husband's dying without iſſue, to the wife in fee; and if he ſurvived the wife, to him in fee, with the common appointment of paying the intereſt of the 2000*l.* to the husband till it was inveſted in lands.

Some time after the marriage, the husband and wife joined in an application to the truſtee, *Humphry Thayer*, to raiſe the money to aſſiſt them in their neceſſities, and upon his paying them 600*l.* they both gave him a releaſe for ſo much, and likewiſe a joint bond to indemnify him; and upon receiving 400*l.* more from him afterwards, another bond of the like nature. The husband and wife came to a new agreement, that the remaining 1000*l.* ſhould be laid out in the purchaſe of an annuity, which ſhould be for the ſole and ſeparate uſe of the wife during the coverture, and in fee in caſe of ſurvivorſhip; the husband afterwards found means to prevail upon *Humphry Thayer* to pay him this 1000*l.* likewiſe. The husband died without iſſue, and left the plaintiff deſtitute, there being no aſſets.

The bill was brought againſt the repreſentative of *Humphry Thayer* for this breach of truſt in him, and to be paid what ſhould be due to the plaintiff for the ſaid 2000*l.* out of his perſonal eſtate.

The cauſe was firſt heard in *March* 1738, before Sir *Joſeph Jekyll*, "who referred it to a Maſter to ſee what was due to the "plaintiff for the 2000*l.* placed in the hands of *Humphry Thayer*, "by virtue of the plaintiff's marriage ſettlement, and to take an account of the aſſets of *John Thayer* come to the hands of his widow, "and what ſhould appear to have come to her hands, after payment "of debts of a ſuperior nature, was to go in diminution of what ſhould "be found due to the plaintiff for the 2000*l.* and intereſt, and to take "an account alſo of the perſonal eſtate of *Humphry Thayer* come to "the hands of the defendant *Jane Gould*, or of *Nathaniel Gould* her "late husband, *and the plaintiff was to be paid what ſhould be re-* "*maining due to her for the ſaid* 2000l. *and intereſt, out of the ſaid* "Humphry Thayer's *perſonal eſtate in a courſe of adminiſtration.*"

The defendant *Gould* appealed from this decree, and on the 24th of *November* 1739, it came on before *Lord Chancellor*.

For the plaintiff was cited *Mary Portington*'s caſe, 10 *Co. Rep.* 42. *b.* where it is laid down, "That no feme covert ſhall be barred by "her confeſſion of her inheritance or freehold, but when ſhe is "examined by due courſe of law; and that is the cauſe that if the "husband and wife acknowledge a ſtatute or recognizance, it is void "as to the wife, although ſhe ſurvive her husband; ſo if the huſband and wife acknowledge a deed to be enrolled, and it is enrolled, "it is void as to the wife; and the reaſon is, becauſe no ſuch writ is "depending againſt the husband and wife, upon which the wife may "by law be examined." From hence they argued, that no act, in which the plaintiff joined with her husband, could make any alteration in the uſes of the ſettlement, and that as money to be laid out in land is conſidered as land, ſhe is intitled, notwithſtanding her releaſe, to have it conveyed to her in fee. The 7th of *Edward* 4. *fol.* 14. *b. Manſell* v. *Manſell*, 2 *Wms.* 610. *Palmer* v. *Trevor*, 1 *Vern.*

261. *Rutland* v. *Molineaux*, 2 *Vern.* 64. were alſo cited, and it was inſiſted by the plaintiff's counſel, that the caſe of *Baker* v. *Child*, 2 *Vern.* 61. is no authority for the defendant, becauſe falſly reported; for though it is ſaid there the court was of opinion, "Where a feme covert agrees to join with her husband in making a ſurrender, or "levying a fine, and he dies before it is done, equity will compel her "to perform the agreement;" *yet it was in fact no more than a recommendation by the court (the parties being preſent and conſenting) to Serjeant* Rawlinſon, *to make an end of the affair between the parties by his private award, which was to be final.* And what makes it ſtill a ſtronger caſe againſt *Humphry Thayer* is, that the co-truſtee, *Stephen Collins*, though the plaintiff's own uncle, was intirely unacquainted with any of theſe tranſactions, and not truſted for fear he ſhould refuſe his conſent to this iniquitous ſcheme.

The Attorney general for the defendants inſiſted, this was not an intereſt in land, becauſe no fine could be levied upon it while it continued in money, and that being perſonal, her contract with her husband would bind her, though a feme covert, and cited the caſe of *Theobalds* v. *Duffoy*, *Mod. Caſ. in Law and Equity*, *2d part*, 101. where it was laid down that the contract of a feme covert, where it was with the conſent of her friends, was good. He alſo cited the caſe of the Counteſs of *Portland* v. *Progers*, 2 *Vern.* 104.

Lord Chancellor: I foreſee great hardſhip on the one ſide, and dangerous conſequences on the other, and have very great doubts with myſelf what decree I ſhall make; and therefore recommend it to the parties, as it is a caſe of conſiderable difficulty, to find out a third way of moderating this affair.

As an annuity was originally intended to be purchaſed for the wife in the life-time of the husband, by way of compenſation for the truſtees paying in of the money, ſome method may be contrived to make that effectual; and therefore let the cauſe be adjourned till the firſt day of rehearings, to give the parties an opportunity of ſettling it among themſelves.

The cauſe ſtanding in the paper to-day, and the plaintiff's counſel alledging that the parties had come to an agreement in writing, ſigned by the plaintiff and defendant, and praying that the ſame might be made an order of court, and a council for defendant conſenting;

His Lordſhip ordered the agreement to be made an order of the court, and purſuant to thereto decreed the defendant *Jane Gould*, out of the eſtate of *Humphry Thayer*, to pay to the plaintiff *Anne Thayer* an annuity of 100*l.* payable quarterly, free of taxes, during her life, and that ſhe ſhould alſo forthwith pay to her the arrears of the ſaid annuity, from *Lady Day* 1737, and that ſhe ſhould likewiſe pay the plaintiff the coſts of this ſuit.

(B) Of reſulting truſts and truſts by implication.

Trinity vacation 1737.

Taylor v. *Taylor.*

Vide title *Evidence, Witneſſes, and Proof, under the diviſion, Where Parol or Collateral Evidence will or will not be admitted to explain, confirm, or contradict what appears on the Face of a Deed or Will.*

Vide title *Copyhold.*

February the 9th 1738.

Hill v. the Biſhop of *London*, *Smith*, and others.

Caſe 281.

R. S. incumbent of the rectory of *B.* deviſes his perpetual advowſon, donation and patronage of the pariſh church of *B.* and all glebe lands, profits, and appurtenances to the ſame belonging, to *G. S.* willing and deſiring her to ſell and diſpoſe of the ſame to *Eton* college, and on their refuſal, to *Trinity* college, *Oxford*, and on the refuſal of both theſe ſocieties, to any of the colleges in *Oxford* or *Cambridge*, who will be the beſt purchaſer. There is in this caſe no reſulting truſt of the advowſon of *B.* to the heirs at law of the teſtator, but a deviſe of the beneficial intereſt therein to *G. Smith*, with an injunction only to ſell to particular ſocieties.

RICHARD Smith, incumbent of the rectory of *Buſhey*, in the county of *Hertford*, by his will dated the firſt of *October* 1713 deviſed in theſe words: "As for my worldly goods with which "it hath pleaſed God to bleſs me, after my debts paid and fu- "neral expences diſcharged, I diſpoſe thereof as follows: *Firſt*, I "give, deviſe, and bequeath my perpetual advowſon, donation, and "patronage of the pariſh church of *Buſhey*, in the county of *Hert- "ford*, and all glebe lands, profits, and appurtenances to the ſame "belonging, unto my honoured mother-in-law, Mrs. *Grace Smith*, "willing and deſiring her to ſell and diſpoſe of the ſaid perpetual "advowſon and patronage, with the appurtenances, as ſoon as ſhe "conveniently and lawfully may ſell and diſpoſe thereof, to the "fellows of *Eton* college in the county of *Buckingham*, and their "ſucceſſors, or to the fellows of *Trinity* college in *Oxford*, where "I had my education; the fellows of *Eton* college to have the firſt "offer, if they will agree to purchaſe it; and upon their refuſal or "diſagreement, to be ſold to the fellows of *Trinity* college in *Ox- "ford* and their ſucceſſors, if they will agree to purchaſe it; and "upon the refuſal or diſagreement of both theſe ſocieties, for the "purchaſing of the ſaid perpetual advowſon, with the appurtenants "thereof, to be ſold to the fellows and ſociety of any one of the "colleges in *Oxford* or *Cambridge*, who will be the beſt purchaſer. "*Item* I give and bequeath all my freehold lands and tenements in "the pariſh of *Oldenham*, in the county of *Hertford*, with the "appurtenances, unto my ſaid mother-in-law, Mrs. *Grace Smith*,

" and to her heirs and aſſigns for ever: *Item*, I give to *Thomas Wood* " 20*s.* and 20*s.* to my couſin *Mary Wicks*, and all the reſt of my " goods and chattels, (except a ſilver tankard, which I give to my " couſin *John Smith*), I give and bequeath unto my honoured mo- " ther-in-law, Mrs. *Grace Smith*, whom I make my ſole executrix."

The plaintiffs, the couſins and co-heireſſes at law of *Richard Smith* the teſtator, preſented *Cleave Greenhill*, and *Grace Smith* preſented the defendant *James Smith* to the living of *Buſhey*: The preſent bill therefore is brought in order that the biſhop of *London* may be injoined from accepting *James Smith*, and that *his Lordſhip* may grant inſtitution to *Cleave Greenhill*; the plaintiffs inſiſting that the teſtator did not intend the preſent avoidance ſhould go to *Grace Smith*, but that ſhe ought to be conſidered altogether as a truſtee for the heirs at law of *Richard Smith*, and more eſpecially as to the preſent avoidance: The defendant *Grace Smith* inſiſted on the other hand, that it is not a truſt, but an abſolute deviſe to her.

On the arguing this queſtion the firſt time, *Lord Chancellor* was of opinion with the plaintiffs, that it was a truſt in the defendant to ſell the advowſon under the reſtrictions in the will, and alſo for the payment of the debts of the teſtator, and after thoſe were paid, a reſulting truſt as to the ſurplus for the benefit of the heirs at law, and that the preſentation was in them as *ceſtuique truſts*.

But *his Lordſhip* a day or two after, doubting, he ordered the caſe to be ſpoke to again, by one council of a ſide, and then took time to give his opinion, and on the 19th of *Auguſt* 1739 gave judgment.

The general queſtion on this deviſe is, Whether there be a reſulting truſt, or not? on the firſt hearing I inclined to think, that there was, but I have changed my opinion intirely: The general rule, that where lands are deviſed for a particular purpoſe, what remains after that particular purpoſe is ſatisfied, reſults, admits of ſeveral exceptions. If *J. S.* deviſe lands to *A.* to ſell them to *B.* for the particular advantage of *B.* that advantage is the only purpoſe to be ſerved, according to the intent of the teſtator, and to be ſatisfied by the meer act of ſelling, let the money go where it will, yet there is no precedent of a reſulting truſt in ſuch a caſe: Nor is there any warrant from the words or intent of the teſtator to ſay, this deviſe ſevers the beneficial intereſt, but is only an injunction on the deviſee to enjoy the thing deviſed in a particular manner. If *A.* deviſes lands to *J. S.* to ſell for the beſt price to *B.* or to leaſe for three years, at ſuch a fine, there is no reſulting truſt, ſo that the deviſe here amounts to no more than this; the teſtator gives the advowſon to *Grace Smith*, but if ſuch or ſuch a college will buy it, then he lays an injunction upon her to ſell, and therefore there are two objects of the teſtator's benevolence, *Grace Smith*, and *the colleges*.

The general rule, that where lands are deviſed for a particular purpoſe, that what remains after that purpoſe is ſatisfied, reſults, admits of ſeveral exceptions.

Where there is a reſulting truſt, the heir at law, after the particular purpoſes are ſatisfied, may by bill compel the truſtee to convey to him, here he cannot; in all events the heir at law is diſinherited

There can be no conſtructive truſt, but where the intent of the teſtator is apparent; *willing and deſiring G. S.* to ſell, &c. are more properly words of injunction, than truſt.

rited; or where the heir at law is intitled to a reſulting truſt, he may by bill compel the eſtate to be ſold out and out; *here* he could not, if the colleges ſhould refuſe to buy. This circumſtance differs the caſe from all the caſes put, the word *truſt* is not made uſe of, and if *Grace Smith* is a truſtee, it muſt be by conſtruction, and then the intent of the teſtator muſt be chiefly conſidered as a guide to that conſtruction; and tho' many other words will create a truſt, yet that muſt be where the intent of the teſtator is apparent, but here, *willing and deſiring* are more properly words of injunction than truſt.

The caſe of *Randal* v. *Bookey*, 2 *Vern.* 425. cited for the plaintiffs, is the common caſe of a ſurplus undiſpoſed of; ſo likewiſe in the caſe of the city of *London* v. *Garway*, 2 *Vern.* 571. *no expreſs truſt was declared*, and yet the deviſees were in all events to be conſidered as meer truſtees, and in the caſe of *Hobart* and the counteſs of *Suffolk*, 2 *Vern.* 644. the deviſe was, *upon the truſts after-mentioned.*

The caſe of *Coningham* v. *Melliſh*, *Prec. in Chan.* 31. cited for the defendants, is a ſtronger caſe for the heir at law, than the preſent, for there the words *in truſt* were uſed, *it being a deviſe of lands to his couſin* A. *and his heirs in truſt to be ſold for payment of his debts and legacies, and the ſurplus held to be no reſulting truſt for the heir.* In *Rogers* v. *Rogers*, *June* 1733, the words, *I leave my wife ſole heireſs and executrix*, amount to no more than deviſing the real and perſonal eſtate; then come the words, *To ſell and pay his debts*, and if this had been ſufficient, to make her a truſtee, it would have been ſo upon that inaccurate expreſſion, yet it was there held, ſhe had *the beneficial intereſt* in the eſtate, and the court muſt in all thoſe caſes collect, if they can, the intent of the teſtator, from the particular circumſtances of the caſe before them; in the caſe of *Mallabar* v. *Mallabar*, 5th *May* 1735, there was a clear intent, that the whole eſtate ſhould be turned into money, and a truſt expreſly mentioned, and yet held by Lord *Talbot* to be no reſulting truſt.

Where a real eſtate is deviſed to be ſold for payment of debts, and no more ſaid, there clearly it is a reſulting truſt.

No general rule is to be laid down, unleſs where a real eſtate is deviſed to be ſold for payment of debts, and no more is ſaid, there it is clearly a reſulting truſt; but if any particular reaſon occurs, why the teſtator ſhould intend a *beneficial intereſt* to the deviſee, there are no precedents to warrant the court to ſay, it ſhall not be *a beneficial intereſt.*

The deviſee in this caſe, and not the heir at law, intitled to preſent on the avoidance that happened by the death of the teſtator.

As to the preſentation that happened by the death of the teſtator, the heir at law cannot preſent, for the advowſon being deviſed, it follows the deviſe, and cannot deſcend. *Vide Holt* and the biſhop of *Wincheſter* in *Lev.* and as the heir cannot take by law, ſo neither can he in equity, for the deviſe here takes effect inſtantly, ſo does *the avoidance*, and it is a deviſe of the beneficial intereſt, accompanied with an injunction to ſell to particular ſocieties, and no other truſt, if ſo, every thing elſe that is beneficial takes effect immediately in the deviſee.

His Lordſhip therefore declared, that there is no reſulting truſt of the advowſon of *Buſhey* for the heirs at law, and ordered that the plaintiffs bill, ſo far as it ſeeks to have the benefit of any

reſulting truſt for the plaintiffs, the heirs at law of the teſtator *Richard Smith*, in reſpect of this advowſon, and of the preſentation in the avoidance that happened by the teſtator's death, do ſtand diſmiſſed, and that the injunction to reſtrain the biſhop of *London* from accepting *James Smith*, and granting inſtitution to him of the rectory of *Buſhey*, do alſo ſtand diſſolved.

But *his Lordſhip* declared, that the plaintiffs the heirs at law are intitled to the copyhold lands deſcended to them, diſincumbered from a mortgage, which muſt be paid out of the perſonal eſtate, and if not ſufficient, then out of the real eſtate, charged by the will of the teſtator with his debts.

November the 7th 1739.

Hawkins v. *Chappel* and others.

WILLIAM Hawkins being patron and incumbent of *Simmonsbury*, by will dated the 5th of *February* 1734, deviſes all his lands in *S.* and the perpetual advowſon of *S.* to Sir *William Chappel*, &c. upon truſt in the firſt place to preſent his ſon *William* to this living, if he ſhould be alive at the time of his deceaſe, if not to ſuch perſon as his wife ſhould nominate, and then he goes on and ſays, *That after the church ſhall next after my death be full of an incumbent, then to ſell the perpetuity of it, and after ſuch ſale, to apply the profit ariſing from it, in the firſt place for the payment of his debts, and the overplus he diſtributes in thirds to his daughters, and to the daughter that was of age, he gives an immediate ſhare, and the proportion of thoſe under age he directs to be placed out in government ſecurities, then comes this condition, that if any, or either of the daughters die before the age of 21, or marriage, their thirds to go to the ſon, provided he executed a deed for the confirmation of the will, and in caſe he ſhould refuſe, the third or thirds ſo lapſing, ſhould go to the ſurviving daughter or daughters.*

Caſe 282.

W. H. by will deviſes the perpetual advowſon of *S.* to *W. C.* &c. upon truſt to preſent his ſon *W.* to this living, and that after the church ſhall next after his death be full of an incumbent, then to ſell the perpetuity, and to apply the profit ariſing from the ſale, firſt for the payment of his debts, and the overplus he diſtributes in thirds to his daughters; the truſtees preſented *W.* the ſon, who died before the advowſon was ſold, leaving a daughter an infant, who by her next friend brings her bill, inſiſting after debts and legacies paid, there is a reſulting truſt to the heir at law of the teſtator in the advowſon.

His Lordſhip of opinion, the whole legal eſtate is deviſed away, and no reſulting truſt for the heir at law.

The truſtees preſented *William* who died before the advowſon was ſold, leaving a daughter an infant, that by her next friend brings this bill, as heir at law to the teſtator, for an injunction to reſtrain the defendants the truſtees from preſenting any other clerk to the living of *Simmonſbury*, than a perſon nominated by the plaintiff, upon a ſuggeſtion, that after the teſtator's debts and legacies are paid, here is a truſt reſulting to the heir at law in this advowſon, and that ſhe has the right to nominate.

Lord Chancellor: Of all the caſes that have born any argument for a reſulting truſt, this ſeems to me to be the ſtrongeſt againſt the heir at law.

Firſt queſtion, Whether any reſulting truſt ariſes out of the deviſe of this advowſon to the heir at law, or whether the ownerſhip of it, or any ſpark of right is deſcended to the heir at law.

Secondly, Whether the ownerſhip is not in the daughters, by virtue of the deviſe under the will of the father.

At common law, where an eſtate is deviſed to truſtees and their heirs, the whole is gone from the heir, but in equity there may be a beneficial intereſt remaining to the heir upon the truſt.

It muſt be admitted, that at Common law where an eſtate is deviſed to truſtees and their heirs, the whole is gone from the heir; then the queſtion will be, Whether in equity there is any beneficial intereſt remaining to the heir upon the truſt of this advowſon, and that muſt depend on the declaration of the truſt by the will, whether the truſt of the whole be declared, or whether any part be omitted; and in my opinion the truſt of the whole is plainly declared, *if either of my daughters die before* 21 *or marriage, the ſhare of her dying to be divided among the ſurvivors:* An expreſs truſt alſo, to ſell the perpetuity and divide the ſurplus among his daughters.

A certain rule in equity, that where an eſtate is charged with an incumbrance, or payment of creditors, and after ſuch charge or payment, the ſurplus is given over, the whole property veſts in the reſiduary legatee.

This is a deviſe of the inheritance clearly to the daughters, ſubject to the charge of the debts, for nothing is more certain in equity than that (where an eſtate is charged with an incumbrance, or with the payment of creditors, and after ſuch incumbrance or creditors are diſcharged, the ſurplus is given over) the whole property or ownerſhip of the eſtate veſts in the deviſee, or reſiduary legatee.

In the preſent caſe too, the heir at law is abſolutely diſinherited, according to the intent of the teſtator, which appears by his direction, that the heir ſhall confirm his will under the penalty of loſing the ſmall contingent benefit in the ſurplus, and the true queſtion is, who is the real owner of the advowſon? now, whoever has the truſt, is in this court conſidered as having the beneficial intereſt, and therefore the ownerſhip of the eſtate, and that is the foundation of the caſe of *Roper* and *Radcliff*; nor did Lord *Harcourt* differ with Lord *Macclesfield* in this general ground of equity, but in the conſequences of that principle, and how it would operate upon the diſabling ſtatute againſt papiſts, the 11 & 12 *Will.* 3. *c.* 4. (*a*).

(*a*) *Vide* Mod. Caſ. in Law and Eq. 2d part, 167 & 181, and the New Abr. of Law, 3 vol. 795.

The right of the heir to the equity of redemption of an eſtate, tho' debts and legacies will exhauſt the whole, is not founded upon his election to redeem, or to ſubmit to a ſale, but upon the ownerſhip he has of the eſtate.

In the arguments for the plaintiff it is ſaid, that though the debts or legacies ſhould exhauſt the whole eſtate, yet an heir at law may come into a court of equity, and compel truſtees to give him the option of taking the eſtate upon payment of the debts, &c. but the reaſon of that is, becauſe the court does not take into conſideration, whether the eſtate is exhauſted, but the right of the heir to the equity of redemption of the eſtate; nor do they give an election arbitrarily, that a perſon ſhall redeem or ſubmit to the ſale of an eſtate,

for

for the privilege is not founded upon the election, but upon the property in and ownerſhip he has of the eſtate.

If a man ſeiſed of an advowſon be likewiſe incumbent of the living, and deviſes the advowſon upon his death, the deviſee will be intitled to nominate.

If *A.* ſeiſed of an advowſon be alſo incumbent, and deviſes it, the deviſee on his death is intitled to nominate.

But then it is objected, that Sir *William Chappel, &c.* are mere truſtees, and that they can do nothing of themſelves, and that ſomebody muſt nominate; why then ſhould not the heir at law, for this plain reaſon, that if the ownerſhip and property of the advowſon is in the daughters, all the reſt is a conſequence of it, for wherever there is a right given, to ſay the heir is intitled, is to ſay, that he hath a right to the fruit fallen, without having any right to the tree, or the ſoil in which it grows.

If the ownerſhip and property of the advowſon be in deviſees, that they, and not the heir at law, ſhould nominate, is a conſequence of ſuch ownerſhip.

It has been ſaid likewiſe, that as it is money, and a mere perſonal intereſt, which is given to the daughters, that therefore there is a reſulting truſt for the heir at law; but whether a man has an advowſon in him as a perſonalty, or a realty, it will make no difference, for the right of preſentation will equally belong to him.

Nor will it make any difference, whether the deviſee has the advowſon in him as a perſonalty, or a realty.

Becauſe the daughters have the money ariſing by the ſale, it does not follow that they have nothing elſe given them; for if giving them ſo much money, gives them the beneficial intereſt in the advowſon, every thing elſe, that is a conſequence of ſuch intereſt, will follow upon it, and therefore as the advowſon is the daughters property, the preſentation is a beneficial intereſt, and will likewiſe belong to them.

It is objected too, that this intereſt of the daughters is a contingency, and to ariſe *in futuro*; but I am clear of opinion, it is a veſted intereſt, for the produce of the money ariſing by the ſale, is intended for a maintenance for the daughters who are under age, though not payable, till they arrived at twenty-one, and this is nothing but a regulation and direction for the managing of the eſtate, till they come of age; and it has never been held in a court of equity, to alter the conſtruction of a will.

But it is ſaid, the daughters take nothing till the ſale, and here the avoidance is before the ſale, and that the delay of the truſtees, in the ſale of the advowſon, has made an alteration in the heir's favour.

Truſtees poſtponing, or accelerating the ſale of eſtates deviſed to them, will make no alteration in favour of the heir to the prejudice of *ceſtuique truſts.*

It never was allowed in this court, that truſtees poſtponing or accelerating a ſale, ſhould make any alteration in the intereſt of the *ceſtuique truſt*, becauſe ſuch an admiſſion would be putting it in the power of truſtees, by fraud or colluſion to deſtroy the whole intention of a teſtator.

It has been ſaid, that if the heir at law ſhould nominate, it would not injure the daughters, becauſe the advowſon may ſell after *the plenarty*, for as much as before, and ſo it may, but ſtill it might be ſold for leſs, and if the daughters diſpoſe of the preſentation, they may for prudential reaſons inſert an old life, and then it would certainly ſell for more than if there was a young one; and therefore I ſhall not aſſume to myſelf a power of giving away the right of the

daughters, upon a bare poſſibility that the heir at law's preſenting will not turn to their diſadvantage.

I am therefore of opinion, that the legal and equitable eſtate are deviſed away by the will, and the ownerſhip in equity veſted in the *ceſtuique truſts* of the ſurplus, and that the nomination to the preſent avoidance follows ſuch equitable ownerſhip of the advowſon.

His Lordſhip therefore ordered the bill to ſtand diſmiſſed, and the injunction upon the truſtees to be diſſolved.

March the 12th 1738.

Hopkins alias *Dare* v. *Hopkins*.

Vide title *Remainder*.

(C) Of truſts to attend the inheritance.

Vide title *Creditor and Debtor*.

(D) Truſtees how to account, and what allowances to have.

Eaſter term 1737.

Jackſon v. *Jackſon*.

Vide title *Maintenance for Children*.

Vide title *Fines and Recoveries*.

Vide title *Evidence, Witneſſes and Proof*.

CAP. CXXI.

Voluntary Deed.

(A) The effect thereof.

After Hilary term 1736.

Oxley v. *Lee.*

LORD Chancellor ſaid in this cauſe, he did not remember that this court ever decreed a voluntary conveyance to be delivered up to a purchaſer, upon a valuable conſideration, unleſs it appears there are ſome circumſtances of fraud, attendant upon ſuch conveyance: A caſe was mentioned to be determined by the late Maſter of the Rolls, where a voluntary conveyance was decreed to be delivered up, though no circumſtance of fraud appeared.

Caſe 283. The court will not decree a voluntary conveyance to be delivered up to a purchaſer, on valuable conſideration, unleſs obtained by fraud.

December the 5th 1739.

Boughton v. *Boughton.*

LORD Chancellor: The firſt queſtion in this cauſe is, Whether a will can have any effect to revoke a voluntary deed, which was previous to it in time, and which is formal as to the execution, but very informal as to ſeveral parts of it.

Caſe 284. A voluntary deed kept by a perſon, and never cancelled, will not be ſet aſide by a ſubſequent will.

The caſe which has been cited before Lord *Macclesfield*, of *Naldred* and *Gilham*, 1 *Wms.* 577. is not applicable to every caſe, but was dependant upon particular circumſtances; "There an old woman "had executed a voluntary deed, which ſhe kept by her, her ne- "phew ſurrepitiouſly got a copy of this deed, the old woman after- "wards deſtroyed the original: It was heard firſt at the Rolls, when "the late Maſter decreed, that as the original was loſt, the copy "ſhould ſupply the place of it, and be effectual for the purpoſe in- "tended by it; an appeal to Lord *Macclesfield*, and he reverſed the "decree, for he ſaid he would not eſtabliſh a copy ſurreptitiouſly "obtained, but left the party to his remedy at law, and that the "keeping the deed by her, implied an intention of revoking."

But in the preſent caſe, here is a voluntary deed, without a power of revocation, not at all unfair, but only kept by him, and never cancelled.

The will is no more than voluntary, and as there is no caſe where a voluntary ſettlement has been ſet aſide by a ſubſequent will, this no longer remains a queſtion.

A father by settlement grants to his 5 daughters 4000*l.* apiece, but to provide againſt the event of the reſidue's being of greater value, binds himſelf in 25,000 *l.* to ſecure the ſurplus over and above the 20,000 *l.*

The next queſtion is, upon the conſtruction of the deed of ſettlement. I take it that the grantor of this deed imagined that 4000 *l.* apiece to his 5 daughters, would exhauſt his whole eſtate, but to provide againſt the event of the reſidue's being of a greater value, he binds himſelf in 25,000 *l.* to ſecure the ſurplus to his daughters, over and above the 20,000 *l.* This is a deed ſolemnly executed, ſigned and ſealed, and muſt therefore be looked upon in nature of a bond to the daughters, and will certainly take place againſt all voluntary claimants; but creditors for a valuable conſideration, would be preferred to it.

This muſt be conſidered in the nature of a bond to the daughters, and will take place againſt all voluntary claimants; otherwiſe as to creditors for a valuable conſideration.

CAP. CXXII.

Uſury.

Vide title *Catching Bargain.*

June the 4th 1746.

Ex parte Thompſon.

Vide title *Bankrupt, under the diviſion, Rule as to Drawers and Indorſers of Bills of Exchange.*

CAP. CXXIII.

Will.

(A) The power of this court over the prerogative office.
(B) The validity of a probate, where examinable.

(A) The

(A) The power of this court over the prerogative office.

November the 23d 1738.

Frederick v. *Aynſcombe.*

PHILIP Aynſcombe deviſed all his real eſtate to the defendant in fee, by a will executed at *Bullogne*; the defendant after the teſtator's death proved the will in common form, and the original will was depoſited in the prerogative court of *Canterbury*: *John Hill* one of the witneſſes reſides altogether at *Bullogne*, and the defendant cannot get him to come from thence, and therefore neceſſary he ſhould have a commiſſion to be executed there, to examine the ſaid witneſs, to prove the will, having brought a bill here to perpetuate the teſtimony thereto; at the execution of which commiſſion it will be likewiſe neceſſary to have the ſaid will; and application having been made for the prerogative office to deliver out the original will to be proved at *Bullogne*, the regiſter of that court refuſed to deliver it upon any ſecurity whatever, for the return of it, but inſiſted to ſend a meſſenger of their own, which will put the defendant to a conſiderable expence.

Caſe 285.

Where a perſon is ſole deviſee of the real eſtate, and one of the witneſſes to the will reſides altogether abroad, upon a commiſſion granted to examine ſuch witneſs, the court will at the ſame time make an order, that the original will be delivered out by the proper officer of *the prerogative court*, to a perſon to be named by the party praying the commiſſion, in order to be carried out of the kingdom; he firſt giving ſecurity to be approved by the judge of the prerogative court, to return the ſame.

It was therefore moved by Mr. *Murray*, that a commiſſion might go to examine witneſſes at *Bullogne* in *France*, and that the regiſter of the prerogative court, or the record keeper, may forthwith deliver out to the defendant the original will of *Philip Aynſcombe*, upon the defendant's giving a reaſonable ſecurity to return the ſame, after executing the commiſſion upon the ſuggeſtion, that *Hill* reſided wholly there, and is in ſuch circumſtances as will not allow him to come to *England*.

Lord Chancellor directed that the defendant be at liberty to take out a commiſſion to examine his witneſs in *Bullogne*, in order to prove the will, and it appearing that the defendant is the only deviſee who can claim any real eſtate under the will, ordered the original will to be delivered out by the proper officer of the prerogative court to a fit perſon to be named by the defendant, in order to be produced at the execution of the ſaid commiſſion; ſuch perſon firſt giving ſecurity to be approved of by the judge of the prerogative court, to return the ſame in three months from the delivery of the ſame to him.

His Lordſhip alſo directed (as there have been precedents of wills being delivered out of the prerogative court upon trials at aſſizes, where

where they were neceſſary to be read at ſuch trials, to ſave the expence of the Regiſter of the prerogative office attending) that theſe precedents be ſearched, and this order to be drawn conformable to them, and if there ſhould be any diſpute as to the ſecurity for the ſafe cuſtody and return of the will, that it ſhall be referred to a Maſter in Chancery to ſettle and adjuſt the ſame.

If the defendant had not been the ſole deviſee of the real eſtate, but there had been other perſons under the will intereſted in it, and they had refuſed their conſent, he ſhould not have made this order, becauſe the taking a will out of the kingdom is different from any former caſes in this court; they have gone no further than ordering them to different parts of *England*.

The court of Chancery, where neceſſary, will make an order *upon the prerogative office*, to deliver a will to the Regiſter's office in *Symond's Inn*, and to lie there till the court of Chancery has no farther occaſion for it.

Lord *Macclesfield*, in a motion of this kind, made an order upon the prerogative court to deliver a will to the regiſter office in *Symonds Inn*, to lie there till the court of Chancery ſhould have done with it, and ſaid at the ſame time, with ſome warmth, that he thought his officers of equal credit, and as fit to be intruſted with the cuſtody of the will as theirs, or any other office whatever.

The court of Chancery, upon motion, ordered *the prerogative office* to deliver a will to be proved in *Glouceſterſhire*, under a commiſſion from the court of Chancery, and would not ſuffer an officer of the prerogative office to attend the execution of the commiſſion.

N. B. I was informed, by a gentleman of the bar, that there was another motion of this kind, in the time of Lord Chancellor *Talbot*, in the cauſe of *Morſe* v. *Roach*, who ordered the prerogative court to deliver a will, to be proved in *Glouceſterſhire*, under a commiſſion from the court of Chancery; and though it was ſtrongly inſiſted upon, on the behalf of the prerogative office, that one of their officers ſhould attend the execution of the commiſſion, yet he abſolutely denied it.

(B) The validity of a probate, where examinable.

October the 29th 1739.

Sheffield v. the Dutcheſs of *Buckinghamſhire*.

Caſe 286.

A bill for a perpetual injunction to ſtay proceedings in the prerogative court for controverting the will and codicils of *John*, Duke of *Buckinghamſhire*, after the determinations already had; *the injunction before granted made perpetual.*

THE bill was brought by Mr. *Sheffield* againſt the defendant the Dutcheſs of *Buckinghamſhire*, for a perpetual injunction to all further proceedings in the ſuit in the prerogative court, for controverting or calling in queſtion the will and codicils of *John* late Duke of *Buckinghamſhire*, after the determinations already had, and opinions given by the court.

Lord Chancellor: After hearing the caſe elaborately argued, I am of the ſame opinion as when I granted the injunction, and the caſe not being altered, the ſame reaſons continue for making it perpetual.

Three queſtions ariſe in this caſe.

Firſt, If this queſtion has been already determined, or which is the ſame thing, whether the Dutcheſs of *Buckinghamſhire* is concluded as to this point?

Secondly, If this queſtion has been determined on proceedings in a proper court?

Thirdly, What will be the conſequences of granting or not granting it?

The firſt depends on ſeveral facts and proceedings in this court, and admiſſions in her Grace's anſwers. Two bills have been brought by the late Duke of *Buckinghamſhire*, *Edmund*, and Mr. *Sheffield*; both of them ſuggeſt the will and codicil to be duly executed, and both to be duly proved. The Dutcheſs was defendant to both the bills, and ſays in her anſwer ſhe believes them both of the Duke's own hand writing, and inſiſts on, and claims legacies under them.

The will and codicil have been both proved in this court by witneſſes examined on the part of the Dutcheſs, the cauſe heard, and the court have declared the will and codicil to be well proved, and decreed the truſts of them to be performed, and thoſe truſts relate as well to perſonal as real eſtate.

The perſonal eſtate has been laid out under the decree of this court, and two great purchaſes alſo made under the direction of the court, and with the acquieſcence of all proper parties, and a conveyance executed to truſtees, and likewiſe an order pronounced for approving of the purchaſe, and a quiet enjoyment by the Dutcheſs of what was given her by the will, to this very time.

After Duke *Edmund*'s death, there was an appeal to the houſe of Lords by the Dutcheſs, not only in her own right, but expreſly named as executrix of her ſon, inſiſting that the court had miſtaken the conſtruction, but not in the leaſt complaining of the invalidity, or undue execution of the will or codicil. The decree of the court below was affirmed by the Lords in 1737.

I am of opinion therefore that by this ſeries of facts and proceedings the Dutcheſs is concluded, unleſs new material evidence appears.

It is objected that this court has preſumed the will and codicil to be well proved on the probate only, which has never yet been conteſted in the proper court.

But it is not ſo, for here the probate has been ſtrengthened by the admiſſion of the parties concerned; and as to the matters of fact, an admiſſion by a party concerned, and who is moſt likely to know, is ſtronger than if it had been determined by a jury, and facts are as properly concluded by admiſſion as by a trial; as in writs of error, the party may admit error in fact, though he cannot admit error in law; and if this court was not to conclude on ſuch admiſſions, there would be no end of cauſes here, where there is no jury at the bar.

Admiſſion by a party concerned in matters of fact is ſtronger than if it had been determined by a jury, and facts are as properly concluded by admiſſion, as by trial.

It is objected the admiſſion carries it no further than the probate would go of itſelf.

Where parties are diſſatisfied with a probate, this court will ſuſpend their determination, till a trial has been had of the validity in a proper court.

If the probate merely is produced, and nothing ſaid about it, this court muſt preſume it good, and proceed on it; but if parties are diſſatisfied with the probate, this court will give time to diſpute the validity of it, and ſuſpend their determination, till it has had a trial in a proper court; as in the caſe of *Pain* v. *Stratton*, the court voluntarily gave time to try the validity, upon ſome apprehenſion of a difference between the probate and original will.

But here the caſe is very different; the party in this caſe, ſo far from being diſſatisfied, that at the time of admitting the probate, the original was produced, and theſe raſures appeared on the face of it; and then, when if at any time this objection to the bill ſhould have been made, they allowed the will well proved.

Second queſtion. If it has been determined in a proper court, it is inſiſted that the validity of the probate is only proper to be determined in the eccleſiaſtical court, and that nothing done in a temporal court can conclude.

This court cannot determine the validity of a probate adverſarily; but if it comes here incidentally, and that incident admitted, they may determine it, and hold the parties bound by their admiſſion.

It is true, in an adverſary way, this court, or a court of law, cannot determine the validity of a probate of a will or codicil; but if it comes here on an incident in a cauſe, and that incident is admitted by the parties, this court, or a court of law, may determine it, and hold the parties bound by their admiſſion; and if either of the parties would afterwards bring a new ſuit to conteſt that determination, this court would certainly grant a perpetual injunction.

No difference between parties admitting things proper to be determined by the court, in which the admiſſion is made, and admiſſion of things cogniſable in another court, but are equally bound.

As to the diſtinction which has been offered between parties admitting things proper to be determined by the court, in which the admiſſion is made, and admiſſion of things cogniſable in another court, I can ſee no difference if facts are admitted, and the parties eſtabliſh their own admiſſions. Diſputes about probates may be determined by a decree in the proper court, yet under the direction of this court, like the caſe where this court does not direct an iſſue, but gives liberty to bring a new ejectment.

But what properly and effectually gives this court a juriſdiction here in the preſent caſe is, the *truſt* declared in the will, the truſts this court have determined on, and every thing that comes in by incident binds the parties.

This queſtion does not touch or impeach the juriſdiction of the eccleſiaſtical court, as in the caſe of a prohibition, where if the court proceeds, the judge is guilty of a contempt; but the injunction ſtays the party from proceeding, and at the ſame time this court ſuppoſes the eccleſiaſtical court to have juriſdiction, but does not think proper, from ſome collateral circumſtances, to ſuffer the party to apply, and take the benefit of that juriſdiction.

Thirdly, As to the conſequences of granting the injunction or not.

It is objected, that this caſe is not a proper one for a perpetual injunction; that here is no vexation or multiplicity of trials, but that

is

is not the only ground the court proceeds on in granting injunctions, though in mere legal titles it is ſo: It was not the ground in the caſe of *Acherly* v. *Vernon*, or of *Calvert* v. *Colby*, where in each there was only one trial.

New matter is the only ſolid ground of conteſting this will, and if there had appeared any new material facts and evidence ſince the laſt hearing, I ſhould not have granted the perpetual injunction; *but the raſures, &c.* objected to now, did appear on the face of the will, nor is there any proof that the Dutcheſs had no knowledge of them till after the hearing, nor is it diſputed but that the raſures and interlineations are of the Duke's own hand writing.

As to a new right accrued to her Grace as executrix of her ſon, that makes no alteration with regard to the conſequences of the preſent queſtion; he was bound by the decree, unleſs there is new matter, or fraud and colluſion, an infant is bound by a decree made for his benefit, which this decree plainly was; and as to perſonal eſtate, unleſs for the cauſes before mentioned, the parol never demurs, and her Grace cannot be in a better condition than her ſon, for if a decree is for the benefit of an infant, and he dies, his executor ſhall never diſpute that decree, though it may be for the advantage of the executor ſo to do.

An infant, unleſs there is new matter, or fraud or colluſion, is bound by a decree made for his benefit; and with reſpect to perſonal eſtate, except for the cauſes before mentioned, the *parol* never demurs. Where there is a decree for the benefit of an infant, and he dies, his executor, tho' it may be for his own advantage to do ſo, ſhall never diſpute that decree.

But here have been acts done by her Grace in this capacity ſince the death of her ſon, which bind her. *An appeal* to the houſe of Lords as executrix of her ſon, and inſiſting on and claiming under the will and codicil.

As to the authorities, *Acherley* v. *Vernon* is full for the plaintiff, unleſs new matter had been ſhewn; and *Calvert v. Colby* was a caſe not ſo ſtrong as the preſent.

The caſe of *Montague* v. *Maxwell*, in the houſe of Lords 1715, cited for the defendant, does not come up to the preſent; there was nothing in that caſe but the probate ſimply, no admiſſion, no proof in this court, nor any acts or judicial proceedings here. In the caſe of *Crompton* v. *Crompton*, there were only extrajudicial declarations.

If I was not to grant this injunction, many inconveniencies muſt neceſſarily ariſe to the parties; the will made was in 1716, and proved, with the privity of the Dutcheſs, in 1721; the decree was in the ſame year, vaſt ſums laid out, and an acquieſcence of all parties; the decree affirmed in the houſe of Lords in 1737; then a new ſuit in the eccleſiaſtical court, to diſpute the will on the ſame facts on which the precedent determinations were had, two witneſſes are dead, who poſſibly, if living, might eſtabliſh the will; if this was ſuffered, property would never be ſafe.

As to the truſtees, actions at law, if the will was overturned, might be brought againſt them for acting under the decree of this court, nor would it be in the power of this court to help them.

His Lordſhip therefore decreed, that a perpetual injunction be awarded to ſtay the defendant, the Dutcheſs of *Buckinghamſhire*, from proceeding in the prerogative court of *Canterbury*, or in any other eccleſiaſtical court, in the ſuit already brought by her Grace, or in

any other ſuit, to call in or revoke the ſaid probate of the will and codicils of *John* late Duke of *Buckinghamſhire* her late huſband, or to have the ſame declared null and void, or that it may be pronounced that the ſaid Duke died inteſtate; and as to the coſts of this ſuit, his Lordſhip gave none.

Vide title *Legacies, under the diviſion, Ademption of it.*

Vide title *Evidence, Witneſſes, and Proof, under the diviſion, Where parol or collateral Evidence will, or will not be admitted to explain, confirm, or contradict what appears on the Face of a Deed or Will.*

Vide title *Power, under the diviſion, Of the right execution of a Power, and where a Defect therein will be ſupplied.*

CAP. CXXIV.

Witneſs.

Vide title *Evidence, Witneſſes, and Proof.*

CAP. CXXV.

Words of Limitation.

Vide title *Deviſes.*

CAP. CXXVI.

Words.

Vide title *Expoſition of Words.*

CAP. CXXVII.

Writ.

(A) Of the De Homine Replegiando, and its effects.

March the 22d 1736-7.

Treblecock's caſe.

Caſe 287.

A Motion to diſcharge an order for ſuperſeding a writ *de homine replegiando.*

The writ *de homine replegiando* is an original writ, and the party may ſue it of right.

Lord Chancellor: The writ *de homine replegiando* is an original writ, and the party may ſue it of right, and granted here on a motion or petition, without ſhewing cauſe.

It is properly returnable in the courts of law, and may be there declared upon; and as it is remedial, the defendant, againſt whom it is ſued, is obliged to aſſign ſome cauſe why he does not comply with the writ.

Therefore, after it is ſued, I do not know that I can ſuperſede it, and if the party who ſues out the writ is not intitled to it, it muſt be pleaded to below; in this caſe it is the writ of the infant, and there is no ſuit about the infant here, and therefore the order made to ſuperſede the writ muſt be diſcharged.

It might be otherwiſe, if the infant was in court, by being a party to the ſuit here.

If this writ is brought by an infant againſt his teſtamentary guardian, or by a villain againſt his lord, I think they may plead the ſpecial matter to the writ, and defend themſelves at law.

His Lordſhip granted the motion.

Vide title *Ne exeat Regno.*

The End of the First Volume.

A TABLE OF The Principal Matters.

Parol Agreements, or ſuch as are within the Statute of frauds and Perjuries.

Voluntary Agreements, in what Caſes to be performed.

Hearſay

Amendment.

In what Caſe allowed or not.

Anſwers, Pleas, and Demurrers.

What ſhall be a good Plea and well pleaded.

A Table of the Principal Matters.

A Table of the Principal Matters.

Bankrupt.

Concerning the Commiſſion and Commiſſioners.

Rule as to Aſſignees.

If

A Table of the Principal Matters.

A Table of the Principal Matters.

An

A Table of the Principal Matters.

A perſon

A Table of the Principal Matters.

A Table of the Principal Matters.

A Table of the Principal Matters.

A Perſon

A Table of the Principal Matters.

A Table of the Principal Matters.

A Table of the Principal Matters.

Whether a Bankrupt during his Time of Privilege may be taken by his Bail.

Rule as to a Certificate from Commiſſioners to a Judge.

Baron and Feme.

How far the Huſband ſhall be bound by the Wife's Acts before Marriage.

A Widow had two children by a former huſband, and no proviſion made for them, and theſe two children had each of them a child, and being in poſſeſſion in her own right of freehold, copyhold, and leaſehold eſtates, by articles before her ſecond marriage, to which her huſband was a party, and by his conſent, conveys the whole

A Table of the Principal Matters.

A Table of the Principal Matters.

Contract.

Copyhold.

A Table of the Principal Matters.

The

Decree.

Deeds and other Writings.

Vide Title **Heir and Anceſtor.**

Vide Title **Voluntary Deed and it's Effects.**

A Table of the Principal Matters.

Deviſes.

Of void Deviſes by Uncertainty in the Deſcription of the Perſon to take.

Of Deviſes of Lands for Payment of Debts.

Lord

Dower and Jointure.

What ſhall be a good Satisfaction, or good Bar of Dower, and how far a Dowreſs will be favoured in equity.

Of making good a Deficiency out of a huſband's Aſſets.

Of what eſtate of the Huſband's with reſpect to the nature and quality thereof, ſhall a Woman be endowed.

The

The

A Table of the Principal Matters.

Vide

A Table of the Principal Matters.

Habeas Corpus.

Heir and Anceſtor.

Infants.

How far favoured in Equity.

A Table of the Principal Matters.

A Table of the Principal Matters.

A ſpecifick

A Table of the Principal Matters.

Maintenance for Children.

A Table of the Principal Matters.

Where

A Table of the Principal Matters.

The

A Table of the Principal Matters.

After

Real Eſtate.

Where the Perſonal ſhall not be applied in Exoneration.

Receiver.

Rule as to appointing him.

Recoveries.

Relations.

A Table of the Principal Matters.

Remainder.

A Table of the Principal Matters.

A Table of the Principal Matters.

Truſt and Truſtees.

What Act of the Truſtees ſhall defeat the Truſt, or be a Breach of truſt in them.

Vide Title **Deviſes**, *Ivie* v. *Ivie*, under the Diviſion, *What Words paſs an Eſtate Tail.* 429

Of Reſulting Truſts, and Truſts by Implication.

Voluntary Deed.

The effect thereof.

THE court will not decree a voluntary conveyance to be delivered up to a purchaſer for a valuable conſideration, unleſs obtained by fraud. 625

A voluntary deed kept by a perſon, and never cancelled, will not be ſet aſide by a ſubſequent will. *ibid.*

A father by ſettlement grants to his five daughters 4000*l.* apiece, but to provide againſt the event of the reſidue's being of greater value, binds himſelf in 25,000*l.* to ſecure the ſurplus over and above the 20,000*l.* This muſt be conſidered in the nature of a bond, to the daughters, and will take place againſt all voluntary claimants; otherwiſe as to creditors for a valuable conſideration. 626

Uſury.

Will.

The Power of this Court over the Prerogative Court.

WHERE a perſon is ſole deviſee of the real eſtate, and one of the witneſſes to the will, reſides altogether abroad, upon a commiſſion granted to examine

F I N I S.