REPORTS

OF

CASES

ARGUED and DETERMINED

IN THE

High Court of Chancery,

IN THE TIME OF

Lord Chancellor HARDWICKE:

COLLECTED BY

John Tracy Atkyns,

Of *Lincoln's Inn*, Esq;

CURSITOR BARON of the EXCHEQUER;

With NOTES and REFERENCES, and Two TABLES; one of the NAMES of the CASES, and another of the PRINCIPAL MATTERS.

VOL. II.

——————*Ex Me disce Laborem,*
Fortunam ex aliis. —————— VIRG.

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MDCCLXVII.

THE

PREFACE.

IT may not be improper to acquaint the publick with my reaſons for dropping the plan I ſet out with, in my firſt volume, of ranging the caſes under their particular heads of equity, in an alphabetical ſeries: In the firſt place, the benefit reſulting from it is by no means equivalent to the immenſe labour and trouble it requires to reduce them to ſuch an order; and in the next, I have been informed, that ſome of the moſt eminent practiſers in the law have expreſſed their diſapprobation of it, and concur with me, in thinking it did by no means anſwer my intention, conſidering the length of time it neceſſarily took up to methodize them in this manner.

It cannot be ſuppoſed that gentlemen who are in buſineſs can find leiſure to read a work regularly through, as a digeſt or ſyſtem of equity, and therefore, inſtead of purſuing this ſcheme, I have taken care to make a very large and copious table of principal matters, which I flatter myſelf will effectually ſupply the place of it; and that each caſe will be ſo fully and clearly abſtracted in this table, together with the points that may ariſe in it, that it may ſafely be cited from thence, if the perſon who has immediate occaſion for it, ſhould not have time to read it at large in the body of the work.

The caſes in my ſecond and third volumes following in a ſucceſſion of time, according to the reſpective years in which they were heard, have enabled me to ſend them

them much ſooner to the preſs, and to anſwer the demand of the publick for the remainder of theſe reports; for, as my bookſellers have informed me, great numbers of the profeſſion have declared they will not purchaſe the firſt volume, till they ſee the whole work is complete, which, with the other reaſons aſſigned, I apprehend, will ſufficiently juſtify me in laying my original plan intirely aſide.

To prevent miſtakes, with regard to the ſtate of a caſe, or the decree, I have been at the trouble and expence of comparing my notes with the regiſter, and have, in thoſe inſtances where I thought it was neceſſary, taken the ſtate of the caſe from thence, and in ſome of the moſt material, have given the ſubſtance of the decree, which I imagine muſt naturally reflect light upon the caſes themſelves; but it has not always been in my power to do this, for where the court have been of opinion to diſmiſs the plaintiff's bill, the regiſter has only made a minute of the diſmiſſion, and the caſe at large has not been entred in the report office, the parties in the ſuit not chuſing to be at the expence of it.

In anſwer to the objection that may be made to my ſetting forth ſometimes the declarations of Lord *Hardwicke*, and his decrees ſo much at large, I hope it is ſufficient to ſay, that, if it is an error, it is more excuſable than to add at the end of the caſe, which frequently occurs in other books of reports, *and ſo the court decreed accordingly*, or words of the like import; for it is very obvious that ſuch a looſe and general expreſſion muſt ſhut out a very conſiderable light, which would naturally have elucidated the caſe it ſelf, if ſuch parts of the decrees had been taken from the regiſter, as do eſſentially relate to the points made in the cauſe.

I am aware too, another objection may be made to caſes of practice occurring ſo frequently in the courſe

of this work; but I hope the eminent practitioners of the law will pleaſe to remember, what difficulties they had to encounter at their firſt ſetting out in the profeſſion, and pardon me for inſerting theſe caſes, which are publiſhed merely for the edification and inſtruction of ſtudents and young council, who, for want of a guide to conduct them in their long and tedious journey through *Weſtminſter-hall*, often wander out of the way, and are ſome time, at leaſt, loſt and bewildered in the labyrinths of the law, before they are able to get into the right road.

Where a caſe is very long, from the number of particulars it conſiſts of, I have thought it more adviſeable to give the abſtract of it in the Table of Principal Matters, rather than run out the marginal notes to an immoderate length, eſpecially as they muſt neceſſarily be in a ſmaller character than the body of the work, and ſtrain the eyes more in reading them.

I think it incumbent on me to take notice, why I have not troubled the Judges with an application for their *Imprimatur*: They could not, from their ſituation, be ſuppoſed to examine the manuſcript with any accuracy before it was printed; and therefore to ſolicit them to give the ſanction of their names to a performance with which they were intirely unacquainted, in my opinion, would have been paying their Lordſhips a very ill compliment; and however flattering the approbation of the Great Men of the Law, who now ſo eminently adorn the courts of juſtice, might be to the author, and whatever weight and authority it might have given to this work, or honour it might have reflected upon it, I choſe rather, after a complete and candid examination of theſe reports, they ſhould either riſe or fall in the eſteem of the public, according to their real and intrinſic merit only.

PREFACE.

I take the liberty of mentioning, for the ſake of thoſe gentlemen whoſe practice lies chiefly in the courts of common law, that during the time Lord *Hardwicke* preſided in Chancery, ſeveral very material points of law, which incidentally aroſe in ſome of theſe caſes, were determined by him with the utmoſt preciſion, and in a very maſterly manner.

A very ingenious friend of mine having furniſhed me with Lord *Hardwicke*'s argument in *Middleton* and *Crofts*, when he delivered the opinion of the court of King's Bench in that caſe, I have added it at the end of this volume, by way of Appendix ;

In Sir *John Strange*'s Reports, there is only a ſhort ſketch, or rather the outlines of his Lordſhip's argument; and as I have been enabled to give it to the public at large, flatter myſelf it will ſufficiently plead my excuſe for introducing it here.

No care or pains have been wanting to make this work complete ; and I am perſuaded, from the known candour and humanity of the profeſſors of the law, that they will have the goodneſs to overlook any failings or imperfections.

——————*Quas aut Incuria fudit,*
Aut humana parum cavit Natura. ——

Before I conclude, permit me to add, that I ſhall think myſelf peculiarly happy, if I have, in ſome meaſure, at leaſt, done juſtice to the determinations of the Great Man whoſe name is prefixed to this work, and who, whilſt he lived, was an ornament of the preſent, and will be a moſt illuſtrious pattern to all ſucceeding ages.

A TABLE

A TABLE OF THE NAMES of the CASES.

Alphabetically diſpoſed in ſuch an 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.

ABINGDON *and* Godolphin. *Page* 57
Abney Sir Thomas *v.* Miller. 593
Abraham *v.* Dodgſon. 157
Adams *and* Hill. 39, 208
Adams *v.* Gale. 106
Albans (Duke of) *v.* Beauclerk. 636
Allen *and* Taylor. 213
Angel *ex parte*. 162
Anneſley *and* Phipps. 57
Anonymous. 1, 2, 14, 15, 50, 113, 123, 210, 237, 333, 507, 604, 621
Aſhburnham *v.* Bradſhaw. 36
Aſhdown *and* Stileman. 477, 608
Aſhurſt *v.* Eyre. 51
Aſtel *v.* Montgomery. 138
Athol (Duke and Ducheſs of) *and* Lanoy. 444
Atkinſon *v.* Turner. 41
Atkins *v.* Smith. 63
Attorney General *and* Baylis. 239
——— *v.* Bucknall. 328
——— *v.* Davy. 212
——— *v.* Montgomery. 378
——— *v.* Pearce. 87
——— *and* Reeve. 223
——— *v.* Sawtell. 497
——— *and* Stiles. 152
Aylet *v.* Dodd. *Page* 238
Ayliffe *v.* Murray. 58

B.

Badcock *and* Sadlers Company. 554
Bagſhaw *v.* Spencer. 246, 570, 577
Bainton *v.* Ward. 172
Baker *v.* Dumareſque. 66
Baker *v.* Hart. 488
Baker *v.* Pritchard *alias* Hoſier. 387
Baker *and* Richards. 321
Balderſton *and* Murphey. 114
Barber *and* Davy. 489
Barker *and* Davy. 2
Barker *v.* Dumareſque. 119
Barnardiſton (Sir John) *v.* Lingood. 133
Baron *and* French. 120
Barret *v.* Powell. 242
Baſkerville *v.* Baſkerville. 279
Bateman (Lord) *and* Handbury. 63
Bates *v.* Dandy. 207
Baylis *v.* Attorney General. 239
Baxter *v.* Wilſon. 158
Beauchamp *and* Proctor. 82
Beauclerk *and* Duke of St. Alban's. 636

Beauclerk

A Table of the Names of the Caſes.

Beauclerk Lord George *v.* Miſs Dormer. *Page* 308
Beauclerk Lord Sidney *v.* Doctor Mead. 167
Beaufort (Duke of) *and* Roy. 190
Bellamont (Earl of) *and* Connor. 382
Bennett *and* Lock. 49
Bennett *and* Seymour. 482
Bennett *ex parte.* 527
Bennett *v.* Lee. 487, 529
Bennett *v.* Vade. 324
Berriſford *v.* Milward. 49
Bicknel *v.* Page. 79
Biggleſton *v.* Grubb. 48
Bill *v.* Kinaſton. 82
Birch *and* Paul. 621
Biſhop *and* Freeman. 39
Blackerby *and* Vernon. 144
Blackmore *and* Merſon. 341
Blackwell *v.* Harper. 93
Blanchard *v.* Hill. 484
Blandford (the Marchioneſs of) *v.* Ducheſs Dowager of Marlbrough. 542
Blew *and* Marſhall. 217
Booth *v.* Booth. 343
Booth *and* Trelawney. 307
Booth *and* Walmeſley. 25, 27
Boughton *and* Brudenell. 268
Bowden *v.* Beachamp. 82
Brace *v.* Harrington. 235
Brace *v.* Tayler. 253
Bradford *and* Buffar. 220
Bradſhaw *and* Aſhburnham. 36
Braſbridge *v.* Woodroffe. 68
Brereton *v.* Gamul. 240
Briant *and* Wood. 521
Briggs *and* Mackworth. 182
Brook *v.* Gally. 34
Broughton *and* Waltham. 43
Brown *and* Burk. 397
Brown *and* Langley. 195
Brudenell *v.* Boughton. 268
Bucknall *and* Attorney General. 328
Buffar *v.* Bradford. 220
Burford (the Bailiffs of, &c.) *v.* Lenthall. 551
Burk *v.* Brown. 397
Burk *and* Fitzgerald. *Page* 397
Burrows *and* Morris. 627
Burton *and* Long. 218
Burton *v.* Mattons. 114
Burton *and* Scarbrough. 111
Buſſey *and* Hodgeſon. 89
Butler *and* Jackſon. 306

C.

Car *v.* Car. 277
Cardonnel *and* Hedges. 408
Carlton *and* Lowther. 139, 242
Carry *and* Franks. 140
Carter *and* Hall. 354
Carter *and* Lee. 84
Carter *and* Lloyd. 84
Cartwright *and* Mathews. 347
Cartwright *v.* Pulteney. 380
Cay *and* Willats. 67
Champernoon *v.* The Borough of Totneſs. 112
Chandos (Duke of) *and* Smith. 159
Charitable Corporation *v.* Sir Robert Sutton. 400
Chauncy *v.* Graydon. 616
Chauncy *v.* Tahourden. 392
Child (Sir Cæſar) *v.* Gibſon. 603
Chitty *v.* Selwyn. 359
Cholmley *v.* Counteſs Dowager of Oxford. 267
Clark *and* Kinaſton. 204
Clarke *and* Montgomery. 378
Clark *v.* Periam. 333, 337
Clarke *and* Poore. 515
Claverden *and* Webb. 424
Clayton *v.* Cookes. 449
Clerk *v.* Miller. 379
Clifton *and* Mackworth. 51.
Cockeril *and* Grey. 114
Cocks *v.* Worthington. 235, 236
Coddrington (Lady) *v.* England. 167
Coleman *and* Ryves. 439
Colſon *v.* Colſon. 246, 247
Combe *v.* Combe. 185
Condon *and* Lowther. 127, 130
Connor *v.* Earl of Bellamont. 382
Cook *v.* Duckenfield. 562, 567
Cook *v.* Martyn. 2

A Table of the Names of the Caſes.

Cooke *v.* Cooke. *Page* 67
Cookes *and* Clayton. 449
Cope *and* Sir William Stanhope. 231
Cottington *v.* Fletcher. 155
Coventry (Earl of) *v.* Coventry. 366
Coxeter *and* Jones. 400
Crawley *and* Hodgeworth. 376
Croft *and* Middleton. 650
Crop *v.* Norton. 74
Croucher *and* Lingood. 395
Cumming *and* Sir John Robinſon. 409
Curl *and* Pope. 342

D.

Daley *v.* Sir Edward Deſbouverie. 261
Dandy *and* Bates. 207
Darwent *v.* Walton. 510
Davis *and* Drapers Company. 211, 295
Davis *v.* Davis. 21
Davy *and* Attorney General. 212
Davy *v.* Barber. 489
Davy *v.* Barker. 2
Dean and Chapter of Ely *v.* Sir Simeon Stewart. 44
De Coſta *v.* Melliſh. 14
Deſbouverie (Sir] Edward) *and* Daley. 261
Dinely *and* Dinely. 394
Dodd *and* Aylet. 238
Dodd *and* Hine. 275
Dodemead *and* Vaillant. 524, 546, 592
Dodgſon *and* Abraham. 157
Donovan *and* Guriſh. 166
Dormer *v.* Forteſcue. 282
Dormer (Miſs) *and* Lord George Beauclerk. 308
Downs *and* Trodd. 304
Drake *and* Saunders. 465
Drapers Company *v.* Davis. 211, 295
Duckenfield *and* Cook. 562, 567
Dumareſque *and* Baker. 66
Dumareſque *and* Barker. 119

E.

Eade *and* Lingwood. 501
Eaſt-India Company *v.* Vincent. 83
Ekins *and* Green. 473
Elliot *v.* Merriman. 41
Ely (Dean and Chapter of) *v.* Stewart Sir Simeon. *Page* 44
Ely (Dean and Chapter of) *v.* Warren. 189
Emes *v.* Hancock. 507
England *and* Lady Coddrington. 167
Evans *and* Thornhill. 330
Evans *and* Stone. 86
Ewer *and* Lockwood. 303
Exceptions to a Maſter's report. 61
Eyles *and* Smith. 385
Eyre *and* Aſhurſt. 51

F.

Farnham *v.* Philips. 215
Fell *v.* Lutwidge. 120
Fell *and* Weedon. 123
Fellows *and* Smith. 62, 377
Fitzer *v.* Fitzer. 511
Fitzgerald *v.* Burk. 397
Fitzgerald *v.* Sucomb. 85
Fleetwood *v.* Janſen. 467
Fleetwood *v.* Templeman. 79
Fletcher *and* Cottington. 155
Forſter *v.* Forſter. 259
Forteſcue *and* Dormer. 282
Francis *and* Strachy. 217
Franks *v.* Carry. 140
Freeman *v.* Biſhop. 39
Freeman *and* Wood. 542
French *v.* Baron. 120
French *and* Grimes. 141
French *and* Smith. 243

G.

Gale *and* Adams. 106
Gally *and* Brooke. 34
Galton *v.* Hancock. 424, 427, 430
Gamul *and* Brereton. 240
Gardiner *and* Knotsford. 450
Garth *v.* Ward. 174
Gibbons *and* Sheppard. 491
Gibſon *and* Sir Cæſar Child. 603
Gibſon *v.* Smith. 182
Glanville *v.* Payne. 39
Glaſs *v.* Oxenham. 121
Glaſs *and* Sir William Saunderſon. 296
Godolphin *v.* Abingdon. 57

A Table of the Names of the Caſes.

Godwin *v.* Winſmore. *Page* 525
Gould *v.* Tancred. 533
Gratwick *v.* Simpſon. 144
Gray *and* Newſham. 286
Graydon *and* Chauncy. 616
Graydon *v.* Hicks and Graydon *v.* Graydon. 16
Green *v.* Ekins. 473
Green *v.* Suaſſo. 229
Grey *v.* Cockeril. 114
Grimes *v.* French. 141
Groſvenor *v.* Lane. 180
Grove *and* Michaux. 210
Grubb *and* Biggleſton. 48
Gryle *v.* Gryle. 176
Guillam *v.* Holland. 343
Gumbleton (*ex parte*) 70
Guriſh *v.* Donovan. 166
Gyles *v.* Wilcox. 141

H.

Hall *v.* Cart r. 354
Halſam (*ex parte*). 50
Haly *v.* Lane. 181
Hambly *and* Yates. 237
Hamilton (Lord Archibald) *and* Smallman. 71
Hanbury *v.* Lord Bateman. 63
Hancock *and* Galton. 423, 427, 430
Hancock *and* Emes. 507
Hand *and* Haws. 615
Harrington *and* Brace. 235
Harriſon *v.* Harriſon. 121
Harriſon *and* Haughton. 329
Harper *and* Blackwell. 93
Hart *and* Baker. 488
Hathornthwaite *v.* Ruſſel. 126
Harvey *v.* Philips. 541
Haughton *v.* Harriſon. 329
Hawkyns *v.* Obyn. 549
Haws *v.* Hand. 615
Haywood *and* Hide. 126
Heathe *v.* Heathe. 121
Hedges *v.* Cardonnel. 408
Henage *v.* Hemloke. 456
Henley *v.* Philips. 48
Herbert *and* Lord Tenham. 483
Heron *v.* Heron. 160, 171
Hicks *and* Graydon. *Page* 16
Hide *v.* Haywood. 126
Higgins *v.* The York Buildings Company. 107
Hill *v.* Adams. 39, 208
Hill *and* Blanchard. 484
Hills *v.* Wirley. 605
Hine *v.* Dodd. 275
Hoare *and* Philpot. 219
Hobbs *and* Walton. 19
Hodgeſon *v.* Buſſey. 89
Hodgeworth *v.* Crawley. 376
Hodſon *and* Wallis. 56, 115
Holland *and* Guillam. 343
Hope *and* Tyrrell. 558
Hopkyns *and* Howard. 371
Howard *v.* Hopkins. 371
Howe *and* Marſh. 50
Huggins *v.* The York Buildings Company. 44
Hughes *and* Oldham. 452
Humphreys *v.* Moore. 108
Humphrey *v.* Morſe. 408
Hunloke *and* Henage. 456
Hunt *and* Wilkins. 151
Hyde *and* Whitchurch. 391

J.

Jackſon *v.* Butler. 306
Jackſon *and* Walker. 624
Janſen *and* Fleetwood. 467
Janſon Sir Thomas Bart. *v.* Rany. 140
Jekyll *and* Shuddall. 516
Jernegan *and* Willis. 251
Jewſon *v.* Moulſon. 417
Ingram *v.* Ingram. 88
Johnſton *and* Newſtead. 45
Jones *v.* Coxeter. 400
Jones *and* Taylor. 600
Judſon *and* Nicholls. 300

K.

Kampſhire *v.* Young. 155
Keith *and* Doctor Trebec. 498
Kemys *v.* Ruſcomb. 45
Kinaſton *and* Bill. 82
Kinaſton *v.* Clark. 204
Kinaſton *and* Woodcraft. 317

Knotsford

A Table of the Names of the Caſes.

Knotsford *v.* Gardiner. *Page* 450
Knowler *and* Powell. 224
Kuffin *and* Roberts. 112

L.

Lacon *v.* Lacon. 395
Lane *and* Groſvenor. 180
Lane *and* Haly. 181
Langley *v.* Brown. 195
Lanoy Miſs *v.* Duke and Ducheſs of Athol. 444
Lee *and* Bennett. 487, 529
Lee *v.* Carter. 84
Legard *and* Sheffield. 377
Lenthall *and* the Bailiffs and Burgeſſes of Burford. 551
Lees *and* Mellor. 494
Lewellin *v.* Mackworth. 40
Lewin *v.* Okeley. 50
Lincoln Biſhop of *and* Pawlet. 296
Lingwood *and* Sir John Barnardiſton. 133
Lingwood *v.* Croucher. 395
Lingwood *v.* Eade. 501
Liſſet *v.* Reave. 394
Litchfield *and* Ulrich. 372
Lock *v.* Bennett. 49
Lockwood *v.* Ewer. 303
Long *v.* Burton. 218
Lowther *v.* Carlton. 139, 142
Lowther *v.* Condon. 127, 130
Lloyd *v.* Carter. 84
Lloyd *v.* Spillet. 148
Lloyd *v.* Williams. 108
Lucas *v.* Seale. 56
Ludlow *ex parte.* 407
Lunatick petitions. 52
Lutwidge *and* Fell. 120
Lyddall *v.* Weſton. 19

M.

Mackintoſh *and* Willington. 569
Mackworth *v.* Briggs. 182
Mackworth *v.* Clifton. 51
Mackworth *and* Lewellin. 40
Malden *v.* Menil. 8
Man *v.* Ward. 228
Marlow *and* Middlecombe. 519
Marborough Ducheſs Dowager of *and* the Marchioneſs of Blandford. *Page* 542
Marſhall *v.* Blew. 217
Marſh *v.* Howe. 50
Marſhall *and* Smith. 70
Marſhall *and* Stanford. 68
Martyn *and* Cook. 2
Mathews *v.* Cartwright. 347
Mattons *and* Burton. 114
Mead Doctor *and* Lord Sidney Beauclerk. 167
Melliſh *and* De Coſta. 14
Melliſh *and* Sturt. 610
Mellor *v.* Lees. 494
Menil *and* Malden. 8
Merriman *and* Elliot. 41
Merſon *v.* Blackmore. 341
Meure *v.* Meure. 265
Michaux *v.* Grove. 210
Middlecombe *v.* Marlow. 519
Middleton *v.* Croft. 650
Miller *and* Sir Thomas Abney. 593
Miller *and* Clark. 379
Millward *and* Berriſford. 49
Mitchell Mr. Juſtice. 173
Montgomery *and* Aſtel. 138
Montgomery *and* Attorney General. 378
Montgomery *v.* Clarke. 378
Moore *and* Gratwick. 144
Moore *and* Humphreys. 108
More *v.* More. 157
Morret *v.* Paſke. 52
Morris *and* Underwood. 184
Morris *v.* Burrows. 627
Morſe *and* Humphrey. 408
Moulſon *and* Jewſon. 417
Murray *and* Ayliffe. 58
Murphey *v.* Balderſton. 114

N.

Newport *and* Smith. 344
Newſham *v.* Gray. 286
Newſtead *v.* Johnſton. 45
Nicholls *v.* Judſon. 300
Northey *v.* Northey. 77
Norton *and* Crop. 74
Norton *v.* Norton. 74

A Table of the Names of the Caſes.

O.

Oates *and* Procter. *Page* 140
Obyn *and* Hawkins. 549
Okeley *and* Lewin. 50
Oldin *v.* Samborne. 15
Oldham *v.* Hughes. 452
Oldham *and* Staunton. 383
Order of *Eaſter* Term 27th *April* 1748. 288, 289, 290
Oxford Counteſs Dowager of *and* Cholmley. 267
Oxenham *and* Glaſs. 121

P.

Page *and* Bicknell. 79
Page *and* Tuffnell. 37
Paget *and* Philips. 80, 81
Parteriche *v.* Powlet. 54, 383
Partridge *and* Sumner. 47
Paſke *and* Morret. 52
Paul *v.* Birch. 621
Pawlet *v.* The Biſhop of Lincoln. 296
Payne *and* Glanville. 39
Peachy *and* Young. 254
Pearce *and* Attorney General. 87
Penſon *and* Plunket. 51, 290
Periam *and* Clarke. 333, 337
Perkyns *and* Timewell. 102
Petitions Lunatick. 52
Philips *and* Farnham. 215
Philips *and* Henley. 48
Philips *and* Harvey. 541
Philips *v.* Paget. 80, 81
Philpot *v.* Hoare. 219
Phipps *v.* Anneſley. 57
Pilkington Sir Lionel *and* The Mayor and Corporation of York. 302
Plunket *v.* Penſon. 51, 290
Plymouth (Earl of) *and* Ridout. 104
Poore *v.* Clark. 515
Pope *v.* Curl. 342
Powell *and* Barret. 242
Powell *v.* Knowler. 224
Powlet *and* Pateriche. 54, 383
Pritchard alias Hoſier *and* Baker. 387
Proctor *v.* Oates. 140
Pugh *v.* Smith. 43
Pullen *v.* Ready. 587
Pultney *and* Cartwright. 380

R.

Radley *and* Sir Thomas Standiſh. *Page* 177
Raney *and* Sir Thomas Janſon Bart. 140
Read *and* Huggonſon. 469
Read *v.* Read. 16
Read *v.* Snell. 642
Ready *and* Pullen. 587
Report (*exceptions* to). 61
Reave *and* Liſſet. 394
Reeve *v.* Attorney General. 223
Rich *and* Wills. 285
Richards *v.* Symes. 319
Richards *v.* Baker. 321
Ridout *v.* The Earl of Plymouth. 104
Roberts *v.* Kuffin. 112
Roberts *and* Sir William Stanhope. 214
Robinſon Sir John *v.* Cumming. 409
Robins *and* Spinks. 491
Rooke (*ex parte*). 2
Roy *v.* The Duke of Beaufort. 190
Ruſcomb *and* Kemys. 45
Ruſſel *and* Hathornthwaite. 126
Ryves *v.* Coleman. 439

S.

Sadlers Company *v.* Badcock. 554
Saltern *v.* Saltern. 376
Samborne *and* Oldin. 15
Sandys *v.* Watſon. 80
Saunders *v.* Drake. 465
Saunderſon Sir William *v.* Glaſs. 296
Savile *v.* Savile. 458
Sawtell *and* Attorney General. 497
Scarbrough *v.* Burton. 111
Seale *and* Lucas. 56
Sealey *and* Sergeſon. 412
Selwin *and* Chitty. 359
Sergeſon *v.* Sealey. 412
Seymour *v.* Bennett and Abbot. 482
Sheffield *and* Legard. 377
Shepherd *v.* Titley. 348
Sheppard *v.* Gibbons. 441
Shepley *and* Woodhouſe. 535
Shudal *v.* Jekyll. 516
Simpſon *v.* Vaughan. 31
Smallman *v.* Lord Archibald Hamilton. 71

A Table of the Names of the Caſes.

Smith *and* Atkins. *Page* 63
Smith *v.* Fellows. 62, 377
Smith *v.* French. 243
Smith *and* Gibſon. 182
Smith *v.* The Duke of Chandos. 159
Smith *v.* Marſhall. 70
Smith *v.* Newport. 344
Smith *and* Pugh. 43
Smith *v.* Wyat. 364
Smith *v.* Styles Eyles. 385
Smith *and* Tendril. 85
Snell *and* Read. 642
South-Sea Company *and* Stockdale. 141
Spencer *and* Bagſhaw. 246, 570, 577
Spillet *and* Lloyd. 148
Spinks *v.* Robins. 491
Standiſh Sir Thomas *v.* Radley. 177
Stanford *v.* Marſhall. 68
Stanhope Sir William *v.* Roberts. 214
Stanhope Sir William *v.* Cope. 231
Staunton *v.* Oldham. 383
Stapleton Sir Miles *and* the Archbiſhop of York. 136
Stawell *and* Warren. 125
Stewart (Sir Simeon) *and* Dean and Chapter of Ely. 44
Stiles *v.* The Attorney General. 152
Stileman *v.* Aſhdown. 477, 608
Stockdale *v.* The South-Sea Company. 141
Stone *v.* Evans. 86
Stone *and* Sutton. 101
Stonehewer *v.* Thompſon. 440
Story *v.* Lord Windſor. 630
Strachy *v.* Francis. 217
Sturt *v.* Melliſh. 610
Suaſſo *and* Green. 229
Sucomb *and* Fitzgerald. 85
Sumner *v.* Partridge. 47
Sumner *v.* Thorpe. 1
Sutton Sir Robert *and* Charitable Corporation. 400
Sutton *v.* Stone. 101
Symes *and* Richards. 319

T.

Tahourden *and* Chauncey. *Page* 392
Tancred *and* Gould. 533
Taylor *v.* Allen. 213
Taylor *and* Brace. 253
Taylor *v.* Jones. 600
Templeman *and* Fleetwood. 79
Tendril *v.* Smith. 85
Tenham (Lord) *v.* Herbert. 483
Thompſon *and* Stonehewer. 440
Thornhill *v.* Evans. 330
Thorpe *and* Sumner. 1
Timewell *v.* Perkins. 102
Titley *and* Shepherd. 348
Totneſs Borough of *and* Champernoon. 112
Tuffnell *v.* Page. 37
Turner *and* Atkinſon. 41
Trebec Doctor *v.* Keith. 498
Trelawney *v.* Booth. 307
Trodd *v.* Downs. 304
Tyrrell *v.* Hope. 558

U.

Ulrich *v.* Litchfield. 372
Underwood *v.* Morris. 184

V.

Vade *and* Bennet. 324
Vaillant *v.* Dodemead. 524, 546, 592
Vaughan *and* Simpſon. 31
Vawdrey *and* Vernon. 119
Vernon *v.* Blackerby. 144
Vernon *v.* Vawdrey. 119
Villiers *v.* Villiers. 71
Vincent *and* Eaſt-India Company. 83

W.

Waite *v.* Whorwood. 159
Walker *v.* Jackſon. 624
Wallis *v.* Hodgeſon. 56, 115
Walker *v.* Walker. 98
Walmeſley *v.* Booth. 25, 27
Waltham *v.* Broughton. 43
Walton *v.* Hobbs. 19
Walton *and* Darwent. 510
Ward *and* Bainton. 172

A Table of the Names of the Caſes.

Ward *and* Garth. *Page* 174
Ward *and* Man. 228
Warner *v.* Watkins. 4
Warren *and* Dean and Chapter of Ely. 189
Warren *and* Stawell. 125
Watkins *and* Warner. 4
Watkyns *v.* Watkyns. 96
Watſon *and* Sandys. 80
Weedon *v.* Fell. 123
Webb *v.* Claverden. 424
Wellington *v.* Mackintoſh. 569
Weſton *and* Lyddall. 19
Weyland *v.* Weyland. 632
Wharton *v.* Wharton. 294
Whitchurch *v.* Hide. 391
Whorwood *and* Waite. 159
Whitfield *ex parte.* 315
Willats *v.* Cay. 67
Wilcox *and* Gyles. 141
Willis *v.* Jernegan. 251
Willis *v.* Willis. 71
Wills *v.* Rich. 285
Williams *and* Lloyd. 56, 115
Wilkins *v.* Hunt. 151
Wilſon *and* Baxter. 152
Windſor Lord *and* Story. *Page* 630
Winſmore *and* Godwin. 525
Wirley *and* Hills. 605
Wood *v.* Bryant. 521
Wood *v.* Freeman. 542
Woodcraft *v.* Kinaſton. 317
Woodhouſe *v.* Shepley. 535
Woodroffe *and* Braſbridge. 68
Worthington *and* Cook. 235, 236
Wrotteſley *v.* Wrotteſley. 584
Wyatt *and* Smith. 364

Y.

Yates *v.* Hambly. 237, 360
York Archbiſhop of *v.* Sir Miles Stapleton. 136
York Buildings Company *and* Huggins. 44
York Buildings Company (Caſe of) 56
York Buildings Company *and* Higgins. 107
York the Mayor and Corporation of *v.* Sir Lionel Pilkington. 302
Young *and* Kampſhire. 155
Young *v.* Peachy. 254

ERRATA

ERRATA in the Body of the Work.

Page 7. line 27. inſtead of *Watſon* read *Watkins.*
13. line 15. inſtead of *the ſon* read *the ſons.*
43. line 26. read *where a freeman of London makes, &c.*
49. line 7. *dele* the word *ſecond.*
81. line 34. for *it* read *they.*
397. line 20. for *pleading* read *plea.*
456. line 15. for *Hencage* read *Heneage.*
499. line 12. for *fort* read *forth.*

ERRATA in the Marginal Notes.

Page 67. *M. N.* 2. after the word *and* read *the term attendant only upon the inheritance.*
77. *M. N.* 1. for *deemed* read *decreed.*
160. *M. N.* 1. line 14. for *leaſe* read *releaſe.*
189. *M. N.* 2. line 5. for *manors* read *mines.*
330. *M. N.* 3. line 17. *dele* the word *into.*
436. *M. N.* 3. line 14. for *much* read *muſt.*
436. laſt *M. N.* line 6. for *his* read *their.*
490. laſt *M. N.* the words *does not* are omitted after the word *contract.*
507. laſt *M. N.* after *Elizabeth Hancock* inſert 60*l.*
587. *M. N. dele* the words *which ſhall firſt happen* at the end of the 8th line.
592. *M. N.* 2. in the 5th line after *witneſs* read *it.*
627. *M. N.* 2. in the 16th line inſtead of *their* read *the.*

A LIST of the Maſters of the Rolls during the time LORD HARDWICKE was Chancellor; and alſo of Attornies and Solicitors General, and King's Council, who were converſant in the Court of Chancery during that period.

Maſters of the Rolls.

SIR JOSEPH JEYKILL appointed Maſter of the Rolls *July* 13, 1717, and continued in this office till the latter end of the year 1738.
The Honourable JOHN VERNEY ſucceeded him *October* 9, 1738.
WILLIAM FORTESCUE, Eſq; appointed *November* 5, 1741.
Sir *John Strange*, *January* 11, 1749—50.
Sir *Thomas Clarke*, *May* 29, 1754.

Solicitors General.

Sir *Dudley Ryder* appointed *November* 30, 1733.
Sir *John Strange*, *January* 28, 1736.
The Honourable *William Murray*, *November* 27, 1742.
Sir *Richard Lloyd*, *April* 10, 1754.
The Honourable *Charles York*, *November* 3, 1756.

Attorneys General.

Sir *Dudley Ryder* appointed *January* 28, 1736.
The Honourable *William Murray*, *April* 9, 1754.
Sir *Robert Henley*, *November* 3, 1756.

King's Council.

Francis Chute, Eſquire, appointed *February* 14, 1735.
John Browne, Eſquire, *February* 14, 1735.
William Noel, Eſquire, *February* 6, 1737—8.
Thomas Sewell, Eſquire, *April* 4, 1754.

CASES

Argued and Determined in the TIME of

Lord Chancellor HARDWICKE.

Between the Seals after *Hilary* Term 1736. *Anon.* Caſe 1.

LORD HARDWICKE ſaid, that a bill tho' depending in Chancery almoſt ſix years was not allowed to be ſuch a demand, as to take a debt out of the ſtatute of limitations; and Sir *Joſeph Jekyll*, in a caſe before him at the Rolls, declared himſelf to be of the ſame opinion.

A bill depending ſix years in Chancery, not ſufficient to take a debt out of the ſtatute of limitations.

Sumner v. *Thorpe.* Caſe 2.

WHERE a bill is brought for a general account, and the defendant ſets forth a ſtated one, the plaintiff muſt amend, but pays only the coſts of the day.

Where there is a plea of a ſtated account to a bill brought for a general one, the plaintiff muſt amend.

There is no rule more ſtrictly adhered to in this court, than, that when the defendant ſets forth a ſtated account, he ſhall not be obliged to go on upon a general one, becauſe very often a ſtated account would unravel a perplexed affair, which might otherwiſe remain in the dark, if left to a general one.

Caſe 3. *Ex parte Rook.*

The power of this court over juſtices of peace is confined merely to the putting them in commiſſion, and cannot puniſh them for male-behaviour, which is the province of the King's Bench only.

LORD *Hardwicke* ſaid, the power of the court of Chancery as to juſtices of the peace extends only to the putting them in commiſſion, but after they are once in the commiſſion of the peace, this court has no right to puniſh them for any male-behaviour; the only redreſs is to move the court of King's Bench, for an information, and afterwards the complainants may apply to this court, to turn them out of the commiſſion, and his lordſhip therefore diſmiſſed the petition.

Caſe 4. *Anonymous, Eaſter* Term 1737.

An order for a cauſe to ſtand over indefinitely implies not 'tis put off to the next term.

LORD *Hardwicke* ſaid, where there has been an order that a cauſe ſhould ſtand over indefinitely; it does not imply that the cauſe is put off only to the next term.

Caſe 5. *Davy* v. *Barker.*

A mortgagee 'till he is fully ſatisfied is not obliged to quit the poſſeſſion to a purchaſer.

THIS court will not allow a purchaſer to oblige a mortgagee in poſſeſſion to quit the eſtate to the purchaſer, unleſs he will firſt pay him principal intereſt and coſts.

Caſe 6. *Cook* v. *Martyn.*

ON the 16th of *September* 1725. *John Martyn* made his will, in which he ſays, "I give all my *South Sea* bonds, *&c.* in truſt "that my executrix ſhall pay unto my ſon *John Martyn*, the ſum of "fifty pounds *per ann.*" and then gives a legacy of 100*l.* to a niece, and ſeveral other pecuniary legacies, all which I direct to be paid within ſix months after my wife ſhall have made a final end of an affair depending with relation to a particular eſtate; and gives all the reſidue of his eſtate to his wife, and makes her ſole executrix.

The queſtion upon this will is, whether theſe are ſpecifick or general legacies? Mr. Attorney general counſel for the executrix argued, that if there is a ſufficient fund, the legatees are entitled to payment, and if not ſufficient, ſo far as it goes; for if a particular fund falls ſhort, a ſpecifick legatee muſt abate in proportion with other legatees, and not be reimburſed out of the general aſſets.

The executrix, in her anſwer to a bill brought by one of the ſpecifick legatees, allows the fund was ſufficient to ſatisfy the ſpecifick legacies, but could not ſet forth what was the exact amount of the *South Sea* bonds, *&c.*

It appeared in proof that the legacies came to 2495*l.* over and above the fifty pounds *per ann.* and the *South Sea* bonds, *&c.* amounted to 2220*l.* principal.

LORD CHANCELLOR,

As the fund proves inſufficient to pay the legacies, is it not the ſame caſe, as if the teſtator had ſaid, I give ſuch a ſum out of an eſtate I am intitled to? but if the particular eſtate falls ſhort of his expectations, will any body ſay, they ſhall not be paid out of the general aſſets?

The payment within ſix months, is no more than a direction for the payment of the ſpecifick legacies, and does not make any alteration as to the fund.

The executrix by her anſwer confeſſes that ſhe hath *South Sea* bonds, *South Sea* annuities, *and other aſſets*, ſufficient to ſatisfy all the legacies, which is putting the ſame conſtruction as is now contended for by the plaintiffs; and though no confeſſion of law can poſſibly hurt the party unleſs the fact be right, yet it would be abſurd, as the very fund the teſtator had then in contemplation was not equal to ſatisfy the legacies and annuity, if I was not to extend them to the other part of the perſonal eſtate, eſpecially where there is a reſidue allowed by the executrix in her anſwer, after all debts and legacies are ſatisfied.

Praying general relief is ſufficient though the plaintiff ſhould not be more explicit in the prayer of the bill; and Mr. *Robins*, a very eminent counſel, uſed to ſay, *General relief* was the beſt prayer next to the Lord's prayer.

Praying general relief in a bill is ſufficient.

The admiſſion of aſſets by the executrix to one legatee is an admiſſion to all.

Admiſſion of aſſets to one admiſſion to all.

But as in this caſe, *general relief* is prayed in one part of the bill, and *particular relief* in another, it muſt ſtand over to be amended, upon paying the coſts of the day.

Where general relief is prayed in one part, and particular in another, the bill muſt ſtand over to be amended.

Warner

Caſe 7. *Warner* and others, executors of *Edward Hankin*, deceaſed — — } Plaintiffs.

Watkins and *Villers*, aſſignees of *Ezekiel Woolley* a bankrupt — — } Defendants.

THE bill was brought in order to have an account of the tranſactions between *Woolley* and *Hankin*, and to be admitted as creditors to a proportionable ſhare of the dividends under the commiſſion of bankruptcy againſt *Ezekiel Woolley*.

On the 25th of *February* 1717, *Woolley* borrowed 500*l.* of *Hankin* on bottomree, and agreed to pay 26*l. per cent.* which he ſecured on bills of ſale and bills of parcel of the cargo of a ſhip belonging to him; and the principal was to be diſcharged when the remittances from the ſhip and produce were ſold; and after the return of the ſhip, till ſuch ſale was compleated, only 5 *per cent.* intereſt was to be paid by the borrower. *Woolley* executed a bond in the penalty of 1000*l.* for performance of covenants, and the lender was to chuſe the goods on which the riſque was to be run; there was a proviſo if the whole goods were loſt, then the principal was to ſink intirely, or if only a part of them, then to abate proportionably: other cargoes were ſent exactly upon the ſame terms, and the ſame ſtipulations.

In 1722 Mr. *Woolley* became a bankrupt, his aſſignees inſiſted this was a very unreaſonable agreement, and ought not to be carried into execution; that the covenants were very unuſual ones, and the intereſt very exorbitant, eſpecially as *Hankin* was to have 5 *per cent.* on the goods after they were actually come home, and therefore they inſiſted they have done right, in refuſing to admit the executors of *Hankin* as creditors, as they have ordered a ſum to be retained to ſatisfy the demand, if they ſhould be eventually intitled to it.

Mr. *Brown*, for the plaintiffs, in order to ſhew it was a reaſonable contract argued, that it muſt not be conſidered as a caſe of *common intereſt*, becauſe this is a caſualty, where the principal is riſqued and may be loſt, and that he did not remember any inſtance, where the ſtatutes of uſury have been applied to a caſe of this nature.

The

The voyage to the *Weſt Indies*, where this ſhip was bound, is a more dangerous one than any other; and beſides there is a very great hazard of the ſugars being very conſiderably damaged by the ſea waſhing away a great part of it.

Though goods are loſt in bottomree contracts, yet if the bottom of the ſhip come home, the contractor here is liable to make them good.

In common caſes the bottomree intereſt is paid, till the whole remittances and produce are ſold, though the ſhip be returned, but here, as ſoon as the ſhip arrives in the harbour, the bottomree intereſt was to ceaſe, and only common intereſt to commence, and we have it in proof that *Woolley* paid 30 *per cent.* on bottomree to others.

Mr. *Owen*, of the ſame ſide, ſaid, the riſque here was double, for it was run upon the goods that were ſent out, and likewiſe upon the goods that were to be remitted.

That common bottomree agreements run for a certain time, as ſuppoſe for *eight months*, though the ſhip return in *ſix months*, and though the principal be paid to the lender, yet the 26 *per cent.* ſtill goes on, till the *eight months* is expired.

LORD CHANCELLOR,

I do not at all wonder that *Woolley* is broke, and then turning to Mr. Attorney General ſaid, do you inſiſt for the aſſignees under the commiſſion of bankruptcy that this is an uſurious contract? for if you can make it doubtful, whether it is uſury or not? I will direct an iſſue to try it at law.

Mr. Attorney General, for the defendants, inſiſted, every contingent contract is not unuſurious, but its circumſtances muſt clear it from uſury.

One hundred and ſeventy-nine pounds *Hankin* actually received, and 500l. 19s. 4d. was all the produce from 900l. worth of goods carried out.

The contract ſeems to be quite of a new nature, for the counſel of the other ſide do not pretend to ſhew any inſtance of ſuch an agreement.

They endeavoured to compare it to the caſe of a bottomree bond; if it was really ſo, I would not diſpute the point with them, becauſe

in that caſe, the cuſtom of merchants has made it a reaſonable and proper contract.

There is no hazard at all run here by any loſs which might inſue from the inſolvency of a factor, for if that had been the caſe, the 26 *per cent.* does not ceaſe, but *Hankin* is ſtill intitled to have it continued till the principal is ſatisfied.

The goods returned, whether of ſufficient worth or not, were to ſatisfy fully the money lent at 26 *per cent.* and the fact was, they fell ſhort in value; and if *Woolley* had not been a bankrupt, he muſt have paid the 26 *per cent.* to this day.

Therefore the terms of this contract are upon the face of it unreaſonable.

There is a time too when there is no hazard run, and yet the lender ſhall have his 26 *per cent.* notwithſtanding: beſides too, the time is uncertain when the contract ſhall end.

By the common form of bottomree bonds, your lordſhip will ſee what merchants think a reaſonable contingent ſecurity.

If the ſhip return in a ſtipulated number of months, as in the caſe of an *Eaſt India* voyage, in 36 months, and in the caſe of a *Weſt India* voyage, in 16 months, the contract may poſſibly run at 26 *per cent.* for the 36 months, but then it cannot poſſibly be extended any further, but ought to be confined to ſo many of the 36 months as are run out before the ſhip arrives.

Here the riſque is run during the whole time the ſhip is in port, as well as out of port: and, in the preſent caſe, the lender runs no riſque if the goods are loſt; for there is a proviſo in the preſent agreement, that unleſs Mr. *Hankin* receives notice on what ſhip theſe goods are put on board, ſo as he may inſure them, that if they are loſt, the borrower ſhall not benefit by it.

In this caſe here was no riſque run upon the loſs of the ſhip; but in the common caſe, though the goods are ſaved, and the ſhip loſt, the lender muſt ſuffer.

LORD CHANCELLOR,

Mr. Attorney General, will you agree to allow the executors of Mr. *Hankin*, upon the contract, intereſt at 26 *per cent.* during all the time, except when the goods were upon land?

Mr.

Mr. Attorney General, on behalf of his clients, deſired time to conſult them as to this propoſal: Lord *Hardwicke* ſaid, I tell you before hand, I will not carry this contract one jot further than I am compelled to do by the ſtrict rules of this court; and, in the mean time adjourned it to the firſt day of cauſes in the next term.

In *Trinity* term 1737, the cauſe came on again, when Lord *Hardwicke* was pleaſed to order, that it be referred to Maſter *Edwards* to take an account of what is due from *Ezekiel Woolley*, the bankrupt, to the plaintiffs, the executors of *Edward Hankin*, on the ſeveral contracts; and in taking the account, the maſter was directed to allow the plaintiffs 26 *per cent.* for the ſums lent in reſpect of the riſque of the goods mentioned in the contracts, during the voyages outward and homeward; and as to the homeward bound voyages, the 26 *per cent.* is to be computed only in proportion to the value of the goods remitted in ſuch voyages; and at the rate of 5 *per cent.* only for the reſt of the time mentioned in the contracts, during which any allowance of intereſt was thereby agreed to be made down to the time of the bankruptcy of *Ezekiel Woolley:* and the maſter is alſo to take an account of what the plaintiffs or *Edward Hankin* received in money or goods towards the ſaid principal and intereſt, which is to be applied firſt to ſink the intereſt and then the principal; and for ſo much as ſhall be found due to the plaintiffs on this account they are to be admitted as creditors under the commiſſion of bankruptcy againſt *Woolley*, and to receive a ſatisfaction for the ſame, in proportion to the reſt of his creditors.

N. B. Lord *Hardwicke* ſaid, in the caſe of *Warner* and *Watſon*, an aſſignee under a commiſſion of bankruptcy cannot make any compoſition of a debt due to the eſtate of the bankrupt, though recommended by the court, without a previous meeting of the creditors for their concurrence, in conſequence of an advertiſement in the *Gazette* for that purpoſe.

An aſſignee of a bankrupt cannot compound a debt, without a previous meeting of the creditors.

George

Caſe 8. *George Malden* and *Mary* his wife, *Thomas Cowper* and *Sarah* his wife, and *Walter Warburton*, and *Ann* his wife, } Plaintiffs.

Littleton Pointz Menil, *Richard Harper*, executor of *Samuel Allen*'s will, *Ann Burdet* the repreſentative of a ſurviving truſtee, *John Minors* and *Henry Scott*, executors of *Samuel Allen*, } Defendants.

THE caſe aroſe upon the following ſettlement made upon the marriage of *John Allen*, and *Eſther Stevenſon* his wife.

Where a purchaſer has given a full value for an eſtate, the miſtake or ignorance of ſome of the parties to a conveyance, of their claim under a marriage ſettlement, ſhall not turn to the prejudice of a fair purchaſer.

" The firſt limitation was to *John Allen*, for life, remainder to " *Eſther* his wife, for life; then to the uſe of —— *Burdet* for a " term of years; then to the uſe of the firſt and every other ſon " of the marriage in tail male, and in caſe there ſhall be no iſſue " male of the ſaid *John Allen*, on the body of the ſaid *Eſther Stevenſon* begotten, at the time of the deceaſe of the ſaid *John Allen*, " or of the ſaid *Eſther Stevenſon*, which ſhall firſt happen, or in " *ventre ſa mere*, and in due form born after the death of the ſaid " *John Allen*; or in caſe the iſſue male between them lawfully begotten ſhall all of them die without iſſue male, and that there ſhall " be a failure of iſſue male of the body of the ſaid *John Allen*, on " the body of the ſaid *Eſther Stevenſon* begotten, and that there " ſhall be at the time of ſuch failure iſſue female, one or more " daughter or daughters between them the ſaid *John Allen* and " *Eſther Stevenſon* begotten, *living* at the time of the ſaid *John* " *Allen*'s deceaſe, or of the ſaid *Eſther*, which of them ſhall firſt " happen, or born alive in due form after the death of the ſaid " *John Allen*, that then the truſtees, or the ſurvivor of them, or " the executors, *&c.* of ſuch ſurvivor, ſhall, by and out of the " rents and profits ſo to them as aforeſaid limited for the ſeveral " terms of 600 and 590 years, raiſe and levy, receive and pay, as " to and for the portion of ſuch daughter and daughters, the ſeveral ſums hereafter mentioned; if one daughter the ſum of " 3000*l.* if two or more 4000*l.* equally to be divided amongſt " them, to be paid at their ſeveral reſpective ages of twenty-one, " if the ſame can be ſo ſoon raiſed and paid; but if not, then the " ſame to be paid ſo ſoon as it can be raiſed; and in the mean time, " for their ſupport and maintenance, intereſt at the rate of 5 *per cent.* " *per ann.* by half yearly payments."

There was a power of revocation, except as to the lands in jointure, and which were ſettled to the uſes of that marriage, which revocation

revocation was afterwards executed as to the uſes upon all the lands except the jointure.

John Allen died, and left a widow and four children, a ſon, named *Samuel Allen*, and three daughters.

Upon an agreement between the mother and the ſon, ſhe joins with him in a recovery, in order to make a title to Mr. *Menill*, a purchaſer of the eſtate of his late father *John Allen*.

After the contract, *Menill* flies off, and refuſes to perform the articles; but *Samuel Allen* obtained a decree againſt *Menill* for a performance of the articles the 19th of *February* 1732. *Menill* did not even then think fit to perform the contract, till *May* 1733, when *Eſther Allen* died, which made it an eſtate in poſſeſſion inſtead of reverſion.

It was afterwards agreed between *Samuel Allen* and *Menill*, that he ſhould have the eſtate; and it being pretended that the mother's, *Eſther Allen*'s, bargain and ſale, in order to make a tenant to the *præcipe*, was never inrolled, and therefore void, *Samuel Allen* ſuffered a new recovery, and then conveyed the eſtate to *Menill*. 982l. was the conſideration of the mother's executing the agreement; but *Menill* inſiſts, that the bargain and ſale not being inrolled, ſhe has not performed her part, and therefore void.

He alſo inſiſted, that the plaintiffs having agreed to give up their right to the ſum of 4000l. in the articles between the mother and the ſon, in order to enable *Samuel Allen* to bar the remainders over, 509l. was paid to her for her own ſhare as conſideration money, and 200l. likewiſe paid to her for rent, unjuſtly received by the ſon.

John Stevenſon, (the father in law of *John Allen*, to whom *John Allen* had conveyed the eſtate, which by the power of revocation he might diſpoſe of) made his will, and deviſed the ſaid eſtate to truſtees, in truſt to raiſe for his three grandaughters the full ſum of 400l. to be paid to each at their full age of twenty-one years, and if any of them die, their ſhare to go to the ſurviving ſiſter.

The articles between *Samuel Allen*, and *Eſther Allen* the mother, and the three ſiſters, were made to ſecure to *Eſther* the ſum of 200l. to *Mary Allen* 100l. and to ſecure likewiſe to *Eſther* 590l. to be divided equally between the daughters; a clauſe at the end of the articles, by way of general releaſe of all the parties. Upon *Samuell Allen*'s performing his covenants, *Eſther* was to deliver up all deeds whatſoever, her jointure excepted.

The articles entred into with Mr. *Menill* were an abſolute conveyance of a reverſion in fee, free from all incumbrances, except the jointure of *Eſther* the mother of *Samuel Allen*, in conſideration of 7489 l. 15 s. 0 d. the purchaſe money: there was a covenant of warranty from *Samuel Allen*, againſt all incumbrances done by him or his anceſtors; in the ſchedule of incumbrances, the very firſt mentioned are the two terms, one of 600 and the other of 490 created by *John Allen* in the ſettlement; the ſecond of which was for raiſing 4000 l. for his daughters.

The decree of the court of Chancery was, that *Menill* ſhould perform the articles, and that the conveyance already executed ſhould be delivered to *Menill*, and not that a new conveyance ſhould be prepared.

Mrs. *Eſther Allen* died in 1733, then *Menill*, who hung off before, was very eager to perform his part.

Samuel died in *June* 1734.

The bill is brought in order to have the ſum of 4000 l. raiſed by there preſentative of the ſurviving truſtee, and paid to the daughters, and alſo for the ſum of 992 *l.* they are intitled to under the articles between *Samuel* and *Eſther Allen*.

Mr. *Wilbraham*, council for the plaintiffs.

I hope your lordſhip will be clear that the daughters of *John Allen* are intitled to the 4000 *l.* unleſs they have done ſome ſubſequent act to bar them.

It has been inſiſted, that, unleſs the daughters have releaſed the 4000 l. there was no conſideration for the 992 l. paid to *Eſther* under the articles.

He cited the caſe of *Moor* v. *Mayhew*, 1 *Ch. caſ.* 34. where paying part of the purchaſe money after he had expreſly, upon his own ſhewing, notice of a deed of leaſe and releaſe, it was held, that he ſhall be preſumed to have had notice *ab initio*.

Where there were other dealings between *Samuel* and *Eſther*, and other controverſies, *the releaſe* ſhall not be extended to any other tranſaction beſides the articles themſelves in favour of a purchaſer with notice; and for this purpoſe he cited *Bovy* contra *Smith* and *Bony*, 2 *Ch. caſ.* 124. " There the plaintiff had given a diſtinct " releaſe, before the purchaſe made, of all actions real and perſonal, " and yet there was no occaſion proved, why that releaſe ſhould " be made, nor any alledged, and there were other dealings be-

" tween them, and therefore were preſumed not to relate to this " matter, and ſo the decree paſſed for the plaintiff."

Mr. *Brown*, council for Mr. *Menill*, ſaid, the croſs bill is brought to have an aſſignment of the two terms from the ſiſters of *Samuel Allen* delivered over to Mr. *Menill* to ſecure his purchaſe.

The eſtate on which there was a limitation to the daughters was ſold for ſo ſmall a ſum as 1500l.

The objection ſtarted by the plaintiff was never made till ſome of the purchaſe money was paid, nor even till the aſſignment of theſe very terms was drawn and ingroſſed, and upon the very brink of being executed by them.

The releaſe is drawn in as full, ample, and general words or terms as can be deviſed, to prevent any diſpute.

The firſt contingency is, in caſe there ſhall be no iſſue *living* at the time of the deceaſe of *John* and *Eſther*, or either of them; and the laſt clauſe that ſpeaks of the payment of the 4000l. mentions, that the intereſt of five *per cent.* ſhall be paid the firſt half year after the deceaſe of *John* or *Eſther*.

Mr. *Attorney General*, in reply for the plaintiff, compared this caſe to the common one in ſettlements of a limitation to *A.* for life, remainder to the iſſue male of his body, remainder over on failure of iſſue male, if there ſhould be iſſue male at the deceaſe of the father, yet if it ſhould fail afterwards, the remainder over would ſtill take place: and, that if upon the execution of the articles the 4000l. had been in contemplation, there ought to have been an expreſs covenant from the daughters to renounce the benefit of this proviſion, and as there is no ſuch covenant, he ſubmitted it to the court, that the plaintiffs are ſtill intitled to the 4000*l.*

LORD CHANCELLOR,

This ſettlement is very inaccurately penned; it has been inſiſted that the meaning of it is, that if there ſhould be a failure of iſſue male, in the life time of *John Allen* and *Eſther* his wife, then the 4000l. ſhould not be raiſed, and therefore, as there was iſſue male in the life time of *John* and *Eſther*, the contingency has never happened.

But this is an abſurd conſtruction, to confine it to iſſue male in the life time of *John* and *Eſter*, becauſe it is expreſsly extended to iſſue male born in due time after the death of *John*, therefore this can never be the meaning of the words.

I do

I do not think that the releaſe under the articles is material on one ſide or the other, and therefore it may be thrown out of the caſe.

There are three conſiderations:

Firſt, Whether the contingency has taken place upon which the truſt of theſe terms was to ariſe, or not? and if it is ſtill to be regarded as a beneficial intereſt, or whether they are attendant upon the inheritance?

Secondly, Whether the plaintiffs have barred themſelves of their right to the 4000l.?

Thirdly, Whether the defendant Mr. *Menill* is intitled to have an aſſignment of theſe terms?

As to the *firſt* queſtion; upon taking all the circumſtances of this caſe together, I am of opinion the contingency has not happened.

" That in caſe there ſhould be no iſſue male of the ſaid *John* " *Allen* on the body of the ſaid *Eſther Stephenſon* begotten, at the " time of the deceaſe of the ſaid *John Allen*, or of the ſaid *Eſther* " *Stevenſon*, which ſhall firſt happen, or in *ventre ſa mere*, *&c.*" *Vide the ſettlement.*

" Or in caſe the iſſue male between them, ſhall all of them die " without iſſue male, and that there ſhall be a failure of iſſue male " of the body, *&c.* and that there be, at the time of ſuch failure, " *iſſue female*, one, or more daughters between them the ſaid *John* " and *Eſter* begotten, *living* at the time of the ſaid *John Allen*'s " deceaſe, or of the ſaid *Eſther*, *&c.* then the truſtees, *&c.* ſhall " raiſe and pay, if one daughter 3000l. if two or more 4000l. " equally to be divided, *&c.*"

The ambiguity of this clauſe ariſes from the word *living*.

The counſel for the plaintiffs have conſtrued *living* to refer to daughters living at the time of the failure of the iſſue male, and that the meaning of the words *living at the time*, *&c.* are to be taken as a further deſcription, in regard to the failure of iſſue male.

The counſel for the defendants have conſtrued the word *living* to refer to the iſſue male, *living* at the time of the ſaid *John Allen*'s deceaſe, or of the ſaid *Eſther*, which ſhall firſt happen.

The

The clauſe relating to the payment explains it ſtill further, and ſhews the parents could not mean to extend the payment of theſe portions to a ſon's dying without iſſue male at any time whatſoever, for the brother might have lived to fourſcore years, which is too remote for them to have in their contemplation, and therefore they have fixed the payment at twenty-one.

The intereſt alſo was to commence upon the dying of *John Allen, &c.*

This refers to either dying without iſſue male, and in this caſe both died leaving iſſue male.

The meaning then is plain, that this was intended as a proviſion for daughters, if there ſhould be only daughters at the time of the death of *John Allen*, or of the ſaid *Eſther*.

The common and ordinary proviſion in marriage ſettlements is, that if the ſon die before twenty-one, then the truſtees, *&c.* ſhall by ſale, *&c.* levy and raiſe, *&c.* and not that it ſhould be ſtretched to a dying at any time.

The ſecond queſtion is whether the plaintiffs have barred themſelves of their right.

To my apprehenſion, it was intended by the mother, daughter and ſon, that all the eſtate in the family ſhould be parted with upon the conſideration expreſſed in the articles.

It appears plainly too, that the ſon was to convey this eſtate to Mr. *Menil*, clear of every thing but the eſtate for life, which the mother had by virtue of her jointure, without any reſervation beſides for any other part of the family.

Great part of the eſtate of *John Allen* was ſettled on the mother, with remainder to the ſon in tail, remainder to him in fee, and therefore the ſon, by fine, could have barred the remainder on all the eſtates, except the eſtate left by the grandfather.

The proviſo was not intended to ſave any right the daughters might have upon any of the lands, and after having a ſum of money in conſideration of theſe articles, it would be too much for them to contend that they have a right to ſet up this demand.

It ſeems to me, that Mr. *Menill* has given very amply for this eſtate, and ſhall a miſtake of the parties, who knew nothing of the 4000l. at the time, turn to the prejudice of a fair purchaſer.

It is rightly obſerved, that the bill is inconſiſtent; for would they have the conſideration of theſe articles and the 4000 *l.* too, when their releaſing all demands was the only pretence for the ſum of 982 *l.* the conſideration money in the articles?

It is ſaid, that the whole articles muſt be performed; but *Samuel Allen* has not performed his part, for he has not conveyed the *Shewell* eſtate, and therefore the articles are void: But ſtill the defendant Mr. *Menill* is intitled to his equity, for the heirs of *Samuel* ought to perform it.

And if the plaintiffs inſiſt upon the 982 *l.* they muſt convey to Mr. *Menill*, or elſe they are not intitled to it; which they agreeing to accept, Lord *Hardwicke* diſmiſſed the bill as to the truſt of the term ſet up by the plaintiffs, and they were decreed to convey by an aſſignment of the terms to Mr. *Menill* upon payment of 590 *l.* part of the 982 *l.* which ſum was directed to be paid in thirds to the plaintiffs from the time of the conveyances executed, the reſidue of the 982 *l.* was directed to be paid to the executors of the mother the plantiffs *Malden* and his wife.

Caſe 9.

Anonymous, *Michaelmas* Term 1737.

Though no demand or rent paid in 30 years, yet the defendant muſt pay coſts at law to the perſon recovering there, but none in equity.

THERE had been no demand, or any rent paid in thirty years; the perſon who was intitled recovered it upon a verdict. Lord *Hardwicke* ſaid the defendant muſt pay the coſts at law, but as the laches aroſe on the part of the plaintiff, and the obſcurity of the title to the rent, from the want of a demand for ſuch a great length of time, he ſhall not be allowed coſts againſt the defendant in equity.

Caſe 10.

Melliſh and *De Coſta*.

LORD *Hardwicke* in this caſe laid down the following rules.

Vying and revying in affidavits not allowable.

That vying and revying in affidavits, is intirely diſcountenanced in the court of King's Bench, *a fortiori* in a court of equity.

A guardianſhip may be applied for though no ſuit depending.

That there may be an application to the court in the caſe of *a guardianſhip of children*, though there be no cauſe depending.

A teſtamentary guardianſhip not aſſignable.

That it is clear in point of law, a *teſtamentary guardianſhip* is not aſſignable.

That

That the children have a natural Right *to the care of their mother:* and his Lordſhip made an order *on Mr. De Coſta the grandfather,* who was a defendant in the cauſe, to deliver the children up to the mother, the wife of the plaintiff.

Children have a natural right to the care of their mother.

Anonymous. Caſe 11.

A Bill in Chancery, ſaid *Lord Hardwicke*, is never diſmiſſed for want of parties, but ſtands over, upon paying the Coſts of the day.

A bill for want of parties is not diſmiſſed, but ſtands over.

A decree of Sir *Joſeph Jekyl*'s, in a cauſe at the Rolls to diſmiſs a bill for want of parties, was reverſed afterwards for that reaſon, and a decree of the ſame nature in the court of Exchequer, was reverſed likewiſe in the houſe of Lords.

A decree to diſmiſs a bill on this account reverſed in the houſe of Lords.

Anonymous. Caſe 12.

LORD *Hardwicke* laid it down as a rule, that where a perſon has an intereſt, it is not ſufficient for him that he has been ſatisfied, he muſt produce a releaſe, or his evidence cannot be read.

A witneſs if intereſted muſt produce the releaſe before he can be an evidence.

Oldin v. *Samborne.* Caſe 13.

LORD *Hardwicke* ſaid in this cauſe it was improper for a guardian to purchaſe his ward's eſtate immediately upon his coming of age, but though it has a ſuſpicious look, yet if he paid the full conſideration, it is not voluntary, nor can it be ſet aſide.

What acts of a guardian with reſpect to an infant's eſtate ſhall be good.

If he gave a full conſideration for his ward's eſtate, it will not be ſet aſide.

An equity of redemption may be conveyed by bargain and ſale. *Id.*

After *Hilary* Term 1737. Caſe 14.

LORD *Hardwicke* ſaid, tho' a receiver is appointed by this court, yet that will not alter the poſſeſſion of the eſtate in the perſon who ſhall be found intitled at the time the receiver was appointed, ſo as to prevent the ſtatute of limitations running on during the right in diſpute.

The ſtatute of limitations will run notwithſtanding the appointment of a receiver.

Read

Caſe 15. *Read* v. *Read*, *November* the 26th 1739.

Where two ſeparate bonds were given the ſame day, an inquiry directed into the conſideration on a ſuſpicion of fraud.

LORD *Hardwicke* thought it a very ſtrong ſuſpicion of fraud in this caſe, that two ſeparate bonds ſhould be given upon the ſame day for different ſums, and one of them juſt double the penalty of the other, where one bond for the whole ſum was the moſt proper and natural method: his Lordſhip for this reaſon directed an inquiry before a Maſter into the conſideration of the bonds.

Caſe 16. *Graydon* verſus *Hicks* and *Graydon* verſus *Graydon*, *January* 14, 1739.

THIS caſe aroſe upon the words of two wills, the one made by the father, and the other made by the mother of *Mary Graydon*, the plaintiff in the croſs bill.

THE FATHER'S WILL. "I give *the ſum of one thouſand pounds* "*to my only daughter Mary Graydon*, to be paid her at her age of "twenty-one years, or on the day of marriage, which ſhall firſt "happen, provided ſhe marry by and with the conſent of my exe- "cutors, but in caſe ſhe dies before the money become payable, on "the conditions aforeſaid, then I give the ſaid thouſand pounds "equally between my two youngeſt ſons, *Benjamin* and *Gregory* "*Graydon*. Mrs. *Mary Gregory*, grandmother of *Mary Graydon*, "*Mary Graydon* the mother, and Mr. *Jeremy Gregory* the uncle, "to be my joint and ſole executors."

THE MOTHER'S WILL. "*Item*, I give to my daughter *Mary* "*Graydon*, all my wearing apparel of all ſorts, with all my dreſſing "plate, jewels, watch chain, *&c.*

"Then my will is, that in caſe my daughter *Mary Graydon* ſhall "marry before ſhe comes to the age of twenty-one years, without "the conſent and approbation of my executor, under his hand "firſt had and obtained, (if he be living) *that then ſhe ſhall not be* "*intitled to any part of ſuch legacies, as I have herein left her*, but "that whole ſhare ſhall be equally divided amongſt my ſons *Ben-* "*jamin* and *Gregory Graydon*; the reſidue, after her debts and "legacies paid, ſhe gives to her three children *Benjamin*, *Mary* and "*Gregory*, equally to be divided between them, or the ſurvivors of "them, ſhare and ſhare alike, and appoints her ſon *John Graydon* "to be her ſole executor."

The bill was brought by the plaintiff in the original cauſe, againſt the defendant *Hicks*, as the huſband of *Mary Graydon*, to relinquiſh

relinquiſh the thouſand pounds which was left to the wife under the will of the father, ſhe having married without the conſent of the executors, and contrary to the direction of his will, and likewiſe to relinquiſh the legacies under the will of the mother.

The executors under the will of the father were all dead before the marriage of *Mary Graydon*.

And *John Graydon* appointed executor under the will of the mother, and who was to give his conſent to *Mary Graydon*'s marriage, renounced the executorſhip in the moſt formal manner in the eccleſiaſtical court.

The croſs bill was brought by *Mary Graydon*, as a feme ſole, againſt the plaintiff in the original cauſe, as one of the deviſees over, under both wills, in caſe of *Mary Graydon*'s marriage without conſent, and likewiſe againſt Mr. *Timewell*, who took out adminiſtration to the mother, on the executor's renouncing, and likewiſe adminiſtration *de bonis non* to the father.

LORD CHANCELLOR. This caſe comes before me under very extraordinary circumſtances; it is a melancholy conſideration that ſome of the parties ſhould be ſo void of honour and decency, and in the firſt place that a child ſhould pay ſo little regard to the direction of parents; but I do not ſit here to determine upon the moral character and moral behaviour, but I muſt determine upon the rights only of parties.

The firſt queſtion is, whether *Mary Graydon* the plaintiff in the croſs cauſe is married, or not.

Secondly, If ſhe is married, what effect that will have both in reſpect to the will of the father and mother.

As to the firſt queſtion, I muſt take her to be married, and ſhould do her a great injury if I did not, but here is ſuch evidence, as would induce any jury to find the marriage; if there was the leaſt doubt, I ought to direct an iſſue to try that fact, but there is no room for it in this caſe, as not the leaſt evidence on the part of the defendant *Mary Graydon* has been offered, to make it doubtful.

The previous ſtep towards a marriage was Mr. *Hicks*'s courtſhip, and an application to the adminiſtrator Mr. *Timewell*, upon that footing; he ſaid likewiſe to two perſons, when he was aſked if he was married, that he choſe to conceal it for the preſent, for fear of his father, but promiſed to reveal it in a fortnight to *Timewell*; took her immediately after this to lodgings, call'd her by his own name, had a piece of plate with both their arms engraved, a child born,

and entered by *Hicks* himſelf, in the pocket-book of the regiſter of St. *Giles*'s pariſh, as the child of *Robert* and *Mary Hicks*, and no proof of their cohabiting otherwiſe than as man and wife.

Therefore I ought to conſider it as a marriage for the honour of the lady, though the gentleman has in a moſt diſhonourable manner, upon his oath, denied the marriage: I am afraid intereſt had too large an influence in his anſwer; and as he appears to have had a very great ſway over this unfortunate lady, or he could never have prevailed over her to bring a bill as feme ſole, I will put it out of his power to touch any of the fortune, that he may not embezil it to the prejudice of the child.

In conſequence of my opinion the croſs bill muſt be diſmiſſed.

The firſt queſtion upon the original cauſe is, what are the rights of the parties under the two wills.

As to the ſurplus of the father's perſonal eſtate, I muſt take it to be undiſpoſed.

Where executors are declared to be only truſtees, or have particular legacies given to them, the reſidue ſhall be conſidered as undiſpoſed.

The rule of this court is, if there is any declaration that executors are but truſtees, or if they have particular legacies, that the reſidue ſhall be conſidered as undiſpoſed; there have been caſes indeed where the wife alone has been appointed executrix, in which the court have held that ſhe ſhall be intitled to the reſidue; but here the wife is not ſingly executrix, but two others are joined with her.

The conſequence of this will be, that the children will be intitled to two parts and the widow to one.

The next conſideration is as to the legacy of a thouſand pounds to *Mary Graydon*, under the will of the father.

Here is certainly a diſpoſition over in caſe of a forfeiture, ſo that it ſtands diſtinct from thoſe caſes where there is no deviſe over.

Where the condition is become impoſſible, by the perſon dying, whoſe conſent was neceſſary before the marriage, it is an excuſe.

It is the conſtant rule of law in conditions ſubſequent, that if the performance becomes impoſſible by the act of God, it is abſolutely void.

I am likewiſe of opinion that this is only a condition ſubſequent, to diveſt the legacy, in caſe of a marriage before twenty-one; and it is the conſtant rule of law, in the caſe of conditions ſubſequent, that if the performance becomes impoſſible by the act of God, that it is abſolutely void; for in *Co. Litt.* 206. *a.* it is laid down, that in caſe of a feoffment in fee, with a condition ſubſequent, that is impoſſible, the ſtate of the feoffee is abſolute; and therefore the daughter, according to this rule, is intitled to the thouſand pounds under the father's will.

Two queſtions ariſe under the will of the mother, firſt, with regard to the ſpecifick legacy to the daughter, and ſecondly, with regard to the ſurplus.

I am of opinion that the latter clauſe goes to the whole, and that the words *ſhe ſhall not then be intitled to any part of ſuch legacies as I have herein left her*, being ſpoken at the ſame time, is no more a relation to what goes before, than to what follows, but is equally applicable to both.

But it has been objected, that this is not ſuch a marriage as is a breach of the condition, becauſe *John Graydon* the executor has renounced, and never took out adminiſtration, and therefore it has been granted only with the will annexed to Mr. *Timewell*.

The word executor in the mother's will is deſcriptive of every perſon who ſhall be adminiſtrator, being a power not annexed to his office, but independant from the reſt of his duty.

Now I am of opinion the objection is not well grounded, for this is a deſcription of every perſon, who ſhall be adminiſtrator, and that this was a power not annexed to the office of executor, but independent from the reſt of his duty as executor.

And therefore, upon the whole of this part of the caſe, I declare that this marriage is a forfeiture of the portion, given under the will of the mother.

The portion under the mother's will is forfeited.

Walton v. *Hobbs*, *December* 10th 1739. Caſe 17.

WHERE there is a ſingle depoſition only, againſt the oath of a defendant in his anſwer, and the facts denied in the anſwer, are equally ſtrong with thoſe that are affirmed by the depoſition, there the rule, that you can have no decree upon ſuch ſingle evidence, againſt the defendant, will hold; but where, as in the preſent caſe, there are a great many concurring circumſtances that ſtrengthen and ſupport the depoſition of this witneſs, it does not come within the aforementioned rule.

The rule that you can have no decree upon the evidence of a ſingle witneſs againſt a defendant, holds only where the facts denied in the anſwer, are equally ſtrong with thoſe that are affirmed by the depoſition.

Lyddal v. *Weſton*, *January* the 18th 1739. Caſe 18.

THERE was a reſervation in a grant of an eſtate by the crown, of tin, lead, and all royal mines within the premiſſes.

The maſter ſtates it, there is a probability that there are ſuch mines, and therefore he reports the plaintiff Mr. *Lyddal* cannot make a good title.

The

The exception is, that the maſter is miſtaken, for there is no evidence of ſuch mines, or even a probability of them.

LORD CHANCELLOR,

I am of opinion the exception is well founded.

This is one of the caſes of willingneſs and unwillingneſs in a purchaſer.

The court of chancery in carrying agreements into execution, govern themſelves by a moral not a mathematical certainty.

It is the buſineſs of this court to carry ſuch agreements into execution, and muſt govern it ſelf by a moral certainty, for it is impoſſible in the nature of things, there ſhould be a mathematical certainty of a good title.

No pretence that there has been any ſearch for royal mines for 111 years, and upon examination, the probability is great that there are no ſuch mines.

There are often ſuggeſtions of old entails, and often doubts what iſſue perſons have left, whether more, or fewer, and yet theſe were never allowed to be objections of that force, as to overturn a title to an eſtate.

Where the crown has only a bare reſervation of royal mines, they cannot grant a licence to any perſon to come upon another man's eſtate and ſearch for ſuch mines. But when mines are once opened, they can reſtrain the owner of the ſoil from working them, and can either work the mines themſelves, or grant a licence for others to work them.

No inſtance where the crown has only a bare reſervation of royal mines, without any right of entry, that it can grant a licence to any perſon, to come upon another man's eſtate, and dig up his ſoil, and ſearch for ſuch mines, I am of opinion there is no ſuch power in the crown, and likewiſe, that by the royal prerogative of mines, they have even no ſuch power; for it would be very prejudicial, if the crown could enter into a ſubject's lands, or grant a licence to work the mines; but when they are once opened, they can reſtrain the owner of the ſoil from working them, and can either work them themſelves, or grant a licence for others to work them.

It would be of miſchievous conſequence, to allow it to be an objection to a title, that it is derived under a grant from the crown, in which there is a reſervation of ſuch mines, eſpecially as all grants from the crown, have for the moſt part, ſuch a general reſervation; but the fact in the preſent caſe is, there has never been an exertion of this right in a ſingle inſtance, ſince the grant, and no probability there ever will.

Davis

Davis v. *Davis*, *January* the 26th 1739. Caſe 19.

THIS cauſe came before the court upon an appeal from a former decree, and likewiſe upon exceptions to a maſter's report.

There was a bill brought for 100 l. legacy, againſt the defendant, charged by a will upon a real eſtate, the reverſion of which belonged to the defendant, the anſwer denied the whole equity of the bill, but was reported inſufficient.

The maſter has reported the ſeveral proceſſes regular in this cauſe, exceptions were taken to this part of his report, and it is inſiſted for the defendant, there is a material irregularity in the preſent caſe, becauſe the proceſs has never been duly ſerved, and no endeavour to ſerve it; for the defendant has lived for twenty years in one place, is a conſiderable farmer, has appeared publickly, and deals publickly, is ſeiſed of a real eſtate of 20 l. *per ann.* beſides renting a large farm, ſo that he might eaſily have been found.

The council for the defendant, in ſupport of this fact, offered to read affidavits ſubſequent to the maſter's report, upon a ſuggeſtion that the plaintiff's were made but the evening before the maſter's report, and conſequently they had not time to anſwer them; but Lord Chancellor would not allow them to be read, for he ſaid, this would be determining the matter *ex poſt facto*.

Upon exceptions to a maſter's report, you cannot read affidavits made ſubſequent to it, notwithſtanding the affidavits of the adverſe party, were filed but the evening before the report.

They likewiſe inſiſted for the defendant, that this decree is *ex parte*, for the defendant has yet never been heard, notwithſtanding he has put in an anſwer; for where a defendant by his anſwer denies the whole equity of a bill, though upon a reference to a maſter, it is reported inſufficient, yet it is ſo far an anſwer, that a bill cannot be taken *pro confeſſo*.

In ſupport of this doctrine, the caſe of *Hawkins* and *Crooke*, before Lord Chancellor *King*, on an appeal from the Rolls, 2 *Wms.* 556. was cited, and *what materially weighed with the court in that caſe was, the coſts being paid to the plaintiff*, * upon the defendant's anſwer, being reported inſufficient, and likewiſe the *ſubpœna's* being taken out for the defendant's putting in a better anſwer, ſo that this the court ſaid in ſome meaſure does eſtabliſh it as an anſwer.

* *N. B.* Mr. *Peer Williams* in his report of the caſe has omitted to mention this circumſtance.

LORD CHANCELLOR,

There are two queſtions ariſe in this caſe:

Firſt, Whether there has been an irregularity in ſerving the proceſſes?

Secondly, Whether there is error in the judgment of the court?

The *firſt* comes properly before the court on exceptions to the maſter's report, in certifying that the proceſſes of this cauſe were regular.

For if they had either irregularly iſſued, or had been irregularly ſerved, the exception is well founded.

But upon hearing the affidavits on the plaintiff's behalf, I am of opinion that the maſter's report is right, and that the exception ought to be over-ruled.

It is moſt manifeſt in this caſe, that the defendant has abſconded, and that he went armed; it is ſaid indeed that a pitch-fork and hedge-bill are tools of his trade, but the queſtion is, what uſe he made of them? if to prevent his being arreſted, they are as bad weapons as a ſword or a dagger, and is ſuch a reaſonable terror, as may deter a ſheriff's officer, without being a coward from attempting to arreſt.

It is true, if a proceſs of outlawry, and a *capias utlagatum* has iſſued irregularly, and there has been no attempt to ſerve them, the court will make the plaintiff pay coſts, but here is no pretence for a complaint of this ſort in the preſent caſe.

The *ſecond* queſtion, is upon the decree that has been made upon the hearing of this cauſe.

And this is a very conſiderable queſtion, with regard to the authority of this court, and the execution of juſtice in it.

I ſhall not give any concluſive opinion in this point, till I have conſulted the Maſter of the *Rolls*; for unleſs ſome method can be found to remedy this inconvenience, any defendant may elude the juſtice of this court.

The practical regiſter in chancery a uſeful book.

The practical regiſter is not a book of authority, but it is better collected than moſt of the kind. *Vide* title *Sequeſtration*, *page* 328 & 330.

A plaintiff is not to be told, becauſe he has a ſequeſtration executed againſt a defendant, for not putting in his anſwer, and goods or real eſtate are ſeized upon the ſequeſtration, that he muſt ſtop there, for he may ſtill proceed in this court, till he has got the bill to be taken *pro confeſſo*.

After goods or a real eſtate are ſeized upon a ſequeſtration for want of an anſwer, the plaintiff may ſtill proceed till he has got the bill taken *pro confeſſo*.

The principal queſtion is, whether the court can take a bill *pro confeſſo*, where an anſwer has been put in which is reported inſufficient.

Now conſider the proceedings of this court, compared with others, they have been formed according to the courſe of the civil law in ſome reſpects, and analagous to the common law in others.

The proceedings in this court are form'd according to the courſe of the civil law in ſome reſpects, and the common law in others.

The eccleſiaſtical courts proceed no further than excommunication, for contempt, the cauſe is at a ſtand till that cenſure is removed.

At common law there are two defaults, one for want of appearance, and the other for want of pleading, and for this the defendant may be outlawed; but then there can be no judgment in chief, but after the eſtates and goods are ſeized upon, a *capias utlegatum*, you muſt go into a court of revenue, and in a ſuit in the name of the *Attorney General*, at the relation of the plaintiff, you may have a decree for theſe goods, or a leaſe of the defendant's lands from that court.

There can be no judgment in chief at common law upon a default, but after a ſeizure on a *capias utlagatum*; the remedy lies in a court of revenue.

The act of the 5th of *George* the ſecond, *ch.* 25. impowers the plaintiff to go on as well upon a ſequeſtration for not appearing, as upon a ſequeſtration for not complying with a decree, which could not be done in equity till then; for according to the 1ſt *ſect.* of that act " where perſons *do not enter an appearance* within the uſual " time, after a ſubpœna iſſues, and is juſtly ſuſpected to abſcond to " avoid the proceſs, then the court out of which ſuch proceſs iſſues, " is to fix a day *for his appearance*, to be inſerted in the *London* " *Gazette*, and publiſhed on the lord's day in the pariſh church " of the defendant; and a copy of the order of the court is to be " poſted up at ſome publick place at the *Royal Exchange* in *London*; " and on the defendant's *not appearing* within the time limited by " the court, the court may order the plaintiff's bill to be taken " *pro confeſſo*, his effects or eſtate to be ſequeſtered, and the plain- " tiff's demand to be ſatisfied out of the eſtate or effects ſo ſe- " queſtered.

In courts of common law, where there is no plea put in at all, the judgment is by *nil dicit*, but if a plea be put in, though ever ſo imperfect, there cannot be a judgment *nil dicit*, the plaintiff muſt demur;

In courts of law where there is no plea, judgment is by *nil dicit*, if an imperfect plea, the plaintiff muſt demur, and if allowed, then he has judgment, becauſe the plea is inſufficient.

demur; and if the demurrer is allowed, then the plaintiff has judgment, becauſe the plea or anſwer of the defendant (for the word *anſwer* is equally uſed at law as in equity) is inſufficient.

In equity, taking *a bill pro confeſſo* is analogous to taking a declaration for true at law.

So in equity the taking a bill *pro confeſſo*, is analogous to taking the declaration for true, where the plea or anſwer of the defendant is inſufficient.

Why is not taking a bill *pro confeſſo*, when an anſwer is reported inſufficient, equally juſt, as taking a declaration for true, where the plea fails; for if a plea upon arguing the demurrer is found inſufficient, unleſs the defendant put in a better plea, the plaintiff ſhall have judgment in chief?

Taking exceptions to an inſufficient anſwer, is tantamount to a demurrer at law.

Though in equity you cannot demur becauſe an anſwer is inſufficient, yet taking exceptions to it before a Maſter, is tantamount to a demurrer upon an inſufficient plea.

What muſt the plaintiff do in ſuch a caſe? Can he reply to an anſwer that has been reported inſufficient, and is full of abſurdities and inconſiſtencies? he muſt injure himſelf by ſuch a reply, and therefore the court will not oblige him to it.

A plaintiff cannot have the ſame benefit, in carrying on the ſeveral proceſſes upon a contempt of the defendant, before the hearing, as upon an abſolute decree; for in this latter caſe, the plaintiff after the proceſſes have been executed, and goods and eſtate ſequeſtered under them, may have both applied to ſatisfy his demand, which he cannot have upon proceſſes for contempt only, and therefore there is a material and eſſential difference between the two.

Theſe are the things which ſtick with me as to the principal point.

The caſe of *Hawkins* v. *Crook* before Lord Chancellor *King*, the 4th of *George* the ſecond, is not determined upon ſatisfactory reaſons, for receiving coſts upon a Maſter's reporting an anſwer inſufficient, is by no means accepting it for an anſwer.

As to the caſe which has been mentioned before Lord *King*, I was of council in it, and I believe I may venture upon my memory to ſay, that the bar were not ſatisfied with the reaſoning of that caſe; for I do not underſtand how receiving coſts upon a Maſter's reporting an anſwer inſufficient, can be ſaid to be accepting it for an anſwer in any ſort whatſoever.

Beſides, in that caſe there was a third anſwer, (which had never been referred for inſufficiency) upon the records of the court; this was a material circumſtance, for that anſwer ſtanding as it did, the court would not examine whether it was ſufficient or not.

Where

Where there has been an amended bill, as in the preſent caſe, and no anſwer put in to it, then the queſtion is whether the plaintiff will not be intitled to a decree *pro confeſſo*, abſtracted from any proceedings in the original cauſe.

Lord *Hardwicke* was inclined to think, that where there is an amended bill, and no anſwer to it, the plaintiff is intitled to a decree *pro confeſſo* abſtracted from any proceedings in the original cauſe.

If the plaintiff ſhould not be intitled to ſuch a decree under theſe circumſtances, then the authority of this court is very defective, and the juſtice of it may be eluded; but I will not give any judgment now, and in the mean time will order precedents to be ſearched.

N. B. This matter never received any determination, the parties having entred into an agreement to withdraw the appeal and affirm the decree, which agreement was made an order of court the 10th of *December* 1741.

Walmeſley verſus *Booth*, *June* the 29th 1739.

Caſe 20.

JAPHET Crook in the year 1728 being under ſeveral proſecutions of a criminal nature in the court of King's Bench for perjury and forgery, employed the defendant *Booth* as his attorney, (who (after many fruitleſs endeavours of *Crook* himſelf to get bail,) by his diligence found out two perſons to be bound with *Crook* in a recognizance in very large ſums, and in the courſe of theſe tranſactions the time of the defendant was principally taken up for many weeks: In this interval he drew the will of *Crook*, who gave inſtructions for it himſelf in writing, in which with his own hand he directed a legacy of 1000 *l.* to the defendant, and 500 *l.* a-piece to the bail: The will was prepared by the defendant, and executed by *Crook*; and after this, at the requeſt of the defendant, *Crook* gives him a bond for the ſecurity of his legacy, in which there was a condition in the words following, or to this effect, that "Whereas "*John Booth* has been ſerviceable to *Japhet Crook* in ſeveral cauſes, "and ſtill continues to be ſo, and the ſaid *Japhet Crook* being "thoroughly ſenſible of his ſervices and favours, if the ſaid *Ja*- "*phet Crook* ſhall leave to the ſaid *John Booth* a legacy of 1000 *l.* "then the obligation ſhall be void, otherwiſe to ſtand in full "force." *Crook* afterwards revoked this will, and by another will appoints *Mary Walmeſley* executrix, and makes her reſiduary legatee, by which ſhe becomes intitled to 17000 *l.*

Japhet Crook in 1728. being under a proſecution for perjury and forgery, employed the defendant as his attorney to get bail, which he did accordingly, and during this tranſaction drew *Crook*'s will, who directed a legacy of 1000*l.* to the defendant, and 500 *l.* a piece to the bail, and afterwards the defendant got a bond for the ſecurity of his legacy: *Crook* afterwards revokes this will, and by another appoints the plaintiff executrix, and makes her reſiduary legatee; after the death of the teſtator, the defendant brings an action on his bond, and has a verdict and judgment; a bill brought to be relieved againſt it for fraud, *Crook* living ſix years after giving the bond, and not attempting to be relieved, Lord *Hardwicke* decreed for the defendant.

The legacy to *Booth* under the former is omitted in the new will, the teſtator declaring in this will, that the procuring that legacy from him, was by impoſition: *Crook* died in 1734. and ſome time after *Mary* intermarried with one *Walmeſley*, againſt whom *Booth* brought an action upon the bond, and had a verdict and judgment, and a bill is filed here by *Mary* and her huſband to be relieved againſt it as obtained by fraud and impoſition.

LORD CHANCELLOR.

This is one of thoſe kind of bonds, which the court muſt diſlike at the firſt appearance; but notwithſtanding there muſt be ſome circumſtances of fraud, or a want of conſideration, to induce me to lay it aſide.

Now upon the circumſtances of the caſe, and upon the recital of the bond, I muſt take this to be a voluntary bond; for though here is a mention of ſervices, yet they are not ſuch as will create a debt, or a valuable conſideration; nor are they ſuch as will make it in its nature a demand, or what the law calls a valuable conſideration.

I ſhould have thought it a much ſtronger caſe, had it been for payment of money at a certain day, but this is to be paid futurely by an executor: now *Crook* might not leave aſſets; for though in ſufficient circumſtances at the time of giving the bond, yet he might have contrived it ſo as to have no aſſets at his death; and it is truly ſaid, that ſuch a bond, according to the caſe in Lord *Harcourt*'s time, ſhall be poſtponed to all debts whatſoever, even ſimple contract ones, ſo that this can by no means be a ſecurity for money.

It has been inſiſted on, that as this perſon ſtood in no other light than an attorney to *Crook*, he cannot intitle himſelf to the bond.

An attorney ought not to take a bond for ſervices, but if a client will give him one of his own accord, it is not abſolutely void.

To be ſure it is extremely wrong in an attorney to take bonds for ſervices; but if a client with his eyes open will give ſuch a bond, it would be going too far to ſay ſuch a bond is abſolutely void.

This caſe has been compared to that of young heirs in diſtreſs for money in the life-time of the father; but I do not think this comes up to the preſent caſe, for there the court preſumes weakneſs in the perſon, and upon that conſideration relieves; but there is no pretence for it here, for *Japhet Crook* was more likely *to impoſe, than to be impoſed upon*; and yet if there had been the ſlighteſt evidence of impoſition upon *Crook*, I ſhould make no ſcruple of relieving againſt this bond.

The length of time that *Crook* lived after the executing of this bond, is certainly a ſtrong circumſtance in favour of the defendant. Why did not *Crook*, if he thought himſelf aggrieved, in ſix years

bring a bill to be relieved, for he had the ſame equity which the executrix ſets up now by the preſent bill? Upon the whole, I am of opinion on the circumſtances of this caſe, that the bond cannot be relieved againſt, and that the injunction which was to ſtay the proceedings at law muſt be diſſolved.

Walmeſley verſus *Booth*.

May the 2d 1741. in the paper of rehearings.

LORD CHANCELLOR.

Lord *Hardwicke* on this cauſe being reheard reverſed his former decree.

This is a caſe of a good deal of conſequence, and I am extremely glad that I have an opportunity of reconſidering it in the manner it deſerves.

I believe I did ſay at the former hearing, that it would be an extraordinary thing if the repreſentatives of *Japhet Crook* ſhould prevail to ſet aſide a bond fraudulently obtained, and by impoſition, upon a man whoſe character for art and cunning was ſo well eſtabliſhed in the world.

But upon this caſe being re-argued and re-conſidered, I am thoroughly convinced that my former decree was wrong.

The firſt conſideration ariſes upon the general nature of the bond, as it was obtained by an attorney from his client while the client was under criminal proſecutions: I think this is a very material ingredient in the caſe, and are the principal grounds I go upon in giving judgment in this caſe.

The ſtatute of 2 *Geo.* 2. *c.* 23. lays down certain rules for regulating the behaviour of attornies and ſolicitors with regard to their clients.

Attornies and ſolicitors, eſpecially ſince the late act of parliament, 2 *Geo.* 2. *c.* 23. have been conſidered as officers of juſtice, and they have ſtated fees allotted them, which they ought not to exceed: and therefore in all courts, but more eſpecially in courts of law, there are certain rules for regulating their behaviour with regard to their clients.

Where an attorney is retained to appear, and does not, the court will puniſh him for it; an attorney once choſen cannot be changed without leave of the court.

Upon this ground, if a man retains an attorney to appear for him, and he does not appear accordingly, the court will puniſh him for it; and on the other ſide they will not ſuffer a perſon who has made choice of an attorney in a cauſe to change him without the expreſs leave of the court.

The court will relieve a client againſt the extortion of an attorney.

The conſequence of this is, that there is a ſtrong alliance between an attorney and his client, and a great obligation upon the attorney to take care of his client's intereſt; and the court will relieve a client againſt the extortion of an attorney.

This

This is the general rule; let us now conſider the preſent caſe.

The defendant Mr. *Booth* does not pretend to ſay that he had the leaſt acquaintance with *Japhet Crook* till *October* 1728. and very little buſineſs appears to have been done from this time till the giving the bond; and allowing that all fees are paid, and every thing admitted beſides that could be charged for the moſt trifling attendances during the period from 1728. to the time of the bond, it is not pretended there was any more than 26 *s.* due to the defendant at the time of the execution of it.

Japhet Crook was then under proſecution for two different offences of a very heinous nature, one for forgery, and another for perjury, for which he afterwards ſuffered as he deſerved: and under theſe circumſtances to be ſure it concerned him very much to find out perſons who would be bail for him.

There are a great many people without doubt that bring diſtreſs upon themſelves, but while they are in ſuch a ſituation, it does not make the leaſt difference, whether this diſtreſs came upon them through their fault, or their misfortune.

While *Japhet Crook* was in this deplorable condition, the defendant draws his will, and gives himſelf a legacy of 1000 *l.* This is no very favourable circumſtance, that an attorney who draws the will of a perſon in ſuch a ſituation ſhould take the advantage, and ſecure to himſelf a legacy of 1000 *l.* and beſides the inſerting the legacy in the will, it is carried much further, and *Japhet Crook* is prevailed upon by the defendant to give him a bond, reciting many and faithful ſervices, and particularly the procuring bail on the criminal proſecutions, and the bond to remain in full force till the executors of *Japhet Crook* ſhall pay to the defendant the ſum of 1000 *l.* in ſix months from the teſtator's death; ſo that by this means the money is ſecured, and it is to all intents and purpoſes made irrevocable.

It has been ſaid by Mr. *Chute*, that this is only a legacy given with a preference; but it differs very materially from ſuch a legacy, becauſe *Japhet Crook* has bound himſelf in a bond, which makes it a debt, and irrevocable.

Upon theſe conſiderations, and attended with ſuch circumſtances, the defendant appears in a very unfavourable light to the court.

This caſe has been compared in the firſt place to the defrauding of young and improvident heirs, where the court relieves upon general principles of miſchief to the publick, without requiring particular evidence of actual impoſition upon them, as they are

caſes of general concern; they alſo give relief, becauſe the circumſtances and ſituation of the young perſons at the time of the agreement make them extremely liable to impoſitions.

Now conſider the condition of *Japhet Crook* at the time of entring into this bond; he was under very ſevere proſecutions, for very heinous offences, and, in ſuch a caſe, was obliged to call in an attorney to his aſſiſtance.

It has been ſaid that *Japhet Crook* was a very cunning fellow, and a very great knave, and I believe it to be true; but the court muſt not conſider the particular circumſtances of the man, but the caſe in general; for a perſon may be proſecuted for theſe very crimes, and yet be innocent; and it would be very miſchievous if there was any incouragement given to an undue advantage taken of another under ſuch circumſtances.

The next caſe to which it has been compared are marriage-brocage bonds, which have ſome ſimilitude, though not entirely ſo.

The next was the caſe of mortgages, as where a perſon takes the advantage of another's neceſſities, and ſecures to himſelf an exorbitant intereſt; in which inſtance, the court will ſet it aſide if he gets any unjuſt gain to himſelf, though it be not done in the bare faced way of intereſt, but in ſome other ſhape.

What is the general rule the court goes upon? why the perſon's being in ſuch circumſtances that any body might have taken the advantage of him, and here the court will not allow *A.* any more than *B.* to get an illegal benefit to himſelf.

So, in this caſe, *Japhet Crook* was no more under an obligation to employ the defendant as his attorney, than any other.

I think the caſe is ſtronger between attornies and their clients, than any of the caſes that it has been compared with by the counſel.

Becauſe all the courts, both of law and equity, order their bills to be taxed: and there are a number of caſes in this court, where a client, unaſſiſted by an attorney, has paid a law bill, and accepted of a receipt for it, and yet has been allowed to open the whole account notwithſtanding, and to take exceptions to any improper or extravagant charge in the attorney's bill.

Nay, even if a client has given an attorney a bond or mortgage to ſecure the payment of what was charged to be due to him on account

Equity will order an attorney's bill to be taxed, tho' he has a mortgage to ſecure the payment of it.

count of a law ſuit, the courts of equity have relieved the client, and ordered the bill to be taxed.

And what is the reaſon the court goes upon, in ſuch determination? why, the great power and influence that an attorney has over his client.

Now, conſider the preſent caſe; here is an extravagant reward given for ſervices, and the court, if they had allowed the legacy, would, in the firſt place, have directed the maſter to inquire what theſe ſervices were, and whether they were in any proportion adequate to the reward.

Theſe two caſes have been put by counſel: that after a ſuit is finiſhed, if a bond is given to an attorney, to ſecure to him ſome reward for his merit and ſervice in a cauſe; or if after a marriage had, a ſecurity is given to a perſon who was inſtrumental in procuring the match, for a conſiderable ſum as a reward, that this court would have ſupported them as juſt demands.

Theſe are certainly very different caſes from the preſent, but I do not know, that even in theſe, there has ever been any determination.

But the bond here does not import any thing of this kind, for it only recites ſome paſt ſervices, which were immaterial and trifling, but the principal conſideration is for any future ſervices he may be ready to do him.

To be ſure, after a ſuit is intirely at an end, a client may give an attorney a reward for ſervices, over and above his legal fees.

Theſe are my reaſons with regard to the publick; but there are other reaſons that weigh with me in this caſe.

The defendant has ſaid in his anſwer, that this is a voluntary bond, but then he has likewiſe ſet forth the reaſonable motives which might induce *Joſeph Crook* to give this bond: namely, the many and frequent ſervices the defendant had done.

Now what are they? only the few tranſactions from *October* 1728, to the time the bond bears date.

This is a falſe recital; and ſhews likewiſe, that there is ſome impoſition, and an undue advantage taken of *Japhet Crook*'s neceſſities.

There is another circumſtance too; it appears that the bail was given upon the *certiorari* the very day the bond was given, juſt at a period

a period of time when *Japhet Crook* muſt have gone to priſon, or put in bail: I do not enter into the conſideration of hired bail, becauſe it does not appear what was the nature of this bail.

Now what is the defendant's merit as to this bail? it does not ſo much as appear that he gave any counter ſecurity to the bail, ſo that he has done nothing more than what every attorney does in the common caſes of bail.

Upon the whole, I am of opinion that the court ought to pay no regard to ſuch a bond, as it might be attended with bad conſequences, by incouraging attornies, after they have got into the ſecrets of their clients, to extort from them unreaſonable rewards to themſelves.

The queſtion is, whether this bond may ſtand as a ſecurity for ſuch ſervices as the defendant has really done, and for ſuch demands as are really due.

And as the plaintiff ſubmits it ſhould, I do not ſee any reaſon why the court ſhould interpoſe.

But I ſhall give directions to the Maſter to inquire what extraordinary ſervices the defendant has done to intitle him to any reward, and what is juſtly due for fees; and his lordſhip made an order accordingly.

Simpſon verſus *Vaughan*, *February* 1, 1739. Caſe 21.

A Bill was brought by the obligor in a bond againſt *Vaughan* the repreſentative of *Nut*, who was a co-obligor with *Baker*. A tradeſman ignorant of the nature of a bond, fills up one from *A.* and *B.* to *C.* in which the obligors are only jointly bound; one of them is dead, and the queſtion was, whether the ſurvivor is anſwerable for the whole money. *The court relieved upon the miſtake.*

The bond was dated the 18th of *September* 1730. and filled up by *Baker*, one of the co-obligors, as follows:

" *John Nut* and *Joſeph Baker* are held and firmly bound in the " ſum of 4000 *l.* or which payment juſtly to be made, we bind " ourſelves, our heirs, executors and adminiſtrators.

" The condition of this obligation is ſuch, that if the above- " bounden *John Nut* and *Joſeph Baker*, their heirs, *&c.* do well " and truly pay the ſum of 2000 *l.* then this obligation to be void."

It was recited in the bond that *Nut* and *Baker* were *partners*.

Nut died in 1732. *Baker* poſſeſſed all the joint effects, and five months after the death of *Nut* became a bankrupt.

The plaintiff ſuggeſts by his bill, that as the bond was filled up by *Baker*, that omitting ſeverally bound, was done fraudulently, or through ignorance and miſtake; and therefore he ought to be relieved, either on the point of fraud, or that as the repreſentative of *Nut* confeſſes aſſets by his anſwer, his Debt ought to be ſatisfied out of the ſaid aſſets; for the defendant *Vaughan* has ſet forth by his anſwer, that *Nut*, as a relation of one *Hawkins*, became intitled by diſtribution to the ſum of 1200 *l.* as his ſhare of the perſonal eſtate of *Hawkins*, and that *Vaughan* as one of the repreſentatives of *Nut*, has permitted this money to be retained by the adminiſtrator of *Hawkins*, to indemnify him againſt the plaintiff's demand on account of *Nut*, and by virtue of his bond.

The defendant inſiſts that the aſſets of *Nut* are not liable, becauſe the bond is joint, and not joint and ſeveral; and therefore *Baker*, by ſurvivorſhip is anſwerable for the whole money.

LORD CHANCELLOR,

There is ſomething new in this caſe; and yet, upon the general reaſoning of this court, equity will extend it further than the law will do; now as to this, it cannot be laid down as an invariable rule, that the court will do it in every caſe.

The remedy in point of law was extinguiſhed, as againſt *Nut*, and ſurvived only againſt *Baker*.

The principal ingredient for the plaintiff, is, that 'tis not a debt in the way of trade, but is an actual loan of a ſum of money, and the debt conſequently ariſes from the contract itſelf, and if there is any defect in the contract, the court will reſort to what was the principal intention of the parties, that they ſhould be ſeverally and jointly bound.

A note of hand at the beginning mentioned to be for 20 l. borrowed and received; but at the latter end were theſe words, *which I promiſe never to pay*. Lord Chief Juſtice *Parker* held, the plaintiff in the action was well intitled, upon the lending on one ſide, and the borrowing on the other, notwithſtanding the words in the concluſion of the note.

I have upon other occaſions mentioned the caſe on the northern circuit, before lord *Macclesfield*; a girl, in conſideration of 20 l. ſubmitted herſelf to the pleaſure of a man, he was ſo ungenerous afterwards as to refuſe payment, and ſhe was obliged to ſue him upon his note, which, in the beginning of it, was mentioned, to be for 20 l. borrowed and received, but at the latter end, were theſe words, *which I promiſe never to pay*. My lord *Macclesfield* held, that here is a good foundation for an *aſſumpſit*, upon the lending on one ſide, and the borrowing on the other; and the words in the concluſion of

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the note will make no variation, and conſequently the plaintiff in the action is well entitled to recover the 20l.

It is the lending of one ſide, and the borrowing of the other, makes the ſtrength of theſe caſes.

As to the word *partners* being recited in the bond, that is rather in the nature of an addition than any thing elſe, and no great ſtreſs to be laid upon it.

All caſes of this ſort muſt depend upon their particular circumſtanecs.

Now here is a reaſonable preſumption that this bond was either through fraud, or for want of ſkill, made a joint, inſtead of a joint and ſeveral bond; for *Baker*, one of the obligors, who filled it up, is only a tradeſman, and intirely unacquainted with the common form of bonds, where money is lent to two perſons; but I do not think it was a fraud in *Baker*, but merely a miſtake, and this is a head of equity on which the court always relieves.

Where money is lent to two perſons, and either through fraud, or for want of ſkill, the bond is made a joint only, inſtead of a joint and ſeveral bond, theſe are heads of equity on which this court always relieves.

The *ſecond* queſtion, Out of what fund is this money to ariſe?

Now it cannot be inſiſted that the 1200l. left in the hands of *Hawkyns*'s adminiſtrators, is by any particular agreement made liable to *Simpſon*'s debt, but merely left as a ſecurity to indemnify them againſt the demand.

The next queſtion will be, whether theſe perſons, *viz. Hawkins*'s adminiſtrators are proper parties to this ſuit?

It has been ſaid at the bar, that you may make any perſon a defendant that you apprehend has poſſeſſed himſelf of aſſets upon which you have a lien: but this certainly cannot be laid down as a general rule, for it would be of dangerous conſequence to inſiſt, that you can make any perſon a defendant who has aſſets, unleſs you can ſhew to the court he denies that he has any ſuch aſſets, or applies them improperly.

It is not a general rule, that any perſon who has aſſets may be made a defendant, to conſtitute him a neceſſary party, the plaintiff muſt ſhew he either denies ſuch aſſets, or applies them improperly.

But, however, in the preſent caſe, the court may give ſuch directions as will reach the ſum of 1200l. for I ſhall order the adminiſtrators of *Hawkins* to retain this money in their hands, till Mr. *Vaughan* has diſcharged this debt to *Simpſon*, and upon ſuch payment, the adminiſtrators of *Hawkins* ſhall aſſign the 1200l. to *Vaughan*, or ſuch perſon as he ſhall appoint; and his lordſhip was pleaſed to order accordingly.

Caſe 22. *Brooke*, executor of *Hobart* v. *Gally*, *April* the 25th 1740, *Eaſter* Term.

A ſchool-boy contracts a debt of 59l. for burgundy, champaign, claret, &c. with G. a victualler, in five months time; in a few days after he came of age, G. prevails on him to give a note for the 59l. without producing any account, or delivering him a bill. Lord *Hardwicke*, upon the circumſtances of the caſe, decreed the note to be delivered up to be cancelled.

THE bill was brought by the plaintiff, as executor of *Hobart*, againſt the defendant, to have a note delivered up to be cancelled, (which *Hobart* had given to the defendant) upon a charge of fraud and impoſition.

LORD CHANCELLOR ſtated the caſe in the following manner.

A young gentleman, admitted to be an infant, and known to be a ſchool-boy at *Montigniack*'s *French* ſchool, near *Oxford* chapel, takes it into his head to reſort to *Gally*'s coffee-houſe, or rather victualling-houſe, as all ſorts of meat and liquors were ſold there; and the maſter of it ſuffers a ſchool-boy, juſt turned of twenty, to contract a debt of fifty-nine pounds, in the ſpace of five months, from *April* 1735 to the *September* following, when his allowance in pocket-money by the guardian was only ſeven ſhillings a week, and in my opinion very ſufficient.

The things for which he contracted the debt, were for meat either for himſelf, his friends, or his dog, or for liquors ſent to his lodgings, which was the ſchool; in one day claret to the amount of 3l. burgundy 1l. 10s. champaign, 2l. 7s. in the whole 6l. 17s. 1l. 15. was charged another day for rack punch ſent to his lodgings; another day *coffee and jellies*, which, if it had reſted there, might have been excuſeable, if done once or twice only; but it was by no means commendable to give an infant ſuch long credit as ſix months for even theſe things.

The defendant's telling Mr. *Montigniack* when he came to *inquire* after his ſcholars behaviour, that it was no buſineſs of his, was a very improper anſwer to the ſchoolmaſter, and an evidence that he was doing wrong, and wanted to conceal it.

As to the young man himſelf, he appears to have been often in liquor, and the fact ſpeaks it ſelf, conſidering the great quantity of wine, *&c.* which were ſo frequently ſent him.

In two or three days at moſt after *Hobart* came of age, *Gally* prevails upon him to give a note for the 59l. though no account appears to have been kept of the dealings, nor any bill delivered after *Hobart* came of age.

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This caſe will turn upon two general conſiderations:

Firſt, As to the tranſactions between *Hobart* and *Gally* before the promiſſory note was given, and before he was of age.

Secondly, On the alteration that has been made, by a promiſſory note being given, and upon the circumſtances at the time it was given.

As to the *firſt*, they are tranſactions of ſuch a nature, as ought to be diſcountenanced in a court of equity.

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The law lays infants under a diſability of contracting debts, except for *bare neceſſaries*, and even this exemption is merely to prevent them from periſhing.

The reaſon why the law lays them under ſuch reſtrictions, is to prevent their being impoſed upon, unknown to their parents or guardians.

Neither law nor equity know any difference between an infant of ſixteen or ſeventeen, and one turned of twenty, there being a preciſe time fixed for their coming of age, and the latter may be equally relieved with the former; for till he arrives at twenty-one, he is conſidered as an infant.

Between an infant of 16 or 17, and one turned of 20, there is no difference either in law or equity, the latter, if impoſed on, equally relievable with the former.

From all the circumſtances of the caſe which I have ſtated before the giving of the note, it is very plain, that the defendant acted *malâ fide* by giving evaſive anſwers, and by endeavouring to ſecrete what he was tranſacting with the infant.

As to the *ſecond* point:

It is truely ſaid, on the part of the defendant, that if an infant takes up goods before he comes of age, and gives a note for it after he is of age, if there is no fraud, it is good at law.

If an infant takes up goods before, and gives a note for them after he comes of age, if no fraud, good at law.

It has been likewiſe ſaid *the executor of Hobart* the plaintiff is a meer volunteer, but I ſhall not conſider him as ſuch, for, as ſtanding in the place of *Hobart*, (who, if he had been living, and had waked out of his drunken ſleep, might have been relieved) is equally intitled to relief as ſuing in his right.

Where an unconſionable bargain is made with an infant before he comes of age, and a note of hand is taken from him immediately on his coming of age; the court to ſubſtantiate

Where it is manifeſt there has been an unconſcionable bargain made with an infant before he comes of age, the taking a note of hand from him in two or three days after he is of age, to ſubſtan-

court, on a bill brought even by his executor, will order it to be cancelled; for attempting thus to ſubſtantiate ſuch a bargain, made with an infant during his infancy, is a principal ingredient with a court to relieve.

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tiate it, is a ſuſpicious circumſtance, and has always been a material ingredient to direct the conſcience of this court.

It is very ſtrange, that there ſhould be no account ſubſiſting for dealings of five months, nor any pretence of a bill delivered after *Hobart* came of age, nor is there any evidence that a bill lay before him for his conſideration, at the time he gave the note.

So that here is a note without any previous conſideration, which, to eſtabliſh, would be contrary to the rules of this court.

If the care and education of youth have been thought of conſequence in former ages, or of publick concern by the parent, to give any encouragement to a tranſaction of this kind, would intirely defeat that care, and be extremely fatal to the health, the manners, and every thing elſe that is valuable in young perſons.

The caſe the neareſt to this, is the impoſition upon young heirs, in the life-time of their anceſtors, who though of full age at the time of the fraud, yet if his neceſſities, extravagancies, or the ſeverity of his parents, made him ſubmit to the impoſition, this court will give relief merely to diſcourage attempts of this nature.

I think it neceſſary to make an example of the defendant in *Weſtminſter Hall*, as it is ſo near a neighbour of *Weſtminſter School*; and, upon the whole circumſtances of the caſe, do decree the note to be delivered up to the plaintiff to be cancelled: but if the defendant ſhould be minded to bring an action at law for goods ſold and delivered, he ſhall not be injoined from doing it; and I will likewiſe direct the executor to admit aſſets, and not to inſiſt upon the ſtatute of limitations, *pendente lite* in the court of chancery, but at the ſame time, I ſhall limit him to bring his action by *Michaelmas* term at furtheſt; that he may not, through vexation, defer it as long as he thinks proper; and his Lordſhip made an order accordingly.

Caſe 23. *Aſhburnham* verſus *Bradſhaw*, *April* the 26th 1740. upon the equity reſerved.

A deviſe to charitable uſes under a will in 1734, the teſtator lived a month after the new ſtatute of mortmain took place; all the judges, except Mr. juſtice *Denton*, certified that the deviſe was good in law.

THERE was a deviſe to charitable uſes under a will in 1734. the teſtator lived till *July* 1736. a month after the new ſtatute of mortmain took place, and then dies without revoking his will: It was referred by the court of Chancery to the Judges for their opinion, whether this was a good diſpoſition to charitable uſes; and all of them, except Mr. Juſtice *Denton*, who was ill, certified that the deviſe to theſe uſes was good in law, notwithſtanding the act;

and thereupon Lord Chancellor declared the will ſhould be eſtabliſhed, and the truſts of the charity carried into execution.

Tuffnell verſus *Page*, *April* the 28th 1740. Caſe 24.

WILLIAM Springet made his will in writing, ſigned by himſelf, but unatteſted by witneſſes, wherein was the following clauſe, " All the eſtate which I have I intend to ſettle in this manner; My eſtate in *Kirby-hall*, near *Henningham-caſtle*, by *Henningham* town, which is 135 l. *per ann.* 128 l. exchequer annuity (and his ſtocks, which the teſtator enumerates) all which I give to my dear brother *Anthony Springet*; after his death, my deſire is, that it ſhould be diſpoſed of after this manner; To Mr. *William Tuffnell*, the ſon of *Samuel Tuffnell*, eſq; at *Langley*, in *Eſſex*, my eſtate at *Kirby-hall*.

W. S. makes his will and ſigns it, *but no witneſſes*; as the teſtator had not ſurrendered his copyhold eſtate, the queſtion was whether it paſſed? held it did; for the ſtatute of frauds and perjuries relates to ſuch eſtates only as paſs by the 34 & 35 *H.* 8. which takes in fee-ſimple only, and does not extend to cuſtomary eſtates.

The other part of his eſtate, the teſtator gave to the perſons named in his will, but made no ſurrender to the uſe of his will of what was copyhold.

William Tuffnell made his will in 1732, by which he deviſed the eſtate of *Kirby-hall*, and other eſtates, to *Page*, and two other perſons, of which one was his heir at law, in truſt for the plaintiff, but this teſtator did not make any ſurrender to the uſe of his will, nor have the deviſees ever been admitted to the copyhold eſtates, but, notwithſtanding, on the death of *Anthony Springet* in 1735, they took poſſeſſion, and againſt them the plaintiff has brought his bill, for an account of the rents and profits of *Kirby-hall*, and prays that the eſtate may be decreed to him.

LORD CHANCELLOR,

I will conſider this caſe in two lights; *firſt*, whether the will of a copyholder unatteſted by witneſſes, is ſufficient to declare the uſes of a ſurrender made to the uſe of a will; and *ſecondly*, where there is no ſurrender, as in the caſe before me, whether ſuch a will is ſufficient to paſs the truſt, of the copyhold lands to the plaintiff.

With reſpect to the conſideration of the queſtion in the firſt of theſe lights; where a man is ſeized of copyhold lands, and ſurrenders to the uſe of his will, and executes a will, though not atteſted by witneſſes, yet it ſhall direct the uſes of the ſurrender; for the clauſe in the ſtatute of frauds and perjuries which requires the teſtator's ſigning in the preſence of three witneſſes, and their atteſtation in his preſence, is confined only to ſuch eſtates as paſs by the ſta-

Where a man ſurrenders a a copyhold eſtate to the uſe of his will, though unatteſted, it ſhall direct the uſes of ſuch ſurrender.

tute of wills, 34 & 35 *H.* 8. *c.* 5. which is an act to explain one made in the 31ſt of the ſame king, and at the cloſe of the third ſection enacts, that the words *eſtate of inheritance*, in the former ſtatute, ſhall be declared, expounded, taken and judged of eſtates of fee-ſimple only, which ſhews plainly, that it does not extend to cuſtomary eſtates, and has been ſo ſettled ever ſince the caſe of the *Attorney General* verſus *Barnes*, which is reported in 2 *Vern.* where it is ſaid, in *page* 598. " As to ſuch of the lands as were copyhold, " it was agreed, they were well appointed, they paſſing by ſur- " render and not by will, though there were no witneſſes to it.

Where the legal eſtate is in truſtees, copyhold lands will paſs under the will of the *ceſtuy que truſt*, as he cannot in that caſe ſurrender them.

As to the ſecond queſtion, whether the will of *William Springet* will paſs the truſt of the copyhold lands; where the legal eſtate is in truſtees, the *ceſtuy que truſt* cannot conſequently ſurrender, but the lands ſhall notwithſtanding paſs by this deviſe, according to the general rule that equity follows the law, for there a copyhold will paſs under a will, without three witneſſes, or where there are no witneſſes at all; and if this nicety is not required in paſſing the legal eſtate, *a fortiori* it is not in paſſing the equitable, and therefore the *ceſtuy que truſt* may by the ſame kind of inſtrument diſpoſe of the truſt eſtate, as if he had the legal eſtate in him.

There is another queſtion made in this cauſe, and that is, what intereſt the plaintiff has in the eſtate at *Kirby-hall.*

The word *eſtate* in a will is ſufficient to paſs not only the land, but *the intereſt* the teſtator has in it.

I am of opinion the word *eſtate* is ſufficient to paſs not only the land, but all the intereſt the teſtator had in it beſides; for though here is a locality *Kirby-hall*, yet the teſtator meant his intereſt in it too; for ſuppoſe, and I believe it has happened, a man ſhould give all his real eſtate in *England*, here is a locality, and yet none will ſay, that the intereſt does not paſs as well as the eſtate.

" All the eſtate which I have, *&c.*" at the outſet of the will, ſhews a plain intention in the teſtator to diſpoſe of the whole, and conſequently Mr. *Anthony Springet* the firſt taker had only an eſtate for life, and the remainder-man Mr. *William Tuffnel* an eſtate in fee; and therefore the plaintiff is intitled to the decree he prays by his bill. The caſe of *Ibbetſon* verſus *Beckwith* * was principally relied on by the plaintiff's council, as being in point, and allowed by Lord *Hardwicke* to reſemble it very much.

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* *Caſes in Equity in Lord Talbot's time* 157. " A teſtator ſetting out in his will to give and " diſpoſe of his worldly eſtate, is a ſtrong proof that he intended to diſpoſe of the inheritance " of his lands, when there are ſufficient words in the following parts of the will for that pur- " poſe; the words *eſtate at ſuch a place*, or *in* ſuch a place, may carry a fee." *Ibbetſon* ver. *Beckwith.*

Berkley Freeman verſus *Biſhop*, *April* the 27th 1740. Caſe 25.

IN this caſe the Lord Chancellor laid down the following rules.

That an heir of 22 or 23 years of age, if a dealer in horſes, or other tradeſmen, impoſe upon him, by ſelling at extravagant prices, in numberleſs inſtances, ſhall be relieved in this court, otherwiſe if in a ſingle inſtance only.

This court in relieving an heir againſt fraud, does not conſider whether the eſtate in expectancy comes to him as heir to his father, and by deſcent, or from any other relation; but the rule which directs in this caſe, is the neceſſity that young heirs are in for the moſt part, which naturally lays them open to impoſitions of this kind.

Where an extravagant price is charged for goods ſold, and a mortgage is taken to ſecure it, the heir may be relieved ſo far as it ſtands a ſecurity for the unjuſt gain; but after it is determined upon a *quantum meruit*, what was the real worth of the goods, the mortgage will ſtill be binding upon the heir, for ſo much as is found by the verdict.

Hill verſus *Adams*, *April* 29, 1740. Caſe 26.

WHERE a title is ſet up to an eſtate, by a bill, and you make a perſon defendant, who diſclaims all right, and do not bring him to hearing, the court ſaid you ſhall not read his evidence as a proof of your own right, to the prejudice of another defendant.

Where a defendant diſclaims all right, you cannot read his evidence, as a proof of your own right, to the prejudice of another defendant.

Where a mortgagee aſſigns without the mortgagor's joining, the heir of the mortgagor on preferring a bill to redeem, has no occaſion to bring the original mortgagee before the court, for the aſſignee, as ſtanding in his place, will be decreed to convey.

The heir of mortgagor need not bring the original mortgagee before the court, where he has aſſigned without the mortgagor's joining.

Glanville verſus *Payne*, *April* 30, 1740. Caſe 27.

LORD CHANCELLOR laid down the following rules.

That where a marriage ſettlement is executed after marriage, in purſuance of articles previous to the marriage, and the limitations are

are to the huſband for life, to the wife for life, and to the heirs of the body of the huſband to be begotten upon the wife, it is executory, and will be carried into ſtrict ſettlement by this court; otherwiſe if executed after marriage without any articles previous to the marriage to direct the uſes of ſuch ſettlement.

The Stat. of *H.* 8. *c.* 28. *ſ.* 2. gives a tenant in tail power only to make leaſes for three lives abſolute, but not for 99 years determinable upon three lives.

Where a ſettlement made after marriage, gives an equivalent to the Iſſue, for what they were intitled to under the ſettlement, previous to the marriage, the court would have diſpenſed with carrying that before the marriage into execution; but in the ſettlement made *after* marriage in the preſent caſe no equivalent is given to the iſſue, and therefore the ſettlement *before*, which is for the benefit of the iſſue, muſt be purſued.

Mr. ſerjeant *Barnardiſton* has ſtated the caſe very fully in his *Chancery Reports*, *p.* 18.

Caſe 28. *Lewellin* verſus *Mackworth*, *June* 23, 1740.

A defendant to a bill for the diſcovery of new matter, muſt plead or demur, and cannot inſiſt upon it at the hearing.

WHEN a ſupplemental bill is brought for any new matter diſcovered ſince the hearing of a cauſe, before the former decree was ſigned and inrolled, if the defendant to ſuch bill is able to ſhew that there is no new matter diſcovered, they muſt take advantage by plea or demurrer, and it is too late to inſiſt upon it at the hearing.

A bill of review improper before a decree is inrolled.

Where a decree is neither ſigned nor inrolled, you cannot bring a bill of review, but a ſupplemental bill, in the nature of a bill of review.

The evidence neceſſary as to finding deeds after a decree is ſuch only as the court thinks reaſonable.

It is not neceſſary there ſhould be a certain and poſitive evidence, as to the finding of deeds, after a decree, which if diſcovered before, would have varied the decree, but ſuch evidence only as the court thinks reaſonable.

The rule with regard to evidence, is, ſuch as the thing to be proved will admit of.

There is no rule of evidence to be laid down in this court, but a reaſonable one, ſuch as the nature of the thing that is to be proved will admit of.

Atkinſon

Atkinſon verſus *Turner*, at the *Rolls*, *June* 30, 1740.

Caſe 29.

I Give two thirds of three eighths of my joint ſtock and trade to my grandſon *Richard Turner*, provided he ſhall attain his full age of 21 years, but if he die before 21, then remainder over to the plaintiffs. *Richard Turner* died before 21.

A teſtator gives a part of his ſtock in trade to *R. T.* provided he attains 21. He dies before that age, the adminiſtrator of *R. T.* is not intitled to the intermediate profits from the teſtator's to the infant's death.

The queſtion was, if the adminiſtrator of *Turner* is intitled to the intermediate profits, from the death of the teſtator to the death of the infant.

The Maſter of the Rolls. The whole turns upon this, whether this was ſuch an intereſt as veſted during the minority of *Richard Turner*, or whether it was ſuſpended during his minority, and deveſted upon his dying before 21.

Conſidering it upon the words of the will, I own I think it a a very ſtrong caſe as a condition precedent, and that the eſtate could not veſt till the infant attained the age of 21.

Nothing is more frequent than a future intereſt in a chattel; and there is no inſtance where the court ſtrains to make it a veſted one, till the future time comes *in eſſe*.

The only difference in the preſent caſe is, that this legacy is not properly money, but the partnerſhip and the profits of a trade.

Nice diſtinctions to be avoided, for the more general a rule is, the better.

The more general a rule is made the better; and it is very dangerous to run into niceties, to diſtinguiſh any particular caſe from a general rule, as it muſt neceſſarily breed uncertainty and confuſion.

Elliot and others verſus *Merriman*, at the *Rolls*, *July* 1, 1740.

Caſe 30.

MR. *Thomas Smith*, who had both a real and perſonal eſtate, was indebted to ſeveral perſons, and particularly to the plaintiffs, and to ſecure the plaintiffs debts, he entered into a bond to them, together with one *Godwin*, as a co-obligor.

T. S. deviſes all his real and perſonal eſtate to *G.* his heirs, *&c.* charged with the payment of his Debts; the plaintiffs who are bond creditors never aſked for their principal, but receive their intereſt regularly for 16 years of *G.* the executor, who during this interval made ſeveral ſales of the teſtator's eſtates; it was held by the *Maſter of the Rolls*, that the bill brought by the bond creditors ſhall be diſmiſſed, and a purchaſer ſhall not be diſturbed after a quiet poſſeſſion of 16 years.

Thomas Smith, by an introductory clauſe at the beginning of his will, charges all his real and perſonal eſtate for the payment of his debts.

Then comes the clauſe upon which the plaintiffs found their claim.

" I deviſe all my real and perſonal eſtate to Mr. *Godwin*, his " heirs, executors, adminiſtrators and aſſigns, charged with the " payment of my debts."

The teſtator died in 1724.

Godwin the deviſee was made ſole executor, and proved the will; he paid the intereſt of 5 *l. per cent.* regularly to the plaintiffs upon their bond, till 1730. as it is admitted on all ſides, nor did they ever ſeem deſirous of their principal; he has made ſeveral ſales of the teſtator's eſtates: Firſt, of his freehold, ſecondly, of his leaſehold; and a third ſale of an eſtate, conſiſting of part freehold and part leaſehold, to *Merriman*. The queſtion upon the whole is brought to this, whether as the deviſe of the real eſtate to *Godwin* is not an expreſs deviſe to ſell, but only charged with debts, the vendee in this caſe takes the eſtate *cum onere*, as the vendor did.

The Maſter of the Rolls was of opinion, Directing an eſtate to be ſold, does not imply that it muſt be ſold at all events, if the debts can be ſatisfied without.

Subjecting an eſtate to debts, without giving an abſolute power to ſell, does not guard the eſtate from being ſold, if debts cannot be paid otherwiſe.

Where a man purchaſes a leaſehold eſtate from an executor, it ceaſes to be a truſt on the land, for where money is wanting an executor muſt ſell.

As to the leaſehold eſtates, they are out of the caſe; for if a man purchaſes ſuch an eſtate from an executor, it ceaſes to be a truſt upon the land, for where money is wanting, an executor muſt ſell; for to entertain a doubt to the contrary, would make it impoſſible for an executor to raiſe aſſets, as no perſon would venture to buy.

Length of time is no favourable circumſtance for creditors; for had they come recently, and prevailed againſt the purchaſer, he might have had his ſatisfaction over againſt the vendor, who was then in good circumſtances, for his bankruptcy was many years afterwards.

Where a creditor of a teſtator accepts of an executor's bond, it is as a new ſecurity.

Where the debtor has charged an eſtate by will with the payment of debts, and the creditor after the death of teſtator accepts of the executor's bond, it is as a new ſecurity, and is a circumſtance to ſhew that he relies more upon the credit of the executor, than the charge in the will.

There is no difference between an expreſs deviſe of an eſtate in truſt, to be ſold, and an eſtate charged in truſtees hands for the payment of debts, without an expreſs power to ſell; in either caſe an executor has an equal right to do it.

An expreſs deviſe of an eſtate to an executor to ſell, or a charge for payment of debts without the power, gives him an equal right to do it.

The court chuſe rather to abide by their general rules, than to let in nice diſtinctions, in order to relieve particular perſons, though even in the caſe of creditors themſelves.

General rules ought to prevail, though in the caſe of creditors themſelves.

Where creditors have ſo eaſy a remedy as to bring a bill againſt a deviſee, in truſt of lands, to compel a ſale, when the annual produce is not ſufficient to pay debts, they ſhall not diſturb a fair purchaſer, who has been in quiet poſſeſſion for 16 years, of the truſt eſtate; the bill was diſmiſſed without coſts, as to thoſe creditors who did not appear to have expreſs notice of the defendant's purchaſe.

Waltham verſus *Broughton & e contra*, *July* 4, 1740. Caſe 31.

THE defendant having been guilty of the groſſeſt fraud that ever appeared before a court, *Lord Chancellor* decreed, that he ſhould refund the principal money he cheated the plaintiffs of, with legal intereſt till the payment, and to pay coſts both of the original and croſs bill.

In notorious frauds the court anciently made a defendant pay *exemplary* coſts, but diſuſed from the difficulty of carrying it into execution.

If, ſaid his *Lordſhip*, I could make the defendant pay exemplary coſts, I would do it, but though it was the ancient courſe of the court, in notorious frauds, yet it has been diſuſed for ſome time, from the difficulty of carrying it into execution; but if the practice had been continued down to the preſent time, I would certainly have inſerted in the decree *Let the defendant pay exemplary coſts.*

Pugh verſus *Smith*, *July* 4, 1740. Caſe 32.

WHERE a freeman makes a will, a child of ſuch freeman muſt elect to take by the cuſtom, or by the will, and cannot claim part by one, and part from under the other, and there is no inſtance to the contrary, for the rule is, you muſt abide by the will *in toto*, or by the cuſtom *in toto*.

A child of a freeman muſt abide by the will *in toto*, or by the cuſtom *in toto*.

Caſe 33. *Huggins* verſus *the York-Buildings Company, July* 4, 1740.

A plea of a bill for the ſame matter over-ruled, where the laſt was brought in a different right.

AN adminiſtrator of a judgment creditor brought the original bill, and died; the executor of the adminiſtrator brought a bill of revivor, which was thought to be wrong, and thereupon another bill of revivor was brought by the ſame plaintiff, having firſt taken adminiſtration *de bonis non, &c.* to the judgment creditor; the defendant pleaded the bill was for the ſame matter, and upon this, it was referred to a maſter to examine whether it was ſo, who made a ſpecial report, that *the laſt bill of revivor* is brought by the plaintiff *in a different right* from what the former was, but does not ſay it was, or was not, for the ſame matter.

A demurrer muſt be good for the whole, otherwiſe as to a plea.

LORD CHANCELLOR over-ruled the plea, becauſe it appears that the bill is brought by a perſon in a different right; but the plaintiff is not intitled to coſts upon ſuch diſmiſſion, becauſe the Maſter's report is ſpecial and not general. His lordſhip alſo laid it down that a plea may be good for part, and over-ruled for part, but a demurrer muſt be good for the whole, or void for the whole.

Caſe 34. *Dean and Chapter of Ely* verſus *Sir Simeon Stewart, July* 12, 1740.

LORD CHANCELLOR laid down the following rules in this cauſe.

The court of chancery will not decree a ſpecifick performance of covenants in dean and chapter leaſes of a long ſtanding.

Where the leaſes of a dean and chapter are of long ſtanding, and have been continued down to this time without any variation as to the form, they cannot have a decree in this court for a ſpecifick performance of covenants for repairs, againſt the preſent tenants, but muſt be left to their legal remedy of an action at law for a non-performance.

An adverſe party may croſs examine a witneſs to the ſame point for which he is produced, but not to any new matter.

Where at law a witneſs is produced to a ſingle point by the plaintiff or defendant, the adverſe party may croſs-examine, as to the ſame individual point, but not to any new matter; ſo in equity, if a great variety of facts, and points ariſe, and a plaintiff examines only as to one, the defendant may croſs-examine to the ſame point, but cannot make uſe of ſuch witneſs to prove a different fact.

Where the admittance of a copyholder is of 30 years ſtanding, a copy of ſuch admittance may be read in evidence, and not neceſſary it ſhould be ſigned by the ſteward of the court.

A copy of an admittance may be read though not ſigned, where it is of thirty years ſtanding.

Deans and Chapters, for fear of incurring the penalties of the reſtraining ſtatutes, have been careful of preſerving the ſame deſcriptions in their leaſes ſince, as they did before thoſe ſtatutes; and poſſibly at the time of the old leaſes there might be barns or ancient buildings, which after ſuch a length of time, muſt have been long ſince decayed and gone; and therefore it would be hard to decree the preſent defendant to deliver up, at the expiration of his leaſe, the premiſſes with ſuch buildings upon them, when there is not the leaſt proof, that they were in being at the making of the leaſe.

Leſſees under deans and chapters preſerve the ſame deſcriptions in their leaſes ſince, as they did before the reſtraining ſtatutes, for fear of incurring the penalties.

Where there is an agreement with relation to a dean and chapter eſtate, executed by the dean, for himſelf and chapter, though ſigned by him only, it ſhall bind the chapter notwithſtanding.

An agreement for a dean and chapter eſtate, though ſigned by the dean only, ſhall bind the chapter.

Kennys verſus *Ruſcomb*, *July* 1740. Caſe 35.

A Bill was brought againſt the repreſentatives of a judgment creditor, for entring ſatisfaction, as it is of 42 years ſtanding, and preſumed to be paid from the length of time; his Lordſhip diſmiſſed the bill with coſts, for where a judgment is ſtill ſtanding out, and there is no ſatisfaction entered upon record, this court will not, merely upon the preſumption from length of time, decree it to be ſatisfied, eſpecially when the ſtatute for the amendment of the law, 4 *Ann. c.* 16. *ſ.* 12. allows you to plead payment at law, as it is an old judgment.

Where a judgment is ſtill ſtanding out, and no ſatisfaction entred, this court will not, meerly on a preſumption from length of time, decree it to be ſatisfied.

Newſtead verſus *Johnſton*, *July* 15, 1740. Caſe 36.

GRACE Lawſon, by her will, gave ſeveral legacies to her children; and then directs 1000l. to be taken out of her partnerſhip ſtock in trade, and ſettled in ſtrict ſettlement on her ſon; the reſidue of her partnerſhip ſtock, ſhe gave to a truſtee, with very particular directions as to the management, in truſt for the ſeparate uſe of her daughter *Elizabeth Johnſton*, who was a feme covert, and appoints Mrs. *Johnſton* her executrix, but makes no diſpoſition of the ſurplus. The bill is brought by *Reynold Newſtead* and *Alice* his wife, who was a daughter of the teſtatrix, againſt *Allen*

G. L. gives the reſidue of her ſtock in trade in truſt for the ſeparate uſe of her daughter, and appoints her executrix of her will, but makes no diſpoſition of the ſurplus.

This is not a legacy, but an exception out of the ſtock the teſtatrix had given to her ſon, and does not exclude the daughter from the ſurplus.

Johnſton and his children by *Elizabeth*, the other daughter, to have the ſurplus diſtributed.

LORD CHANCELLOR,

Where a perſon appoints one executor, 'tis giving him the reſidue, unleſs he has a particular legacy; and the ſame rule holds in the eccleſiaſtical court.

The giving ſeveral other legacies to the reſt of the children, is no rule that the child who is left executor ſhould have the reſidue; it is impoſſible to reduce all the caſes, as there is ſo great a contrariety between them to one general rule; but, as the law ſtands now, where a perſon appoints one executor, it is giving him the reſidue, unleſs there is a particular legacy: the ſame rule holds in the eccleſiaſtical court, except there be a ſtrong and violent preſumption that the executor was not to have the reſidue. 2 *Vern.* 648. Lady *Glanville et al'* verſus the Dutcheſs of *Beaufort*.

A legacy given to *an executor* for his care and pains, makes him, as to the reſidue, a truſtee only for the next of kin.

Ever ſince the caſe of *Foſter* and *Munt*, 1 *Vern.* 473. it is ſettled, that wherever a legacy is given to an executor for his care and pains, he is, as to the reſidue, a truſtee only for the next of kin, for it would be abſurd to give one a legacy for his care and pains in managing the eſtate for himſelf.

This reaſoning in ſubſequent caſes has been carried further, where general legacies were given without aſſigning any particular reaſon, yet held to be in excluſion of the reſidue, for a teſtator's giving a perſon part of his eſtate, is an implication that he did not intend him the whole.

Mr. *Vernon* told Lord *Macclesfield*, that he took this point to be as well eſtabliſhed, as that an eſtate to a man and his heirs is a fee-ſimple, which his Lordſhip mentioned in the caſe of *Farrington* v. *Knightly*, 1 *Wms.* 551.

There is no ſort of preſumption to be admitted from nearneſs, or remoteneſs of kin in the perſon who is left executor, that the teſtator did or did not intend him the reſidue; though in the caſe of *Ball* and *Smith*, there was a diſtinction in favour of a wife.

The preſent caſe falls directly within the reaſoning of *Griffith* and *others*, and the Dutcheſs of *Beaufort*, in the Houſe of Lords, *December* 12, 1710. Giving a ſhare in the partnerſhip ſtock to *S.* in truſt for the wife, is conſiſtent with intending her the reſidue; for had it not been done in this manner, it muſt have ſunk in the reſidue, and the huſband by this means would have been intitled to it; conſequently I can never ſay an implication ariſes from hence, that the teſtator has excluded the executrix from the benefit of the ſurplus, for implications muſt flow from natural and neceſſary conſequences; this was not a legacy but an exception out of the legacy ſhe had given of the partnerſhip ſtock to the ſon.

The

The giving a legacy directly to *B.* or giving it to *A.* in truſt for *B.* is one and the ſame thing, and equally excludes the reſidue.

A legacy in truſt equally excludes an executor from the reſidue.

Where a reſidue is given to the executor for life, (as in the caſe before the Maſter of the *Rolls*) it implies a negative that he ſhall not have it for any longer term, and diſtinguiſhes it from the preſent caſe, for here is no expreſs deviſe of the reſidue.

A gift of the Reſidue to an executor for life, implies he ſhall have it for no longer a term.

Sumner verſus *Partridge*, at the *Rolls*, *July* 25, 1740. Caſe 37.

A Deviſe to *A.* and her heirs, and if ſhe die before her huſband, he to have 20l. a year for life, remainder to go to her children, the wife died before the huſband.

Tenancy by the curteſy muſt come out of the inheritance, and not the freehold.

It is a rule, ſaid the court, in the caſe of a tenancy by the curteſy as well as in a tenancy in dower, that the eſtate ſhall come out of the inheritance, and not out of the freehold.

A tenancy by the curteſy, and a tenancy in dower are excreſcences out of the inheritance, and a continuation of the inheritance for a certain time in the huſband, which would otherwiſe have ceaſed.

A tenancy by the curteſy is a continuation of the inheritance in the huſband.

A tenancy by the curteſy muſt ariſe out of the inheritance, which muſt veſt in the wife, and there muſt be a poſſibility of its deſcending upon the children; now they take here by virtue of the remainder over, not by deſcent from the mother, and there is no difference between making an eſtate of inheritance, to ceaſe in the wife, the moment ſhe dies, and to ariſe in the children, and a jointenancy.

There can be no tenancy by the curteſy where the children take by virtue of a remainder over, and not by deſcent from their mother.

Neither a tenant in dower or curteſy can intitle themſelves to an eſtate in dower, or curteſy, where the children who are left cannot poſſibly take an inheritance, for the moment of time the huſband takes as tenant by the curteſy, the inheritance muſt deſcend upon the children, and therefore it is impoſſible, in the preſent caſe, to maintain the father is tenant by the curteſy.

To intitle the huſband to be tenant by the curteſy, the inheritance muſt deſcend upon the children.

Biggleſton

Caſe 38. *Biggleſton* verſus *Grubb*, *July* 16, 1740.

500 *l.* given in a teſtator's life time is a ſatisfaction for the ſame ſum left in his will.

A Bill was brought for a legacy of 500 *l.* by a huſband, in the right of his wife, given her under the will of her father, notwithſtanding he had in the father's life-time received 500 *l.* as a portion.

Parol evidence was admitted to ſhew the father gave the 500 *l.* to the huſband, in full of what he intended his daughter under his will.

A bill diſmiſſed with coſts, for refuſing a fair offer of accommodation.

Where a plaintiff is abſurd enough to refuſe a fair offer of accommodation, and obſtinately perſiſts in his ſuit, it is an aggravation, and the bill ſhall be diſmiſſed with coſts. And his Lordſhip decreed accordingly.

Caſe 39. *Henley* verſus *Philips*, *July* 1740.

Rules of evidence the ſame in law and equity.

THE rules of evidence in this court as to witneſſes are exactly the ſame as at law.

Where a witneſs is dead who atteſted a deed, you muſt prove him to be ſo.

If witneſſes are dead, who have atteſted a deed, it is not ſufficient you prove the hand-writing, but you muſt likewiſe ſhew they are dead.

Where an atteſting witneſs has lived abroad, a ſtrict proof of his death is required, otherwiſe where he has lived conſtantly in *England*.

Where a perſon has lived abroad for ſome years, after atteſting a deed, there muſt be a ſtrict proof of his death; otherwiſe where the witneſs has lived conſtantly in *England*, from the time of his ſubſcribing his name to the day of his death; there a ſlight evidence of his death is ſufficient, eſpecially where the perſon who proves his hand knew him intimately, and ſwears that he believes him dead; in ſuch a caſe, the court will not expect ſuch nicety, as that a certificate of his funeral ſhould be produced.

If a truſtee, merely to have a point relating to his private intereſt determined, brings the *ceſtuy que truſt* before the court, he ſhall pay the whole coſts of the ſuit.

Where a truſtee is merely a truſtee, and there is any act to be done by him, it is very commendable in him to be cautious, but where he has a private intereſt of his own ſeparate and independant from the truſt, and obliges *ceſtuy que truſt* to come into this court, merely to have the point relating to his private intereſt determined at the expence of the truſt; this is ſuch a vexatious behaviour in him, that for example's ſake he will be decreed to pay the whole coſts of the ſuit.

Though

Though a feme covert has a power of diſpoſing of a ſum of money, or any other thing, by a writing, purporting to be a will, yet after the wife's death, the proving it in the ſpiritual court will not give it the authority of a will, but it will be ſtill conſidered as an inſtrument only, or an appointment of ſuch ſum or other thing in the purſuance of the power; and before it is proved in the commons, as a teſtamentary conveyance, the ſecond huſband ought to be examined there, as to his conſent, nor till then will it have the effect and operation of a will.

A power in a feme covert to diſpoſe by a writing purporting to be a will, does not give it the authority of one in the eccleſiaſtical court, and the huſband muſt be examined to his conſent, before it can be proved.

Lock verſus *Bennet*, *July* 17, 1740. Caſe 40.

WHERE there are mutual demands between a creditor and a bankrupt under the clauſe in 5 *Geo.* 2. *ch.* 30. *ſect.* 29. in which are theſe Words, *no more ſhall be claimed and paid than appears to be due, on either ſide, upon a balance of accounts ſtated.* The *Maſter of the Rolls* was of opinion, that upon an action at law the defendant might ſet off his demand againſt the plaintiff, as is done in other caſes by virtue of the ſtatute of 2 *Geo.* 2. *ch.* 22. *ſect.* 13. and 8 *Geo.* 2. *ch.* 24. *ſect.* 6. and that there is no occaſion to come into a court of equity, to pray an injunction to a ſuit at law, and that the plaintiffs at law may account.

Where there are mutual demands, a defendant upon an action at law may as well ſet off upon 5 *Geo.* 2. the bankrupt act, as in common caſes under 2 *Geo.* 2.

Berriſford verſus *Milward*, *July* 18, 1740. Caſe 41.

A mortgagee was preſent when the mortgagor was in treaty for the marriage of his ſon, with the father of *A.* the ſon's intended wife, and the lands incumbred being agreed to be ſettled upon this marriage to the huſband for life, to the wife for life, remainder to the iſſue male and female, it was not oppoſed by the mortgagee, but he fraudulently concealed his mortgage, and at the ſame time privately aſſured the father of the ſon, that he would truſt to his perſonal ſecurity; it was decreed that the ſon, and his wife, and the iſſue of this marriage, ſhall hold the lands quietly and peaceably againſt the mortgagee and his heirs.

Where a mortgagee was preſent whilſt a mortgagor was in treaty for his ſon's marriage, and fraudulently concealed his mortgage, the court decreed the ſon, the wife, and the iſſue, to hold the lands againſt the mortgagee and his heirs.

The mortgagee was directed to aſſign his mortgage to truſtees, the one to be named by the ſon, and the other by himſelf, to attend the ſeveral limitations contained under the marriage ſettlement; and in caſe the plaintiff dies without iſſue of the marriage, or the eſtates limited to the iſſue of the marriage determine, then the parties were at liberty to apply to the court for further directions, the injunction to ſtay the mortgagee's proceedings at law was made perpetual, and he

likewiſe was ordered to pay the expence of the aſſignment to the truſtees.

Caſe 42. *Marſh* verſus *Howe*, *July* 18, 1740.

Where a probate differs from an original will, there muſt be an application to the ſpiritual court to amend.

WHERE there is a variance between the original will and the probate, the cauſe muſt ſtand over, and the Parties are at liberty to apply to the ſpiritual court for amendment; and if they ſee occaſion, to make the proper alterations in the probate.

July 18, 1740.

Caſe 43.

A cauſe on a rehearing muſt be opened as a caſe.

UPON rehearing a cauſe which was originally heard before the chancellor, it muſt be opened as a caſe.

Caſe 44. Exceptions *ex parte Halſam*, *July* 24, 1740.

A wife whoſe conſcience is hurt by the anſwer drawn up by the huſband, will be allowed to anſwer diſtinct from him.

IF a wife cannot in conſcience conſent to ſuch an anſwer as is drawn up by the huſband, ſhe is not obliged to ſubmit to it; but upon application to the court, ſhe may be conſidered as a ſeparate perſon, and will be allowed to anſwer diſtinct and independant from the huſband.

Where a huſband by menaces prevails on a wife to put in an anſwer, he may be puniſhed for a contempt.

If a huſband inſiſts that his wife put in an anſwer contrary to what ſhe believes is the fact, and by menaces prevails upon her to do it; this is an abuſe of the proceſs of the court, and he may be puniſhed for the contempt.

Caſe 45. *Lewin* verſus *Okeley*, *July* 26, 1740.

Where an executor is alſo the truſtee for payment of debts, the aſſets ſhall ſtill be equitable and not legal, and the creditors muſt be paid *pari paſſu*.

THERE was a deviſe to truſtees for the payment of debts, and the ſaid perſons were made executors, the aſſets, ſaid the court, ſhall notwithſtanding be equitable, and not legal, and all the creditors muſt be paid *pari paſſu*. There are caſes in *Vernon's Reports*, in which it is held, that where truſtees are made executors, (*vide Girling* v. *Lee*, 1 *Vern.* 63, *&c.*) debts ſhall be paid in a courſe of adminiſtration, but the modern reſolutions have been otherwiſe.

Mackworth verſus *Clifton*, at the *Rolls*, *July* 31, 1740. Caſe 46.

THE ſtatute of limitations cannot be pleaded to the diſcovery when the debt was due, though it may to the debt it ſelf, becauſe, by the defendant's ſetting forth when the debt commenced, it will appear to the court, whether the ſix years are incurred according to the ſtatute.

The ſtatute of limitations may be pleaded to the debt, but not to the diſcovery when the debt was due.

Aſhurſt verſus *Eyre*, *Eaſter* Term, 1740. Caſe 47.

A Bill for a diſcovery of aſſets was diſmiſſed, upon a plea that the adminiſtrator was not a party, though it was a fact not diſputed, that he was an inſolvent perſon.

An adminiſtrator, though inſolvent, muſt be a party to a bill for diſcovery of aſſets.

Plunket verſus *Penſon*, at the *Rolls*, *July* 31, 1740. Caſe 48.

A Bill, ſaid the court, ſo far as it is not contradicted by the plea, muſt be taken to be true.

A plea, for want of proper parties, is a plea in bar, and goes to the whole bill, as well to the diſcovery as to the relief.

A plea that the bill is only brought againſt the repreſentatives of the real eſtate, whereas it ought to be likewiſe againſt the repreſentatives of the perſonal eſtate, ſuch a plea ought to be allowed, whatever reaſon there may be to ſuſpect it is put in for delay, that the rule of the court may be uniform.

A plea for not bringing the repreſentatives of the perſonal eſtate before the court allowed, even though ſuſpected to be for delay merely.

In bills of diſcovery, the court ſaid, you ſhould make every perſon a party who is neceſſarily to be made ſo, that you may not multiply ſuits improperly; at law, indeed, if you was to join the heir and executor in an action, they might demur to your action, but in equity you may join them.

At law, if you join the heir and executor in an action they may demur, otherwiſe in equity, for every perſon muſt be made a party, who is neceſſarily ſo.

A bill of diſcovery of real aſſets may be brought againſt an heir, in order to preſerve a debt, without making an adminiſtrator of the perſonal eſtate a party, where you ſuggeſt that the repreſentation is conteſting in the eccleſiaſtical court, and there a plea for want of parties would not be allowed.

Where the repreſentation is conteſting in the ſpiritual court, you may bring a bill for diſcovery of aſſets againſt the heir, without making an adminiſtrator a party.

Lunatick

Caſe 49. *Lunatick Petitions, Auguſt* 4, 1740.

Vagrants only, and not perſons of rank, are within the act that impowers juſtices of peace to take care of lunaticks.

THE act of parliament that impowers juſtices of peace to take care of lunaticks, upon complaint made to them of any outrages committed, relates to vagrant lunaticks only, who are ſtrolling up and down the country, and does not extend to perſons who are of rank and condition in the world, and whoſe relations can take care of them properly, by applying to this court, as is uſual in caſes of lunacy.

A commiſſion of lunacy kept back for ſeveral years, without putting it in execution, is a contempt of the court, and will be diſcharged with coſts.

A perſon's keeping a commiſſion of lunacy by him for ſeveral years, without ever putting it in execution, is of very dangerous conſequence, as it may be made an improper uſe of in many reſpects, particularly to terrify and diſtreſs the perſon againſt whom it iſſues; and therefore, for theſe reaſons, and it being likewiſe a contempt of the court, the commiſſion was diſcharged with coſts, and the petition alſo.

Caſe 50. *Morret* verſus *Paſke, October* 16, 1740.

A Creditor by judgment, in 1698, for 600l. in the year 1707, comes to an account with the conuſor, and ſettles the remainder due upon the judgment at 420l. and then takes a mortgage in fee for that ſum, as a collateral ſecurity to the judgment: one *Saunders*, an attorney, in 1716, takes an aſſignment of this mortgage, in which there is a recital, that 90l. the conſideration of the aſſignment, was then the full worth of the eſtate; and the aſſignment likewiſe was made at a time when there was a ſuit depending between particular creditors upon ſeveral other eſtates of the mortgagor, (the late Mr. *John Bennet*,) in conjunction with judgment creditors at large, and the repreſentatives of *Bennet*. *Saunders* was in poſſeſſion too of another mortgage, in 1688, upon the ſame eſtate as was ſubject to the judgment in 1698, and the mortgage in 1707.

LORD CHANCELLOR,

Saunders ſhall not be allowed to tack the two mortgages together, *viz.* that in 1688, and the other in 1707, ſo as to defeat intermediate incumbrancers, between the years 1688 and 1698, and yet the mortgage in 1707, ſhall have relation back to the judgment in 1698, and by conſolidating them together, ſhall intitle *Saunders* to receive the ſum due upon that judgment prior to creditors after the year 1698, but as to money reported due ſince the mortgage in 1707, *Saunders* is to be paid only in priority to creditors ſubſequent to 1707.

The rule of the court as to prior incumbrancers taking in a ſubſequent one, ſo as to tack it to the prior, is where he is a *bonâ fide* purchaſer of the puny incumbrance, without notice of intermediate ones, but here the puny incumbrance was brought in while there was ſuch a *lis pendens*, as will make *Saunders* a purchaſer with notice.

None but a *bonâ fide* purchaſor of a puny incumbrance, without notice of intermediate ones, can tack it to a prior.

The words in the recital of the aſſignment of the mortgage in 1716, that 90l. the conſideration money, was the full worth of the eſtate, at that time, naturally implies that there were other intermediate incumbrances, and therefore to give *Saunders* the advantage of tacking both mortgages would be contrary to his own intention, for at the time he took the aſſignment of this puny incumbrance, he muſt know the eſtate was worth no more, from the very words of the recital.

If a prior mortgagee takes an aſſignment of a third mortgage, as a truſtee only for another perſon, he ſhall not be allowed to tack the two mortgages together, to the prejudice of intervening incumbrancers; if this was permitted, a mere ſtranger purchaſing the third mortgage, by declaring he bought it in truſt only, for the firſt mortgagee might tack both together, and defeat all the other incumbrancers.

A prior mortgagee, who has an aſſignment of a third mortgage as a truſtee only, cannot tack the two mortgages together, to the prejudice of intervening incumbrancers.

The reaſon why a mortgage may be tacked to a judgment, is this, becauſe the judgment creditor, by virtue of an elegit, may bring an ejectment, and hold upon the extended value, and as he has the legal intereſt in the eſtate, the court will not take it from him; but this rule holds only where the ſame perſon has both judgment and mortgage in the ſame right, and not where he has the judgment in his own right, and the mortgage in another right, as a truſtee only.

A mortgage may be tacked to a judgment.

Where there is a prior mortgagee, who has a puiſne incumbrance, a ſecond mortgagee ſhall not redeem the prior, without redeeming the puiſne at the ſame time; and the reaſon is, becauſe the legal eſtate is in the firſt mortgagee, and this court will not take away that benefit from him, provided he had no notice of the ſecond at the time he bought in the puiſne one.

A firſt mortgagee has the legal eſtate, and if he has a puiſne incumbrance, a ſecond mortgagee ſhall not redeem the prior, without redeeming the puiſne at the ſame time.

Where a prior incumbrancer, by mortgage, judgment, or ſtatute ſtaple, has a bond likewiſe from the mortgagor, the mortgagor in his life-time may redeem the mortgage, *&c.* without paying off the bond debt; otherwiſe as to the heir at law, becauſe the moment he redeems the eſtate, it ſhall be aſſets in his hands, and for this reaſon, the court compels him to diſcharge the bond, as well as the mortgage.

Where a mortgagee has a bond likewiſe from the mortgagor, the heir muſt diſcharge the one as well as the other.

Where a prior incumbrancer has a bond likewiſe, it ſhall be poſtponed to all other incumbrances, whether by mortgage, judgment, or ſtatute ſtaple.

Where there are ſeveral incumbrancers upon an eſtate, as is the preſent caſe, and the prior incumbrancer has a bond likewiſe, he cannot inſiſt upon being paid both, which would be a prejudice to the puiſne incumbrancers, but his bond ſhall be poſtponed to all other incumbrancers, whether by mortgage, judgment, or ſtatute ſtaple, for he has not the ſame equity againſt a puiſne incumcrancer as againſt an heir at law, who is liable in reſpect of aſſets.

A prior creditor who buys in a puiſne incumbrance, though he did not give the full value, ſhall be allowed the whole, otherwiſe as to a *truſtee, agent, heir at law*, or *executor*.

An agent, truſtee, heir at law, or executor, purchaſing a puiſne incumbrance, as againſt another incumbrancer, ſhall be paid no more than what he gave for this incumbrance; otherwiſe as to a prior creditor, who *bonâ fide* buys in a puiſne incumbrance, though he did not give the full value for it; the rule is laid down generally indeed by Lord Chancellor *Jefferys*, in the caſe of *Williams* v. *Springfield*, as well with regard to creditor and creditor, as to truſtees, heir at law, or executor; * but I cannot ſay, that I remember any decree in this court, ſubſequent to this caſe, where it has been laid down as a general rule, but has been much more narrowed ſince, and holds only, as I obſerved before, with regard to agent, truſtee, heir at law, or executor.

Caſe 51. *Partriche* verſus *Powlet*, upon the Maſter's ſpecial report, *October* 17, 1740.

MRS. *Sarah Ward*, previous to her marriage with Mr. *Partriche*, was intitled to a moiety of perſonal eſtate, amounting to 5300l. with her ſiſter Mrs. *Powlet*, in jointenancy, being the eſtate of their ſiſter *Mary Ward*, deceaſed; by the marriage ſettlement, the real eſtate only is conveyed, for what relates to her perſonal eſtate depends merely upon a recital in the deed, which is nothing more than that ſhe ſhall enjoy the 5300l. to her ſeparate uſe, and a covenant on the part of the huſband, that ſhe ſhall enjoy it quietly, *&c.* then come theſe words, *for want of iſſue of her own body*, it ſhall go to the next of kin of her own family.

The ſingle queſtion was, Whether the jointenancy between Mrs. *Sarah Ward*, who is dead, and her ſiſter Mrs. *Powlet*, in the eſtate of *Mary Ward*, is ſevered in whole, or in part?

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* *Per Cur'*: Where there are ſubſequent incumbrances, or creditors in the caſe, there *a man* that buys in a prior incumbrance ſhall be allowed only what he really paid, though there was in truth a greater ſum due. *Williams* v. *Springfield*, 1 *Vern.* 476.

LORD CHANCELLOR,

This is not a ſeverance, for, *firſt*, here is no agreement for this purpoſe; *ſecondly*, if no agreement, then there muſt be an actual alienation to make it amount to a ſeverance; the declaration of one of the parties that it ſhould be ſevered is not ſufficient, unleſs it amounts to an actual agreement, and here is nothing in the marriage ſettlement which amounts to an alienation, either in law or equity; for the real intention was to preſerve the right of the wife as it was, ſo that her property may not be altered, by the interpoſition of the huſband; and for any thing that appears to the contrary, it might likewiſe be intended to preſerve the right ſhe might have of ſurvivorſhip, upon Mrs. *Powlet*'s dying before her.

An actual alienation only can ſever a jointenancy; a declaration of one of the parties that it ſhall be ſevered is not ſufficient.

There is, beſides, another reaſon, the other jointenant was no party to the deed.

The only thing that could give the leaſt colour to the ſuppoſition of jointenancy, are theſe words in the marriage agreement, *for want of iſſue of her own body*, then it ſhall go to the next of kin of her own family.

But I do not think they are ſufficient to make the iſſue of her body purchaſers, or to give them a right to come into this court as purchaſers, to have the agreement carried into execution in their favour; if it had, I ſhould have inclined to think it a ſeverance, but, notwithſtanding theſe words, it ſtill leaves it at large, and abſolutely at the wife's diſpoſal.

A jointenancy is undoubtedly no favourite of a court of equity, though otherwiſe at law; but, in the preſent caſe, here is no pretence of an alienation, either in law or equity. *Moyſe* ver. *Gyles*, 2 *Vern.* 385 *.

A jointenancy a favourite at law; otherwiſe in a court of equity.

Alienatio rei præfertur juri accreſcendi, is a maxim in equity, but then it muſt appear to be an actual alienation, and not from inference and implication only, without any expreſs declaration of the parties.

A maxim in equity is *alienatio rei præfertur juri accreſcendi*.

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* *Per Cur'*: The plaintiff's huſband and defendant had enjoyed a church leaſe in moieties, under an agreement there ſhould be no benefit of ſurvivorſhip. Upon the laſt renewal, the leaſe was taken in both their names, and no expreſs agreement againſt ſurvivorſhip. The plaintiff's huſband being ſick, by deed, aſſigned his moiety of the leaſe to his wife, and by his will, deviſed it to her. The grant to the wife is void, and the deviſe will not ſever the jointenancy. *Moyſe* v. *Gyles*.

Caſe 52. *Lucas* verſus *Seale*, *October* 17, 1740.

Where one executor is indebted to the teſtator by mortgage, if the co executors are apprehenſive he is inſolvent, they ſhould bring a bill againſt him for ſale of the eſtate, to pray a foreclosure would be improper.

LORD CHANCELLOR ſaid in this caſe, where there are ſeveral executors, and one of them is indebted to the teſtator, for which he had given a ſecurity by way of mortgage upon his eſtate, if the co-executors are apprehenſive that he is inſolvent, and that the eſtate may prove a deficient ſecurity, bringing a bill againſt him to foreclose is improper, becauſe the teſtator having made him an executor, gives him an intereſt in the mortgage, the other executors ſhould have brought a bill for ſale of the eſtate.

Caſe 53. The caſe of the *York-Buildings Company*, *October* 24, 1740.

An account with the King can be in the Exchequer only.

LORD CHANCELLOR ſaid, an account between the King and a ſubject, cannot be taken in any caſe, in this court, but in the Exchequer only.

This court will not decree publick Companies to make calls in favour of a partiular creditor.

Where the companies are obliged to make calls, this court will not decree them to make ſuch a call, upon a bill brought by a creditor for that purpoſe, in favour of that particular creditor, unleſs under very extraordinary circumſtances.

Caſe 54. *Wallis* verſus *Hodgeſon*, *October* 24, 1740. upon exceptions.

When a will is to be eſtabliſhed, the teſtator muſt be proved to be of a ſound and diſpoſing mind.

LORD CHANCELLOR ſaid, it had been determined over and over in this court, that you muſt ſhew the perſon to be of ſound and diſpoſing mind, where a will is to be eſtabliſhed as to real eſtate, and eſpecially if there are infants in the caſe; proving it to be well executed, according to the ſtatute of frauds and perjuries, is not ſufficient.

If, ſaid his Lordſhip, they could have produced evidence on the part of the plaintiff, of any act having been done under the will relating to the real eſtate, he would have diſpenſed with the rule, being a mere matter of formality.

Godolphin

Godolphin verſus *Abingdon*, *October* 27, 1740. Caſe 55.

WHERE, ſaid LORD CHANCELLOR, a limitation is to *A.* for life, to his wife for life, to truſtees to preſerve contingent remainders, to the firſt and every other ſon in tail, remainder to his own right heirs; it will be abſurd to ſay, that by a conveyance of land, or by uſe, or by deviſe, the laſt limitation ſhall make the right heirs purchaſers, and by that means prevent the reverſion from being aſſets to ſatisfy the ſon's debts; for according to the doctrine laid down in the caſe of *Counden* and *Clerke*, *Hobart* 29. the limitation to the right heirs, will be but a reverſion, and will veſt alſo in the ſon; for it is a poſitive rule, that a man cannot raiſe a fee-ſimple to his own right heirs by the name of heirs, as a purchaſe, by any form of conveyance whatſoever. The ſame caſe is reported in *Moore* 860. but the point is wrong ſtated.

A man cannot by any form of conveyance whatſoever raiſe a fee-ſimple to his own right heirs, by the name of heirs, as a purchaſe, ſo as to prevent the reverſion from being aſſets to ſatisfy the ſon's debts.

Phipps verſus *Anneſley* & *e contra*, *October* 27, 1740. Caſe 56.

THE only queſtion in this caſe of *Phipps* and *Anneſley* was, whether 3000 *l.* given under the will of *James* Earl of *Angleſea* to his daughter, ſhall come out of the perſonal eſtate, or whether it is expreſly exempted from the payment of it; the will ſets out in general words, "As to my worldly eſtate, with which "it has pleaſed God to bleſs me, (and then recites ſeveral manors, "lands, *&c.*) I deviſe them in truſt for the payment of all my juſt "debts, and all my legacies, and the reſidue to my nephew *Arthur* "*Anneſley*. *Item*, I give and bequeath to my only daughter *Ca-*"*therine*, the ſum of 3000 *l.* (over and above the 12,000 *l.* which "is conveyed to her under my marriage ſettlement) at her age of "18, or marriage; and that the truſtees ſhall levy and raiſe by "mortgage or ſale of his lands, together with his perſonal eſtate, as "much as will pay the 3000 *l. but that it ſhall not be raiſed till* "18, *or marriage, out of the before mentioned eſtate or land that it* "*may not be a debt upon my perſonal eſtate.* There are three dif-"ferent clauſes beſides in the will, that conclude with theſe words, "*that his lands are deviſed to pay his debts, and all his legacies, in* "*caſe his perſonal eſtate ſhall not be ſufficient.*"

A teſtator gives his only daughter the ſum of 3000*l.* at her age of 18, or marriage, and that the truſtees ſhall levy and raiſe by mortgage or ſale of his lands, together with his perſonal eſtate, as much as will pay the 3000 *l.* but that it ſhall not be raiſed till 18, or marriage, out of the before-mentioned eſtate, or land, *that it may not be a debt on his perſonal eſtate.*

Lord *Hardwicke* held that the perſonal eſtate was excepted, and that the 3000 *l.* is a charge on the real eſtate.

LORD CHANCELLOR.

Though this objection comes extremely late after two decrees, it muſt have its weight, if, as the plaintiff inſiſts, it be rightly founded.

Perſonal eſtate is the natural fund for payment of debts.

It is certainly the rule of the court, that perſonal eſtate is the natural and proper fund to be firſt applied to the payment of debts, unleſs there are expreſs words to exempt it.

I am of opinion, however inaccurately penned, that the intention of the teſtator in the preſent caſe, was to exempt his perſonal eſtate from the payment of this 3000 *l.* for in the clauſe by which he bequeaths this ſum to his daughter, he takes notice that there was the ſum of 12,000 *l.* already charged upon the real eſtate.

A leſs ſum given under a will than under a ſettlement, is not a ſatisfaction of a greater.

His deſign muſt have been to give her this as an additional fortune, and to connect the two ſums together; for where a leſs ſum is given under a will than under a ſettlement, the rule will not hold, that it ſhall be taken to be in ſatisfaction of a greater.

It has been objected, that *the before-mentioned eſtate* muſt mean the perſonal eſtate, perſonal eſtate being the laſt antecedent; and yet it certainly does not, but is ſet in direct oppoſition to the perſonal eſtate, and the words immediately following, *or lands*, is not disjunctive, as is inſiſted on, but explanatory rather of his intention, that the 3000 *l.* ſhould come out of the real eſtates charged before with the 12,000 *l.*

Where a legacy is a charge upon perſonal eſtate, this court will ſet apart a ſufficient ſum to anſwer it, though not immediately payable.

Where there is a charge upon a perſonal eſtate, though it is not immediately payable, yet the perſon intitled may come into this court, and pray that a ſufficient ſum may be ſet apart to anſwer the legacy when it ſhall become due.

This probably was the reaſon of the teſtator's inſerting the words, *that it ſhould not be a debt upon his perſonal eſtate*, that ſo large a ſum as 3000 *l.* might not be locked up in the mean time, until the daughter, who was then young, ſhould arrive at eighteen, or be married; and theſe words, *that it ſhould not be a debt upon his perſonal eſtate*, are ſaid indefinitely, and not for a limited time.

Upon the whole, this is one of thoſe caſes where by negative words in a will the perſonal eſtate is excepted, and therefore the 3000 *l.* as well as the 12,000 *l.* are a charge upon the real eſtate only.

Caſe 57. *Ayliffe* verſus *Murray*, *October* 27, 1740.

Two perſons executors and truſtees under a will, would not prove the will, nor ſuffer the *ceſtuy que truſt* to take out letters of adminiſtration *cum teſtamento annexo*, till he had executed a deed, by which he was to pay *a hundred pounds* to one executor, and *two hundred pounds* to the other, within ſix months after they ſhall have exhibited an inventory. Lord *Hardwicke* declared the deed was unduly obtained, and decreed no allowance ſhould be made for the ſum of 100 *l.* and 200 *l.* to the plaintiffs.

TWO perſons who were both executors and truſtees under a will, and one of them an attorney that drew up the will refuſed to act in the truſt, unleſs *ceſtuy que truſt* would give them beſides

beſides their legacies ſome conſideration for acting in the truſt; he refuſed to do it for ſome time, but at laſt conſented, and executed a deed for paying 100*l.* only, to *Brian Ayliffe*, one of the truſtees, who being an attorney thought ſome profitable ſuit might ariſe out of the will, and therefore aſked no more, but to Mr. *Pomfret* the other truſtee 200*l.* becauſe being no lawyer, he had not the ſame advantage with his co-truſtee.

This contract was obtained from the *ceſtuy que truſt* only two days after teſtator's death, but then it was ſettled by his counſel, at three ſeveral meetings for that purpoſe, before he executed it.

The truſt-eſtate is 1200*l.* a year in value, conſiſting chiefly of leaſehold eſtates, which the truſtees are directed by the will to renew from time to time, beſides other neceſſary trouble.

The 200*l.* to *Pomfret*, and the 100*l.* to *Brian Ayliffe*, under the contract, was to be paid to them, over and above their legacies, within ſix months after they ſhall have exhibited an inventory to the eccleſiaſtical court, and ſuch payment was to ariſe out of the dividends and intereſt which ſhould become due to the defendant.

The bill is brought for a ſpecifick performance of the agreement, and for an account.

The principal ſuggeſtion of fraud on behalf of the defendant was, that the plaintiff and his co-truſtee threatned that they would not prove the will themſelves, nor ſuffer the defendant to take out letters of adminiſtration, *cum teſtamento annexo*, unleſs he would agree to their propoſal, and that this was the ſole inducement of the defendant's executing the contract.

LORD CHANCELLOR.

This is a caſe of very great conſequence, and it is incumbent upon the court to proceed upon wary ſteps, before they eſtabliſh ſuch demands.

That a truſtee cannot contract with *ceſtuy que truſt*, or purchaſe part, or the whole truſt-eſtate from the *ceſtuy que truſt*, though for a valuable conſideration, but that a court of equity will ſet it aſide, muſt depend upon circumſtances, and is not a general rule.

It is not a general rule to ſet aſide every purchaſe made by a truſtee of a truſt eſtate, but depends upon circumſtances.

If the defendant is right in his objections, to theſe allowances, undoubtedly he might have brought his croſs-bill to ſet them aſide; but

Where a bill prays an account and allowances in that account, a defendant may equally make objections, as if he had brought his croſs bill.

I am of opinion, where a plaintiff brings his bill, praying an account againſt a perſon, and allowances in that account, the defendant is as proper to make objections, as if a croſs-bill had been brought.

There may be caſes where the court will eſtabliſh an agreement, made with a truſtee for an extraordinary allowance, beyond the terms of the truſt.

With regard to the merits, whether upon general grounds a truſtee may make an agreement with a *ceſtuy que truſt* for an extraordinary allowance, over and above what he is allowed, by the terms of the truſt, I think there may be caſes where this court would eſtabliſh ſuch agreements, but at the ſame time would be extreamly cautious and wary in doing of it.

This court always holds a ſtrict hand over truſtees in reſpect to extra allowances.

In general this court looks upon truſts as honorary, and a burden upon the honour and conſcience of the perſon intruſted, and not undertaken upon mercenary views; and there is a ſtrong reaſon too againſt allowing any thing beyond the terms of the truſt, becauſe it gives an undue advantage to a truſtee, to diſtreſs a *Ceſtuy que truſt*, and therefore this court have always held a ſtrict hand upon truſtees in this particular.

If a truſtee comes in a fair and open manner, and tells the *ceſtuy que truſt*, that he will not act in ſuch a troubleſome and burdenſome office, unleſs the *ceſtuy que truſt* will give him a further compenſation, over and above the terms of the truſt, and it is contracted for between them, I will not ſay this court will ſet it aſide, though there is no inſtance where they have confirmed ſuch a bargain.

But in the preſent caſe, the proceeding is not ſo fair and open, for Mr. *Ayliffe* is an attorney, drew the will himſelf, and was likely in the way of his profeſſion to make a conſiderable profit of the truſt; as there was an account to be ſettled, a conveyance to be made, and ſeveral other things to be done in the law way; and beſides, if the legacy was too ſmall, why did not *Ayliffe* make the objection at the time he drew the will, as the defendant very properly obſerved, when *Ayliffe* aſked for an additional allowance.

Not ſwearing expreſsly to words ſpoken, but adding, or to that effect, is a proper caution in an affidavit.

It has been ſaid, that the defendant's brother, ſwearing in his depoſition that *Ayliffe* ſaid, he would hinder *Murray* from adminiſtring, *or words to that effect*, carried too great a Latitude; but I think it very proper, for where a man ſwears to words, if he is miſtaken in any of them, he is perjured, and therefore ſwearing *Ayliffe* ſaid, he would hinder *Murray* from adminiſtring, *or to that effect*, was very right, and I have often objected to affidavits for want of them.

I conſider the caſe in this light; two truſtees are making an ill uſe of an authority, they had under the will, to extort a reward from a *ceſtuy que truſt*; if they had told him, give us a farther reward,

ward, or we will renounce, they had acted fairly, and ſomething might have been ſaid in favour of the contract.

The perſonal eſtate was veſted in them before probate, and could not be got out of them without an actual renunciation; the real eſtate likewiſe veſted in them, and could not be taken out of them but by an actual aſſignment; and ſenſible of theſe difficulties upon the defendant, the plaintiffs would not act, in order to force him into their terms.

This caſe has been compared to ſeveral other caſes of fraud, and amongſt the reſt to marriage-brocage bonds, and not improperly; for the perſon who has the reward there, has as much trouble as the truſtees have here, and the party giving the reward in thoſe caſes, full as willing as the defendant in this, and yet the court always ſet thoſe bargains aſide as unconſcionable.

Conſider the ill conſequences of ſuch a caſe; ſuppoſe it ſhould be neceſſary that a will ſhould be immediately proved, as, in the caſe of a widow and children, ſhall a truſtee, in whom the teſtator repoſed a truſt, and confidence, and depended upon his honour and kindneſs, inſiſt upon ſuch hard terms as to have an unreaſonable reward, before he will either prove the will, or act in the truſt?

Therefore upon the whole I declare that this deed was unduly obtained from Mr. *Thomas Murray*, and decree no allowance to be made for the ſums of 100*l.* and 200*l.* and direct both the plaintiff *Pomfret*, and the repreſentaitve of *Bryan Ayliffe*, to pay coſts as to ſo much as relates to the deed, general coſts reſerved.

April 16, 1740. on exceptions to a Maſter's report. Caſe 58.

LORD CHANCELLOR laid it down in this caſe, that where a rent-charge is granted by deed, and the deed happens to be loſt, you cannot read a copy in evidence at law, becauſe you muſt declare with a *profert hic in curia*, as the defendant is intitled to *oyer* of the original, ſo that the plaintiff muſt either ſet up a preſcriptive title to the rent, from a conſtant and uninterrupted payment, or he muſt bring his bill to de relieved againſt the accident of the original's being loſt; the ſame rule holds in the caſe of a bond, for though a hundred witneſſes could prove the ſubſtance of it, yet it is not ſufficient at law, for you muſt declare upon it, with a *profert hic in curiâ*.

Where a deed happens to be loſt, you cannot at law read a copy, becauſe you muſt declare with a *profert hic in curia*, and therefore you may bring a bill here to be relieved againſt the accident of the original's being loſt.

Caſe 59. *Smith* verſus *Fellows*, at the *Rolls*, *October* 28, 1740.

If a freeman of *London* makes a voluntary deed in conſideration of love and affection only, and reſerves the power over the eſtate to himſelf, the property ſtill continues in him, and is ſubject to the cuſtom.

THE queſtion here was, whether a freeman of the city of *London*, who makes a voluntary Deed, merely for the conſideration of love and affection, without any pecuniary one, and reſerves the power over the eſtate to himſelf, is not guilty of ſuch a fraud upon the cuſtom, as will induce this court to ſet aſide the deed.

The deed was in ſubſtance as follows.

" Whereas I the ſaid *William Fellows* am deſirous to ſettle the " aforementioned premiſſes for the benefit and advantage of my ſon " *Richard Fellows* in the world, in caſe he ſhall attain the age of " 21, and be living at the time of my deceaſe, over and above what " he may be intitled to beſides, out of my eſtate, I grant to *Joſiah* " *Fellows* and *George Barlow* a term of 99 years in truſt to permit " me the ſaid *William Fellows* the father to take the rents and profits " of the ſo aſſigned premiſſes, for ſo long of the 99 years term as I " ſhall live, and in caſe the ſaid *Richard Fellows* my ſon, at my " deceaſe ſhall be at full age, to aſſign the reſidue of the term to him; " but if he ſhall not be of full age, then the ſaid *Joſiah Fellows* and " *George Barlow* ſhall receive the rents and profits, and allow ſo " much as they think proper for his maintenance, and the ſurplus to " be laid out by the truſtees, or ſurvivor, in government ſecurities, " for the benefit of *Richard*, when he comes of age.

" Provided always, that if the ſaid *Richard Fellows* ſhould depart " this life, in the life-time of *William*, then all the truſts hereby de- " clared to him by this deed to be void, and in caſe of his death, be " a truſt for the other children, (in excluſion of the widow) if they " attain the age of 21, and in caſe of the death of all the children " before that age, then to the next of kin of his own family.

This deed was made in the life-time of the firſt wife of *William Fellows*.

The bill is brought by the 2d wife, the widow of the freeman, who was ignorant of this deed at the time ſhe married, and likewiſe by the reſt of the freeman's children, to have the property diſpoſed of by this deed to the eldeſt ſon, to be brought by him into hotchpot, that it may be diſtributed according to the cuſtom of *London*.

Maſter of the Rolls. The caſe 2 *Lev.* 130. is a ſtronger than the preſent, becauſe there the poſſeſſion of the term was delivered purſuant to the aſſignment, here poſſeſſion was kept, and the rents received conſtantly by the aſſignor; however I ſhall take time to conſider of

it. On the 2d of *November* 1740, the cauſe came on again, and upon the authority of *Cotterel* and *Cotterel*, heard before the late *Maſter of the Rolls*, about ſix years ago, his Honour declared the plaintiff the wife to be intitled to her ſhare, according to the cuſtom of *London*, and that the property in theſe leaſehold eſtates, notwithſtanding the deed ſtill continued in *William Fellows* the huſband, and of conſequence is ſubject to the cuſtom. *Hall* and *Hall*, 2 *Vern.* 277. and *Turner* and *Jennings* 612. were the caſes principally relied on in the determination of this point. *

Caſe 60.

Atkins verſus *Smith*, *October* 29, 1740.

IT was ſaid in this cauſe by LORD CHANCELLOR, that eccleſiaſtical juriſdictions are limited within their particular diſtrict, and an adminiſtration taken out here will not extend to the colonies in *America*; but if an executor ſends over an exemplification of a probate to *Maryland*, or any other colony, the perſon who is employed as an agent there by the executor, may by letter of attorney from him collect in the effects of the teſtator, and he is chargeable as much as if the executor had got them in himſelf.

An adminiſtration taken out here will not extend to the colonies in *America*, but an agent there, who gets in aſſets under the exemplification of a probate, is equally chargeable as if executor got them in himſelf.

Hanbury verſus *Lord Bateman*, *October* 29, 1740. Caſe 61.

SIR *James Bateman*, a freeman of *London*, on the marriage of his daughter *Anne* with Mr. *Weſtern*, gave her a portion of 10,000 *l.* which was conveyed to truſtees for the benefit of younger children, if any; if none, to Mr. *Weſtern* his executors, adminiſtrator, or aſſigns, and a jointure was ſettled in lieu of the portion, and in the deed is this covenant.

The cuſtom of *London* will operate on the orphanage part of a freeman's eſtate, and he cannot leave it to go in ſuch proportion as he pleaſes.

" That if the ſaid Sir *James ſhould by any ways or means give or* " *leave* to any of his daughters, other than the ſaid *Anne Bateman* " any ſum or ſums of money, or other thing for her portion, *which* " *ſhould be delivered or conveyed* and which ſhould exceed the value " of 10,000*l.* that then he would pay or give to Mr. *Weſtern*, his ex- " ecutors, *&c.* ſo much money, or other eſtate, as ſhould make his ſaid daughter *Anne*'s portion, equal to that of any other ſiſter.

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* *Hall* verſus *Hall*. *Per cur.* If a freeman of *London* abſolutely gives away his goods in his life-time to any of his children, this is good; but if he keeps the deed of gift in his own power, or continues in poſſeſſion of the goods, then it is a fraud upon the cuſtom. 2 *Vern.* 277.

Turner verſus *Jennings*. A freeman of *London* aſſigns the greateſt part of his perſonal eſtate in truſt for himſelf for life, and then for his grandchildren. *Per cur.* This deed not good againſt the cuſtom of *London* as to the moiety belonging to the children, but binding as to the other moiety, which he had power to diſpoſe of, he having no wife. 2 *Vern.* 612.

In

In 1708. Sir *James Bateman* died, and his daughter *Anne*'s orphanage ſhare came to 1777*l.* 15*s.* 3*d.* ¼ over and above the 10,000*l.*

In 1729. Mr. *Weſtern* died leaving only two daughters, the wife of the plaintiff Mr. *Hanbury*, and the wife of the defendant *Dominick*.

The 1777*l.* 15*s.* 3*d.* ¼ is in the hands of the defendant lord *Bateman*, executor of Sir *James*, and this bill is brought to have it in money, or to be laid out in lands purſuant to the covenant.

Sir *James Bateman*'s will.

" Whereas I am a freeman of the city of *London*, my deſire is, " that my eſtate may go as to one moiety, according to the cuſtom, " and whereas I have already advanced my daughter *Anne* with " 10,000*l.* my will is if there ſhould be a deficiency in one moiety " of my eſtate, to make up my other five daughters portions " 10,000*l.* that then as much as is wanting to make up that ſum " to each of them, ſhall be ſupplied out of the other moiety."

The ſtatute of the 4 & 5 *Phil.* and *Ma. ch.* 8. which is intitled, An act for the puniſhment of ſuch as ſhall take away maidens that be inheritors being within the age of ſixteen years, or that ſhall marry them without conſent of their parents, was read, to ſhew that the ſiſter of Mrs. *Hanbury* had forfeited her fortune, by marrying under the age of 16 years *Dominick*, a footman in lord *Bateman*'s family, againſt the will of her relations.

Lord Chancellor.

The authority which the Star-chamber had in caſes under the 4 & 5 *Ph. & M.* relating to the taking away maidens, is now aſſumed by the court of King's Bench.

At the time of making this ſtatute, the juriſdiction in theſe caſes veſted in the court of Star-chamber, but when that court was aboliſhed, the power, as far as it was legally exerciſed, was taken up by the court of King's Bench, who have aſſumed this authority ever ſince.

Though a huſband is convicted of an offence of a criminal kind, yet it does not follow in all caſes, that it ſhall be given againſt him in evidence in a civil ſuit.

A criminal conviction againſt the huſband, cannot in a civil ſuit be read in evidence againſt a wife, as it tends to make her incur a forfeiture of her portion.

But in this caſe I am of opinion, that the conviction of the huſband under this ſtatute may be read in evidence againſt him, becauſe it is uſed for no other purpoſe, but to convict him alone within the penalties of the ſtatute; otherwiſe if offered as to the wife, as it would tend to make her incur a forfeiture of her portion for her life, under the ſtatute, eſpecially as ſhe is an infant, and was no party to the conviction.

I think it may be compared to the caſes of diſability under the ſtatute of 11 & 12 of *William* and *Mary*, *cap.* 4. againſt papiſts, in which the court will never ſuffer a conviction of recuſancy to be given in evidence againſt a third perſon, but you muſt prove the facts.

A conviction of recuſancy cannot be given in evidence againſt a third perſon, under the 11 & 12 *W.* & *M.* but you muſt prove the facts.

As there was no proper evidence in this caſe of the marriage, he reſerved the conſideration of it to another time.

LORD CHANCELLOR.

The great queſtion is, whether the contingency has happened on which the augmentation of *Anne*'s portion was to ariſe.

I am inclined to think the contingency has not happened.

At the time of entring into this covenant, Sir *James* had ſeveral children, the plain meaning of this covenant was to prevent Sir *James Bateman* from giving a greater Portion out of his eſtate to one daughter than another.

What is the meaning of theſe Words, *other than the ſaid Anne Bateman*; does it mean that Sir *James Bateman* ſhould leave his perſonal eſtate to go equally among his daughters?

I think it means if he ſhould give more to any one daughter, in preference or in excluſion of any other daughter, then that he ſhould be a debtor for ſo much to Mr. *Weſtern*, *&c.*

But he has not done this, for he has left the cuſtom of the city of *London* to operate upon his perſonal eſtate.

The covenant is plainly not applied to his perſonal eſtate, for the words are, if he ſhall *deliver or convey*, which more properly and in legal underſtanding belong to real eſtate; ſo that he might have made that equivalent or ſatisfaction for the inequality out of his lands.

If Sir *James Bateman* had given 15,000*l.* to any other daughter in his life-time, he would have been liable to have been ſued by Mr. *Weſtern*, his executors, *&c.* upon the covenant.

The conſequence of the covenant is, that it creates a debt upon his eſtate, and not a charge upon the orphanage part.

It has been objected, that if he ſhould *by any ways or means give or leave*, will extend to the orphanage ſhare in favour of the plaintiff.

The preſent caſe differs greatly from both the caſes cited, *Wilcox* and *Wilcox*, 2 *Vern.* 551. *Blandy* and *Widmore*, 2 *Vern.* 709.

It is not in the power of a freeman of *London*, to leave his orphanage ſhare to go in ſuch proportion as he pleaſes, but the cuſtom will operate upon that part of a freeman's eſtate.

Caſe 62. *Baker* and others verſus *Dumareſque*, *October* 30, 1740.

On a motion to prevent the defendant's going out of the kingdom 'till he has put in his anſwer, the court ordered he ſhould give ſecurity to abide by the decree that ſhall be made at the hearing.

A Perſon largely in debt aſſigned over all his effects to the hands of the procurator general of the jeſuits for the province of *Brazile*, reſiding at *Liſbon*, and ſoon after died inteſtate; the widow refuſed to adminiſter; the brother, who is next of kin, has applied to the eccleſiaſtical court here for letters of adminiſtration; the creditors have brought their bill for a diſcovery of aſſets; the defendant has not yet put in his anſwer, and is going to *Jerſy*, the place of his abode, and to which the proceſs of this court will not reach; the preſent application is to prevent his going out of the kingdom till he has put in his anſwer, and likewiſe to have a receiver of the eſtate and effects of the inteſtate beyond ſea, appointed by this court for the benefit of the creditors, becauſe the perſon who is applying for adminiſtration lives generally beyond ſea; for if he ſhould obtain letters of adminiſtration from the ſpiritual court, to which he is intitled by law, as next of kin, he will get out of the kingdom before the month's time for putting in his anſwer, allowed him at a former ſeal by the court, is out.

LORD CHANCELLOR,

Let the defendant, by his clerk in court, give ſecurity to be approved of by a Maſter, to abide the decree that ſhall be made at the hearing of the cauſe.

I would not have reſtrained the defendant in this caſe from taking out letters of adminiſtration as he is next of kin to the inteſtate, but upon a motion for a *ne exeat regno*, I would have made an order that he ſhould not receive himſelf the eſtate and effects of the inteſtate abroad, nor any other perſon by his order or direction.

A creditor cannot take an aſſignment of a bond given by an adminiſtrator purſuant to the ſtatute of diſtributions, nor will an action lie upon it though aſſigned for a breach he was indebted to the aſſignee in the ſum of 200 l. upon ſpecialty.

It has been determined ſolemnly by the court of King's Bench, that a creditor cannot take an aſſignment of a bond given by an adminiſtrator, purſuant to the ſtatute of diſtributions, to adminiſter faithfully, and to exhibit an inventory, *&c.* and that an action will not lie upon it, though aſſigned for a breach that he was indebted to the aſſignee in the ſum of 200*l.* upon ſpecialty, *Vide* 1 *Salk.* *The archbiſhop of Canterbury* ver. *Wills*, *Hill.* 6 *Ann. B. R. p.* 316. cited by Mr. *Chute*, the plaintiff's counſel, to ſhew that creditors had no way of reſtraining the defendant from taking adminiſtration,

or

or coming at their juſt debts, by aſſigning a breach in the adminiſtration bond.

Cooke verſus *Cooke*, *November* 22, 1740. Caſe 63.

WHERE the enjoyment of an eſtate has been ſo long and uninterrupted as this has been, *viz.* from the year 1719, courts of law, as well as courts of equity, will make a ſtrong preſumption in favour of ſuch a poſſeſſion, though there may be ſome circumſtances to ſhew that it was not the intention that the inheritance ſhould be conveyed.

Courts of law, as well as courts of equity, will make a ſtrong preſumption in favour of a poſſeſſion of 21 years.

Where a perſon is owner of a term, and there is a covenant for the truſtees to convey the inheritance, he is to be conſidered as the *ceſtuique truſt* of the inheritance, becauſe he might have called upon the truſtee in this court to have aſſigned the legal eſtate.

Whether the legal eſtate is in the *ceſtuique truſt* or in the truſtees, it will make no difference, for where there is a covenant that it ſhall be conveyed, this court will conſider it as actually conveyed, and will look upon it as a term only attendant upon the inheritance, and ſo connected together in the *ceſtuique truſt*, that it can never be ſevered in favour of an heir or executor at leaſt; there are ſome caſes where it has been done in behalf of creditors.

When there is a covenant to convey the legal eſtate, this court will conſider it as actually conveyed, and conſider it as a term only to attend the inheritance.

It was decreed, that the plaintiff do hold and enjoy the premiſſes, and be quieted in the poſſeſſion, and that the defendant do not diſturb him in ſuch poſſeſſion, or any perſon claiming by, from, or under him.

Willats verſus *Cay*, at the *Rolls*, *Nov.* 2. 1740. Caſe 64.

THE ſum of 1300l. was charged in truſt, as a proviſion for a daughter, ſhe marries without the conſent of her relations; it was inſiſted upon, by the counſel for the truſtee, that the huſband, who appeared to be an inſolvent perſon, ſhould find ſome method of ſecuring the wife's money as a proviſion for her, but as he has neither real or perſonal eſtate of his own, he was incapable of doing it, and therefore it was propoſed, that it ſhould be referred to a maſter, to conſider of a ſcheme for ſecuring ſome proviſion for the wife, as had been done in caſes of this nature.

A wife may as well diſpoſe of perſonal eſtate, over which ſhe has an abſolute controul, as of real, by joining in a fine with the huſband; and on her conſent in court, her whole fortune of 1300l. was directed to be paid to him, though he appeared to be an inſolvent perſon.

The wife appearing in court, and being examined, deſired that the whole 1300l. might be paid to the huſband, without expecting

any proviſion for herſelf, upon which, his Honour refuſed to refer it to a Maſter, which he ſaid was never done unleſs circumſtances of fraud appeared, or compulſion on the part of the huſband, and that a wife may as well diſpoſe of perſonal eſtate, over which ſhe has an abſolute controul, as of real eſtate by joining in a fine with her huſband.

Caſe 65. *Stanford* verſus *Marſhall*, *November* 2, 1740.

By deed a father directs rents and profits of a real eſtate to be paid to his daughters, whether ſole or covert, for their ſeparate uſe, they join in bonds for money lent to their huſbands; the truſtee ordered by the court to pay the rents and profits accordingly.

A Father, by deed, creates a truſt of a real eſtate for the benefit of his daughters, the rents and profits to be paid them whether ſole or covert for their ſeparate uſe, either to their own, or the hands of any perſon that they ſhall appoint. The daughters join with their huſbands in bonds, for money lent to their huſbands; the truſtee refuſes to pay, the creditor brings a bill to compell him to pay the rents and profits of the truſt eſtate.

Maſter of the Rolls. The daughters had an abſolute power over the rents and profits, and could certainly aſſign it by mortgage or otherwiſe, and the court will never encourage the locking up of property, which would be the caſe, if the daughters could not create any lien they thought proper upon their intereſt in the eſtate, and therefore ordered the truſtees to pay the rents and profits of the truſt eſtate to the creditor.

Caſe 66. *Braſbridge* and others verſus *Woodroffe*, at the *Rolls*, *November* 14, 1740.

Where reſidue is undiſpoſed, and a teſtatrix has always declared the next of kin ſhall have nothing, executors, though they are legatees, ſhall have the reſidue notwithſtanding.

THOUGH the executors in this caſe have legacies, one of 200l. the other of 100l. yet if it appears in proof by parol evidence, that both before, and after the execution of the will, the teſtatrix always declared that the next of kin, who were plaintiffs in this cauſe ſhould have nothing, and that ſhe would not leave them any thing by her will, the executors, ſhall notwithſtanding have the reſidue.

Where it is undiſpoſed of, it was objected by the plaintiffs counſel, that evidence of the teſtatrix's intention of excluding the next of kin, is not ſufficient to give the reſidue to the executors; the evidence ought to be poſitive that ſhe had it in contemplation to give it to the executors at the time of making of the will.

Maſter of the Rolls: I am fully ſatisfied, if I ſhould in this caſe give the reſidue to the next of kin, I ſhould give it contrary to the intention of the teſtator.

The court, with reſpect to the reſidue, will depart from their general rules in favour of the next of kin, where the teſtator's intention is proved to be againſt them.

The court will certainly favour the next of kin, where they can do it conſiſtently with the rules of equity and juſtice, but this does not tie me down from inquiring into the intention of the teſtatrix; for wherever there is evidence that will ſatisfy the mind of the court as to the intention, they will depart from their general rules, though they will not do it upon ſlight proofs.

The giving 200l. to one executor, and only 100l. to the other, is a preſumption upon the face of the will that it was not intended to exclude them from the reſidue, but only to ſhew a preference to one of them. *Vide Batchelor* ver. *Searl*, 2 *Vern.* 736 *.

Though the will was drawn by doctor *Hales*, a clergyman, who is not ſuppoſed to be conuſant of the law, yet that will make no alteration in favour of the executors, but it muſt depend on the proofs.

In anſwer to the objection of the plaintiff's counſel, it is enough if the court is ſatisfied as to that ſingle fact, that the next of kin were not to have it, for there is no medium between the next of kin and executors; for if it appears that the intention was to exclude the next of kin, the executor muſt have it of courſe.

There is no medium between next of kin and executors, for if the former appear to be excluded, the executor muſt have it of courſe.

The bill diſmiſſed, but without coſts, becauſe when the next of kin are diſappointed of the reſidue, it is ſome excuſe, ſaid the court, for their litigating the executors right to it.

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* One by will gives his executor an expreſs legacy, and makes no diſpoſition of the ſurplus. The court will admit of parol evidence to ſhew the intention of the teſtator, and if proved that the teſtator intended the ſurplus to the executor, he ſhall have it, notwithſtanding his expreſs legacy. *Batchellor & Ux'* verſus *Searl*, 2 *Vern.* 736.

Caſe 67. *Ex parte Gumbleton, November* 8, 1740.

A quaker cannot be admitted to exhibit articles of the peace againſt her huſband, upon her affirmation, as it is in nature of a criminal proſecution.

A Motion was made on behalf of a woman who was a quaker, and lives 250 miles from hence, for a writ of *ſupplicavit*: the doubts in this caſe aroſe from the words of the ſtatute of 7 & 8 *W.* 3. whether a quaker may be admitted to give evidence upon her affirmation ſo as to exhibit articles of the peace againſt her huſband; and if it is not in nature of a criminal proſecution, and not grantable but upon oath of the perſon.

In the caſe of articles of the peace, where the party complained of is not in court, an attachment for a breach of the peace goes on *the oath* of the complainant.

LORD CHANCELLOR took a few days to ſearch for caſes of this kind, and upon looking into them ſaid I find a great variety, and that affirmations have been generally refuſed: I have been likewiſe inquiring of the judges for precedents in point; there is one reported in 3 *Salk.* 248. *Hilton* v. *Biron*, 11 *W.* 3. *B. R.* but this is a book of no authority, the note however I have of it I believe is authentick; this was in the caſe of articles of the peace; and the court held that it being a criminal matter, they would not grant an attachment, unleſs the perſon would conſent to be ſworn; for if the party complained of is not in court, there is an attachment goes for a breach of the peace upon the oath of the complainant. The other caſe was in the 11th year of the late king, *ex parte Green*, on the motion of the preſent Chief Juſtice of the Common Pleas, upon the affirmation of the perſon who moved for the *ſupplicavit*, and the court granted the motion: but as there are authorities both ways, I will not take upon me to determine it, but ſhall refer it to the judges, and the expence to come out of the perſon's pocket who moves for the *ſupplicavit*.

But as I have inſtances in my hand, where perſons who called themſelves quakers, upon their affirmations being refuſed, have brought their conſciences to digeſt an oath, perhaps Mrs. *Gumbleton* as ſhe goes in danger of her life, may diſpence with the ſtrict rules of her ſect, and may be perſuaded to ſwear likewiſe, if not I will conſult with the judges upon it.

Caſe 68. *Smith* verſus *Marſhall*, *the ſame day*.

Where a mother ſecretes her children who are infants, ſervice of a *ſubpœna* on her is ſufficient.

WHERE infants are parties to a cauſe, and the mother ſecretes them ſo as they cannot be ſerved, a ſervice of the *ſubpœna* upon the mother is ſufficient, as ſhe is the natural guardian of the children.

Smallman

Smallman verſus *Lord Archibald Hamilton*, at the *Rolls*, Caſe 69. *November* 6, 1740.

LORD *Lucas* by his will left to one *Dorothy Potter*, an annuity of 25*l. per Ann.* for her life; ſhe dies in 1718, and the plaintiff, as the repreſentative of the annuitant, brings a bill for the arrears of the annuity, ever ſince the year 1708 to the death of Mrs. *Potter*.

Lord *L.* gives *D. P.* an annuity for life, ſhe dies in 1718. and in in 1740 a bill is brought by her repreſentative for the arrears from 1708 to the death of *P.* the court from the length of time preſumed it to be paid, and diſmiſſed the bill with coſts.

Maſter of the Rolls: Though there is no proof of the defendant's ſide that it had been paid, yet the diſtance of time is the ſtrongeſt preſumption that it has been long ſince ſatisfied: the ſtatute of limitations ought to be the rule to direct the court in this as well as in other caſes, though the doctrine has prevailed, that the ſtatute will not run as to a legacy, yet it will not hold as to an annuity, and therefore the bill muſt be diſmiſſed with coſts.

Though it is a rule, that the ſtatute of limitations will not run as to a legacy, yet it will not hold as to an annuity.

Willis verſus *Willis*, *November* 7, 1740. Caſe 70.

THE ſtatute of frauds and perjuries, ſaid the court, requires that all declarations of truſts ſhould be in writing, otherwiſe abſolutely void, except ſuch as ariſe by operation or conſtruction of law.

All declarations of truſt under the ſtatute muſt be in writing.

Now truſts of this nature are when the legal intereſt is in another, but the purchaſe money has been paid by a third perſon; this is a reſulting truſt for him who paid the money, but then he muſt clearly prove the payment.

He who pays the purchaſe-money has a reſulting truſt, but then he muſt clearly prove the payment.

There is another way of taking a caſe out of the ſtatute, and that is by admitting parol evidence within the rules laid down in this court, to ſhew the truſt, from the mean circumſtances in the pretended owner of the real eſtate or inheritance, which makes it impoſſible for him to be the purchaſer.

Parol evidence admitted to ſhew a truſt, from the mean circumſtances of the pretended owner of the real eſtate.

Villiers verſus *Villiers*, *November* 15, 1740. Caſe 71.

THE rule of evidence, ſaid *Lord Chancellor*, is that the beſt evidence the circumſtances of the caſe will allow muſt be given.

A counterpart may be read if an original deed is loſt, and if no counterpart a copy, and if no copy, parol evidence of the manner of its being loſt; if deſtroyed by fire, or loſt by any unforeſeen accident, they are of themſelves ſufficient excuſes.

If an original deed is loſt the counterpart may be read, and if there is no counterpart forth coming, then a copy may be admitted, and even if there ſhould be no copy, there may be parol evidence of the deed, and the manner of it's being loſt, unleſs it happens to be deſtroyed by fire, or loſt by robbery, or any unforeſeen or unavoidable accident, which are ſufficient excuſes of themſelves: but then the copy muſt not be inconſiſtent, and variant from the title, which is ſet up by the party, who claims under the original deed, as it is in this caſe; for the limitations here under the copy are different from what they are ſet out to be in the pleadings.

A fee will paſs without the word *heirs*, where a truſt of land can be ſatisfied no other way.

If land be given to a man without the word *heirs*, and a truſt be declared of that eſtate, and it can be ſatisfied by no other way but by the *ceſtuy que truſt's* taking an inheritance, it has been conſtrued that a fee paſſes to him even without the word *heirs*.

A term attendant upon the inheritance is a part of it, and ſhall not be ſevered from it, nor can it paſs without it.

A term attendant upon the inheritance is conſidered as a part of it, and cannot be diſannexed in this court; there is hardly any family where the eſtate is conſiderable but there are ſuch terms; and it would be abſurd to ſay that when a will is not executed according to the ſtatute of frauds and perjuries, that ſuch a term ſhall be ſevered from the inheritance, and paſs, notwithſtanding the inheritance to which it was annexed would not paſs under ſuch a will.

It has been inſiſted, that in this caſe a term of 60 years is merged by being created to the ſame perſon to whom the fee was deviſed, and who had likewiſe the reverſionary intereſt in another term for 99 years: but Mr. *Villiers*'s counſel have on their ſide contended that there is no merger, becauſe there was a truſt of this term that kept it ſeparate, and conſequently was not merged.

A demiſe of a leaſe for years to the ſame perſon to whom the fee is deviſed, and which commences in the life of the deviſor, is no revocation of the fee.

But then the plaintiffs contend that as the teſtator had granted a leaſe for 60 years to the ſame perſon, to whom he had deviſed the fee, paying a rent to the teſtator for life of 200*l. per ann.* that it was a revocation of the fee: but I am of opinion that the leaſe is merged in the inheritance, and is not like the caſe of *Cooke* v. *Bullocke*, *Cro. Jac.* 49. becauſe there the term was not to commence till after his death, and then there was a joining of two eſtates that were inconſiſtent together, which was the reaſon of the judges determining it to be a revocation.

I find no authority whatever at law (and it depends upon the conſtruction of the law) that a demiſe of a leaſe for years to the ſame perſon to whom the fee is deviſed, and which commences in the life of deviſor, is a revocation of the fee.

The

The caſe of *Peacock* verſus *Spooner* will not govern the preſent, that caſe received different determinations; it was heard firſt by Lord Chancellor *Jefferys* in *P. T.* 1688. afterwards reheard in *M. T.* 1690. before the lords commiſſioners, and on appeal to the houſe of Lords, the judges opinions were taken, as appears by the minutes. Lord Chief Baron *Atkyns* was of opinion that it belonged to the executor of the wife; *Nevill* differed from him, *Gregory* agreed with *Atkyns*, *Letchmere* differed again, and ſo alternately through all the judges, but the decree of the Lords Commiſſioners was affirmed notwithſtanding. *

Upon the appeal in *Peacock* and *Spooner* to the houſe of Lords, the judges in their opinions were equally divided, but the decree below was affirmed notwithſtanding.

Then came the caſe of *Webb* v. *Webb*, 2 *Vern.* 668. where my Lord *Harcourt* reverſed the *Maſter of the Rolls*'s decree. There the limitations were to the huſband for life, to *Thomas Webb*, *Anne* his wife for life, remainder to the heirs of the bodies of *Thomas* and *Anne* during the reſidue of the term; the wife dies leaving iſſue, the whole term notwithſtanding veſts in the huſband, and he may aſſign it. There has been a diſtinction taken of late years in the caſe of *Peacock* v. *Spooner*, that there it was *ſub poteſtate viri*, as the eſtate moved from the huſband; but I can find no grounds for this opinion from the minutes of the houſe of Lords, and therefore muſt be thrown out of the caſe.

A limitation in marriage articles to the huſband for life, to the wife for life, remainder to the iſſue of their two bodies, will not intitle a huſband by virtue of ſuch a remainder, to diſpoſe of the eſtate as he ſhall think proper, but will be carried into ſtrict ſettlement in this court.

This court will carry into ſtrict ſettlement, an eſtate limited to a huſband for life, to the wife for life, remainder to the iſſue of their two bodies.

Where children are infants at the time of their bringing a bill, the allegations of it cannot be read againſt them after they come of age.

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* Term aſſigned in truſt for baron and feme for their lives, remainder in truſt for the heirs of the body of the feme by the baron; baron and feme die. Lord Chancellor *Jefferys*, who firſt heard the cauſe, held the whole intereſt of the term veſted in the wife, and muſt go to her executors. 2 *Vern.* 43. But ſaid the Lords Commiſſioners, upon a rehearing, the term ſhall go to the heir of the body of the feme by the baron, and not to her executor or adminiſtrator, the words, *heirs of the body* being a good *deſcriptio perſonæ*. *Peacock* verſus *Spooner*, 2 *Vern.* 195.

Caſe 72. *Crop* verſus *Norton* and *Norton* verſus *Norton*, *November* 8, 1740.

R. N. the laſt life in a biſhop's leaſe, agrees with *C. N.* to ſurrender this leaſe on a promiſe of the biſhop to grant a new one for three

OLD *Richard Norton* of *Southwick* in *Hampſhire*, the laſt life in a leaſe under the biſhop of *Wincheſter*, agrees with colonel *Norton* to ſurrender the old leaſe upon the biſhop's promiſing to grant a new leaſe for 3 lives, for old *Norton*'s life, for colonel *Norton*'s life, and the ſon of colonel *Norton*, an infant of tender years; at the time there was a private agreement between old *Norton* and colonel *Norton*, that in conſideration of his ſurrendering the old leaſe, the new one ſhould be in truſt for the infant, ſon of Colonel *Norton*.

lives, *viz.* for *R. N.*'s life, *C. N.*'s life, and the ſon of *C. N.* and in conſideration of *R. N.*'s ſurrendering the old leaſe, it was agreed the new one ſhould be in truſt for the infant ſon of *C. N.* The whole purchaſe-money was paid by *C. N.* to the biſhop, but the legal eſtate was granted in the new leaſe to *R. N.* and his heirs during his own life and the lives of *C. N.* and his ſon. *C. N.* after the death of *R. N.* took upon him to diſpoſe of it. *R. N.* by a deed poll dated the day after the leaſe, declares his intention to be, that *C. N.* and his ſon ſhould after his deceaſe hold to them and their heirs during the remainder of the term. Lord *Hardwicke* held *R. N.* had a valuable ſhare in the conſideration of the new leaſe, having given up his intereſt in the old, and that having a right to declare the truſt, *C. N. had his life only in the leaſe.*

Colonel *Norton* paid the whole money to the amount of 1500*l.* to the biſhop of *Wincheſter* for renewal, but the legal eſtate in the new leaſe was notwithſtanding granted to old *Norton* and his heirs during his own life and the lives of colonel *Norton* and his ſon: colonel *Norton* after the death of old *Norton* imagining he had the whole property in the leaſe, took upon him to diſpoſe of it.

The original bill was brought by Mr. *Crop* the purchaſer from colonel *Norton* for performance of articles, and the croſs-bill by the ſon of colonel *Norton*, to have a deed poll that had been executed by old *Norton*, which declares the truſt of the new leaſe, and was found in his cuſtody at his death, produced by the defendant colonel *Norton*, and to be kept in court for the benefit of the plaintiff in the croſs cauſe.

Colonel *Norton* was neither party nor privy to the deed poll.

Old Mr. *Norton*'s declaration of truſt of the new leaſe, under the deed poll, was ſubſequent in time to the leaſe itſelf only one day.

LORD CHANCELLOR.

Two Queſtions ariſe upon the original bill.

The firſt, whether Mr. *Crop* is intitled to have the articles carried into execution, as againſt the defendant colonel *Norton*, for there is no pretence as againſt the defendant *Richard Norton* the ſon, he being

being no party to the articles, and has by his croſs-bill inſiſted on his right, and ſet up an equitable claim to this leaſe under the deed poll. The general queſtion in the original cauſe, as I ſaid before, depends upon another queſtion, whether colonel *Norton* has a title to the eſtate; for if he has not, the court will not do an impoſſible thing, but leave the plaintiff Mr. *Crop* to law upon the articles.

Admitting that colonel *Norton* has not the legal eſtate, the next queſtion will be if he has the equitable, for this court will in that caſe equally decree performance of articles.

This depends upon two conſiderations.

1ſt. The circumſtances of the tranſaction between old *Richard Norton* and colonel *Norton* relating to the renewal of the leaſe.

2dly. Upon the deed poll.

Conſider it firſt upon the circumſtances of the caſe diveſted of the deed.

Old *Norton* had the ſole intereſt in this eſtate, and though he had only one life, yet he had the right of renewal; it is true he could not compel the biſhop to renew; but this as to colonel *Norton*, who came in by permiſſion of old *Norton*, muſt be conſidered as a right and intereſt, and the perſon who comes in under the new leaſe has always been looked upon in this court as deriving from the perſon who had the old leaſe.

The letters which have been read to ſhew the agreement between old *Norton* and colonel *Norton* are of no conſequence one way or another; and though it appears in the cauſe there were other letters, yet theſe being loſt, is no reflection upon colonel *Norton*, for perſons do not keep all letters which at the time of their being written were not perhaps material.

The loſing letters which when written were not material, is no reflection upon a party.

I am of opinion upon the whole, that there is no reſulting truſt whatever for colonel *Norton*.

His counſel for him have argued, that where the purchaſe money is paid by one perſon and the legal eſtate is in another, that this by operation of law is a reſulting truſt for the perſon who paid the money, and the doctrine is very right where the whole purchaſe money is paid by one perſon.

But here the whole value of the purchaſe is not paid by colonel *Norton*, for the 1500 *l.* is only part of the conſideration, as the leaſe was not intirely fallen in, and therefore a material circumſtance was the conſent of old *Norton* to ſurrender the old leaſe.

The next conſideration is the deed poll, executed the 14*th* of *Auguſt* 1722. the very day after the leaſe. It recites the life of old *Norton* to be the only remaining life in the old leaſe: "Know ye "therefore, that I having given my conſent to ſurrender, &c. declare "my intention is, and my deſire was always, that the ſaid colonel *Nor-* "*ton* and his ſon ſhould immediately after my deceaſe hold to them "and their heirs this eſtate of——during the remainder of the term."

Now this is a plain declaration of the truſt, he having the legal eſtate, and a right to do it, and the only perſon from whom the truſt was to move.

But then it has been ſaid it is very hard old *Norton* ſhould have a power of giving away ſo beneficial an intereſt from colonel *Norton* who paid the whole fine.

The court conſiders writings executed near together as one tranſaction.

But when writings are executed ſo near together, it is very natural to think that they are all in purſuance of one tranſaction and agreement between the parties.

It is ſaid it is very unnatural that *Thomas Norton* ſhould pay the whole 1500*l.* and yet have only a reverſionary intereſt for his own life, and if the laſt life had been a ſtranger, it might indeed have been a hardſhip; but as colonel *Norton*'s ſon is the laſt life, it is ſo far from being a hardſhip, that it was a benefit, for old *Norton* parted with a valuable intereſt, that colonel *Norton* might have an opportunity of purchaſing an advantage for his ſon.

I muſt determine upon an expreſs declaration of truſt by old *Norton*, who had the legal intereſt, and a valuable ſhare in the conſideration of the new leaſe at the time it was purchaſed, and conſequently the only perſon who had a right to declare the truſt, and there can be no pretence for an implied truſt by operation of law.

I do therefore declare that colonel *Norton* had his life only in the leaſe.

Now as to *Richard Norton* the ſon, the queſtion is, whether the deed poll ſhall be delivered up by the purchaſer, to be kept for the ſake of the ſon, who, if this opinion be right, has an intereſt in the eſtate.

At the time of the mortgage, the mortgagee Mr. *Crop* had no notice of the deed poll, but at the time of the articles of his purchaſe he had.

Therefore the deed poll muſt be brought into court for the benefit of all parties; but I will not decree it to be delivered to any one of the parties.

Northey verſus *Northey*, *November* 10, 1740. Caſe 73.

A Bill was brought by Mrs. *Northey*, the widow of the late Mr. *Northey*, againſt the executor of the huſband, to have her *paraphernalia*, part of which was preſented by the huſband, and the other part given by her own relations; but the huſband, in his life-time, having taken them into his own poſſeſſion, gave ſome of them to different perſons, as ſpecifick legacies by his will, and the reſt he has directed to be ſold by his executor.

LORD CHANCELLOR.

The widow might have brought her action of trover for theſe ſpecific things, as the executor has not aſſented to the legacies; for at law a legacy does not veſt in the legatee till the executor's aſſent; but then legatees may come againſt an executor in this court, and he will be decreed to deliver the ſpecific legacies, according to the will, for this court conſiders him as no more than a bare truſtee for legatees.

At law a legacy does not veſt in the legatee till the executor's aſſent, but in equity, he will be deemed to deliver the ſpecific legacies, being conſidered here as a bare truſtee.

It has been objected that the ſpecific legatees are infants, and are not before the court; and, I am of opinion, the ſpecific legatees ought to have been brought before the court; and, unleſs the plaintiff will wave the part that is deviſed to them, the cauſe muſt ſtand over to make proper parties.

On *December* the 6th, 1740, this Cauſe came on again to be heard. Caſe 74.

THE plaintiff, the wife of the late Mr. *Northey* in his life-time, was poſſeſſed of ſeveral jewels, part of them bought with her own money, and part with her huſband's, and proved in the cauſe, that ſhe wore them but ſix weeks before his death, and ſubſequent to any will or codicil of the late Mr. *Northey*, who has given part of the jewels, by will, to his brother, and made him executor: the bill was brought by the widow, as to thoſe jewels only which are given to the brother as executor, and now waves any right ſhe might claim to the reſt of the jewels, as *paraphernalia*, which are left by the will to her children.

A huſband by will diſpoſes of jewels, of which the wife was poſſeſſed in his life-time, bought partly with her own, and partly with his money, to his brother, whom he made executor; ſhe brings a bill for thoſe only which are given to the brother; Lord *Hardwicke* held clearly, that the wife was intitled to them as her *paraphernalia*.

The will had given the plaintiff the jewels for her life, provided ſhe makes an inventory of them, and enters into a ſecurity to double the value, for refunding, in caſe of a ſecond marriage: but,

by a codicil, in *Auguſt* 1738, the teſtator revokes this part of his will, and gives the reſidue (excluſive of the part to the children) to his brother, the executor.

Mr. *Chute*, of council for the defendant, the executor, inſiſted, that it is merely a legal queſtion, and ought to be determined at law by an action of trover, as the plaintiff is under no imbecillity which can intitle her to come into this court; and, with regard to the general queſtion, urged theſe things.

Firſt, That the teſtator has abſolutely diſpoſed of the jewels.

Secondly, And the moſt material is, the plaintiff had not that kind of property in theſe things as *paraphernalia*, upon which ſhe can ground ſuch a claim.

Before the caſe of *Tipping* ver. *Tipping*, 1 *Wms.* 729. in Lord *Macleſfield*'s time, he ſaid, it was very far from being a point clearly ſettled.

In the caſe of Lord *Haſtings* and Sir *Archibald Douglaſs*, *Cro. Car.* 343. and 1 *Roll.* 911, 912. the court were equally divided.

It appears likewiſe in the cauſe, that the wife was not with her huſband at the time of his death; and that the jewels were kept under lock and key, and that ſhe was permitted only to wear them ſometimes, at his pleaſure.

And there ought to be ſuch a ſpecial property in the wife as conſtant poſſeſſion and cuſtody, in the life-time of the huſband, to ſupport her claim as *paraphernalia*.

That the defendant, the executor, found them locked up in the huſband's bureau, at the time of his death.

That after making the will, there was evidence, indeed, that ſhe wore the jewels; but this was only a bare permiſſion of the huſband, and not abſolutely in her power.

LORD CHANCELLOR.

There are ſome caſes both in law and equity ſo plain, that they will not admit of any diſpute.

A wife with reſpect to *paraphernalia*, has been conſidered as a creditor, and having a lien upon real eſtate.

The late caſes have gone ſo far in the point of *paraphernalia*, that they have conſidered a wife in the nature of a creditor, and as having a lien upon real eſtate

Though

Though the jewels here are worth 3000l. at leaſt, yet the value makes no alteration in this court.

The value of the jewels makes no alteration.

There are ſeveral caſes where there have been debts ſtanding out againſt the huſband, and yet the wife has been admitted as a creditor to the value of the *paraphernalia*, even upon truſt eſtates created for payment of debts.

A wife has been admitted a creditor to the value of her *paraphernalia*, upon a truſt eſtate for payment of debts.

The being in the cuſtody of the huſband will make no alteration, for the poſſeſſion of the huſband is the poſſeſſion of the wife, and ſo *vice verſa*, as ſhe wore them for the ornament of her perſon whenever ſhe was dreſt.

The huſband's poſſeſſion of jewels makes no alteration, where the wife has worn them as ornaments whenever ſhe was dreſſed.

The teſtator having taken upon him to diſpoſe of the *paraphernalia*, which he had no power to do, I direct the eſtate of the huſband to pay the coſts, and decree for the wife according to the prayer of the bill.

Bicknel verſus *Page*, *November* 10, 1740. Caſe 75.

A Man in his will expreſsly deviſes his real eſtate to truſtees, for the payment of all ſuch debts as he ſhall owe, legacies, and funeral expences; then follow ſome ſpecific legacies of ſome ſpecific part, and then he gives all the reſidue of his perſonal eſtate to his executors.

Where a real eſtate is expreſsly deviſed for payment of debts, the perſonal eſtate is exempted, but if the real is not ſufficient, the perſonal muſt be applied.

LORD CHANCELLOR.

This caſe certainly comes under the rule laid down in *Adams* v. *Merrick*, at the *Rolls*, *Equity Caſes Abridged* 271. That where real eſtate is expreſsly deviſed for payment of debts, the perſonal eſtate is exempted: but if the real eſtate be not ſufficient, the perſonal eſtate muſt be applied; and if there is any reſidue, the executors are intitled to it.

Fleetwood verſus *Templeman*, the ſame Day. Caſe 76.

A Man and his wife, in the year 1692, made a mortgage of the wife's eſtate of 40l. *per ann.* for the ſum of 789l. and covenant in the mortgage deed to levy a fine of the premiſſes in the *Eaſter* term following; the fine was not levied till *Trinity* term in

A covenant in a mortgage deed by a huſband and wife, in 1692, to levy a fine in the *Eaſter* term following, but not levied till *Trinity* term in 1695; for 10l. more they join in a conveyance of the equity of redemption, and covenant the fine heretofore levied ſhould be to the uſes of this deed. Lord *Hardwicke* held the covenant in 1695 to be good and binding on the huſband and wife, and that the former deed might be laid out of the caſe, as the covenant under it was not ſtrictly purſued.

the year 1695; in conſideration of 10l. more, they join in a conveyance of the equity of redemption, and covenant that the fine heretofore levied, ſhould be to the uſes of this deed.

LORD CHANCELLOR ſaid, he was inclined to think, as the covenant to levy the fine under the firſt deed was confined to one particular term, and was not levied till the next term after, that the huſband and wife might, by the deed in 1695, covenant that the fine heretofore levied ſhould be to the uſe of the latter deed; and that the former deed in 1692, might be laid out of the caſe, as the covenant under it for levying the fine in *Eaſter* term was not ſtrictly purſued.

Caſe 77. *Sandys* verſus *Watſon*, at the *Rolls*, the ſame Day.

Where the eſtates of two teſtators have been blended ſo as to create confuſion, the executor of an executor ſhall be excuſed coſts, though it appeared he had aſſets enough to pay the plaintiff's debt.

A Bill was brought againſt an executor of an executor, for a debt of the firſt teſtator; the defendant denied aſſets, but at the ſame time, ſet out ſpecially in his anſwer, that the eſtates of the two teſtators were ſo blended together, that he could not poſitively ſay, whether there are aſſets or not.

On a reference to a Maſter, it came out, that there were aſſets enough to pay the plaintiff's debt, and ſome ſmall matter over.

The Maſter of the Rolls of opinion, that the executor in this caſe, muſt pay the debt in the firſt place to the plaintiff, out of the aſſets, and if there are any left, after ſuch payment, he may retain to pay himſelf the coſts of this ſuit: if there had not been the favourable circumſtance of the confuſion ariſing from the two eſtates, the executor muſt have paid the coſts out of his own pocket, and the reſidue of the aſſets applied to other debts.

Caſe 78. *Philips* verſus *Paget*, *November* 11, 1740.

An executor, purſuant to a will, pays into the hands of *the three children* of *Philips* their legacies of 100l. each; the eldeſt ſixteen, the ſecond fourteen, and the youngeſt nine years of age at the time; the father embezilled the money; bill brought for a repayment. Lord *Hardwicke* held at firſt, that as the executor made this payment to ſave a forfeiture of what he himſelf took under the will, he ought not to pay it over again; but the next day, his Lordſhip thinking it a doubtful point, recommended it to the defendant to give the plaintiffs ſomething, who agreeing to pay in 50l. to be divided among the three children, they were ordered to releaſe their legacies.

MRS. *Paget* by her will gives a legacy of 100l. to each of the three children of Mr. *Philips*, and makes the defendant her executor, leaving him the bulk of her eſtate, provided he pays the three legacies of 100l. within a year after her death, purſuant to her will. The defendant, within the time, pays to the children's own hands their legacies; the eldeſt of them was ſixteen years old at the time, the next fourteen, and the youngeſt nine only; and in his

anſwer

anſwer denies he knows this money ever came to the father's hands; but the children have now brought their bill againſt the defendant, to be paid their ſeveral legacies, ſuggeſting that their father has imbeziled the money, paid by the defendant during their infancy, and is inſolvent; and that this was a fraudulent payment to the father, and therefore it muſt be paid over again.

LORD CHANCELLOR aſked the counſel for the defendant, if they knew any inſtance where an executor paying ſo large a ſum as 100l. into the hands of minors, has been allowed ſuch payments? indeed, in caſes where the legacies have been very ſmall, the payment has been allowed by the court.

But, in this caſe, notwithſtanding the ſum is above 100l. yet as the payment by the executor to the children themſelves is ſo fully proved, and not at all controverted by the plaintiffs, and their loſing the benefit of it, is owing to the negligence and inſolvency of the father, I will not ſtrain the rules of this court to make an executor pay it over again; eſpecially as he made this payment to ſave a forfeiture, it being an expreſs condition of his own taking under the will, that he ſhould diſcharge their legacies within a year after Mrs. *Paget*'s death.

Philips verſus *Paget*, *November* 12, 1740.

THE next day, LORD CHANCELLOR ſaid, That upon looking into the caſes, he found this a very doubtful point, and unleſs the defendant will agree to give the plaintiffs ſomething, he would not determine it, without taking time to conſider of it: the defendant, upon this recommendation of the court, agreed to pay in 50l. to be divided between the three plaintiffs; and each ſide were to abide by their coſts; and it was made part of the decree, that the 50l. was paid by conſent of all parties; and his Lordſhip directed each of the plaintiffs, upon receiving their reſpective ſhares, to releaſe the legacies under the will.

The caſe of *Dagley* ver. *Tollferry*, 1 *Peer Will.* 285. He ſaid, muſt have ſome other circumſtances, for the rule is laid down too ſtrictly, that (in all caſes where executors pay infants legacies to fathers) in order to deter executors from ſuch payments, it ſhall be paid over again: Lord *Cooper* confirmed the *Maſter of the Rolls*'s decree; but he ſeemed, even by this report of the caſe, to have had a remorſe of judgment at the time, for, on looking into the Regiſter's office, it appears, his Lordſhip ordered the depoſit to be divided between the parties.

Though Lord *Cooper* in the caſe of *Dagley* verſus *Tollferry*, confirmed the *Maſter of the Rolls*'s decree, yet by the report of the caſe, had a remorſe of judgment at the time.

Caſe 79. *Bill* verſus *Kinaſton*, *November* 12, 1740.

A deviſee for life of goods, muſt ſign an inventory, to be depoſited with the maſter for the benefit of all parties.

LORD CHANCELLOR ſaid, that where goods are given to a perſon for life only, the old rule of the court was, that ſuch perſon ſhould give ſecurity that they ſhould not be imbeziled, but the method now is, for an inventory to be ſigned by the deviſee for life, and to be depoſited with the Maſter, for the benefit of all parties.

Caſe 80. *Bowden* verſus *Beauchamp*, *November* 12, 1740.

A co-adminiſtrator, who was a plaintiff in a bill in 1723, brings in 1739 a bill, partly of revivor, and partly ſupplemental, to the ſame purpoſe pretty near with the original: Lord *Hardwicke allowed the plea of a former diſmiſſion*, for otherwiſe, he ſaid, it would be keeping up a right *in nubibus* and *in cuſtodia legis*, and parties would never know when to be at reſt.

A Bill was brought by two perſons as co-adminiſtrators for an account of perſonal eſtate in 1723; one of the plaintiffs dies in 1725, the ſurviving plaintiff moves by his council to diſmiſs the bill without coſts, which was conſented to by the council on behalf of the defendants: the repreſentative of the co-adminiſtrator, in 1739, brings a bill, partly a bill of revivor, and partly ſupplemental, and pretty much to the ſame purpoſe with the original bill; the defendants to this bill plead the former diſmiſſion.

LORD CHANCELLOR.

It muſt be allowed in this caſe; for though it is ſuggeſted by the council for the new bill, that the former was brought by the co-adminiſtrator in two rights; firſt, by virtue of the adminiſtration; and ſecondly, as next of kin, for a diſtributive ſhare of the inteſtate's eſtate.

Yet, upon the death of one of them, the adminiſtration ſurvived to the other, and there was no neceſſity that there ſhould be a repreſentative of the deceaſed adminiſtrator before the court when the bill was diſmiſſed.

Beſides, it would be a very great inconvenience, where there are ſeveral plaintiffs, and one of them dies, if, after ſuch a length of time, bills of revivor ſhould be allowed; this is keeping up a right *in nubibus*, and *in cuſtodia legis*, and parties would never know when to be at reſt: and, as to the other right of diſtribution which is ſet up under the old bill, it will not avail the plaintiff in the new, becauſe he ſhould have made the repreſentatives of the eſtate (who claim a right of diſtribution as next of kin) parties to the ſuit. I

do therefore allow the plea, and leave the plaintiff to bring an original bill if he thinks proper.

The Eaſt India Company verſus *Vincent*, *November* 15, 1740. Caſe 81.

LORD CHANCELLOR ſaid, there are ſeveral inſtances where a man has ſuffered another to go on with building upon his ground, and not ſet up a right till afterwards, when he was all the time conuſant of his right; and the perſon building had no notice of the other's right, in which the court would oblige the owner of the ground to permit the perſon building to enjoy it quietly, and without diſturbance.

Where a man ſuffers another to build on his ground, without ſetting up a right till afterwards, the court will oblige the owner to permit the perſon building to enjoy it quietly.

But theſe caſes have never been extended ſo far as where parties have treated upon an agreement for building, and the owner has not come to an abſolute agreement, there, if perſons will build notwithſtanding, they muſt take the conſequence, and this is not ſuch an acquieſcence on the part of the owner, as will prevent him from inſiſting on his right.

If I ſhould give an opinion that lengthning of windows, or making more lights in the old wall, than there were formerly, would vary the right of perſons, it might create innumerable diſputes in populous cities, eſpecially in *London*, and therefore I do not give an abſolute opinion, but I ſhould rather think it does not vary the right.

Lengthning of windows, or making more lights in the old wall than formerly, does not vary the right of perſons.

Where an agent of the *Eaſt India* company is in treaty with an owner of ground, for a liberty for the company to build, and the owner, at the time of the treaty, in conſideration of his conſent, inſiſts upon terms, to which the agent makes no anſwer or objection, but immediately afterwards the company think proper to build, the ſilence of the agent ſhall be conſtrued an acquieſcence under the propoſal of the owner of the ground, and ſhall bind the company his principals, as being in the conſideration of this court the agreement of the agent.

I am of opinion, that notwithſtanding the company's diſmiſſing Mr. *Vincent* from their ſervice as a packer, contrary to their agreement between him and the agent of the company, yet he is not juſtified in building a wall, meerly to block up the lights, but he might have brought his bill in this court, to eſtabliſh the agreement between him and the company's agent as a compenſation for conſenting the company ſhould build upon his ground.

Upon

Upon the whole, I muſt decree the wall erected by the defendant to be pulled down; but then I muſt direct in his favour, that the company do employ him double to any other packer, during his term in the eſtate, provided he does it at the ſame rates that people of the ſame trade would do.

Caſe 82. *Lee and others* verſus *Carter and others, November* 17, 1740.

A Voluntary ſociety was eſtabliſhed of a number of perſons, to provide for ſuch of the club, as ſhould become neceſſitous, and likewiſe for the relief of the widows of thoſe of the club who died inſolvent.

Three perſons who were truſtees for one particular year, lent 60*l.* of the ſtock of the ſociety to *Carter* the defendant (who is an alehouſe-man, and at whoſe houſe they kept their meetings) upon bond. *Carter* gave ſome particular members leave to ſet off their alehouſe ſcores againſt the intereſt they had in the money due upon the bond from *Carter*.

LORD CHANCELLOR.

Where there is a general truſt of money for a ſociety, a particular member cannot ſet off a private debt, againſt a ſhare he may be intitled to on a a contingency.

I know no inſtance where there is a general truſt of money for a ſociety of perſons, that any particular members can ſet off their private debts againſt the ſhares they may be intitled to upon contingencies, which poſſibly may never happen to be the caſe of theſe perſons.

This is ſo unwarrantable a behaviour, and ſo unjuſt a defence, that *Carter* and thoſe perſons who have ſet off their alehouſe ſcores muſt pay the whole coſts of the ſuit, and likewiſe the coſts at law.

Caſe 83. *Lloyd* verſus *Carter, November* 17, 1740.

A. gave a woman who cohabited with him, a bond for 2000*l.* and intereſt quarterly during her life, and after her death to her children, but from the time of the bond to the day of his death, which was four years and a half, conſtantly maintained her. Lord *Hardwicke* held the maintenance muſt clearly be taken to have been in lieu of intereſt.

A. To whom the plaintiff is adminiſtrator, lived and cohabited with the defendant for ſeveral years, and had a long intercourſe with her, on a promiſe of marriage, and during this cohabitation, he gave a bond to a perſon in truſt for the payment of 2000*l.* and intereſt quarterly, for the benefit of the defendant, who is a widow, during her life, and after her death to her children, but from the time of the bond to the day of his death, which was four years and a half, *A.* conſtantly maintained her: the defendant has ſued the plaintiff at

law upon the bond, who comes into this court, and by his bill offers to pay the principal and intereſt likewiſe ſince the death of the inteſtate, but inſiſts he ought not to pay the intereſt accrued due in the life-time of the inteſtate, becauſe his maintenance of the widow and her family, after giving the bond to the day of his death, muſt be taken to be in lieu of intereſt.

LORD CHANCELLOR.

This is a very plain caſe for the plaintiff, for he certainly is not obliged to pay any intereſt accrued due in the life-time of the inteſtate, becauſe maintenance muſt clearly be taken to have been in lieu of intereſt.

Fitzgerald verſus *Sucomb*, *November* 20, 1740. Caſe 84.

IT was now moved to diſcharge the election the plaintiff had made of proceeding at law by a former order on coming in of the defendant's anſwer. The plaintiff had brought his action at law for the debt, and likewiſe a bill in this court for a diſcovery of aſſets, and thereby prayed that the defendant might come to an account with the plaintiff and pay what ſhould be due to him.

It is an eſtabliſhed rule, that if you elect to proceed at law on coming in of the anſwer, your ſuit here muſt be diſmiſſed, but on dropping that part of the bill which prayed relief, the plaintiff was allowed to proceed at law.

The old rule of this court ſaid LORD CHANCELLOR was, that you might proceed at law for the debt, and likewiſe in equity for a diſcovery of aſſets; but it is an eſtabliſhed rule now, that if you make your election to proceed at law upon coming in of the anſwer to your bill, your ſuit here muſt be diſmiſſed, becauſe it prays relief as well as a diſcovery; but upon the plaintiff's agreeing to drop that part of his bill which prayed relief, *Lord Chancellor* diſcharged the order for the election, and allowed the plaintiff to proceed at law.

Tendril verſus *Smith*, *November* 24, 1740. Caſe 85.

LORD CHANCELLOR. Where copyhold lands are ſurrendred to the uſe of a will; by a deviſe of lands generally, the copyhold will paſs notwithſtanding there are freeholds to anſwer ſuch deviſe.

A copyhold ſurrendered to the uſe of a will, will paſs by a general deviſe of lands notwithſtanding there are freeholds.

Where a father and a child of full age come to an agreement to alter the limitations under a ſettlement, there is no ground of equity for a child to ſet aſide ſuch agreement, under pretence of being drawn into it by the power and authority of a father, and to reſtore the

An agreement between a child and a father to alter the limitations under a ſettlement, will not be ſet aſide, on pretence of being drawn in by the father's power and authority.

antient limitations again. In a caſe in Lord *Cooper*'s time, where a father prevailed upon a ſon, who was tenant in tail under a ſettlement, to take an eſtate for life only with remainder to his firſt and every other ſon, his lordſhip would not ſet it aſide upon the ſuggeſtion of the father's having an undue influence over him, *&c.*

Caſe 86. *Stone* verſus *Evans*, at the *Rolls*, before Mr. Juſtice *Wright*, *December* 14, 1740.

THE will of *Aſgil Evans*.

Imprimis, I give unto my nephew *Rollinſon Evans* all the income or dividend on my *South-Sea* annuities, now ſtanding in my name in the books of that office.

A teſtator gives the reſidue of his eſtate to his executrix, *or to her heirs, executors, adminiſtrators or aſſigns*; ſhe died in his life-time; Mr. Juſtice *Wright* held, it was given her as executrix, and ſhe dying before him, he is dead inteſtate as to the reſidue.

The reſt and reſidue of my eſtate real and perſonal, and all my effects whatſoever and whereſoever, I give and bequeath unto my executrix, or to her heirs, executors, adminiſtrators or aſſigns; and I do hereby appoint my ſiſter *Eleanor Evans* my ſole executrix.

The codicil.

Aſgill Evans by his will deviſes to his nephew *Rollinſon Evans* all his dividends on his *South-Sea annuities*, and afterwards by a codicil gives his niece *Margaret Stone* 20 *l.* a year for her life, to be paid out of his *South-Sea annuities*; held not to be a revocation *in toto*, but that both deviſes may ſtand conſiſtently together.

Alſo I give unto my niece *Margaret Stone* after the deceaſe of my ſiſter *Eleanor Evans* 20 *l.* a year, to be paid out of my *South-Sea* annuities, now ſtanding in my name in the *South-Sea* books, during her natural life, and no longer; and after her deceaſe, I give the aboveſaid 20 *l.* a year unto my ſiſter *Eleanor Evans*'s children, ſhare and ſhare alike.

The executrix died in the life-time of the teſtator.

Rollinſon Evans is dead.

The huſband of *Margaret Stone* had one ſhilling given him under the will.

The defendant is adminiſtrator to the executrix, and claims in that right.

The 1ſt queſtion was, whether Mr. *Aſgil Evans* is dead inteſtate as to the reſidue.

The 2d queſtion was, whether by charging a 20 *l.* a year annuity upon the old *South-Sea* annuities during the life of *Margaret Stone* by

by the codicil, is a revocation of the deviſe *in toto* to his nephew *Rollinſon Evans* under the will.

Mr. Juſtice Wright: If it had been given as reſidue to her as executrix only, and ſhe had died in the life-time of the teſtator, there is no doubt but it would have been a lapſed legacy: but then upon the ſubſequent words, the queſtion will be, whether they are a limitation only, or deſcriptive of ſome other perſon.

To be ſure from the caſes cited, and ſeveral other caſes to that purpoſe, there is no doubt but the word *or*, is conſtrued as a copulative, as well as a diſjunctive, where it is to ſupport the intention of a perſon; but the deſign of the teſtator in this caſe plainly appears from the laſt words, that he gave her the reſidue as executrix, and all the ſubſequent words may be rejected as ſurplus; and ſhe being dead in the teſtator's life-time, he certainly is dead inteſtate as to the reſidue, and it muſt go amongſt the next of kin.

As to the ſecond point, whether the deviſe of the 20*l. per annum* is a total revocation of the deviſe to *Rollinſon Evans*: it is not inconſiſtent like the caſe of real eſtate, for there a term for years given to the ſame perſon to commence at the teſtator's deceaſe is not conſiſtent with the fee deviſed to him before; but here ſuch conſtruction muſt be made as that both legacies may take place.

The manner of diſpoſing of a real and perſonal eſtate under a will, and under a codicil, is very different; for if a man leaves twenty ſeveral papers behind him executed at different times, in reſpect to perſonal eſtate, they ſhall all be taken as one will, and the court will endeavour to reconcile them together ſo that they may all anſwer as near as poſſible the intention of the teſtator.

If a man leaves twenty ſeveral papers behind him, executed at different times, they ſhall all be taken as one will, and ſo conſtrued as that all may anſwer the teſtator's intention.

The Attorney General verſus *Pearce*, *December* 6, 1740. Caſe 87.

A Queſtion was made in this caſe relating to a charity ariſing out of the wills of Mrs. *Squire* and Mrs. *Northcote*.

Each particular object may be private, but it is the extenſiveneſs which will conſtitute it a publick charity.

Several charities of a publick nature were given under the will of Mrs. *Squire*; the executrix Mrs. *Northcote*, by her own will gives 100*l.* to each of the publick charities which Mrs. *Squire* had mentioned in her will.

The diſtinction attempted for the defendant was that Mrs. *Northcote* meant by the word *publick* in her will to diſtinguiſh it from private charities.

LORD

LORD CHANCELLOR.

I am rather of opinion that the word *publick* was meant only by way of deſcription of the nature of them, and not by way of diſtinguiſhing one charity from another; for it would be almoſt impoſſible to ſay which are publick and which are private in their nature.

The charter of the crown cannot make a charity more or leſs publick, but only more permanent than it would otherwiſe be, but it is the extenſiveneſs which will conſtitute it a publick one.

A deviſe to the poor of a pariſh is a publick charity.

A deviſe to the poor of a pariſh, is a publick charity, the ſame as to a diſpoſition of a ſum among poor houſekeepers.

Where teſtators have not any particular perſon in their contemplation, but leave it to the diſcretion of a truſtee to chuſe out the objects, though ſuch perſon is private, and each particular object may be ſaid to be private, yet in the extenſiveneſs of the benefit accruing from them they may very properly be called publick charities. A ſum to be diſpoſed of by *A. B.* and his executors, at their diſcretion, among poor houſekeepers, is of this kind.

Caſe 88. *Ingram* verſus *Ingram*, *December* 8, 1740.

A power under a ſettlement, for a huſband to diſpoſe of a reverſionary intereſt in an eſtate, in ſuch proportions as he ſhould think fit, among the iſſue of the marriage; he by will, delegates it to his wife, to diſpoſe of in ſuch ſhares as ſhe pleaſes between his ſon and daughter. *Lord Hardwicke held it to be like a power of attorney, and not tranſmiſſible to a third perſon, but could be executed by the huſband only.*

MR. *Ingram* by his marriage articles and ſettlement had a power of diſpoſing of a reverſionary intereſt in copyhold land, ſubject to an eſtate for life in his wife, in ſuch ſhares and proportions as he ſhould think fit among the iſſue of the marriage, and for want of ſuch appointment by the huſband to his right heirs; and this power was directed to be executed by deed in his life-time, or by will at his death. He by his will reciting the power under the articles and ſettlement, delegates it to his wife, that ſhe may in ſuch ſhares and proportions as ſhe ſhall think proper, diſpoſe of it between his ſon and daughter; and for want of ſuch appointment, in equal ſhares between his two children.

LORD CHANCELLOR.

This muſt be conſidered as a power of attorney which could be executed only by the huſband, to whom it is ſolely confined, and is not in it's nature tranſmiſſible or delegatory to a third perſon; therefore the intermediate appointment to the wife under Mr. *Ingram*'s will is abſolutely void, and the latter part where he gives it in equal ſhares between the two children, is a good appoinment within the marriage articles and ſettlement.

Hodgeſon

Hodgeſon and others verſus *Buſſey*, *November* 18, 1740. Caſe 89.

EDWARD Buſſey poſſeſſed of a term of 59 years by a ſettlement made after marriage, dated *January* the 21ſt 1731. conveyed it to truſtees in truſt to permit his wife *Grace Buſſey* to receive the rents and profits for her ſole and ſeparate uſe during the term, if ſhe ſhould ſo long live; and after her deceaſe to permit *Edward Buſſey* to enjoy the profits thereof during the remainder of the term, if he ſhould ſo long live; and after his deceaſe in truſt for the heirs of the body of *Grace* by *Edward Buſſey* begotten, their executors, adminiſtrators and aſſigns; and for default of ſuch iſſue, remainder in truſt for *Henrietta Hodgeſon* during the reſidue of the term, if ſhe ſo long live, and after her deceaſe in truſt for her two ſons *William* and *Edward*.

Edward Buſſey termor for 59 years, by ſettlement conveys it to truſtees, in truſt to permit his wife *Grace Buſſey* to receive the rents during the term, if ſhe ſo long live, and after her deceaſe to permit him to enjoy the rents during his life, and after his deceaſe in truſt for *the heirs of the body* of *Grace* by *Edward Buſſey*, and for default of ſuch iſſue remainder to *Henrietta Hodgeſon* for her life, and after her deceaſe in truſt for her two Sons *William* and *Edward*.

Edward Buſſey died, having never had any iſſue, and *Grace* his wife ſurvived him. *Lord Hardwicke held that the whole term was not veſted in Grace Buſſey, and that the words* HEIRS OF THE BODY, *were not words of limitation but purchaſe, and directed the leaſe to be depoſited in court for the benefit of all parties.*

After making this ſettlement *Edward Buſſey* died having never had any iſſue, and *Grace* his wife ſurvived him.

The bill is brought by the plaintiffs for the diſcovery of the ſettlement, and to have their intereſt in the term declared, and the deeds ſecured for their benefit, after the deceaſe of the wife the defendant *Grace Buſſey*, who inſiſts by her anſwer that ſhe is intitled to the whole term.

The queſtion in this cauſe is, whether ſhe is ſo intitled, or for life only?

December the 5*th* 1740. LORD CHANCELLOR gave judgment.

The general queſtion, he ſaid, was whether the plaintiffs are intitled to have a decree for the ſecuring of the deeds, and that depends upon the intereſt they have in the truſt of this term.

It appears in the cauſe that there was no iſſue of the wife Mrs. *Grace Buſſey* the defendant.

The great point which has been relied on for the defendant is, that the limitations to *Henrietta Hodgeſon* and her ſon are too remote to take place: and that the deed is ſo penned that the whole truſt of the term is veſted in the defendant *Grace Buſſey*.

Secondly, That if there had been ſuch heirs of the body of *Grace Buſſey* they would have taken the whole term, and her having no iſſue will not vary the caſe, but that it is an eſtate-tail in the defendant, as heirs of the body are words of limitation and not of purchaſe, and conſequently the limitations to *Henrietta Hodgeſon* and her ſon are too remote.

I am of opinion that the whole term is not veſted in *Grace Buſſey*, and that the words *heirs of the body* are not words of limitation but of purchaſe.

The general run of caſes makes this plain, that notwithſtanding they found like words of limitation, yet upon circumſtances and the intention of the parties, they may be conſtrued words of purchaſe, and deſcriptive of the perſon who is to take. *Archer*'s caſe, 1 *Co.*

The caſe of *Liſle* v. *Grey* goes further, reported in Sir *Thomas Jones* 114. 2 *Lev.* 223. and *Raym.* 278.

The caſe of *Liſle* and *Gray* is differently reported; but by the record ſearched by Mr. Juſtice *Tracy* it appeared, the judgment in the King's Bench was affirmed in the Exchequer-chamber.

It was held in that caſe of *Liſle* and *Grey*, that the words *heirs of the body* coming after the limitations to the 1ſt, 2d, 3d and 4th ſons, were words of purchaſe.

It is differently reported in the ſeveral books I have mentioned; but Mr. Juſtice *Tracy* ſaid in the caſe of *Legat* and *Sewell*, 1 *P. W.* 90. that he had ſearched the record in *Liſle* and *Gray*, and that the judgment in the Exchequer-Chamber affirmed the judgment in the court of King's Bench.

Words of limitation are improperly uſed on terms for years.

Words of limitation are not properly uſed on terms for years, and therefore it is not to be wondered at, that ſuch conſtruction ſhould be found in ſo many caſes where words of limitation are made uſe of in terms for years.

Peacock v. *Spooner*, 2 *Vern.* 43 & 195. heard firſt before Lord Chancellor *Jeffereys*, and reheard before the Lords Commiſſioners, who reverſed the former decree, and held the words *heirs of the body* to be words of purchaſe; an appeal to the houſe of Lords, and the opinion of all the judges taken, and the decree of the Lords Commiſſioners affirmed.

Another caſe before Lord *Somers* of *Daforne* v. *Goodman*, 2 *Vern.* 362. and after this caſe follows *Web* v. *Web*, before Lord *Harcourt*, reported in 2 *Vern.* 668. and more particularly in *P. W.* 1 *Vol.* 132. than in Mr. *Vernon's Reports*, but not ſo full as it ought to be neither.

I am at liberty to determine this caſe, as if *Web* verſus *Web* was out of the way, as I am of opinion that the words *heirs of the body* here muſt be held equally to be words of purchaſe, as they were in *Peacock* v. *Spooner*, *Dunn* and *Merrick*, heard before Sir *Joſ. Jekyll* at the *Rolls*, the 27th of *October*, the 4*th* year of *Geo.* 2. the limitations there were under a will, in the following words: " *Item*, " all other my leaſehold eſtates I deviſe to *Richard Merrick*, my ex- " ecutor, to the following uſes, to *John Merrick* for life, to *Cathe-* " *rine Merrick* for life, and to the heirs of their bodies, and to their " executors, adminiſtrators, and aſſigns;" but in that cauſe an iſſue was directed to try the power of the teſtator under a particular deed to deviſe, and no determination by the late *Maſter of the Rolls* as to the point, whether the words *heirs of the body* were words of purchaſe or limitation.

All the caſes that I have mentioned on truſts for terms for years, are all grounded upon the manifeſt and apparent intention of the parties: an objection has been taken that ſuch conſtructions have been upon ſettlements or wills only, where the intention of the party always prevails.

The intention of the parties appearing on a deed, always governs the court in conſtructions.

But the caſe of *Liſle* and *Gray*, 2 *Jones* 114. 2 *Lev.* 223. is a full anſwer to this Objection, for there it was not a marriage ſettlement, but a ſettling of lands by *John Liſle* who was ſeiſed in fee, *in his name, and blood*; and it is not the conſideration of it's being a conveyance on marriage, or on any other account, but the intention of the parties appearing on the deed that always governs the court in conſtructions.

The court will make a favourable expoſition of words in marriage ſettlements, to ſupport the intention of the parties, the ſame as to voluntary ones.

In the caſes of marriage ſettlements, the court will make a favourable expoſition of words to ſupport the intention of the parties, and even in voluntary ſettlements, if the words lean more ſtrongly to the one conſtruction than to the other, It muſt likewiſe prevail.

The preſent caſe is more ſtrong to this purpoſe than any of the cited caſes; for I am of opinion that it will be the ſame here upon the words *if ſhe ſhall ſo long live*, as if it had been expreſsly given her for life only; *vide* the caſe of *King* v. *Melling*, 1 *Vent.* 214, 225.

The words *if Grace Buſſey ſhall ſo long live*, are an affirmative implying a negative at the ſame time, that if ſhe did not live ſo long, the remainder of the term ſhould go over.

It was allowed at the bar, even in caſe of a freehold, that if the words *for life* only had been inſerted, it muſt have put it out of doubt notwithſtanding heirs of the body had followed; ſo here *if ſhe ſhall ſo long live*, is an affirmative implying a negative at the ſame time, that if ſhe did not live ſo long, the remainder of the term ſhall go over to the plaintiffs.

The reaſon, the words *heirs of the body* veſt an eſtate-tail in the firſt taker, either in the limitation of a freehold, or upon a term, is, that it includes iſſue *in infinitum*.

The

The ſecond thing relied upon for the defendant, is the limitation over being too remote. *Vide Higgins* verſus *Dowler*, 2 *Vern.* 600. *Clare* and *Clare*. *Caſ. in Eq. in the time of Lord Talbot* 21. *Sabbarton* verſus *Sabbarton*. *Ditto* 55. and 245.

I am of opinion that if the words *heirs of the body* of *Grace Buſſey*, are words of purchaſe, there is no limitation in tail, and that it is the ſame as if the limitation had run to the 2d, 3d and 4th ſons, or if no ſon, then to daughters; for the intention was that it ſhould veſt in ſome particular perſon, and not go on in ſucceſſion from heir of the body to heir of the body, and to executors, &c. of the heir of the body, but it muſt veſt in the firſt taker; as if it had been to the firſt ſon, his executors, adminiſtrators and aſſigns, for and during the reſidue of the ſaid term, and for want of ſuch iſſue remainder to the plaintiffs heirs.

For want of ſuch iſſue, is the ſame as for want of ſuch ſon or ſuch daughter, for the word *ſuch* confines it to ſuch iſſue as is meant by the words *heirs of the body*.

Now the words for want of *ſuch* iſſue, will be the ſame as if it had been ſaid, for want of ſuch ſon or ſuch daughter; for the word *ſuch* confines it to *ſuch* iſſue as is meant by the words *heirs of the body*, and then it is not too remote a remainder, but brings it to the caſe of *Gore* verſus *Gore*. *Vide* 2 *P. Wms.* 28.

I am apprehenſive it may be objected that this is like the caſe of *Higgins* v. *Derby*, 1 *Salk.* 156. but the preſent differs greatly, for there it was ſaid to be an attempt to intail a chattel, and therefore conſtrued to veſt in the firſt ſon, to prevent the inconvenience of a perpetuity.

Heirs of the body here mean, *the heir of the body living at the death of Edward Buſſey*, or born in a reaſonable time after, which differs it from all the caſes.

Here the words *heirs of the body* muſt mean heir of the body living at the time of the death of *Edward Buſſey*, or born in ſome reaſonable time after, and that differs it from all the caſes that have been cited.

Upon the whole, I declare the plaintiffs *Henrietta Hodgeſon* and her ſon intitled to the truſt and benefit of the term of 59 years, being the reverſionary term after the deceaſe of the defendant *Grace Buſſey*.

The leaſe of the 7th of *July* 1709. whereby the ſaid term is created, I order to be depoſited in court for the benefit of all parties; and direct the defendant to deliver to the plaintiff *Henrietta Hodgeſon* a counterpart of the ſettlement in 1731.

Blackwell

Blackwell verſus *Harper*, *December* 8, 1740. Caſe 90.

A Queſtion aroſe in this cauſe upon the act of parliament made in the 8th year of *George* the 2d. *ch.* 13. intitled, An act for the encouragement of the arts of deſigning, engraving and etching hiſtorical and other prints, by veſting the properties thereof in the inventors and engravers for fourteen years, to be computed from the 24*th* *June* 1735. The plaintiff Mrs. *Blackwell* has ingraved no leſs than 300 medicinal plants, and has now brought her bill to eſtabliſh her right to the ſole property in them, and to reſtrain the defendants from copying and engraving them, upon the penalties within the act of parliament.

The act of 8 *Geo.* 2. for the encouragement of the arts of deſigning, engraving, *&c.* is not merely confined to works of invention only, but means the deſigning or engraving any thing that is already in nature.

For the plaintiff was cited, the caſe of *Baller*, adminiſtrator of *John Gay Eſq*; verſus *Walker* and others; the printers and ſellers of the ſecond part of the *Beggars Opera*; a perpetual injunction was granted, and an account decreed: it was heard before Lord Chancellor *Talbot*.

Mr. Attorney General for the defendant inſiſted, firſt, that this is a monopoly, and an infringement upon the common law; the plaintiff therefore muſt make out very clearly that ſhe is exactly within the words of this act of parliament.

Secondly, That this does not come within the meaning of the act, which has the word *inventors*.

For engraving is not properly inventing, and therefore is not within the act, unleſs it had been ſomething in the mind, and not already in nature, as all theſe plants certainly are.

Thirdly, That the name of the proprietor ſhould have been engraved on each plate, and printed on every ſuch print; for Mrs. *Blackwell* might both delineate and engrave them, and yet not be the proprietor of them. It ought to have been mentioned at the foot of each print, when it was publiſhed, the day of the firſt printing, and the name of the proprietor, that all mankind may know when it commences, and when it expires, and that people may be apprized to ſell clear of the penalty in this act.

The only charge againſt the defendant is ſelling, which is not liable to the penalties of the act, unleſs the perſon ſelling knows them to be printed by one who is not the author and proprietor of them, and knows likewiſe who is the real author at the ſame time. The forty firſt plants produced in the cauſe are as common plants as exiſt, and are in every herbal extant; and it could never be the in-

tention of the act, to include ſuch as inventions, which have been publiſhed before, only in another form.

LORD CHANCELLOR.

The principal thing inſiſted on for the defendant, is the want of engraving *the time*, and *the name* at the foot of each plate, as the fourteen years are to commence from the day of the firſt publication.

It was objected in the caſe of *Baller* verſus *Walker*, that the book ought to have been regiſtred in *Stationers-Hall*, or otherwiſe it is not notice of property within the *8th* of Queen *Anne*, *ch.* 19. but this objection was over-ruled by the court.

This is the firſt caſe under the act of the preſent King.

Two objections have been taken againſt the injunction, and to the account prayed by the bill.

Firſt, Againſt the right of the plaintiff, as not being ſuch prints as are within the meaning of the act.

Secondly, If they are, that Mrs. *Blackwell* has not complied with the terms of the act of parliament ſo as to veſt the ſole property in herſelf.

As to the firſt objection. It is extreamly clear that they are prints within the meaning of the act of parliament. It has been ſaid that the words of this ſtatute muſt be confined ſtrictly to invention, and not to engraving any thing copied from what is already in nature; but this certainly never could be the deſign of the act.

The words of the act are; "Every perſon who ſhall invent and "deſign, engrave, etch, or work in *Metzotinto*, or *Chiaro oſcuro*, or "from his own works and invention, ſhall cauſe to be deſigned and "engraved, etched, or worked in *Metzotinto*, or *Chiaro oſcuro*, any "hiſtorical or other print or prints, ſhall have the ſole right and li-"berty of printing and reprinting the ſame, for the term of fourteen "years to commence from the day of the firſt publiſhing thereof, "which ſhall be truly engraved with the name of the proprietor on "each plate, and printed on every ſuch print or prints."

But I do not think the act confines it merely to invention; as for inſtance, an allegorical or fabulous repreſentation; nor to hiſtorical only, as, ſuppoſe the deſign of a battle, *&c.* but it means the deſigning or engraving any thing that is already in nature.

Therefore

Therefore, I am of opinion, that if there ſhould be a print publiſhed of any building, or houſe and gardens, or that great deſign of Mr. *Pine*'s of the city of *London*, they will all come properly within this act of parliament; or elſe it would be narrowing it greatly, and making it of little uſe.

A print publiſhed of any building, houſe, or garden, fall within this act of parliament.

If it had not been for the clauſe thrown in for Mr. *Pine*'s benefit, any body might have copied the prints of the hangings in the Houſe of Lords, for what is tapeſtry but copies taken from drawings.

The defendant, to make out the caſe he aims at, muſt ſhew me that theſe prints of medicinal plants are in any other book or herbal whatſoever, in the ſame manner and form as they are repreſented here, for they are repreſented in all their ſeveral gradations, the flower, the flower cup, the ſeed veſſel, and the ſeed.

The ſecond objection is, as to the directions of the act, that Mrs. *Blackwell* has not complied with the terms of it ſo as to veſt the ſole property in herſelf. *Elizabeth Blackwell ſculpſit et delineavit* is ſufficient, and are the very words of the act of parliament to ſhew the perſon to be the proprietor.

The more material objection is, as to the day of publication, for it is inſiſted here is no *terminus a quo*, from whence the term is to commence, nor the *terminus ad quem* when it ſhall expire.

I am of opinion that the words are only directory, and not deſcriptive of the day, and that they are only neceſſary to make the penalty incur, and that the property in the prints veſts abſolutely in the engraver, deſigner, *&c.* though the day of the publication is not annexed to the foot of it.

The property in the prints veſts abſolutely in the engraver, though the day of publication is not mentioned.

Upon the act of 8 *Ann. c.* 19. the clauſe, *of regiſtring* with the ſtationers company, is relative to the penalty, and the property cannot veſt without ſuch entry; for the words are, "That nothing in "this act ſhall be conſtrued to ſubject any bookſeller, *&c.* to the "forfeitures, *&c.* by reaſon of printing any book, *&c.* unleſs the "title to the copy of ſuch book hereafter publiſhed, ſhall be"fore ſuch publication, be entered in the regiſter book of the "company of ſtationers.

The property of books cannot veſt without being firſt regiſtred with the ſtationers company.

Here the clauſe which veſts the property is diſtinct.

The clauſe concerning the printing and re-printing, and publication, relates to the penalty, and is diſtinct: it is true, in the firſt act the clauſe is ſeparate, but that will make no difference in my opinion.

The next conſideration is, what will be the conſequence.

The plaintiff will be intitled to a perpetual injunction, but not to an account of profits, becauſe it would be hard to make the defendant account as he was ignorant of the property.

In the caſe of *Baller* verſus *Walker*, it was ſtated by the bill, and not denied by the anſwer, that the book was entred in Stationers-hall, and coſts were given for that reaſon.

There is a material objection in this caſe againſt giving coſts; that the defendant, though he knew the plants were publiſhed, yet did not know the exact time, ſo that they might have been publiſhed before the act.

My conſtruction, that the words requiring the day to be annexed at the foot of the act are directory, and not deſcriptive of the day, I do not ſay is ſo certain, but judges may think otherwiſe; however, as it is doubtful, I cannot give coſts, nor decree any thing more beſides a perpetual injunction.

Caſe 91. *Watkyns* by her next friend verſus *Ferdinando Watkyns* her huſband, *December* 10, 1740.

A bill brought by a wife for maintenance, on ſuggeſtion of *cruel uſage* by the huſband; and on the part of the defendant, as an excuſe for his ill uſage, depoſitions were offered to prove a criminal converſation; unleſs it is expreſsly charged by the anſwer, the court will not ſuffer ſuch depoſitions to be read.

A Bill was brought againſt the huſband to have a maintenance out of her fortune, upon a ſuggeſtion of very cruel uſage without any provocation on her ſide.

She was a widow when the defendant married her, and had a conſiderable fortune.

Several depoſitions were read of the huſband's cruel uſage.

The plaintiff, upon her marriage with the defendant, truſted him to draw up a bond with his own hand to ſecure ſeventeen hundred pounds for the wife, in caſe ſhe ſhould ſurvive him.

He likewiſe entred into a bond for paying five hundred pounds to the plaintiff's ſiſter, for prevailing upon the plaintiff to marry the defendant.

Depoſitions were offered on the part of the defendant charging very high provocation; as for inſtance, the plaintiff's drawing in the defendant to admit one *Ralph Cox* into his houſe, whom he ſoon after perceived to hold a ſtricter correſpondence with the plaintiff than he ought to have done, and that upon his admoniſhing her in a very mild manner, ſhe flew into a very great paſſion, and left

left the houſe; and that the defendant went to her, and intreated her to return, and offered to forget every thing that had paſſed; and that the huſband, upon her refuſal, broke open the plaintiff's cabinet, and took out the ſeventeen hundred pound bond.

LORD CHANCELLOR ſaid, the court will not ſuffer any depoſitions to be read to prove a criminal converſation againſt a wife, unleſs it is expreſsly charged by the huſband's anſwer, and made part of his defence and excuſe for ill uſage of her, and was denied in the caſe of *Sidney* verſus *Sidney*, 3 *Wms.* 269. but it being charged by the anſwer in this caſe, that ſhe behaved in a very indecent manner with one *Cox*, he thought it ſufficient for the defendant to read evidence againſt the plaintiff of criminal converſation, for it is not neceſſary to make the charge in groſs terms, but ſufficient as it is charged here for the court to know what is aimed at by the anſwer.

Charging the wife has behaved in an indecent manner, will intitle the huſband to read evidence againſt her of criminal converſation.

The depoſitions were then read for the defendant, ſuggeſting that the plaintiff held a private and unlawful correſpondence with *Ralph Cox*, one of the plaintiff's witneſſes, and likewiſe to her being ſeen in bed with one *Daws*.

There appears to me to be a ſufficient ground for this court to direct an inquiry what eſtate the defendant has, to make ſatisfaction for impoſing upon the plaintiff at the time of the marriage; for if there be fraud and impoſition on the part of the huſband, this court will interpoſe, and make the agreement according to the intention of the parties, and though the bond may be void in law, yet the court will eſtabliſh it in favour of the plaintiff.

Though a huſband has impoſed on a wife, by giving her a bond void at law, yet this court will eſtabliſh the agreement according to the intention of the parties.

The great objection is the elopement and adultery of the wife, and that the court will not give any maintenance to a wife who miſbehaves in this manner, and it is true, upon full proof of ſuch behaviour, that they will not allow the wife any thing for maintenance.

This court will not allow a wife maintenance where there is full proof of her elopement and adultery.

But the evidence here is not quite full, though in one of the depoſitions a witneſs indeed goes ſo far as to ſay, that ſhe ſaw her Miſtreſs in bed with one *Daws* between the firſt and ſecond marriage, but I do not much like the account this witneſs gives of her ſelf, that ſhe lived as a ſervant to the plaintiff before the ſecond marriage, and notwithſtanding ſhe ſaw this improper behaviour in her miſtreſs, yet ſhe did not think it wrong to live on with the plaintiff even after her ſecond marriage; and where a witneſs is under a neceſſity of firſt exculpating herſelf, no regard ought to be given to her evidence.

Where a witneſs is under a neceſſity of exculpating her own behaviour firſt, no regard ought to be paid to her evidence, againſt the conduct of others.

On the plaintiff's ſide there is very ſtrong and ſubſtantial evidence of her being cruelly and barbarouſly uſed.

On the defendant's ſide very looſe and trifling with regard to this point, for there is evidence only of perſons who now and then came into the family, which amounts to nothing at all, for a huſband and wife may live very unhappily together, and have notwithſtanding prudence enough to keep within bounds before ſtrangers.

I can do no more in this caſe than Lord Chancellor *King* did in the caſe of *Colemore* and *Colemore*, when he framed his decree by way of analogy to the writ of *ne exeat regno*, and impounded the fortune of the huſband for the wife's maintenance till he ſhould think proper to return.

I muſt declare the bond to be an impoſition, and that the money ought to have been ſecured to her to be paid out of her own fortune, in caſe ſhe ſurvived him; I muſt likewiſe refer it to a Maſter to take an account of the perſonal eſtate of the plaintiff before her marriage come to the hands of the defendant ſince the marriage, or to any other perſon by his order and for his uſe, and ſo much of it as remains in ſpecie of capital and principal money ariſing out of ſuch eſtate and effects, to be placed out in real or perſonal ſecurities, in the name of a truſtee to be approved of by a maſter, in truſt to pay the intereſt ariſing therefrom in ſuch manner as is hereafter mentioned during the joint lives of the plaintiff and the defendant; and in caſe the defendant ſhall die in the life-time of the plaintiff, then to ſecure the ſum of 1700l. the principal money in the bond to be paid to the plaintiff within ſix months after the defendant's death.

The huſband having left the kingdom, intereſt out of truſt money directed to be paid to the wife, till he thinks proper to return, and maintain her as he ought.

And, as it appears to the court, the huſband has poſſeſſed himſelf of the greateſt part of the wife's fortune, and is gone out of the kingdom without leaving a proviſion or maintenance for her, I decree that the intereſt ariſing from the truſt money ſhall be paid to her, till he thinks proper to return and maintain her as he ought, and decree the defendant to pay coſts.

Caſe 92. *Walker* verſus *Walker*, *December* 10, 11, 1740.

The queſtion was, whether parol evidence may be admitted on the part of the defendant (as there was no written agreement between him and the plaintiff) to eſtabliſh a fact: *the defendant may be admitted to read parol evidence, to rebut the equity ſet up by the bill.*

JOHN *Walker*, the eldeſt brother of the family, being pretty near his end, applied to *Thomas Walker*, the plaintiff, and to his ſiſter, who had ſolicited him to do ſomething for them, and told them, if you will ſurrender your copyhold eſtate, as you have no children of your marriage, for the benefit of your brother *Ralph Walker*, the defendant, I will ſecure an annuity of 5l. *per ann.* for your life, and an annuity of 2l. 10s. for your ſiſter: the plaintiff did agree to the terms, and promiſed to ſurrender his copyhold eſtate; upon which *John Walker* ſurrendered his copyhold eſtate to the defendant, charged with theſe annuities; the defendant refuſes

to

to pay them, unleſs the plaintiff will ſurrender his own copyhold eſtate purſuant to his promiſe to *John Walker*.

The queſtion (as there is no written agreement of this tranſaction between *John Walker* and the plaintiff) if parol evidence may be admitted to eſtabliſh this fact.

Mr. *Chute*, of council for the defendant, inſiſted, that a man who comes into a court for equity ought to have clean hands, and to do equity by ſurrendring his copyhold lands purſuant to his agreement with *John Walker*: and upon the general doctrine that parol evidence may be admitted to rebut an equity, cited the following caſes; *The Counteſs* verſus *The Earl of Gainſborough*, 2 *Vern.* 252. *Eq. Caſ. Abr.* 230. *Oldham* verſus *Litchford*, 2 *Vern.* 506. *Eq. Caſ. Abr.* 231. *Gaſcoigne* verſus *Thwing and others*, 1 *Vern.* 366. *Mallabar* verſus *Mallabar*, before Lord Chancellor *Talbot*, *Caſes in his Time* 78. The defendant was heir at law both to *John Walker* and the plaintiff.

LORD CHANCELLOR.

There are a great many inſtances in this court where parol evidence will be admitted to be read to rebut an equity ſet up by the plaintiff, in the caſe of reſulting truſts; and then it will come to this, if a plaintiff has failed at law, as the preſent has done, and comes into this court for equity, whether the defendant ſhall not be admitted to read this parol evidence to rebut the equity the plaintiff ſets up by this bill.

I am very clear of opinion, that ſuch evidence ought to be admitted here, and would be a great injuſtice to the defendant if it was not.

It is not rightly ſtated when it is ſaid, the evidence to be read here is in ſupport of an agreement, but may more properly be ſaid to be a defence ariſing from the fraud and impoſition of the plaintiff, and has nothing in the world to do with the ſtatute of frauds and perjuries.

The defence ariſes here from the impoſition of the plaintiff, and therefore not affected by the ſtatute of frauds and perjuries.

Here is a ſurrender in purſuance of an agreement, with an annuity charged upon the defendant, the ſurrendree for the plaintiff's benefit, and he refuſing to perform his part, is not this ſuch a caſe as the court will relieve?

Suppoſe a perſon who advances money, ſhould, after he has executed the abſolute conveyance, refuſe to execute the defeaſance, will not this court relieve againſt ſuch fraud?

Where a perſon advancing money, refuſes, after an abſolute conveyance, to execute a defeaſance, this court will relieve.

The agreement as ſet forth in the defendant's anſwer is proved by three witneſſes in the fulleſt manner, and their being relations is no objection to their competency. Four pounds *per ann.* is the value of

of the copyhold eſtate, which the plaintiff, according to his agreement with *John Walker*, was to ſurrender the inheritance of, ſubject to his own and his wife's life.

The queſtion is, Whether the plaintiff is intitled to have the aid of a court of equity, to recover the annuity which he has failed in at law.

I am of opinion that the plaintiff is not intitled to have the aid of a court of equity, and that it would be contrary to the rules of juſtice; for it appears to me plain, that *John Walker* intended to grant theſe annuities or rent-charges conditionally only.

It was held to be a defective charge at law, and therefore the plaintiff comes into this court, ſuggeſting it to be an equitable charge.

The defendant inſiſts that he ought not to have the aid of a court of equity, to ſupply this defect, unleſs he will do equity in performing his part of the agreement, by which he drew in *John Walker* to ſurrender his copyhold eſtate charged with the annuities.

The material part of the defendant's evidence is, that in three days after *John Walker*'s ſurrender, the plaintiff declared, I have *John Walker* faſt, but he ſhall not have me faſt.

Neither the fact is charged by the defendant's witneſſes, nor the credit of the witneſſes impeached by the plaintiff's evidence.

The ſteward ſwearing he never heard of the agreement *at or before the ſurrender*, is a negative pregnant, that he heard of it *after*.

The ſteward of the court examined for the plaintiff, and concerned in the tranſaction, ſwearing, that at or before the time of the ſurrender, he never heard of the agreement inſiſted on by the defendant, is a manifeſt evaſion, and a negative pregnant that he heard of it after the ſurrender.

The plaintiff for theſe reaſons is not intitled to relief in this court, for ſupplying the defect of a legal conveyance, but it is rebutted by the equity ſet up by the defendant.

Where a part of the agreement is performed on one ſide, it is juſt it ſhould be carried into execution on the other.

I am not at all clear, whether if the defendant had brought his croſs bill to have this agreement eſtabliſhed, the court would not have done it, upon conſidering this in the light of thoſe caſes, where one part of the agreement being performed by one ſide, it is but common juſtice it be carried into execution on the other, and the defendant would have had the benefit of it as an agreement.

The allowing any other conſtruction upon the ſtatute of frauds and perjuries, would be to make it a guard and protection to fraud, inſtead of a ſecurity againſt it, as was the deſign and intention of it.

Decreed, No coſts on either ſide.

Sutton verſus *Stone and others*, *December* 10, 1740. at the *Rolls*, before Mr. Juſtice *Wright*. Caſe 93.

A Surrender of a copyhold eſtate to the huſband for life, to the wife for life, and to the heirs of the bodies of the huſband and wife, remainder in fee to the ſurvivor, did not veſt an abſolute eſtate-tail in the wife, who ſurvived, but only gave her an eſtate-tail *after poſſibility of iſſue extinct*, and the eſtate-tail veſts in the perſon who is the heir of the body both of huſband and wife.

A copyhold ſurrendered to the huſband for life, to the wife for life, remainder to the heirs of the bodies of huſband and wife, remainder in fee to the ſurvivor, *gives to the wife, who ſurvived, an eſtate-tail only, after poſſibilty of iſſue extinct, and the eſtate-tail veſts in the heirs of the huſband and wife.*

In the caſes of ſurrenders of copyhold eſtates the ſame conſtruction muſt take place as in all other conveyances at law: and ſo held in *Idle* verſus *Coke*, *Holt's Caſes* 164. by the whole court, that a limitation of uſes in a copyhold ſurrender muſt be conſtrued by the ſame rules, as if it were a limitation in any other conveyance at common law; and that the intent of the party is not ſufficient, as in a will.

The ſame conſtruction takes place in copyholds, as in other law conveyances.

Where there is a clear tenancy in tail, there is no occaſion for the remainder man's being a party to a bill of foreclоſure; but if there is an expreſs eſtate for life, the remainder man ought to be a party.

A mortgagee who is not in poſſeſſion, may bring his bill againſt a mortgagor before admittance for a decree of foreclоſure, and after he has obtained ſuch a decree, may bring his ejectment for the poſſeſſion of the morgaged premiſſes.

Before admittance, a mortgagee may bring a bill of foreclоſure, and after a decree, an ejectment for the poſſeſſion of the premiſſes.

The mortgagee here has brought his bill againſt a mortgagor to compel him as tenant in tail to make a good title by ſuffering a recovery.

I do not apprehend, ſaid Mr. Juſtice *Wright*, that this court will point out what title the mortgagor ſhall make, but will decree him to make ſuch title to the mortgagee as he is capable of doing, and therefore I direct a good title to be made by the defendant to the plaintiff, and the principal, intereſt and coſts on the mortgage to be paid in ſix months, or the defendant to ſtand abſolutely foreclоſed.

Where there is no replication to the anſwer, a defendant is intitled only to coſts according to the courſe of the court; but notwithſtanding the plaintiff has not in this caſe replied to the anſwer of the lord of the manor, yet deſiring an act to be done by the lord, *videlicet*,

Though the plaintiff has not replied to the defendant's anſwer, yet deſiring him to do an act, will intitle the defendant to his coſts to be taxed.

licet, the admitting him to the copyhold eſtate, he muſt pay this defendant coſts to be taxed by a maſter.

Caſe 94. *Timewell* verſus *Perkins*, *December* 15, 1740. at the *Rolls*, before Mr. Juſtice *William Forteſcue*.

All my freehold lands in the tenure of the widow *L.* and the reſidue of my eſtate, conſiſting in ready money, plate, jewels, leaſes, judgments, mortgages, *&c.* or in any other thing whereſoever or whatſoever, I give to *A. H.* or her aſſigns for ever. *The court will intend an inteſtacy in favour of the heir at law, unleſs there is a clear intention to paſs the real eſtate.*

THE will of *John Hitchins*.

" *Item*, all thoſe my freehold lands and hop grounds with the meſ-
" ſuages or tenements, barns, *&c.* now in the tenure and occupa-
" tion of the widow *Leach*, and all other the reſt and reſidue and
" remainder of my eſtate, conſiſting in ready money, plate, jewels,
" leaſes, judgments, mortgages, *&c.* or in any other thing whatſo-
" ever or whereſoever, I give unto my dearly beloved *Arabella*
" *Hitchins* and her aſſigns for ever."

The queſtion is, whether the reſidue paſſed to *Arabella* or not.

There is no doubt but the words, *to Arabella and her aſſigns for ever*, will carry the fee to her without the word *heirs*.

It has been inſiſted for the plaintiff, that the words in the preamble of the will " *as touching the temporal eſtate with which it hath pleaſed* " *God to bleſs me, I give, bequeath, and diſpoſe of as follows*," ſhew plainly the teſtator's intention to diſpoſe of his whole eſtate, and that the court will never intend an inteſtacy of any part; and that the word *eſtate* will include lands as well as perſonal eſtate, and though coupled with words applicable to perſonal, yet will paſs freehold.

Although it would have been ſtronger if the word real had been added, yet however this will not do, unleſs there are ſome words that ſhew the intention to paſs the real eſtate, or the court will intend an inteſtacy in favour of an heir at law.

The word *eſtate* itſelf indeed may include as well real as perſonal; yet when the teſtator has expreſſed himſelf by ſuch words as are applicable to perſonal only, I cannot intend he meant the real eſtate.

Whatſoever and whereſoever muſt be confined to the things antecedent, and is reſtrained to the hop grounds and leaſeholds; for if he intended to give his wife all his real eſtate, why did he mention only the *Eſſex* eſtate.

Eſtate, where it is only coupled with things that are perſonal, ſhall be reſtrained to perſonals. *Vide Wilkinſon* and *Meream* or *Merryland*, *Cro. Car.* 447, 449. Sir *W. Jones Rep.* 380.

The

The ſtate of this caſe as it ſtands in *Roll's Abridgment* 334. *pl.* 14. " That if a man ſeiſed in fee of any lands, and alſo *poſſeſſed* of " certain leaſes of lands, deviſes the leaſes to *J. S.* and then deviſes " to his executor all the reſidue of his eſtates, mortgages, goods, *&c.* " his debts paid and funeral expences diſcharged; this *will paſs a* " *fee* to the executor by the word *eſtates* being coupled with the " word *goods*. *Hill.* 10 *C. B. R.* between *Wilkinſon* and *Meriam*, *per Cur.* upon a ſpecial verdict; but it appears to have been otherwiſe determined on ſearching the record of the judgment.

I think the preſent caſe is ſtronger, becauſe, though the word *poſſeſſed* is not mentioned, yet there are other words which make it ſtronger; for here the word eſtate is expreſsly confined to perſonals, as plate, jewels, rings, judgments, mortgages, *&c.* which are all perſonal eſtate, and therefore I think the reſidue of the real eſtate does not paſs.

But ſuppoſing it would admit of a doubt, yet certainly the heir at law ought to be preferred, unleſs the intention of the teſtator to exclude him appears exceeding plain.

Arabella Timewell's will.

A deviſe of plate, jewels, linen, houſehold goods, and coach and horſes, will be confined to things of the ſame nature; and goldſmiths notes, and bank bills, do not paſs by thoſe words.

" I give to *Mary Timewell* all mortgages, ground rents, judg- " ments, *&c.* whatever I have or ſhall have at my death, as plate, " jewels, linen, houſehold goods, coach and horſes for her uſe, " that no huſband ſhall meddle with them, and at her death to " give them to whom ſhe pleaſes.

" *Item*, I give my houſes in *Broad-ſtreet* and *Throgmorton* to " *Mary Timewall* for her own uſe, to give away at her death to " whom ſhe pleaſes.

" *Item*, I give to *Sarah Perkins* my freehold eſtate in *Eſſex*, to " diſpoſe of to whomſoever ſhe pleaſes, and my two houſes at " *Croyden*, it being all freehold, for her own uſe, and if ſhe ſhould " have children, for her to give to them as ſhe pleaſes; but if ſhe " die leaving none, to *Mary Timewell* and her children."

At the laſt part of the will ſhe ſays, " I think I have given them " as equally as I can, and hope my two daughters will live in great " harmony and friendſhip together."

One part of the will relates to *Sarah Perkins*: as to the lands in *Eſſex* and the houſes in *Croydon*, it does not appear to me ſo clear what eſtate *Sarah Perkins* has, but whether ſhe has an eſtate for life with a remainder to her children, or whether ſhe has an eſtate-tail with a power of diſpoſing as ſhe pleaſes, is not neceſſary for me to declare now, as ſhe has no children.

There is no doubt but *Mary Timewell* is intitled to the fee in thoſe eſtates which are not expreſsly deviſed to *Sarah*.

I am of opinion the Goldſmiths notes and bank bills did not paſs by the will to *Mary Timewell*; for though there is no doubt but the general words, *whatever I have or ſhall* have at my death have paſſed them, yet the particular words which follow, as plate, jewels, *&c.* confine and reſtrain them to things of the ſame nature, and ſo laid down in the caſe of *Trafford* and *Berrige*, * and therefore as they do not paſs they muſt go equally between the two ſiſters.

It has been ſaid, that as the teſtatrix has expreſsly deviſed *the ground rents* to *Mary Timewell*, the defendant *Sarah Perkins* is bound by it, becauſe ſhe herſelf takes by another part of the will, and for that reaſon ſhe cannot except to particular *deviſes*, but muſt take the will in the whole.

But this argument will not hold here, for as it is not a particular ground rent that is deviſed, and as the teſtatrix might have other ground rents of her own to ſatisfy this part of the will, and I ſhall intend it ſo; and beſides, it is impoſſible ſhe could give away to *Mary* from *Sarah* what was *Sarah*'s inheritance from her father.

Caſe 95. *Ridout* verſus *the Earl of Plymouth and others*, in the paper of exceptions, *December* 16, 1740.

Where a huſband's perſonal eſtate is not ſufficient to pay his debts, a wife cannot ſet up any claim to jewels, rings, pictures, dreſſing plate and other trinkets given her before marriage.

THE queſtion was, whether jewels, rings, pictures, dreſſing plate and other trinkets given to Mrs. *Lewis* prior to her marriage, belong to her as her ſeparate eſtate, and the huſband is to be conſidered only as a truſtee for them: and as to things given after the marriage, *videlicet*, mourning rings, family pictures, *&c.* whether they ſhall not be retained by Mrs. *Lewis* as too trifling to be called the perſonal eſtate of the huſband.

LORD CHANCELLOR.

It is a very unfortunate and a very hard caſe, that Mrs. *Lewis* ſhould be ſtripped of theſe things.

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* A man deviſed to his niece all his goods, chattels, houſhold-ſtuff, furniture, and other things which then were, or ſhould be in his houſe at the time of his death, and ſome time after died, leaving about 265 *l. in ready money* in the houſe; and it was decreed that *this ready money* did not paſs, for by the words *other things* ſhall be intended things of like nature and ſpecies with thoſe before mentioned. *Mich.* 1729. between *Trafford* and *Berrige*.

She claims them in two lights, 1ſt. as paraphernalia, and in that reſpect ſhe certainly is not intitled, where the aſſets of the huſband are not ſufficient to pay his debts, nor is there any truſt upon the real eſtate for payment of debts, ſo that ſhe cannot ſtand in the place of creditors, and be allowed for her paraphernalia out of the real eſtate; and there is no caſe which has carried it ſo far as to let the widow come upon the real eſtate at all events to be ſatisfied her paraphernalia.

Where there is no truſt on real eſtate for payment of debts, a widow cannot come upon it at all events, to be ſatisfied her paraphernalia.

The two things relied upon are, that the huſband ſhall be conſidered as a truſtee for the things given to the wife previous to the marriage; but it will be impoſſible to maintain this, becauſe though ſhe had an abſolute property in the jewels, *&c.* by virtue of the gift before marriage, yet immediately upon the marriage, the law gives them the huſband, and where his perſonal eſtate is not ſufficient to pay his debts, a wife cannot ſet up any claim, nor can I poſſibly conſider him in the light of a truſtee for ſuch jewels, *&c.* as were given previous to the marriage, as it would be a manifeſt prejudice and fraud upon the creditors.

There is no pretence for conſidering the things given after the marriage as the property of the widow, but ſhe ſhall be allowed to be a purchaſer of them, at the value ſet upon them by the maſter, none of the parties oppoſing it.

The Attorney General, upon the conſideration of the greatneſs of the debts, ſubmitted it to the court, that the real eſtate ſhould be ſold, and the money ariſing from the ſale applied in a courſe of adminiſtration.

The words of Mr. *Lewis*'s will are, " that the truſtees ſhould " by perception of rents and profits, or by leaſing or mortgaging the " ſame, raiſe and levy the ſaid ſums and legacies made payable out " of the ſaid lands amounting to 30000*l.* and ſhould pay the ſame " in ſuch manner as is therein before mentioned.

LORD CHANCELLOR.

Where a man creates a truſt for payment of debts, and declares the truſt of that term to be, by perception of rents and profits, or by leaſing, or by mortgaging, to raiſe ſufficient money for the payment of his debts, it reſtrains it merely to a payment out of rents and profits; if it had been a truſt *of the rents and profits*, the term might have been ſold for the ſatisfaction of creditors.

Debts and legacies are by a will directed to be raiſed by perception of rents and profits, or by leaſing or mortgaging of the land; this reſtrains it merely to a payment out of rents, and the court cannot decree a ſale.

Beſides, if the court would conſent to decree a ſale of the term, people are not fond of buying a term though for 200 years; and then it would not anſwer the end propoſed, becauſe it would not raiſe a ſufficient fund for the payment of all the debts.

Where there are other limiting words following rents and profits in a truſt for payment of debts, I do not remember any caſe which will authorize me to direct a ſale.

Lord *Hardwicke* recommended it to the parties to apply for a private act of parliament to obtain a ſale of the teſtator's real eſtates.

In reſpect of ſeveral difficulties appearing in this caſe, as well relating to the intereſt of the Earl of *Plimouth* as of the creditors and legatees of the teſtator *Thomas Lewis*; *Lord Chancellor* recommended it to the parties in the mean time to make a proper application for a private act of parliament in order to obtain a ſale of the teſtator's real and leaſehold eſtates, or ſo much thereof as ſhall be ſufficient for the ſatisfaction of the ſeveral charges thereupon.

Caſe 96. *Adams* verſus *Gale*, in the paper of exceptions, *December* 16, 1740.

A debtor leaves a creditor by note on demand, his executor, this court will not allow him intereſt for it, becauſe he may turn money to his own advantage, which is coming in by the teſtator's aſſets.

A Perſon who was executor under a will was likewiſe a creditor by note payable on demand; the queſtion was, whether as he could not poſſibly make a demand of intereſt upon himſelf, he ſhall not by the equity of this court be intitled to be allowed intereſt.

For the plaintiff, who was a legatee under the will, a caſe was cited of *Hacknott* and *Webber* in 1728, before Lord Chief Juſtice *Eyres*, where an action was brought upon two promiſſory notes payable on demand, and judgment by default, and a writ of inquiry of damages was awarded, and intereſt given by the jury from the date of the notes; the judgment upon the writ of inquiry was ſet aſide for this reaſon, as intereſt is not due upon promiſſory notes, unleſs there is an actual demand of intereſt; and ſaid by the court, that it was the conſtant rule in caſes of this nature, at *niſi prius*.

LORD CHANCELLOR.

I do admit it to be a caſe in which the defendant could not recover intereſt at law, becauſe in the life-time of the teſtator he made no demand of intereſt, and ſince the death of the teſtator he is incapable of doing it, by being left executor.

As an executor may make uſe of money which is perpetually coming in by aſſets of the teſtator, and turn it to his own advantage; and as it is not improper for an executor to do it upon his own account, where he is a reſponſible man, and ready to anſwer legacies and debts when called upon; therefore I do not think it right to allow intereſt for the note.

Higgins

Higgins and others verſus *the York Buildings Company*, Caſe 97. *December* 20, 1740.

THE *York Buildings* company ſet up a deed of truſt of the eſtate in queſtion, which at the hearing of the cauſe was declared to be a fraudulent conveyance againſt the plaintiffs, who are judgment creditors; the ſubſtance of the petition now on behalf of the creditors, is, that as the court have declared this deed to be void, they are intitled to an account of profits from the *York Buildings Company* of this eſtate, who have received them *pendente lite*, and that the company may account for ſuch pernancy of profits from the time of filing the bill.

This court only removes fraudulent conveyances out of the way, but will not decree profits back againſt the original debtor and owner of the eſtate, received *pendente lite*, in favour of judgment creditors, from the filing of the bill.

LORD CHANCELLOR.

If it had not been for the conveyance which has been made by the members of the company for their own benefit, the plaintiff might have had the remedy of an *Elegit* at law, but that would have intitled him only to a moiety; but there being more judgment creditors than one, gives the court a handle to decree an account of the profits of the eſtate from the time of the decree.

The moſt uſual caſe in this court is a judgment creditor's coming here againſt an heir at law for an account of rents and profits received by him, being conſidered as aſſets of the anceſtor; for if he brought an action of debt, he would have judgment for the full value of the eſtate, and therefore the courts of equity make their decrees conformable to the judgments at law.

A mortgagee cannot have a decree for an account of rents for any of the years back during the poſſeſſion of the mortgagor.

In the caſe of a mortgagee, where a mortgagor is left in poſſeſſion, upon a bill brought by the mortgagee for an account in this court, he never can have a decree for an account of rents and profits from the mortgagor, for any of the years back during the poſſeſſion of the mortgagor.

Suppoſe there is a truſt-eſtate which does not amount to a fraudulent conveyance by the party, the ſtatute of frauds and perjuries will help to make the eſtate liable to an execution notwithſtanding.

I do not know in the caſe of fraudulent conveyances, that this court have ever done any thing more than remove ſuch fraudulent conveyances out of the way, nor are there any caſes that I can find of decreeing profits back, againſt the original debtor and owner of the eſtate, received *pendente lite* in this court, in favour of judgment creditors from the filing of the bill, nor any inſtance of a decree for a ſale; but equity follows the law, and leaves them to their remedy by *elegit*, without interfering one way or the other.

Caſe 98. *Humphreys* verſus *Moore*, *December* 13, 1740.

Though executors are not to pay coſts, yet they ſhall not be allowed any, becauſe they are ſuppoſed to reimburſe themſelves by the credit they take in the account kept by them.

PER curiam: Executors and adminiſtrators who are brought before the court for an account of aſſets though they are not to pay coſts, yet they ſhall not be allowed any, becauſe they are ſuppoſed to reimburſe themſelves any charges or expences they may have been at, in the account of a teſtator's or inteſtate's eſtate, which is always kept by executors or adminiſtrators.

Caſe 99. *Lloyd* verſus *Williams*, came on upon exceptions, *January* 13, 1740.

A. by will in 1699. creates a truſt term of 21 years for the payment of debts and legacies, to be paid within five years after his death, and by a codicil deviſes the ſame eſtates to truſtees and their heirs to pay the wife during her life 300 *l. per ann.* and with the ſurplus profits his debts and legacies. The teſtator's widow did not die till 1736. the queſtion was, whether a legatee for 20 *l.* and a ſimple contract creditor for 76 *l.* 9 *s.* are intitled to intereſt upon the legacy, and debt, and from what time. Lord *Hardwicke held that intereſt on the legacy begun at the expiration of the five years, and allowed intereſt on the debt only from the time it was aſcertained by the Maſter's report, and confirmed in* 1717.

MR. *Anwell* by his will in 1699 creates a truſt term of twenty-one years for the payment of debts and legacies, and declares by his will that he would have his debts and legacies paid within five years after his death.

And in a ſubſequent clauſe, he declares that the truſtees of theſe eſtates upon the term of twenty-one years ſhall have a power to leaſe or mortgage them if the heirs refuſe to pay his debts, legacies and funeral expences, till the debts, &c. are paid.

By his codicil he deviſes the ſame eſtates to truſtees and their heirs, and directs them during the life of his wife to receive the rents of his eſtate, and thereout to pay to the wife 300*l. per annum*, and with the ſurplus profits to pay his debts, legacies and funeral expences with all the ſpeed that can be.

The teſtator's widow did not die till 1736.

The queſtion upon exceptions to the maſter's report was, whether a legatee for 20*l.* and a ſimple contract creditor likewiſe for 76*l.* 9*s.* who lent part of it to the teſtator, and paid the reſt by the teſtator's direction in diſcharge of a bill of funeral expences, is intitled to intereſt upon his legacy and debt, and from what time, whether from the five years after teſtator's death, or from 1717. the time when the maſter's report of the ſums due for the legacy and debt was confirmed.

It

It was inſiſted by the counſel for the truſtees that this was a dry reverſion, and that there was no fund if the eſtates had been ſold, to pay debts, legacies and funeral expences, till the death of the widow in 1736.

LORD CHANCELLOR.

This queſtion ariſes on the will and codicil of Mr. *Anwell.*

In favour of creditors the court would have conſtrued the ſubſequent clauſe to the creation of the truſt term of twenty-one years, which begins with, (" as touching and concerning the aforeſaid lands " and premiſſes deviſed in truſt, in caſe my heir ſhall refuſe to pay " debts, *&c.*") as a charge upon the inheritance for payment of debts, legacies and funeral expences; if it ſtood as it does upon the will only.

But then comes the codicil, which makes a very great alteration; for here the teſtator has charged thoſe very eſtates with annuities to the wife and other perſons, and afterwards follows the clauſe relating to ſurplus profits, and when the debts are ſatisfied out of thoſe profits, then the reſidue to be paid to ſuch perſon as ſhall be intitled to the inheritance.

This cannot, as has been contended, be confined to the ſurplus rents and profits during the life of the wife only, but muſt likewiſe run on againſt the owners of the inheritance: and the court already by a former decree have determined theſe points, for it directs the annuities to be paid firſt, and the eſtates to be ſold for payment of debts.

The preſent queſtion as to the legacy and debt carrying intereſt, and from what time, will fall under different conſiderations.

I do not know, though it may ſound oddly in a court of equity, whether the queſtion applied to the legacy does not come out to be the cleareſt caſe: for as it is a general legacy, if there had been no time limited for the payment, it would have been due within one year after the death of the teſtator with intereſt, to be computed from the expiration of the year; and if the perſonal eſtate be not ſufficient, the reverſionary eſtate is charged with it.

Indeed, if a legacy is given out of a real eſtate, and expreſsly charged upon it, there might have been a conſiderable queſtion, whether it ſhould have been paid till the real eſtate fell in.

The next queſtion with regard to the legacy, is, from what time the intereſt ſhall be computed.

A legacy in its nature carries intereſt, and there is no diſtinction between a reverſionary eſtate and any other.

A legacy does in it's nature carry intereſt, and I know of no diſtinction between a reverſionary eſtate and any other, and the time of payment of intereſt in this caſe ought to begin at the expiration of the five years, according to the directions of the will.

Lord *Hardwicke* declared, he knew of no general rule that on a truſt created for the payment of debts, ſimple contract ones ſhall carry intereſt.

The remaining queſtion will be with regard to the debts carrying intereſt, and from what time it ſhall be computed.

A debt by ſimple contract does not carry intereſt in it's nature, nor will this court direct it to be paid, but then it is inſiſted that in all caſes where there is a truſt created for payment of debts in general, that ſimple contract ones ſhall carry intereſt; now I muſt own that I do not apprehend there is ſuch a general rule; for I can upon my memory ſay that it is a frequent direction in this court for the maſter to take an account of debts, and of ſuch particularly as in their nature carry intereſt.

Simple contract creditors ſhall ſtand in the place of bond creditors, and be allowed out of the real eſtate equal to what has been exhauſted out of the perſonal.

The caſe of *Car* verſus *the Counteſs of Burlington*, 1 *Williams* 228. was a truſt created in the life-time of *Richard* Earl of *Burlington*, impowering truſtees by leaſing of his lands in *England* and *Ireland* to pay all his debts which ſhould be owing at his death.

When a truſt is created for payment of all debts whatſoever, and bond creditors ſhall exhauſt the perſonal eſtate, the court will direct that ſimple contract creditors ſhall ſtand in the place of the bond creditors, and be allowed equal to what has been exhauſted out of the perſonal, from the real eſtate.

Therefore I apprehend the reporter has been deceived; and this caſe is not rightly taken; for it ſays, "if the perſonal eſtate is not "ſufficient to ſatisfy bond creditors, they may ſtill come in to be "paid the remainder of their debts in proportion with the ſimple "contract creditors."

In the caſe of *Maxwell* verſus *Wettenhall*, 2 *Williams* 26. and 47. it is laid down generally, "that if a legacy is charged upon lands "which yields rents and profits, and there is no time of payment "mentioned in the will, the legacy ſhall carry intereſt from the "teſtator's death, becauſe the land yields profit from that time."

And the caſe ſays further, "that if a legacy be charged upon a "dry reverſion, here it ſhall carry intereſt only from a year after the death of the teſtator, a year being a convenient time for a ſale.

But this does not determine that a dry reverſion will be liable to ſimple contract debts and intereſt upon them.

Suppoſe

Suppoſe a ſimple contract debt ſhould be unliquidated, has it ever been determined that a debt of this nature when aſcertained, ſhall have relation back to the time of the teſtator's death, and carry intereſt from thence?

Then it comes to this queſtion, whether there were ſuch eſtates as yielded annual profits, over and above the payment of annuities, which have been decreed to be prior charges and to take place of the debts.

And it appears to me by the Maſter's report that there was not a farthing left after the ſeveral charges were ſatisfied, during the life of the widow, who did not die till 1736.

Where the land does not yield annual profits, all debts will not carry intereſt out of a truſt for payment of debts.

It would be going too far to ſay that where a man creates a truſt for payment of debts, that all debts ſhall carry intereſt though the land does not yield annual profits; on the other hand it would be extreamly hard, that legatees, who are mere volunteers, ſhall have intereſt even out of a reverſion itſelf, and that a ſimple contract creditor ſhall have no intereſt at all.

Lord Chancellor *Notingham* decreed, that where a man deviſes lands for payment of debts and legacies, that they ſhall be paid *pari paſſu*. Lord *North* reverſed that decree, and Lord Chancellor *Jefferies* in *Goſling* v. *Dorney* made the ſame decree with Lord *Nottingham*. 1 *Vern.* 482.

But this doctrine has been exploded ſince, for as my Lord *Nottingham* ſaid in another caſe, it would be making a man ſin in his grave; and it is now the conſtant determination that creditors ſhall be preferred before legatees, where there is not ſufficient for both.

As the debt in the preſent caſe was not liquidated and aſcertained till the Maſter's report, which was confirmed by the court in 1717, I ſhall allow intereſt upon it only from this time.

Scarbrough verſus *Burton*, *January* 14, 1740. came on upon exceptions.

Caſe 100.

As it may accelerate a decree, the court poſtpones the conſideration of coſts till a cauſe comes back from the Maſter.

COSTS in equity are intirely in the diſcretion of the court; but where they think it would accelerate a decree, the court chuſes to poſtpone the conſideration of the coſts till the cauſe comes back from the maſter, though there might be grounds enough for decreeing coſts even at the hearing of the cauſe.

What

What I ground my direction upon in the preſent caſe, is, the defendant's giving the plaintiff further trouble after the pronouncing of the decree, by intangling and perplexing affairs as much as poſſible ſince in bringing a vexatious bill.

A plaintiff may apply for coſts, where a defendant gives unneceſſary trouble in carrying a decree into execution.

The proper conſtruction upon ſuch clauſes in a decree (that if the defendant ſhall give unneceſſary trouble in carrying it into execution) is, that the plaintiff may apply to the court for coſts; every body knows that the coſts which are given by a court on the diſmiſſion of a bill, are not an adequate compenſation for the expences a party is put to in ſuch a vexatious ſuit.

Caſe 101. *Champernoon* verſus *the Borough of Totneſs*, *January* 15, 1740. came on upon exceptions.

Where there is a diſpute as to boundaries or unity of poſſeſſion, a defendant muſt ſet forth how he is intitled.

IT is true, ſaid *Lord Hardwicke*, in general that a perſon cannot compel another to ſet forth by what title, and under whom he derives his eſtates, merely becauſe his lands lie next to the plaintiff's; but where there is a diſpute as to boundaries, or unity of poſſeſſion, there a defendant muſt ſet forth in his anſwer how he is intitled, eſpecially when the defendant has not thought proper to demur to this part of the bill.

Caſe 102. *Roberts* verſus *Kuffin*, *January* 15, 1740.

A party who is at liberty to ſurcharge and falſify, is not merely confined to errors in fact, but may take advantage of errors in law.

WHERE this court, ſaid LORD CHANCELLOR, by a decree give directions to a maſter to examine accounts, and the parties are at liberty to ſurcharge and falſify, you are not merely confined to errors in fact, but you may take advantage likewiſe of errors in law.

Owen Roberts in 1711, made his will to the following effect.

I give to my ſon *Thomas Roberts* 200*l.* ſecured by a mortgage on the eſtate of Mr. *Marriot*, and all the meſſuages, lands and tenements for ſecuring the ſame.

LORD CHANCELLOR.

A deviſe of 200 *l.* on a mortgage paſſes the principal only.

This intitles the deviſee to the principal only of the mortgage, and not to the intereſt from the time of the execution of the will, nor from the death of the teſtator, or any other time whatever.

A gift of 300*l.* upon a bond does not carry the intereſt incurred in the teſtator's life-time.

If a man gives three hundred pounds due upon a bond by his will, this does not carry the intereſt incurred in the life-time of the teſtator, becauſe it is quite doubtful what it might amount unto, from the uncertainty of the time the teſtator might live after making his will.

Where there is a deviſe in expreſs words, the conſtruction in this court is, that ſubſequent general words ſhall not extend it further than the natural meaning of the preceding ones will do.

A deviſe in expreſs words, is not extended by ſubſequent general ones.

A. by his will deviſes to his daughter all goods and things of every kind and ſort whatever which ſhall be found in her cloſet at the time of his death: the queſtion whether 45*l.* 0*s.* 7*d.* in money found in it at his death will paſs to the daughter by that deviſe.

Money will not paſs by a deviſe of all goods and things of every kind, where the deviſee has a money legacy at the outſet of the will.

LORD CHANCELLOR.

If this will had been conſtrued ſtrictly in law or equity, I am of opinion it would not have carried the 45*l.* and 7*d.* to the daughter, for in the outſet of his will he gives her a money legacy, which muſt be preſumed to be the whole he intended his daughter by way of money legacy: beſides, in the clauſe which is in diſpute, goods are firſt named, therefore the ſubſequent word *things* muſt be confined to houſehold goods and what is of the ſame ſpecies, for it would be unnatural to extend it to money; a cloſet too is a very improper place to refer to for money, the teſtator would have certainly mentioned cabinet or bureau, or any other thing where money is uſually kept, if he had intended a further bequeſt of money; but by referring to a cloſet, it is reaſonable to believe he meant furniture only, which the daughter made uſe of in the cloſet.

In equity as well as at law coſts follow the juſtice of the demand.

At law the coſts follow the juſtice of the demand, and in this court the plaintiff ſhall likewiſe have his coſts (unleſs circumſtances ariſe which are an excuſe on the part of the defendant) where the plaintiff has ſucceeded in his demand, for he was under a neceſſity of coming into this court, or he muſt have loſt his money.

A bill may be brought for errors in an account though ſettled for three or four years.

Bringing a bill 3 or 4 years after an account is ſettled for errors in that account, is not too long a time, for bills of this nature have been brought after a much greater diſtance from the ſettling of the account.

January 19, 1740. the laſt ſeal before *Hilary* term. Caſe 103.

A plea muſt firſt be removed out of the way, before a plaintiff can have an injunction to ſtay proceedings at law.

WHERE a defendant has put in a plea to the plaintiff's bill, the plaintiff cannot move for an injunction to ſtay the defendant from proceeding at law till the plea by ſome means or other is removed out of the way, all that the plaintiff can do is to move that the plea may be accelerated, which the court did accordingly by ordering it to be ſet down to be argued the next day of pleas and demurrers.

Caſe 104. *Grey* verſus *Cockeril*, Cauſe-petitions, *January* 20, 1740.

A clerk in court who lends money to the ſolicitor is not intitled thereby to detain a client's papers as a pledge.

A Clerk in court's lending a ſolicitor money to carry on a cauſe ſhall never intitle the clerk in court to detain the papers of the client as a pledge or mortgage for the money ſo advanced to the ſolicitor, but he ſhall deliver them up to the party and get his money from the ſolicitor the beſt way he can.

Caſe 105. *Burton* verſus *Mattons*, in the paper of petitions, *January* 21, 1740.

A miniſter of a pariſh prevents an order for a defendant's appearance being publiſhed purſuant to the 5 *Geo.* 2. he is indictable for a contempt.

THE ſtatute of 5 *Geo.* 2. *c.* 25. requires ("that upon affida-"vit of a perſon's being gone out of the kingdom to avoid "being ſerved with the proceſs of this court) the copy of the or-"der of Chancery, directing ſuch defendant to appear at a cer-"tain day therein to be named, ſhall, within 14 days after ſuch "order made, be inſerted in the *London Gazette*, and publiſhed on "ſome Lord's day, immediately after divine ſervice, in the church "of the pariſh where ſuch defendant made his uſual abode within "thirty days next before his abſenting;" and if the miniſter of that pariſh prevents its being publiſhed, as the act it ſelf is ſilent, nor mentions any penalty for his diſobeying it, I am of opinion the miniſter is indictable for a contempt of the order of this court.

Caſe 106. *Murphey* verſus *Baldærſton*, *January* 22, 1740.

A repreſentative of a perſon who had obtained an order to tax a bill, can revive it only on an undertaking to pay.

IF a perſon applies to this court for an order of reference to a maſter to tax a bill, upon an undertaking to pay; and the perſon who obtains the order dies; his repreſentative ſhall not revive it, but upon the ſame terms, the undertaking to pay. *Vid.* 2 *G.* 2. *c.* 33. *An act for the better regulation of attornies and ſolicitors.*

In the 23d ſection, relating to bills of coſt, a ſolicitor muſt leave a copy of the execution of the order for taxation, and the Maſter's report of the ſum, at which the bill is taxed, at the defendant's houſe, or it will not bring him into contempt without ſuch ſervice, for the act of parliament does not alter the old method of proceeding in this reſpect.

To bring a defendant into contempt, on an order of taxation, you muſt leave a copy at his houſe, and the report of the ſum at which the bill is taxed.

Though ſeveral clerks in court were of opinion, that an attachment will go forthwith upon non-payment of a bill taxed under an order of chancery, by this act of parliament, yet I am of opinion,

that the defendant ought to be ſerved, for it would be abſurd to take him into cuſtody, before he knows what the ſum is, at which the bill is taxed.

Elizabeth Wallis, an infant — — Plaintiff. Caſe 10.

Charles Hodſon, and *Elizabeth* his wife Defendants.

Et e contra.

J. W. died inteſtate 1724, and left iſſue *T. W.* who died within a week after his father, and his wife *enſeint*

JAMES Wallis, an inhabitant of the province of *York*, died inteſtate in *December* 1724, and at his death left iſſue *Towers Wallis*, his only child, an infant, who died within a week after his father, and the defendant *Elizabeth* his widow *enſeint* with the plaintiff, who was born the 22d of *May* following.

and on the 20th of *May* following the plaintiff was born; ſhe is intitled to her ſhare under the ſtatute of diſtributions, as much as if ſhe had exiſted in his life-time.

The widow took out letters of adminiſtration of her huſband's perſonal eſtate, and poſſeſſed herſelf thereof, and afterwards intermarried with *Charles Hodſon*: the bill is therefore brought by *Elizabeth Wallis* againſt *Hodſon* and his wife, praying an account of the perſonal eſtate of *James Wallis*, come to the hands of the defendants.

Hodſon and his wife by their croſs bill inſiſt that *Elizabeth*, not having any jointure before her marriage, was by the cuſtom of the province of *York* become intitled to one moiety of her late huſband *James Wallis*'s perſonal eſtate, and under the ſtatute of diſtributions, to a third of the dead man's ſhare; and that her ſon *Towers Wallis* was intitled to the other two thirds of the diſtributable moiety; and that he dying inteſtate within the ſaid province, and without wife or children, all his ſhare of the perſonal eſtate, by virtue of the ſtatute, came to the plaintiff *Elizabeth*, his mother; and that the defendant *Elizabeth Wallis*, not being born till after the death of *Towers Wallis* the ſon, was born heir to her father, and by that means ſhe could not by the cuſtom of the province of *York* take any part of his perſonal eſtate, but was by ſuch her heirſhip barred and excluded, and therefore prayed that the whole perſonal eſtate might be decreed to the plaintiff *Elizabeth*, the wife of *Hodſon*.

LORD CHANCELLOR.

James Wallis having been an inhabitant of the province of *York*, and dead inteſtate; his eſtate became deviſeable into three equal parts; one third thereof belonged to his widow, one third to the ſon, and the laſt diſtributively according to the ſtat. of 22 & 23 *C.* 2. *ch.* 10.

The

The queſtion therefore in theſe cauſes, can relate only to the third part diſtributable under the ſtatute; and the diſpute is as to *Towers Wallis* the ſon's ſhare of the diſtributable third, whether it ſhall go intirely to the mother *Elizabeth Hodſon*, or in moieties between her and *Elizabeth Wallis* his ſiſter.

It has been inſiſted on behalf of the defendants, that *Towers Wallis* dying without wife or children, his whole perſonal eſtate goes to his mother, as next of kin.

And, on the other hand, the plaintiff in the original cauſe claims a moiety of her brother's perſonal eſtate, under the ſtat. of 1 *J.* 2. *ch.* 17. *ſ.* 7. the words of which are, "If after the death of a "father, any of his children die inteſtate, without wife or chil-"dren, in the life-time of the mother, every brother and ſiſter, "and the repreſentatives of them, ſhall have an equal ſhare with "her, any thing in the laſt mentioned act to the contrary not-"withſtanding."

To be ſure, if the plaintiff the ſiſter had been born before the death of the brother, out of controverſy ſhe would have been thus intitled.

But the doubt is, whether ſhe is ſo intitled as ſhe was a poſthumous child? And I am of opinion it will make no material difference.

A parent's duty to provide for all his children will extend to poſthumous ones.

It has been admitted that the debt of nature which the father owes, to provide for all his children, will extend to poſthumous ones, for as it is an event which muſt happen within nine months, no inconvenience can ariſe from it: but then it is objected, that there is no ſuch debt of nature as to collaterals, *viz.* Brothers and ſiſters.

There is no determination under the ſtatute of *J.* 2. that the half blood ſhall take equally with the whole.

It has been ſaid, if I ſhould determine in favour of the plaintiff *Elizabeth Wallis*, it would introduce this inconvenience, that a poſthumous child of the half blood might hereafter be held able to take; but though it has been long ſettled, that the children of the half blood ſhall take equally with the whole, under the act of *C.* 2. commonly called the ſtatute of diſtributions, (*Vid. Smith* ver. *Tracy* in *B. R.* 1 *Vent.* 307, 316, 323. and *Shower's Parl. Caſ.* 108. and 2 *Mod.* 204.) Yet I do not find any determination as to this point, under the ſtatute of 1 *J.* 2. and therefore will leave this point unprejudiced till it ſhall ariſe.

The principal intention of the act of *J.* 2. is to prevent the mother's running away with too much to her children by a ſecond huſband.

With regard to the difference that has been taken between the collateral and lineal ſucceſſion; to be ſure the principal and primary

intention

intention of this ſtatute of *J.* 2. was to preſerve the eſtate of the father to his own children in a reaſonable degree, and not to let the mother run away with too much to her children by the ſecond huſband.

That the ſhares veſt on the death of the inteſtate, holds equally in lineal and collateral ſucceſſion.

Though it is in general ſettled, that the ſhares veſt immediately upon the death of the inteſtate, and holds equally in lineal and collateral ſucceſſion, (*Vid. Palmer* verſus *Allicot*, 3 *Mod.* and *Gudgeon* verſus *Ramſden*, 2 *Vern.* 274.) yet, notwithſtanding, it has been determined, that there is an exception to this rule in the caſe of a poſthumous child; for in *Edwards* verſus *Freeman*, it is ſaid, a diſtributive ſhare does not in all events veſt in the iſſue on the inteſtate's death, becauſe if there be a poſthumous child, ſuch child ſhall be let in for its ſhare, though not *in eſſe* at the inteſtate's death. 2 *Wms.* 446.

A child *in ventre ſa mere*, is *in rerum natura*, and is as much one, as if born in the father's life-time.

The principal reaſon I go upon in the queſtion is, that the plaintiff was *in ventre ſa mere* at the time of her brother's death, and conſequently a perſon *in rerum natura*, ſo that both by the rules of the common and civil law, ſhe was, to all intents and purpoſes, a child as much as if born in the father's life-time.

This court will grant an injunction to ſtay waſte, in favour of an infant *in ventre ſa mere*.

Firſt, As to the common law, there is the trite caſe of an infant *in ventre ſa mere* being vouched in a common recovery; a mother alſo may juſtify the detaining of charters on behalf of it; a deviſe to him is good, by the opinion of *Treby* and *Powell*, in *Scatterwood* and *Edge*, 1 *Salk.* 229. a bill may be brought in his behalf, and this court will grant an injunction in his favour to ſtay waſte, 2 *Vern.* 710. *Muſgrave* verſus *Parry et al'*.

The contention between the common law, and eccleſiaſtical court gave riſe to the ſtatute of diſtributions.

Every body knows, what gave riſe to the ſtatute of *C.* 2. of diſtributions, was the contention between the common law and the eccleſiaſtical courts: *See* a very good account of this diſpute in *Palmer* and *Elliot*, 3 *Mod.* 58. *Carter* verſus *Crawley*, *Raym.* 496.

The juriſdiction of the eccleſiaſtical court made more extenſive by the ſtatute.

The third and fifth ſection of the ſtatute of diſtributions ſhew, the main ſcope of it was to make the juriſdiction of the eccleſiaſtical court more extenſive, than is allowed by the common law.

The ſtatute is to be conſtrued by the rules of the civil law: the act of *J.* 2. is an act of continuance of the ſtatute of *C.* 2.

In 2 *Williams* 441. Sir *Joſeph Jekyl* ſtates at large, in the caſe of *Edwards* and *Freeman*, the occaſion of making the ſtatute of diſtributions; and I now take it to be fully ſettled, that this act is to be conſtrued by the rules of the civil law; and the ſtatute of 1

J. 2. I think ought to be conſtrued in the ſame manner; which is an act of continuance of the ſtatute of *C.* 2. with three additional clauſes, and is to be conſidered as if the ſtatute of *C.* 2. had been re-enacted, and repeated with theſe clauſes.

Secondly, As to the civil law, nothing is more clear, than that this law conſidered a child in the mother's womb abſolutely born, to all intents and purpoſes, for the child's benefit. *Swinbourn new edit.* 250 & 251. *Digeſt, lib.* 1. *tit.* 5. *L.* 7. *Juſtin. Inſt. lib.* 2. *tit.* 13. *de exheredatione liberorum, L.* 1. *ſect.* 1. *lib.* 5. *tit.* 2. *de inofficioſo teſtamento. L.* 6.

It may poſſibly be ſaid that theſe rules are only laid down with regard to lineals, but you will find it there equally with regard to collaterals. *Digeſt, lib.* 32. *tit. de Legatis et fidei commiſſis, L.* 9. *Digeſt, lib.* 37. *tit.* 9. *De ventre in poſſeſſionem mittendo, L.* 1. *ſ.* 1, 2. *Lib.* 38. *tit.* 8. *Unde cognati, L.* 1. *ſ.* 8.

The civil law makes a difference between a child *in ventre ſa mere in eſſe*, at the father's death, and only *conceived*.

The laſt paſſage in the *Digeſt* is more explicit than any other, but then it makes a difference between a child *in ventre ſa mere in eſſe* at the father's death, and only *conceived*, the latter is not conſidered as having any relation to the inteſtate, being according to a term made uſe of there not *animax*.

By the *Roman* law, the having a great many children of one's own, excuſed from the guardianſhip of others; but a child unborn was never reputed to excuſe a father from being a guardian, nor amongſt the number of the *trium liberorum*, but this no way relates to the preſent caſe, for no queſtion can ariſe here but what makes for the benefit of the poſthumous child, and therefore I decree, after payment of the debts and funeral expences of *James Wallis* the inteſtate, that the clear ſurplus of the perſonal eſtate be divided into nine equal parts, according to the cuſtom of the province of *York*, and the ſtatute for diſtribution of inteſtates eſtates, and that four ninths thereof be conſidered as the ſhare of *Elizabeth Hodſon*, and be paid or retained by *Charles Hodſon* and his wife; and that four other ninths thereof be conſidered as the ſhare of *Elizabeth Wallis*, and allotted to her; and that the remaining ninth part thereof be conſidered as the diſtributive ſhare of the dead man's part, belonging to *Towers Wallis*, deceaſed; and order this ninth ſhould be divided into moieties, one moiety thereof to be paid to or retained by *Hodſon* and his wife; and the other moiety thereof to the infant *Elizabeth Wallis*.

Vernon

Vernon verſus *Vawdry*, *January* 24, 1740. Caſe 108.

AN original bill, and an amended bill, are as one, and the records are always fixed together, but where the amendments are ſo large as they cannot be added, then there is a new engroſſment, and the parties ought to be mentioned over again, and to be ſerved with notice of it.

Where amendments are ſo large as they cannot be added, there a new engroſſment, and a new ſervice on the parties, is neceſſary.

A breach of truſt is conſidered but as a ſimple contract debt, and can only fall upon the perſonal eſtate of a truſtee, and the particular circumſtances of a caſe ought not to vary the rule.

Breach of truſt, can fall only on the perſonal eſtate of a truſtee.

If there are only miſtakes and omiſſions in a ſtated account, the party objecting ſhall be allowed no more than to ſurcharge and falſify; but if it is apparent to the court that there has been fraud and impoſition, the decree muſt be that the whole ſhall be opened, notwithſtanding it was a ſtated account of 23 years ſtanding, and Mr. *Richard Vernon*, who was guilty of the fraud, is dead likewiſe.

Where fraud appeared in a ſtated account, the whole decreed to be opened, though of 23 years ſtanding.

Barker verſus *Dumareſque*, *January* 29, 1740. Caſe 109.

THE plaintiff brought his bill for a diſcovery of aſſets, and relief againſt the defendant as adminiſtrator.

The defendant, to give preference to other creditors, confeſſes judgments.

Where the repreſentative of an inteſtate is ſeeking to give preference by confeſſing judgments, the court will give the plaintiff leave to proceed at law to recover judgment with a *ceſſet executio*, and in this court, for a diſcovery and account of aſſets.

The plaintiff thereupon brought an action at law for the ſame demand he ſued for in equity.

The defendant obtained the uſual order, that the plaintiff might make his election whether he would proceed at law.

The plaintiff now moves to diſcharge the order of election.

LORD CHANCELLOR.

The plaintiff ſhall not proceed in this court and at law at the ſame time, for the ſame demand againſt executors or adminiſtrators in ordinary caſes: but the repreſentative of the inteſtate ſeeking to give a preference to others by confeſſing judgments, diſtinguiſhes this

this caſe from the ordinary rule, and therefore I will give the plaintiff leave to make a ſpecial election, *viz.* to proceed at law to recover judgment with a ſtay of execution, and likewiſe to proceed in this court for a diſcovery and an account of aſſets.

Caſe 110. *Fell* verſus *Lutwidge*, *February* 3, 1740.

Though an adminiſtration is not taken out, till after the filing of the bill, yet if procured before a cauſe comes to a hearing, in equity it is ſufficient, otherwiſe at law, becauſe there the defendant may crave *oyer* of the letters of adminiſtration.

IT is charged by the bill that the plaintiff is the repreſentative of the late Mr. *Fell*, and has taken out adminiſtration, and by that means intitled to a demand againſt the defendant; neither the title he ſets up objected to, nor the adminiſtration denied by the defendant's anſwer, and therefore though the adminiſtration was not actually taken out till ſome time after the filing of the bill, yet, as the plaintiff has procured it, before the cauſe comes to a hearing, in equity it is very ſufficient, though not good at law, becauſe there the defendant may crave *oyer* of the letters of adminiſtration; but nothing is more frequent in this court than where a plaintiff has a right to a diſtributory ſhare, and the adminiſtrator is not made a party to the ſuit, to order him to be brought before the Maſter, and the bill is never diſmiſſed in ſuch a caſe for want of his being a party.

Caſe 111. *French* verſus *Baron*, the ſame Day.

The court cannot declare a will well proved, where an heir at law is not to be found.

A Bill brought by a reſiduary legatee, for ſale of a real eſtate, purſuant to the will of *Arthur Squire*, and that the reſidue, after payment of debts, may be paid to the plaintiff.

The bill ſuggeſted that no heir at law could be found, which was admitted by the defendant's anſwer.

LORD CHANCELLOR.

Let there be a ſale of the real eſtate, but I cannot declare the will well proved, there being no heir at law.

The court will not allow a mortgagee more than his principal and intereſt, notwithſtanding the mortgagor has agreed, he ſhall be paid for his trouble of receiving the rents.

Though there is a private agreement between a mortgagee and the mortgagor, for an allowance for the mortgagee's trouble in receiving the rents and profits of the eſtate, yet the court will not carry it into execution, for they will not allow him any more than his principal and intereſt.

Harriſon

Harriſon verſus *Harriſon*, *February* 7, 1740.

Caſe 112.

WHERE a truſtee of ſtock or annuities takes upon him to transfer, it is a breach of truſt, and the *ceſtuy que truſt* in this court will be intitled to an election, either to have the individual ſtock or annuities reſtored to him, which ſtood in the name of the truſtee, or elſe to have the money it produced, when it was ſold by the truſtee.

Glaſs verſus *Oxenham*, *February* 10, 1740.

Caſe 113.

A Father by his will appoints an executor *durante minore ætate* of his daughter, and that ſhe ſhould be the executrix when ſhe comes of age; the daughter, turned of 21, brought alone before the court, though it apears in the cauſe that the executor *durante minore ætate* had collected in the greateſt part of the perſonal eſtate: the council for the plaintiff inſiſt it is ſufficient to have the daughter, becauſe, being of full age, ſhe is compleat executrix *ab initio*, and had the whole right of repreſentation in her.

Though the perſon is come of age, during whoſe infancy, the will appointed an executor *durante minore ætate*, yet if he has not collected in the whole eſtate, he muſt be brought before the court.

LORD CHANCELLOR.

This bill is brought by the repreſentative of the teſtator's widow, for the ſum of 3000l. charged upon the whole real and perſonal eſtate of the teſtator, for her benefit, and therefore you muſt have the repreſentative of the whole perſonal eſtate, that is the executor *durante minore ætate*, and for want of him the cauſe muſt ſtand over.

If the daughter had received all the teſtator's perſonal eſtate from the hands of the executor *minore ætate*, upon an account between them, the objection for want of parties had been over-ruled.

Heathe verſus *Heathe*, *February*, 11, 1740.

Caſe 114.

WILLIAM Madgewicke, eſq; being ſeiſed in fee of the manor of *Gayton*, made his will, dated *March* 7, 1721. and deviſed the ſaid premiſſes unto *Averilla* his wife, for her life, and after her death, to his couſin *William Madgewicke*, his heirs and aſſigns for ever, upon condition that he ſhould pay, and that the premiſſes ſhould ſtand charged with the payment of 400*l.* within ſix months after the death of *Averilla*, among all the children of his ſiſter *Catherine Heathe*, ſhare and ſhare alike.

In *April* 1722. the teſtator died, and *Avarilla* made her will, being ſeiſed in fee of ſeveral copyhold meſſuages and divers freeholds, and gave her ſaid lands and meſſuages in truſt by ſale or mortgage, to pay all her ſaid huſband's debts, and gives all the reſidue of the money ariſing by ſuch ſale, of the lands and premiſſes copyhold or freehold, and all her perſonal eſtate, among all the children reſpectively, male or female, of her brother and ſiſter *Heath*.

Some years after the teſtator and teſtatrix's death, another daughter of *Catharine Heath* was born.

One of the daughters (living at the time of making the will and at the ſeveral deaths of the teſtator and teſtatrix) died inteſtate, to whom her father adminiſtered.

The firſt queſtion was, whether the after-born child ſhall have any ſhare under either of the wills.

The ſecond queſtion was, whether the father of the deceaſed daughter ſhall have a ſhare under the will of *Avarilla*, or whether her ſhare ſurvives. *Vide* the caſe of *Greave* verſus *Boyle*.

Share and ſhare alike has been held this 200 years to be a tenancy in common.

Mr. Juſtice Parker. A queſtion that was made upon the firſt will, whether the words ſhare and ſhare alike make a tenancy in common or a joint-tenancy, is given up, and very rightly, for it has been held this 200 years to be a tenancy in common.

The words of the ſecond will are not quite ſo clear, and yet are pretty clear too.

" To and amongſt all the children reſpectively, male or female, " of her brother and ſiſter *Heath*."

Lord Chief Juſtice *Holt* leaned ſtrongly to a joint-tenancy, but courts of equity are far from favouring it.

I ſhould think the word *reſpectively* would ſeparate the eſtate and make a tenancy in common; for notwithſtanding my Lord Chief Juſtice *Holt* leans ſo ſtrongly to joint-tenancy, yet courts of equity are very far from favouring it ſo much.

The principal queſtion is as to the after-born child.

A deviſe can never relate to a child who was not *in eſſe*, till ſome years after a teſtator's death.

For my part I have no notion that this deviſe can have any relation to a child not *in eſſe* till ſome years after the teſtator's and teſtatrix's death; it may as well be intended twenty years afterwards, if a woman is capable of bearing ſo long, and would make great confuſion by unravelling accounts that have been ſettled ſo long before.

As to the point of the father's taking the ſhare of the deceaſed daughter as her adminiſtrator, I am clear of opinion that he was intitled, and that it ſhall not ſurvive to the brothers and ſiſters, for it veſted in the deceaſed as her ſeparate and independant ſhare, being a tenancy in common, and not a joint-tenancy, according to the aforementioned conſtruction of the word *reſpectively*.

The word *reſpectively* will ſeparate an eſtate, and make it a tenancy in common.

The laſt ſeal in *Hilary* Term, *February* 12, 1740. Caſe 115.

A Motion on behalf of a defendant in a cauſe, that the plaintiff ſhould not be allowed to amend his bill on payment of twenty ſhillings coſts only by virtue of the laſt order which he got from this court; but upon coſts to be taxed by a maſter, the Chancellor would have granted the motion, as this was the third order of amendment, if it had not appeared in this caſe that the laſt order which the plaintiff obtained had been upon terms, and with the expreſs conſent of the defendant.

After a third order of amendment, a defendant will be allowed coſts to be taxed.

Weedon verſus *Fell*, *February* 17, 1740. before Mr. Juſtice *Parker*, at the *Rolls*, now Lord Chief Baron. Caſe 116.

SAMUEL *Parker* by his will dated the 30*th* of *September* 1717. "gave the ſum of 3000*l.* to his father-in-law *John Fell*, and to "*Elizabeth Parker* his wife, upon and in truſt to put the ſame out "to intereſt or otherways upon ſome purchaſe, as my ſaid truſtees "and the ſurvivor of them ſhall think fit, and then to permit my "ſaid wife to receive all intereſt, benefit and profit as ſhall accrue, "ariſe from, or become due for the ſame, to her own uſe during "her natural life, and after her *deceaſe*, *to divide the whole principal* "*with all intereſt and profits among my four children, ſhare and ſhare* "*alike, and the ſurvivors of them, but not before they ſhall have re-* "*ſpectively attained the age of one and twenty years, or days of mar-* "*riage, which ſhall firſt happen*; for my mind and intent is, that "if any of my four children ſhall die before they attain their age "of twenty-one or days of marriage, that his, her or their ſhare ſo "dying, ſhall go and be equally divided among the ſurvivors of "them."

Samuel Parker by will gives 3000*l.* to truſtees to be placed out at intereſt or on a purchaſe, and then to permit his wife to receive the intereſt during her natural life, and after her deceaſe to divide the whole principal with all intereſt among his four children ſhare and ſhare alike, *and the ſurvivors of them*, but not before they attain 21, or day of marriage.

Conſtance the plaintiff's wife, who was one of the four children, attained 21, but died in the life-time of the mother, ſo that the diviſion of the 300*l.* could not be made till after her death: the truſtees laid out the greateſt part of the money in the purchaſe of freehold and copyhold, and lent another part on bond. Mr. Juſtice *Parker held this was a veſted intereſt in* CONSTANCE, and that *ſurvivors* meant ſuch as ſhould be living at the death of the child before 21, and not ſuch as were living at the death of the mother: and that the repreſentative of *Conſtance* is intitled to a fourth of the bond, and a fourth on the whole in government ſecurities, and which has not been inveſted in land.

Conſtance

Conſtance the wife of the plaintiff, and one of the four children of *Samuel Parker*, attained her age of 21, and died in 1737. in the life-time of her mother, ſo that the diviſion of the 3000*l.* could not be made till after her death.

The firſt queſtion was, whether an intereſt veſted in *Conſtance* the wife of the plaintiff and tranſmiſſible to him as her repreſentative, or whether it is to be conſidered as a contingent intereſt during the life of the mother, and not tranſmiſſible to the repreſentative of *Conſtance* till after the mother's death.

The truſtees after the death of the teſtator laid out the greateſt part of the 3000*l.* in the purchaſe of freehold and copyhold lands in *Stepney* and *Ratcliffe* in *Middleſex*, to the uſe of the truſtees, their heirs and aſſigns for ever; but by divers declarations of truſt declared the purchaſes were made for the uſes under *Samuel Parker*'s will, concerning the 3000*l.*; the reſidue was lent to *John Robinſon* on bond.

The ſecond queſtion was, what the nature of the power is that the truſtees have under this will, whether they are bare truſtees, or whether they could alter the nature of the property, and by veſting it in land make it ceaſe to be money, and go to the heir at law inſtead of being divided in equal ſhares among the children.

Mr. Juſtice Parker. As to the firſt queſtion, it ſeems to me very clear that this is an intereſt veſted in *Conſtance* at her age of 21, and the words *ſurvivors of them* in the latter clauſe plainly mean ſuch ſurvivors as ſhould be living at the death of the child before 21, and not ſuch as were living at the death of the mother; and as the contingency therefore has not happened, it certainly veſted in *Conſtance*, and will go to the plaintiff as her repreſentative.

The words upon which the point in the ſecond queſtion ariſes are equally clear, as to giving a power to them to lay out the 3000*l.* in the purchaſe of lands, and it would have been improper if they had bought only a term for years, as it is a leſs beneficial property.

I do agree that it muſt be taken according to the natural meaning and intention of the teſtator at the time of his death, and no alteration in circumſtances afterwards can impower a truſtee to vary that intention; but I am clear in this caſe that the truſtees have purſued and not acted contrary to their power.

I ſee no difference between money left abſolutely to the perſon himſelf, or to another in truſt for him; it equally veſts in the *ceſtuy que truſt* when the contingency happens upon which it became payable.

The

The civil law has made a diſtinction where a legacy is charged upon land, and where it is to be paid out of a perſonalty; in the former if expreſsly ſaid to be payable at 21, and would veſt though the legatee died before that age, if iſſuing out of perſonal eſtate, yet in favour of land it ſhall ſink into the land, unleſs the legatee actually arrives at 21.

I do not know what grounds this law goes upon in making this diſtinction between a legacy veſted, when charged upon perſonal, and when charged upon real eſtate, but it is a ſettled diſtinction now, and therefore cannot be diſpenſed with in any particular caſe, ſo as to let in the repreſentative of *Conſtance* to a fourth of the value of lands purchaſed by the truſtees.

Mr. Juſtice Parker declared that the plaintiff is intitled to the ſum of 37*l.* 10*s.* as her ſhare of the 150*l.* not placed out in land, together with intereſt for the ſame from the time of the death of *Elizabeth Parker* the mother; and ordered and decreed that the defendant *John Fell* the elder, and *John Fell* the younger, do pay the ſame to the plaintiff accordingly. And it was further ordered that the plaintiff's bill as to all the other relief ſought thereby, do ſtand diſmiſſed out of court.

Warren verſus *Stawell*, at the *Rolls*, *February* 17, 1740. before Mr. Juſtice *Parker*.

Caſe 117.

AN objection was made for want of parties upon the act of parliament of 3 *W. & M. c.* 13, againſt fraudulent deviſes, that the heir at law muſt be before the court.

A creditor brings a bill under the ſtatute of fraudulent deviſes againſt the aſſignee of the deviſee only, the heir at law is a neceſſary party, and for want of him the cauſe ordered to ſtand over.

In anſwer to the objection it was inſiſted, that where the creditor comes againſt the alienee of deviſee it is not neceſſary.

Mr. Juſtice Parker ſaid, The Objection muſt be allowed: it is admitted on all hands that if an action at law is brought, it muſt be both againſt the deviſee and heir at law, and equity follows the law in this reſpect; but beſides, this is not an alienee of the deviſee, but an aſſignee of bankrupts only who ſtands in the place of the deviſee, and repreſents him, ſo that he can by no means be called an alienee.

If an action at law is brought it muſt be both againſt the deviſee and heir at law, and equity follows the law in this reſpect.

Caſe 118. *Hide* verſus *Haywood, the ſame day*, before Mr. Juſtice *Parker*.

Notwithſtanding a teſtator directed that his executors, for any expences they ſhall be put to, ſhall be allowed their coſts out of his eſtate; yet as there was a plain fraud in this caſe in the executors, the court decreed coſts againſt them.

A Teſtator in this caſe directed that his executors, for any expences they ſhall be at, ſhall be allowed their coſts out of his eſtate; and therefore, if there had been only an error in judgment, I ſhould have been of opinion that they ſhould not have paid coſts, nay even if there had been no proviſion for it in the will; but where there is a plain fraud in executors, as there was in this caſe, (for though 150*l.* was offered for the good will of a houſe, part of the teſtator's eſtate, the executors refuſed the perſon unleſs he would promiſe to imploy them in the way of their trade as wine merchants) I will decree coſts againſt them; for this is a diminiſhing of the eſtate, and notwithſtanding the teſtator's direction that their coſts ſhould come out of the eſtate, he could never mean to ſave them harmleſs where they have been guilty of a fraud.

Caſe 119. *Hathornthwaite* verſus *Ruſſel*, firſt ſeal after *Hilary* Term, *February* 18, 1740.

It is no ingredient to take the aſſets out of the hands of an executor, that he is not of an affluent fortune, as long as the teſtator himſelf has placed this confidence in him without regarding his circumſtances.

A Motion for a receiver to be appointed by this court to collect in the money ſtanding out upon ſeveral ſecurities, and the reſt of the aſſets of a teſtator, on a ſuggeſtion that the will was obtained by fraud, and that the ſanity of the teſtator is now likewiſe conteſting in the eccleſiaſtical court; affidavits too on the part of the motion were produced to ſhew the mean circumſtances of the two executors, and the counſel relied much upon the caſe of *Powis* verſus *Andrews*, where upon a like motion a receiver was appointed.

Lord Chancellor denied the motion, and diſtinguiſhed it from the caſe of *Powis* and *Andrews*; there the fraud appeared very ſtrong, the executors too were not related to the teſtator, took out a probate the very morning he died, and that very afternoon waſted and imbeziled large ſums of money which they got into their hands.

But here it is widely different, there are very ſtrong affidavits produced on the part of the defendants to prove the ſanity of the teſtator, and no circumſtances to ſhew that the executors uſed any unjuſt means, or prevailed upon the weakneſs of the teſtator, to make his will in their favour; beſides, upon the very face of it, it is a rational will, for he gives away his eſtate in legacies to ſeven of his neareſt relations, and has preferred the executors, who are as near of kin to him as the plaintiff himſelf, by making them reſiduary legatees.

Nor

Nor are there any grounds to grant this motion upon the other ſuggeſtions of the executors not being reſponſible from their indigent circumſtances; the court never eſteems this as any ingredient to take the aſſets out of the hands and care of the executors, nor will even the eccleſiaſtical court refuſe perſons a probate becauſe they are not of affluent fortunes, as long as the teſtator himſelf has placed this confidence in them without regarding their circumſtances; beſides too, this caſe is materially different from *Powis* and *Andrews* in another reſpect; there is no probate here, ſo that as the bulk of the teſtator's eſtate is placed out upon ſecurities, the executors are not intitled to ſue or bring any actions for them; this application too is not till a year after the commencement of the ſuit in the eccleſiaſtical court; for theſe reaſons his lordſhip denied the motion.

Lowther verſus *Condon*, *February* 9, 1740. Caſe 120.

THOMAS *Condon* made his will, wherein were theſe words:

Imprimis, " I give and bequeath unto my daughters *Iſabella Con-*
" *don* and *Diana Condon* the ſum of 500*l.* a-piece, to be raiſed and
" paid unto them and each of them immediately after my death out
" of the rents, iſſues and profits of my lands and tenements in *Wold*
" *Newton Ballerwicke* and *Bogthorpe* in the county of *York*, or by
" ſale or mortgage of the ſame, or a competent part thereof, together
" with intereſt for the ſaid reſpective ſums after the rate of 6*l. per*
" *cent. per ann.* from the time of my deceaſe until the ſeveral re-
" ſpective ſums of 500*l.* ſhall be duly paid to my ſaid daughters,
" *or their reſpective executors, adminiſtrators or aſſigns.*"

" *Item*, I give and bequeath unto each of my ſaid daughters, the
" ſum of 1000*l.* to be raiſed and to be paid unto them ſeverally
" and reſpectively immediately after the deceaſe of my wife, out
" of the rents, iſſues and profits of my manors, lands, tenements
" and hereditaments in *Willougby* in the ſaid county of *York*, or by
" ſale or mortgage of the ſame, or a competent part thereof, toge-
" ther with intereſt for the ſaid ſeveral ſums of 1000*l.* after the rate
" aforeſaid, from the deceaſe of my ſaid wife, until the ſaid ſums
" ſhall be duly paid to my ſaid daughters, *or their reſpective exe-*
" *cutors, adminiſtrators or aſſigns*; and my further will is, that in
" caſe either of my ſaid daughters ſhall depart this life before me,
" then the ſurvivor of my ſaid daughters, her executors, adminiſtra-
" tors and aſſigns, ſhall have and receive all and every the ſum and
" ſums of money herein by me before deviſed out of my ſaid lands,
" to be raiſed in the manner herein before appointed; *And in ſuch*
" *caſe the part of the daughter ſo dying ſhall not ceaſe or ſink into the*
" *eſtate for the benefit of my heir, but ſhall remain and be raiſed for*
" *the benefit of my ſurviving daughter.*"

Laſtly, " I bequeath all my chattels real and perſonal, and all " my goods moveable and immoveable, and all my perſonal eſtate " whatſoever, unto my ſaid daughters, and do make and con- " ſtitute them executors of this my laſt will and teſtament. In " witneſs, *&c.*"

The teſtator died and left one ſon *Thomas*, and two daughters *Diana and Iſabella*; In 1719. after the death of the teſtator, *Diana* intermarried with Sir *William Lowther*; *Diana* died in 1736. *Anne* the mother died in the year following: the preſent bill is brought by Sir *William Lowther* againſt *Thomas Condon* and *Iſabella*, who has intermarried with Mr. *Pitt*, in order to have the ſum of one thouſand pounds mentioned in the will raiſed out of the eſtate, which was thereby charged with it.

Lord Chancellor ſaid his opinion was that the 1000 *l.* ought to be raiſed: He owned it was very true, that there is an eſtabliſhed and fixed diſtinction between legacies charged upon the perſonal eſtate, and legacies upon the real; and though this would have been clearly a veſted legacy in caſe it had been chargeable upon the perſonal, yet it is not ſo clear a caſe as it is chargeable upon the real eſtate; but ſtill there is ſufficient ground to ſay, even in the preſent caſe, the legacy is a veſted one, and the plaintiff intitled to it.

The words of the will are in this manner: " I give and be- " queath to each of my daughters the ſum of 1000 *l.* to be raiſed " and to be paid unto them ſeverally and reſpectively immediately " after the deceaſe of my wife."

It has been determined, where a legacy upon land depends on two contingencies, though one of them doth not happen, the legacy ſhall be raiſed. Where the poſtponing the time of payment of a legacy has been owing to the circumſtance of the teſtator's eſtate, and not to the circumſtances of the legatees, that is not ſo ſtrong a caſe for a legacy's ſinking into the eſtate, as where the poſtponing the payment of it has appeared to have ariſen from circumſtances on the part of the legatee.

So that it is a gift immediate to the daughters, though not indeed to be raiſed till after the death of the teſtator's wife; the time mentioned in the will is not annexed to the ſubſtance of the legacy, but to the payment of it; and conſequently, if this had been a legacy chargeable upon the perſonal eſtate, it would have been clearly a veſted one, and the plaintiff intitled to it; but this is chargeable upon the real; it muſt be owned that it is equally an eſtabliſhed rule, that where a legacy is given of this ſort, though the time mentioned in the will is annexed to the payment of it, and not to the body and ſubſtance of the legacy, yet in general ſuch legacies ſhall not be raiſed, where the legatee dies before the time of payment, and this is ſo more eſpecially where a legacy of that ſort is given by way of portion: but notwithſtanding this is the general rule, yet the principal ingredient which has given riſe to this doc-

An inference may be drawn in the plaintiff's favour from the direction that the legacy ſhall be paid to the daughters, *or their reſpective executors, adminiſtrators and aſſigns.*

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trine has been, that the poſtponing the payment of the legacy has appeared to have ariſen from circumſtances on the part of the legatee, as her attaining the age of 21 or marriage; there, if the legatee had died before the time of payment of the legacy, this court, which favours the real eſtate, have conſidered it in this light, that there is no occaſion it ſhould be raiſed, the party dying, who was in the immediate contemplation of the teſtator; but where the poſtponing the time of payment of a legacy has been owing to the circumſtance of the teſtator's eſtate, and not to the circumſtances of the legatee, that is not ſo ſtrong a caſe to favour the legacy's ſinking into the eſtate, as the other is; though his Lordſhip ſaid he did not know but that the caſes have gone ſo far as even there in ſome inſtances to allow of their ſinking into the eſtate: it has been determined that where a legacy charged upon land depends upon two contingencies, and one of them doth not happen, the legacy ſhall be raiſed; the caſe of *King* and *Withers Prec. in Ch.* 348. However, in the preſent caſe it is clear upon the penning of the will that the intention of the teſtator was that the legacy in queſtion ſhould be raiſed in favour of the plaintiff: here 1000 *l.* is given to each of the daughters, with intereſt to be computed from the death of the teſtator's wife: no argument can be drawn from the circumſtances relating to the intereſt, for it was natural to give a direction about that in the manner it has been done; but then the will goes on and directs *that this legacy ſhall be paid to the daughters, or to their reſpective executors, adminiſtrators and aſſigns:* and ſomething may be inferred from thence in favour of the plaintiff.

It has been ſaid, that the uſe of this clauſe might be only to ſhew the teſtator's intention that if the daughters ſurvived the mother, and afterwards died, the legacies ſhould be paid to their repreſentatives; but if that was the meaning of the teſtator, the inſerting this clauſe was very unneceſſary; for if the daughters ſurvived the mother, there could be no doubt but that the repreſentatives of them would be intitled to the legacy of courſe.

The uſe of this clauſe ſeems rather to ſhew the teſtator's intention, that if the daughters died in the life-time of their mother, and after the teſtator's death, that the legacies ſhould be paid to their repreſentatives. But his Lordſhip ſaid he did not reſt his opinion upon this clauſe in the will; the clauſe that he founded himſelf principally upon, was the following: and my further will is, "that in caſe "either of my ſaid daughters ſhall depart this life before me, then "the ſurvivor of my ſaid daughters, her executors, adminiſtrators "and aſſigns, ſhall have and receive all and every the ſum and ſums "of money herein before by me deviſed out of my ſaid lands, to "be raiſed in the manner herein before appointed; and in ſuch caſe "the part of the daughter ſo dying ſhall not ceaſe, or ſink into the "eſtate for the benefit of my heir, but ſhall remain and be raiſed "for the benefit of my daughters."

The clauſe on which Lord *Hardwicke* principally founded his opinion was, the direction that if one daughter died before him her part ſhould not ſink into the eſtate.

It has been ſaid, that the contingency upon which this clauſe of the will was to take effect has not happened; but it is plain that the teſtator had in his view a certain caſe wherein the legacy ſhould not ſink into the eſtate: *That caſe was*, the event of either of the daughters dying in the life-time of the teſtator. And if even in that caſe the teſtator deſigned that the legacy ſhould not ſink into the eſtate, a much ſtronger reaſon is there to infer, that he did not deſign it ſhould when the daughter ſurvived him.

This clauſe is a plain indication of the teſtator's deſign, that the daughters ſhould have this legacy at all events, and that it ſhould not depend upon the accident of their dying in the life-time of their mother: it has been ſaid, that if the teſtator had been aſked at the time of making his will, whether in ſuch an event as has happened he would have the 1000*l.* legacy raiſed for the plaintiff, he certainly would have anſwered that he would not.

But ſuch manner of arguing by aſking a queſtion of this ſort, is a very uncertain one: thoſe that make the queſtion, anſwer it themſelves, and give ſuch an anſwer as ſeems for their purpoſe. But if this queſtion had in reality been aſked the teſtator, his Lordſhip ſaid, he ſhould have thought it much more probable that under the circumſtances of the preſent caſe, the teſtator would have anſwered that his meaning was that the plaintiff ſhould have this legacy.

The plaintiff married this lady in 1719. ſhe did not die till 1736. and it would be a reaſonable thing in itſelf that under ſuch circumſtances, the teſtator ſhould intend that the plaintiff ſhould have this legacy; and *Lord Chancellor* decreed the 1000*l.* ſhould be raiſed for the plaintiffs out of the eſtate charged with it.

Lowther verſus *Condon*, *June* 6, 1741.

THIS cauſe was brought on again by the defendant on a petition of rehearing, when the Attorney General of council for him cited the following caſes: *Pawlet* verſus *Pawlet*, 2 *Vent.* 366, 367. on a ſettlement. *Hall* verſus *Terry*, (ſee my 1ſt Vol. of *Rep.* 502.) *M. T.* 1738. before Lord *Hardwicke*. *Bradley* verſus *Powell*, before Lord *Talbot*, *May* 1736. on a ſettlement. *Butler* verſus *Duncomb*, 2 *Vern.* 760. *Brown* verſus *Berkley*, *M. T.* 1728. Duke of *Chandos* verſus *Talbot*, 2 *Will.* 609. *Prowſe* verſus *Abingdon* 1738. (ſee my 1ſt Vol. of *Rep.* 482.)

The caſes cited for the plaintiff were *King* verſus *Withers*, *Prec. in Chan.* 348. *Eq. Ca. Abr.* 112. *Bruin* verſus *Bruin*. 2 *Vern.* 439. *Pitfield*'s caſe. 2 *Will.* 513. *Wilſon* verſus *Spencer*, before Lord *King*, aſſiſted by Sir *Joſeph Jekyll* 1732. *Atkins* verſus *Hiccock*, *July* 1737. (ſee my 1ſt Vol. of *Rep.* 500.) *Carter* verſus *Bletſoe*, 2 *Vern.* 616.

The caſe of *Bradley* verſus *Powell*, being much relied upon by the defendant's counſel, was ſtated more fully, and is as follows:

John Powell tenant for life, remainder to *Henry* his eldeſt ſon in tail, by recovery, *&c.* ſettled the eſtate to the uſe of *John* the father for life as to part, remainder to truſtees for 200 years, upon truſt to raiſe 1100*l.* for *Richard* the ſecond ſon, to be paid him within ſix years after the death of *John*, or as ſoon after as the ſame could be raiſed, and in the mean time intereſt from the death of *John* the father for and towards his maintenance, remainder to *Henry* the eldeſt ſon for life, remainder to his firſt and other ſons in tail.

Richard the ſecond ſon attained his age of 45 and died in the life of his father, greatly in debt, and left no aſſets; two years after *John* the father died, and upon his death 700*l.* *per ann.* came to *Henry*, and after his death to his ſon the defendant.

A bill was brought by the creditors of *Richard* to have the 1100*l.* raiſed.

Lord Talbot declared *Richard* is to be conſidered as a purchaſer under the recovery, and ſettlement of the 1100*l.* but however, ſaid he, this caſe differs from *King* verſus *Withers*, and *Brown* verſus *Berkley*, for there, marriage one of the contingencies happened, but here the 1100*l.* is limited to be paid to *Richard* within 6 years after his father's death, without any other limitation, and he dying in his father's life-time, the contingency hath never happened, and the portion muſt therefore ſink for the benefit of the owner of the real eſtate; and ſo diſmiſſed the bill. *Vide Caſ. in Eq. in Lord Talbot's Time* 117.

LORD CHANCELLOR.

Lord *Hardwicke* ſaid he had no doubt at the firſt hearing, and thought there was as little doubt for it here as in any caſe.

The preſent caſe ſeems to me to be brought on again rather for learning ſake, and to refreſh the memory of the court, than for any real ſervice to the defendant; for my own part I had no doubt at the firſt hearing, and I think there is as little room for it here as in any caſe whatever.

Ever ſince the caſe of *Pawlet* verſus *Pawlet* it has been the rule, that where there is a portion to be raiſed out of land, if the perſon dies before the day of payment comes, it ſinks for the benefit of the heir.

As to the general rule with regard to portions to be raiſed out of land, it has certainly been eſtabliſhed ever ſince *Pawlet* verſus *Pawlet*, that where there is a portion to be raiſed out of land, if the perſon dies before the day of payment comes, it ſinks for the benefit of the heir, and determined on this reaſoning, that the child did not want the portion, and therefore ſhould not burthen the inheritance.

A reaſonable diſtinction may be made from that caſe, between a time of payment that appears to have been derived from the circumſtances of the perſon, and from the circumſtances of the fund.

There are ſeveral ſubſequent caſes where there have been determinations againſt ſome of the diſtinctions in *Pawlet* verſus *Pawlet*; as for inſtance, there may be a reaſonable diſtinction made between a time of payment that appears to have been derived from the circumſtances of the perſon, and where it has been derived from the circumſtances of the fund; and this is the ſtrong reaſoning Lord *Harcourt* introduces in his argument on the caſe of *King* verſus *Withers*.

As caſes of this ſort muſt be left to the diſcretion of the court, who are governed by prudential reaſons and particular circumſtances, it is not to be wondred at that there ſhould not be one certain and invariable rule.

The father here has poſtponed the raiſing of the ſum of 1000*l.* a-piece to his daughters till after his wife's deceaſe, and for this reaſon, becauſe it did not ſuit the circumſtances of his eſtate that it ſhould be raiſed before.

The intention of the teſtator is ſhewn moſt ſtrongly in the clauſe, where he gives the whole to the ſurviving daughter. *Vide* the clauſe in the firſt part of this caſe.

It is probable there may be ſome common lawyers who do not know if a portion is charged on land that it will ſink in the inheritance, if the perſon dies before time of payment.

The teſtator might know that if the legatee died in his life-time it would lapſe, but he might not know the rule of this court in another reſpect; and I believe there may be ſeveral common lawyers who do not attend here, that poſſibly may not know, that if it is charged on land, it will ſink in the inheritance if the perſon dies before the time of payment.

It is a moſt abſurd ſuppoſition, that if both daughters ſhould die in the mother's life-time, tho' they had lived to be fifty years old, that the portions ſhould not be raiſed, and yet if one only ſurvived the father, that daughter ſhould have the whole.

In ſhort, the manner in which this clauſe is worded ſhews the intention of the teſtator extreamly plain, and as there is ſo clear an indication of his intention, I may, and ought to lay hold of a ſtrong reaſoning to be drawn from the words *executors, adminiſtrators and aſſigns*, immediately preceding the clauſe of ſurvivorſhip; for his meaning was, that in caſe the daughters ſhould die before the portion was raiſed, that the executors ſhould be intitled to have the 1000*l.* raiſed off the eſtate.

It is circumſtances, as I ſaid before, muſt govern in caſes of this nature, and here are very ſtrong ones: Lady *Lowther* was married ſixteen years, ſurvived her father twenty, and died but a year before her mother; and becauſe of this accident of the mother's ſurviving, it is inſiſted that I am to adhere to ſtrict rules, and not ſuffer the portion to be raiſed; this muſt ſound very oddly in a court of equity.

There

There is no doubt if a bond had been entred into by Mr. *Condon* on condition to pay 1000*l.* to his daughter after the death of his wife, but it would have been forfeited if the father's executors had refuſed to pay after the wife's death, notwithſtanding ſhe ſurvived the daughter.

In the caſe of *Breuen* v. *Breuen*, 2 *Vern.* 439. * where the portion was to come out of land, though there was no time of payment fixed, yet the child dying at five years old, the court would not raiſe it: ſo that by this caſe it is plain that equity does not always keep to ſtrict rules, for when no time of payment is fixed, a legacy in general is held to be paid immediately; and yet the court then deviated from the general rule, by decreeing it not to be raiſed, becauſe the child died ſo young that the end for which it was given ceaſed.

Had the father entered into a bond to pay 1000 *l.* to his daughter after his wife's death, it would have been forfeited if the executor had refuſed to pay. When no time of payment is fixed, a legacy in general is held to be paid immediately, unleſs the end for which it was given ceaſed.

On the whole, I think the intention is extreamly clear under this will, that the portion ſhould be raiſed, and that the poſtponing the time of payment was only for the convenience of the eſtate, becauſe it would have diſtreſſed the ſon to have raiſed it in the mother's life-time before her jointure fell in.

The poſtponing of the payment here was only for the convenience of the eſtate, becauſe the ſon would have been hurt if raiſed before his mother's jointure fell in.

Sir *John Barnardiſton* verſus *Lingood*, *February* 9, 1740. Caſe 121.

SIR *John Barnardiſton*, remainder in tail in the eſtate in queſtion, being diſtreſſed in his circumſtances, conveys the manor of *Ratton Magna* and *Ratton Parva* in *Suffolk* of the yearly value of 300*l.* expectant upon an eſtate for life in his uncle Sir *Samuel Barnardiſton* for the ſum of 300*l.* only, to the defendant Mr. *Lingood*, his heirs and aſſigns for ever, from and after the deceaſe of Sir *Samuel Barnardiſton* without iſſue male.

Sir *J. B.* remainder in tail in the eſtate in queſtion, being diſtreſſed, conveyed two manors of the yearly value of 300 *l.* expectant on an eſtate for life in his uncle Sir *Samuel Barnardiſton* for the ſum of 300 *l.* to the defendant, his heirs and aſſigns, from and after the deceaſe of Sir *Samuel Barnardiſton* without iſſue male.

Sir *J. B.* brought a bill to be relieved againſt this bargain as unconſcionable. *Lord Hardwicke held it a void conveyance even in point of law, for as the plaintiff had a remainder in tail only, he could but convey ſuch eſtate as he had, and not diſpoſe of the inheritance.*

The original bill is brought by Sir *John Barnardiſton* to be relieved againſt this bargain, as being an unconſcionable one, and made without a proper conſideration.

Note, in *Caſes in Equity abridged* 267. it is mentioned, *that the daughter died within the year*, though not taken notice of in Mr. *Vernon*'s report of *Bruen* verſus *Bruen*.

The croſs-bill by the defendant to eſtabliſh the agreement between him and the plaintiff for the ſale of theſe manors, and for a ſpecific performance.

LORD CHANCELLOR.

The firſt conſideration is, if the plaintiff in the croſs cauſe is intitled to a decree for a ſpecific performance of this agreement.

I am of opinion here are no Grounds for the court to make ſuch a decree: for I am inclined to think it a void conveyance even in point of law: for it is a conveyance of the manors therein mentioned to Mr. *Lingood*, *Habendum* to him, his heirs and aſſigns for ever, from and after the deceaſe of Sir *Samuel Barnardiſton* without iſſue male: now as the plaintiff in the original cauſe had a remainder in tail only, he could but convey ſuch eſtate as he had; but this is an attempt to diſpoſe of the whole inheritance of the eſtate.

A perſon who conveys an eſtate-tail conveys *totum ſtatum ſuum*, which is an eſtate for life; and as this deed only carries an eſtate for life, it is not ſuch an eſtate as the parties contracted for, and therefore void.

A perſon who conveys an eſtate-tail, conveys *totum ſtatum ſuum*, which is an eſtate for life: it is one thing where an eſtate-tail takes place in poſſeſſion, and where it is to veſt *in futuro*; this is *habendum* a remainder after the death of tenant for life, and conſequently veſts nothing in the defendant, for a ſpringing uſe cannot be limited, and as this deed only carries an eſtate for life, it is not ſuch an eſtate as the parties contracted for, and is therefore void. *Vide* the caſe of *Brayne* verſus *Deakin* in the houſe of Lords.

In the caſe of a hard Bargain where it is not abſolutely executed but executory only, the conſtant rule of the court is not to carry it into execution.

The uncle Sir *Samuel Barnardiſton* was living, who was in poſſeſſion of the eſtate, and the father of the plaintiff likewiſe was living, under whom the plaintiff claimed as laſt remainder man, at the time of this agreement: the parties too were not abſolutely ſure whether the eſtate conſiſted of one or two manors, ſo that the plaintiff did not know for certain what he ſold, nor the defendant what he purchaſed, and taking it then in the faireſt light, the court ought not to decree a ſpecific performance of a bargain made intirely in the dark.

A judgment of 6000*l.* being taken at the time of the purchaſe as a ſecurity for the performance, Lord *Hardwicke* directed it ſhould ſtand only as a ſecurity for principal, intereſt and coſts, and no further.

This being the caſe, I cannot think of leaving the plaintiff in the original cauſe at the defendant's mercy, to put a judgment of 6000*l.* in ſuit which he compelled or rather drew in the plaintiff to give at the time of the agreement, as a ſecurity for the performance of it.

I am of opinion therefore upon the circumſtances of this caſe, it is juſt in the court to ſet the thing right for the benefit of all the parties: and in the firſt place I muſt relieve the plaintiff in the original cauſe; and for this purpoſe do decree that the judgment ſhall ſtand as a ſecurity only for the defendant's principal, intereſt and coſts, and no further.

For without doubt there are all the material ingredients in this caſe, as well as in thoſe which have been cited of *Comes Arglaſſe* verſus *Muſchamp*, 1 *Vern.* 75, 135, 237. and *Berny* verſus *Pitt*, 2 *Vern.* 14. and *Knot* verſus *Johnſon and Graham*, 2 *Vern.* 27. to ſet aſide this agreement as a catching bargain againſt a neceſſitous and improvident heir.

There are all the material ingredients in this caſe, as in thoſe which have been cited, to ſet aſide this agreement as a catching bargain againſt a neceſſitous heir.

The very advancing money in ſuch ſmall ſums, as has been done in the preſent caſe, as three guineas, ſix guineas, *&c.* ſhew the plaintiff to be in the utmoſt diſtreſs; and as to the hazard the defendant run of it's being a loſing bargain, it is a circumſtance in common only with all people who are dealers in this way, and if this had been a reaſon for carrying ſuch an agreement into execution, there never would have been any of them ſet aſide; but what the court is guided by in all theſe caſes is, the taking an undue advantage of an heir's being in diſtreſſed and neceſſitous circumſtances; and this is the principal ground of theſe decrees.

What guides the court in all theſe caſes, is, the taking the advantage of an heir's being diſtreſſed, and is the principal ground of theſe decrees.

Here is no more than three hundred pounds given for an eſtate of three hundred pounds a year, which is but one year's purchaſe of a reverſion that was to fall in upon the death of a perſon who was turned of fifty, and not likely to marry, ſo that the hazard the contracting party run was very ſmall.

The conveyance is dated on the ſixth of *January* 1730, and the firſt receipt the plaintiff gave, which was for 15 guineas, was but the *May* before, expreſsly recited to be in part of payment for the reverſion of *Ratton Magna* and *Ratton Parva*, 10*l.* in another, 6*l.* 6*s.* in another, and 20*l.* in another receipt, and ſo on, and all of them recited to be in part of the purchaſe money; and if this had been a fair tranſaction, the court would have decreed the plaintiff to convey on ſuch receipts.

But can this be ſaid to be a fair way of purchaſing eſtates, to furniſh a young heir with money from hand to mouth, and barely enough to buy him neceſſaries, in the life-time of his anceſtor.

The court have always extended their relief in ſuch caſes for the ſake of the publick, to prevent peoples gaming to the prejudice of improvident perſons, and the ruin of families. Coſts decreed to Sir *John Barnardiſton*.

As to the hazard which the purchaſer run, I have ſaid before that this court have always extended their relief in ſuch caſes, and with the greateſt juſtice in the world for the ſake of the publick, to prevent peoples gaming as it were, to the prejudice and damage of young improvident perſons, and the ruin of families.

I cannot do proper juſtice in this caſe unleſs I decree coſts to the defendant in the croſs cauſe; I ſhall reſerve the conſideration of coſts in the original cauſe till the maſter ſhall have taken an account of what is due to the defendant in the original, for principal and intereſt, at the rate of 4 *per cent.* on the ſums advanced by him at different times.

Caſe 122. *The Archbiſhop of York and Doctor Hayter* verſus *Sir Miles Stapleton and others, February* 21, 1740.

A leſſee of a rectory for three lives, who had made a derivative leaſe, brings a bill for tithe in kind, and to eſtabliſh a cuſtom of ſetting out corn in ſtooks: Lord *Hardwicke* held the bill is properly brought, though the tithes are out in leaſe, to prevent colluſion between a leſſee and occupiers.

THE archbiſhop of *York* was intitled *in jure eccleſiæ*, to the rectory of *Mitton* in *Yorkſhire*; and in 1733, granted a leaſe for three lives, to archdeacon *Hayter*, who made a derivative leaſe to one *Taylor*; and this bill is brought by the archbiſhop and doctor *Hayter*, for an account of tithes in kind, and to eſtabliſh the cuſtom of ſetting out the corn in ſtooks or ſtacks.

It was objected, that there is no foundation for this bill, becauſe doctor *Hayter* having made a leaſe to *Taylor*, is not intitled to any account, and cannot maintain a bill to eſtabliſh a cuſtom of ſetting out in ſtooks or ſtacks which is a mere right.

LORD CHANCELLOR.

I am of opinion the bill to eſtabliſh the cuſtom is well brought; and that the perſon who is intitled to the inheritance is properly made a party, notwithſtanding the tithes themſelves were out in leaſe at the time for which the account is prayed; for otherwiſe, it might introduce great inconveniences by a colluſion between the leſſees and the occupiers: and that a bill may be even brought, without praying an account, to eſtabliſh a mere right only, appears from the common caſe of bills for eſtabliſhing *moduſſes*, and therefore ſhall direct an iſſue to try the cuſtom of the ſtacks or ſtooks.

The

The courſe of proceeding in the court of Exchequer, is to decree an account of tithes from the filing of the bill, but it will be time enough when the cauſe comes back after trial to ſearch for precedents here, in tithe bills, though I know the rule of this court in general is, where an account is directed that it ſhall be carried down even to the time of the Maſter's report, and not to the filing of the bill only.

The plaintiff could not properly amend his original bill, by filing new matter which has ariſen ſince the original bill, but ought to have brought a ſupplemental bill; but then the defendant ſhould have taken the advantage of this defect in form, by a demurrer, and it is too late to make the objection after they have anſwered.

A defendant muſt take advantage of a defect in form by a demurrer, it is too late to object after he has anſwered.

Next, with regard to the matter of right, as to lands for which an exemption is inſiſted on, againſt a demand for tithes in kind, though the charge in the bill is general, yet in the anſwer you muſt ſhew the exemption of the particular cloſes, which is not done in this caſe.

The queſtion of right is upon an exemption claimed of all the lands that did belong to the monaſtery of St. *Mary*, in the neighbourhood of *York*, which was one of the greater abbies diſſolved by the ſtat. of 31 *H.* 8.

It is certain they are diſcharged in the hands of the crown, and their grantees, in the ſame manner they were in the hands of the monaſtery at the time of the diſſolution: but the evidence of this exemption depends upon uſage; now it has been very rightly ſaid, that a poſterior uſage is evidence of the antecedent, and has been always allowed ſo in caſes of this nature, for what other evidence can be had?

Evidence of an exemption depends on uſage, and a poſterior one is evidence of the antecedent, for no other can be had.

It has been objected, there has been unity of poſſeſſion of the lands and the tithes in the *Stapleton* family, and that occaſions the obſcurity, and accounts for the non-payment of tithes: but the antient leaſe produced by the defendants where there is a covenant that one of the anceſtors of this family ſhall hold tithe free, is an anſwer to this objection.

The next queſtion is, as to the real compoſition for *main* meadow of about 200 acres, in which it is inſiſted 5 acres, called *tithe acres*, are ſet apart in lieu of tithes for the reſt.

It is very natural to think that the denomination of tithe acres aroſe firſt from thoſe acres being ſet apart from the reſt, in lieu of tithes; and it is a ſtrong circumſtance in favour of the defendants, to ſhew that this meadow is exempt from tithes.

A *modus* to take part of the tithes for the whole, has always been held a void cuſtom.

It has been ſaid, and very rightly, a *modus* to take part of the tithes for the whole, could never have been at any time a ſatisfaction for the whole, and has always been held a void cuſtom: but in this caſe it is impoſſible to ſay, whether 300 years ago five acres might be a ſufficient compoſition for the tenth part of the whole, and therefore the objection fails as to the inequality between five acres and two hundred.

There are ſo many obſcurities, that the court cannot determine clearly, without directing a trial at law: for a jury will have much better opportunities of unravelling this difficulty from a view of the lands themſelves, and the boundaries, *&c.* will effectually quiet this queſtion.

Firſt iſſue, As to the manner and method of tithing.

Second iſſue, As to the exemption.

Third iſſue, As to the real compoſition.

Caſe 123. *Aſtel and others* verſus *Montgomery*, ſecond Seal after *Hilary* Term, *February* 26, 1740.

Lord *Hardwicke* thought a defendant making a uſual depoſit on petition for a rehearing was a great hardſhip on a plaintiff, and not an adequate compenſation.

AN iſſue had been directed to try the validity of the will of *Elias Turner*, eſq; and a verdict was found in favour of the will; this court was afterwards pleaſed to give the defendant his coſts, on the cauſe coming back on the equity reſerved, upon his promiſing to give no further trouble: ſince the firſt decree, the defendant has brought his ejectment at law, and has alſo petitioned to have the cauſe reheard; and likewiſe brought a bill here, charging new matter diſcovered ſince the decree, in order to prevent the plaintiff in the original bill, from getting his decree ſigned and inrolled.

Mr. *Chute* moved that the original plaintiff might have time allowed him to anſwer the new bill, till the firſt cauſe is reheard, becauſe this would give his client an opportunity of inrolling the decree, and pleading it in bar to the new ſuit.

Lord Chancellor denied the motion, becauſe he found it the practice of the court, when he came to the ſeals, to allow the method of proceeding the defendant has taken in this caſe, but ſaid, at the ſame time, it was an extreme hardſhip on the plaintiff, that he ſhould be obliged to acquieſce upon the defendant's making the uſual depoſit only in caſe it ſhould be decreed againſt him upon the rehearing, which he thought was not an adequate compenſation, and therefore will think of ſome rule which he will eſtabliſh for the

future in caſes of this kind, or there never will be an end of ſuits, and for the preſent, allowed the defendant in the new bill, and plaintiff in the former, ſix weeks to plead, anſwer, or demur *.

Lowther verſus *Carlton*, *Febrrary* 27, 1740. Caſe 124.

THE plaintiff, who is intitled to the equity of redemption in certain lands, has brought his bill againſt the repreſentatives of the Marquis of *Wharton*, who was the *meſne* purchaſer, and likewiſe againſt *Carlton*, who was the *puiſne* purchaſer; the plaintiff has not replied to the anſwer of the repreſentatives of the Marquis of *Wharton*; and the queſtion is, whether they ſhould not have been brought before the court as proper parties.

A bill brought to redeem againſt the defendant, who had notice of the plaintiff's title, but bought of the marquis of *Wharton*, who had no notice, the objection allowed for not bringing the repreſentative of the marquis before the court, or otherwiſe *Carlton* would be deprived of that defence.

LORD CHANCELLOR.

The repreſentatives of the Marquis of *Wharton* deny, he had any notice of the plaintiff's title at the time he purchaſed, and it is admitted on all hands, that *Carlton*, who purchaſed of the Marquis, had notice of the title: now, if I ſhould go on with this cauſe, I ſhould deprive Mr. *Carlton* of the benefit he would have from the defence which is ſet up by the repreſentatives of the Marquis; it is like the caſes at law of tenant by warranty, *&c.* where one defendant is allowed to pray in aid the evidence of another defendant, who has an intereſt in the thing conteſted, if it is of uſe or advantage to him in ſtrengthning his own caſe.

The plaintiff's offer of waiving his demand of an account of rents and profits, in the time of the Marquis of *Wharton*, might have removed this objection with regard to theſe defendants, if there had not been a difficulty in another reſpect, the depriving Mr. *Carlton* of the benefit of that defence which is ſet up by the repreſentatives of the Marquis, namely, the denial of notice, and that bring's it, as I ſaid before, to the caſes of law, at praying in aid: and for this reaſon, his Lordſhip allowed the objection, for want of parties in not bringing the repreſentatives of the Marquis of *Wharton* before the court.

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* The 17th of *October* 1741, Lord *Hardwicke* made the following order: That no ſupplemental or new bill, in nature of a bill of review, grounded upon any new matter diſcovered, or pretended to be diſcovered, ſince the pronouncing of any decree of this court, in order to the reverſing or varying of ſuch decree, ſhall be exhibited without the ſpecial leave of the court firſt obtained for that purpoſe; and unleſs the party exhibiting the ſame do firſt depoſit with the regiſter of this court ſo much money as together with the depoſit by the rules of this court to be made, on obtaining a rehearing of the cauſe wherein ſuch decree was pronounced, will make up the ſum of fifty pounds, as a pledge to anſwer ſuch coſts and damages as ſhall be awarded to the adverſe party, in caſe the court ſhall think fit to award any at the hearing of the cauſe on ſuch ſupplemental or new bill. *And to the end all parties may take notice of this order, it was directed to be entered with the regiſter, and ſet up in the offices of the ſix clerks, and regiſter of this court.*

Procter

Caſe 125. *Procter* verſus *Oates*, *February* 28, 1740.

After a poſſeſſion of a mortgagee for 25 years, the court decreed a redemption, on the defendant's ſubmitting by his anſwer to be redeemed.

A Bill was brought to redeem after the poſſeſſion of a mortgagee from 1707, to 1732, the year in which the bill was filed; the defendant, as it is a family affair, ſubmitted by his anſwer, to be redeemed, notwithſtanding the length of time: *Lord Chancellor* ſaid, he ſaw no colour for the redemption; but on the defendant's ſubmiſſion, he decreed an account of what was due for principal, intereſt, and coſts, and directed the plaintiff to pay the ſame in ſix months after the Maſter's report; and thereupon the defendants were to convey; but, in default of the plaintiff's payment as aforeſaid, the bill was to be diſmiſſed without coſts.

Caſe 126. *Franks* verſus *Carry*, *February* 28, 1740.

A bill for quit-rents, and an account produced, it muſt be proved to have been a ſteward or bailiff's, or is not evidence of payment here any more than at law.

WHERE a lord of a manor brings a bill for quit-rents, and produces an account in order to ſupport his right, it muſt be proved to have been the account of ſome ſteward or bailiff, who, by marks againſt the particular *items* of receipts, appears manifeſtly to have collected them, and his name beſides muſt be placed at the bottom; but if there are not ſuch marks, nor any name of ſteward or bailiff, it may be only a paper of rents drawn out of any book by a lord of a manor himſelf, for his own private uſe, and is not evidence of the payment here, any more than it would be at law.

Caſe 127. *Sir Thomas Janſon*, *Bart*, verſus *Rany*, *March* 3, 1740.

Where the evidence of a ſingle witneſs againſt a negative in a defendant's anſwer is corroborated by a great number of circumſtances, it is ſufficient to ſupport an equity.

THE bill was brought to have execution ſtayed, upon a judgment obtained at law by the defendant, on a bond, wich the plaintiff inſiſts has been ſatisfied long ſince.

LORD CHANCELLOR.

Where a man comes to be relieved againſt a proper demand at law, it is not ſufficient to ſupport an equity to have one ſingle evidence againſt the defendant's negative in his anſwer, and this is the rule undoubtedly; but the preſent is not this caſe, becauſe the evidence produced by the plaintiff does not reſt upon this ſingle proof only, but it is ſupported and corroborated by a great number of circumſtances which takes it entirely out of the rule.

The

The caſe here is ſo ſtrong in favour of the plaintiff, that I ſhall decree coſts againſt the defendant, both at law and in this court, to be taxed by the maſter.

Stockdale verſus *The South Sea Company*, *March* 5, 1740. Caſe 128.

THE *South Sea* company have no more right to enquire who is the true proprietor, when the truſt does not appear, than a lord of a manor into a right to a copyhold eſtate when no truſt appears, for the perſon whoſe name is entered in their books, is to all intents and purpoſes, with regard to the company, the proprietor.

The perſon whoſe name is entred in the *South Sea* company's books, is, with regard to them, the proprietor.

A court of equity will never decree a perſon to purſue a miſtake, or effectuate an act (which he had done through ignorance) after he comes to the knowledge of the reality of the fact.

Which is the *South Sea* company's caſe here, who acted under a miſtake with regard to this ſtock, as imagining it to be the property of one perſon, when in fact it had been transferred long ſince, and the property of another.

Grimes verſus *French*, the ſame Day. Caſe 129.

THOUGH you pray general relief by your bill, you may at the bar pray a particular relief, that is agreeable to the caſe you make by your bill, but you cannot pray a particular relief which is intirely different from the caſe.

You may at the bar pray a particular relief, though by your bill you have prayed a general one.

As here, the bill is brought for an annuity or rent-charge of ten pounds *per ann.* left under a will, and the council for the plaintiff pray at the bar, that they may drop the demand of this annuity, and inſiſt upon the land itſelf, out of which the annuity iſſues, but the chancellor denied it, becauſe it came within the rule before laid down.

Gyles verſus *Wilcox*, *Barrow and Nutt*, *March* 6, 1740. Caſe 130.

A Bill was brought by *Fletcher Gyles*, bookſeller, for an injunction to ſtay the printing of a book in *octavo*, intitled *Modern Crown Law*; it being ſuggeſted by the bill to be colourable only, and in fact borrowed *verbatim* from Sir *Matthew Hales's Pleas of the Crown*, only ſome old ſtatutes have been left out which are now repealed; and in this new work all the *Latin*

and *French* quotations in the *Hiſtoria Placitorum Coronæ* are tranſlated into *Engliſh*; and for this reaſon it is inſiſted the defendant is within the letter of an act of parliament, made in the eighth year of queen *Ann*, *c.* 19. intitled, An act for encouragement of learning, by veſting the copies of printed books in the authors, or purchaſers of ſuch copies, during the term of fourteen years.

Sect. 1. "From and after the tenth day of *April* 1710. the author of any book or books already printed, who hath not transferred to any other the copy or copies of ſuch book or books, ſhare or ſhares thereof, or the bookſeller or bookſellers, printer or printers, or other perſon or perſons, who ſhall or have purchaſed or acquired the copy or copies of any book or books, in order to print or reprint the ſame, ſhall have the ſole right or liberty of printing ſuch book and books for the term of 21 years, to commence from the ſaid tenth day of *April*, and no longer, and that the author of any book or books already compoſed and not printed and publiſhed, or that hereafter ſhall be compoſed, and his aſſignee or aſſigns ſhall have the ſole liberty of printing and reprinting ſuch book and books for the term of 14 years, to commence, from the day of firſt publiſhing the ſame, and no longer; and that if any other bookſeller, printer, or other perſon whatſoever, from and after the tenth day of *April* 1710, within the times limited by this act as aforeſaid, ſhall print, reprint, or import, or cauſe to be printed, reprinted, or imported, any ſuch book or books, without the conſent of the proprietor or proprietors thereof firſt had and obtained in writing, ſigned in the preſence of two or more credible witneſſes, or knowing the ſame to be ſo printed, or reprinted, without the conſent of the proprietors, ſhall ſell, publiſh, or expoſe to ſale, or cauſe to be ſold, publiſhed, or expoſed to ſale, any ſuch book or books, without ſuch conſent firſt had and obtained as aforeſaid, then ſuch offender or offenders ſhall forfeit ſuch books, and all and every ſheet and ſheets being part of ſuch book and books to the proprietor or proprietors of the copy thereof, who ſhall forthwith damaſk and make waſte paper of them: and further, that every ſuch offender or offenders ſhall forfeit one penny for every ſuch ſheet which ſhall be found in his or their cuſtody, either printed or printing, publiſhed or expoſed to ſale, contrary to the true intent and meaning of this act, the one moiety thereof to the queen, her heirs and ſucceſſors, and the other moiety thereof to any perſon or perſons that ſhall ſue for the ſame, to be recovered by action of debt, bill, plaint or information."

Mr. *Browning*, council for the plaintiff, cited the caſe of *Read* verſus *Hodges* before Lord *Hardwicke*, as a caſe in point, that was an attempt to prejudice the author of the life of *Czar Peter the Great*, by

by publiſhing it in one volume, which was word for word the ſame with *Mottley*'s, only ſeveral pages left out together which had appeared in the 3 volumes.

LORD CHANCELLOR.

The caſe of *Read* verſus *Hodges* was upon a motion only, and at that time I gave my thoughts without much conſideration, and therefore ſhall not lay any great weight upon it.

As to what has been ſaid by Mr. Attorney General of the acts being a monopoly, and therefore ought to receive ſtrict conſtruction, I am quite of a different opinion, and that it ought to receive a liberal conſtruction, for it is very far from being a monopoly, as it is intended to ſecure the property of books in the authors themſelves, or the purchaſers of the copy, as ſome recompence for their pains and labour in ſuch works as may be of uſe to the learned world.

The ſtatute of 8 *Ann*, *c.* 19. for veſting the copies of books in authors is not a monopoly, but ought to receive the moſt liberal conſtruction.

The queſtion is, Whether this book of the *New Crown Law*, which the defendant has publiſhed, is the ſame with Sir *Matthew Hale's Hiſtor. placit. Coronæ*, the copy of which is now the property of the plaintiff.

Where books are colourably ſhortened only, they are undoubtedly within the meaning of the act of parliament, and are a mere evaſion of the ſtatute, and cannot be called an abridgment.

Books colourably ſhortened only, are within the meaning of the act.

But this muſt not be carried ſo far as to reſtrain perſons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, becauſe not only the paper and print, but the invention, learning, and judgment of the author is ſhewn in them, and in many caſes are extremely uſeful, though in ſome inſtances prejudicial, by miſtaking and curtailing the ſenſe of an author.

An abridgment fairly made is a new book, becauſe the judgment of the author is ſhewn in it.

If I ſhould extend the rule ſo far as to reſtrain all abridgments, it would be of miſchievous conſequence, for the books of the learned, *les Journals des Scavans*, and ſeveral others that might be mentioned, would be brought within the meaning of this act of parliament.

In the preſent caſe it is merely colourable, ſome words out of the *Hiſtoria placitorum Coronæ* are left out only, and tranſlations given inſtead of the *Latin* and *French* quotations that are diſperſed through Sir *Matthew Hale*'s works; yet not ſo flagrant as the caſe of *Read* verſus *Hodges*, for there they left out whole pages at a time; but I ſhall not be able to determine this properly, unleſs both

both books were read over, and the caſe fairly ſtated between the parties.

This is not a caſe proper for law, as it would be abſurd for a judge to ſit and hear both books read over, which is neceſſary, where one is only a copy from the other.

Mr. Attorney General has ſaid I may ſend it to law to be determined by a jury; but how can this poſſibly be done? it would be abſurd for the chief juſtice to ſit and hear both books read over, which is abſolutely neceſſary, to judge between them, whether the one is only a copy from the other.

The court is not under an indiſpenſible obligation to ſend all facts to a jury, but may refer them to a maſter, to ſtate them, where it is a queſtion of nicety and difficulty, and more fit for men of learning to inquire into, than a common jury.

The parties ought to fix on two perſons of learning in the law, to compare the books, and report their opinion.

This I think is one of thoſe caſes where it would be much better for the parties to fix upon two perſons of learning and abilities in the profeſſion of the law, who would accurately and carefully compare them, and report their opinion to the court.

The Houſe of Lords, in matters of account which are intricate, refer it to two merchants named by the parties, to conſider the caſe, and report their opinions upon it.

The Houſe of Lords very often, in matters of account which are extremely perplexed and intricate, refer it to two merchants named by the parties, to conſider the caſe, and report their opinions upon it, rather than leave it to a jury; and I ſhould think a reference of the ſame kind in ſome meaſure would be the propereſt method in the preſent caſe.

Caſe 131. *Gratwick* verſus *Simpſon and Moore*, *March* 9, 1740.

Where no demand has been made on a bond for 20 years, the judge will direct a jury to find it ſatisfied.

THE judges have laid it down now as an invariable rule, that if there be no demand for money due upon a bond for twenty years, that they will direct a jury to find it ſatisfied from the preſumption ariſing from the length of time.

Caſe 132. *Vernon* verſus *Blackerby*, *March* 10, 1740.

It never was the intention of the act for building the 50 new churches, that there ſhould be a ſuit in the ordinary courts of juſtice; the commiſſioners are the perſons to determine any diſpute.

LORD CHANCELLOR: This is one of the moſt extraordinary bills I ever remember; and there is no foundation for relief either in law or equity: it is brought againſt Mr. *Blackerby*, who is nothing but an officer under the commiſſioners for building the fifty new churches.

It would be abſurd if a bill ſhould lie againſt a perſon who is only an officer, and ſubordinate to others, and has no directory power.

It

It has been inſiſted by the plaintiff's counſel, that it is not neceſſary to bring the commiſſioners before the court, but that it is very ſufficient to have the treaſurer Mr. *Blackerby* who iſſues out the money: and they have compared it to the caſe of the *Bubble*, in the year 1720.

But this is by no means like that caſe, for there although ſeveral perſons were intereſted, yet they lodged a general power and authority in ſome few only, and therefore to avoid inconvenience from making ſuch numerous parties, this court reſtrained them to thoſe particular perſons who were intruſted with this general power.

The ſeveral parts of the relief prayed are theſe.

Firſt, that the defendant ſhould pay the intereſt of two thouſand pounds from *Michaelmas* 1730. to the *Michaelmas* following, which is prayed to be paid out of the groſs fund given by the firſt of the late King, before it was veſted in *South-Sea* annuities.

Secondly, that the plaintiff may be paid intereſt from *Lady-Day* 1733. to the *Michaelmas* following out of the ſum of three thouſand pounds.

Thirdly, that intereſt may be paid out of the reſidue till it is placed out in land.

As to the queſtion whether the plaintiff is come into a proper court;

I am of opinion that he is not, for it never was the intention of theſe acts of parliament, that he ſhould come into ordinary courts of juſtice; and I may compare it to acts of parliament which give toll, or turn-pike acts: the commiſſioners are to determine any diſpute ariſing upon theſe acts.

But ſuppoſe I was not to make this conſtruction upon the ſeveral ſtatutes relating to the fifty new churches.

The proper method even then would have been to move the court of King's Bench to have granted a *mandamus*.

For if the commiſſioners or their officers do any thing improper, the court of King's Bench will oblige them to make a return to the *mandamus*.

If the commiſſioners do any thing improper, the court of King's Bench will grant a *mandamus*.

But as the acts of parliament expreſsly direct that the commiſſioners ſhould account for the diſtributions of this branch of the

The commiſſioners are by the act directed to account before the auditors of the treaſury, and if there is any grievance, the relief is by applying to a court of revenue.

revenue before the auditors of the treaſury, if there is any grievance there can be no relief, but upon an application to a court of revenue; for if I ſhould direct an account before a Maſter, the two accounts would claſh; nor do I know any thing that could give me a juriſdiction unleſs there were ſome fraudulent circumſtances.

The ſeveral acts relating to this matter, muſt be taken together.

I am of opinion all theſe ſeveral acts of parliament muſt be taken together, or otherwiſe it would be a moſt inconſiſtent ſyſtem.

" 10 Q. *Anne*, *c.* 11. *ſect.* 7. ſays, the money ſo to be iſſued as " aforeſaid ſhall be paid unto ſuch perſon or perſons, not being of " the number of the commiſſioners, for the ends and purpoſes " aforeſaid, as her majeſty, her heirs and ſucceſſors, ſhall from time " to time direct or appoint, to be the treaſurer or treaſurers on this " behalf, and ſhall be received by him or them by way of impreſt, " and accounted for only by ſuch treaſurer or treaſurers, and ſhall " be diburſed, expended and applied, by ſuch treaſurer and trea- " ſurers reſpectively, according to ſuch orders and warrants as he or " they ſhall receive from the commiſſioners, or any five or more " of them, for all or any of the uſes by this, or the former act pre- " ſcribed or allowed, and not to any other uſe, intent or purpoſe " whatſoever, which ſaid treaſurer and treaſurers ſhall be reſpec- " tively accountable in the Exchequer for the ſame."

I read this clauſe relating to the treaſurer, to ſhew that it is clear he could not iſſue a penny without a previous order from the commiſſioners.

1 *G.* 2. *ſtat.* 2. *c.* 23. *ſec.* 2. and 4. relates to the maintenance of the miniſters of the fifty new churches.

3 *G.* 2. *c.* 19. *ſec.* 1. " enacts, that the ſum of 3000*l.* of lawful " money of *Great Britain*, *&c.* ſhall be allotted and appointed for " and as the ſhare and intereſt which the rector for the time being " of the ſaid new pariſh church in or near *Bloomſbury* market ſhall " have or be intitled to out of the ſame monies; and the treaſurer " for the time being is hereby required by and out of the firſt monies " which are or ſhall be iſſued to him, as ſoon as conveniently may " be, to lay out and diſpoſe of the ſaid ſum of 3000*l.* or any part " thereof, according to ſuch orders and warrants as he ſhall from " time to time receive from the commiſſioners, any five or more " of them, in purchaſing lands, *&c.* to be conveyed to and ſettled " upon and to the uſe of the ſaid new church for the time being, and " his ſucceſſors in the ſaid church for ever, for and towards his and " their maintenance, to be laid out in the mean time on real ſe- " curities, or in the publick funds, and the intereſt and produce to " the rector."

There is ſome variation in the penning of this act, but not ſuch as to create any difference in the authority or power of the commiſſioners.

For if there had been no ſuch clauſe of orders and warrants under commiſſioners hands, I ſhould ſtill have been of opinion from the general tenor of thoſe acts of parliament, that nothing could have iſſued by order of the treaſurer without a previous order from the commiſſioners.

Nothing can iſſue by order of the treaſurer, without a previous one from the commiſſioners.

If this be ſo, then with regard to the other relief that is prayed as to the dividend on the *South-Sea* annuities from *Lady-Day* 1733. to *September* the fifth following, the treaſurer being an officer only, and obliged to purſue the directions of the commiſſioners, though poſſibly an order might not be wanted for every particular ſum, yet for every half year's dividend there certainly ought to be one.

I ſhould think the commiſſioners only, and not the treaſurer, ought to have been parties; for it is abſurd to make a perſon who acts miniſterially the ſole party.

It is improper to make a perſon who acts miniſterially only, a ſole party.

I agree that it was the intention of the legiſlature, that if the money could not be laid out in land before 1730, that the miniſter for the time being ſhould not be without a maintenance, and that it ſhould have been paid out of the groſs produce.

But here was no miniſter, for Doctor *Vernon* was not intitled till *February* 1730. and yet he had intereſt from the *Michaelmas* before; but the plaintiff is ſo unreaſonable as to aſk for the time that he was not miniſter, from the *Midſummer* before: it is moſt abſurd that a new rector ſhould expect to diminiſh a groſs fund before he was actually inſtituted, or in any ſort of poſſeſſion whatever.

When there are ſales of *South-Sea* ſtock in this court, if it is ſold during the running of a dividend, and before the half year is compleat, it cannot be ſeparated.

The money has been laid out in land, and therefore it is impoſſible to have the very money, unleſs I would decree a ſale of ſo much of the lands; and according to the opinion I have already given, this ought not to be done without an order of the commiſſioners: nor will I direct a ſale of part of the annuities to raiſe the ſum prayed by Doctor *Vernon*, unleſs I had the commiſſioners before the court.

The cauſe was ordered to ſtand over for want of parties upon the plaintiff's paying the coſts of the day.

Lloyd

Caſe 133. *Lloyd and Jobſon* verſus *Spillet and others*, in the paper of rehearings, *March* 12, 1740.

JOHN Stamp being ſeiſed of a conſiderable real eſtate, and poſſeſſed of a large perſonal eſtate, made his will dated the 28*th* of *March* 1721. and afterwards a codicil of the 10*th* of *October* 1721. and appointed *John Houſe* and *John Spillet* his truſtees, to ſee what he had done in his life-time be continued as he ordered, and then gave his couſins *Anne* and *Mary Jobſon* 15*l.* a year a-piece during their lives, and directed his truſtees to improve all his eſtate to the beſt advantage, and that the yearly profits thereof ſhould be given to and for the yearly maintenance of ſuch miniſters, as were called by the name of *Preſbyterian* and independent miniſters, that do not receive above 40*l.* a year for their preaching; the teſtator afterwards added *Richard Froome* to the other two truſtees, and on the 7*th* of *December* 1721. there was an indenture of releaſe duly executed between *John Stamp*, of the one part, and *Houſe*, *Froome*, and *Spillet* of the other part, witneſſing that *Stamp* as well for and in conſideration of the natural love and affection which he bore unto his couſins *Houſe*, *Froome*, and his friend *Spillet*, and alſo in conſideration of ten ſhillings paid by them, granted to them ſeveral meſſuages and farms therein mentioned, to hold to them, their heirs and aſſigns, to the uſe of them, their heirs and aſſigns for ever; provided always, *&c.* that if *Stamp* ſhould at any time during his life tender or pay to *Houſe*, *&c.* 10*s.* on purpoſe to make void the ſaid deed and the eſtates thereby conveyed, then the deeds and the eſtates thereby limited ſhould be void. *John Stamp* did alſo execute a deed poll of his perſonal eſtate to *Houſe*, *Froome*, and *Spillet*, whereby *John Stamp*, in conſideration of ten ſhillings, and other good cauſes, bargained and ſold to *Houſe*, *&c.* all his goods and chattels, to hold to them, their executors; *&c.* and put them in poſſeſſion of all the premiſſes by the delivery of five ſhillings to them; and it was agreed between the parties, that *Stamp* ſhould have the rents and profits of the premiſſes during his life for the maintenance of himſelf and family, and a power was reſerved to *Stamp* to make void this deed by any deed or writing, and to diſpoſe of the premiſſes as he ſhould think fit; and he had power alſo to revoke the leaſe and releaſe.

The bill is brought by the plaintiffs as heirs at law to *John Stamp*, and the end of it is, that the defendants may convey *John Stamp*'s real eſtate to the plaintiffs and their heirs, and account for the rents and their ſhare of the perſonal eſtate, and deliver up the deeds of bargain and ſale, and leaſe and releaſe, and the title deeds.

The

The defendants inſiſt on their right to the real and perſonal eſtate by virtue of the will and conveyances of *John Stamp*, and in regard it is by his will declared that if his heirs ſhould commence any ſuit relating to his will, that then it ſhould be void: they ſubmit to the court, that if the plaintiffs had any title to their annuities of fifteen pounds each, they have forfeited the ſame by bringing this ſuit.

Firſt, With regard to the perſonal eſtate: I am of opinion there are no grounds for the preſent plaintiffs to be relieved, according to the prayer of their bill.

Natural love and affection is very ſufficient to create a uſe, and will amount to a covenant to ſtand ſeiſed, though no other conſideration appear.

For here is an aſſignment, or bill of ſale of all his goods and chattels, and all other his ſubſtance whatſoever moveable or immoveable, quick or dead, to his truſtees during his life, for the maintenance of himſelf and family, with another proviſo to revoke the uſes of this deed by any other deed or writing, or even by cancelling without any form or ceremony whatſoever.

A man makes a will antecedent to a deed, in which he has given away all his perſonal eſtate to charitable uſes.

Now whether a man after a will made reſerves a truſt in what was his perſonal property before, or acquired after, the will is ambulatory, till his death, and therefore as to the next of kin, there is no pretence that the perſonal eſtate is diviſible under the ſtatute of diſtributions.

Secondly, As to the legal eſtate, whether it will paſs by the leaſe and releaſe without a conſideration.

Now there are no grounds whatſoever to ſay that the legal eſtate did not paſs by the leaſe and releaſe.

For the conſiderations in it are ſuch as will operate by way of tranſmutation of poſſeſſion.

In the firſt place, here is a conſideration expreſſed of natural affection to two perſons, who are not diſputed to be very nearly related to the grantor, and here is likewiſe the conſideration of ten ſhillings, but there is no manner of doubt the eſtate would have paſſed even without the laſt pecuniary conſideration, under the ſtatute of uſes, for natural love and affection is very ſufficient to create a uſe, and will amount to a covenant to ſtand ſeiſed, though no other conſideration appear.

But then it has been inſiſted, here is not a ſufficient conſideration to paſs the beneficial intereſt in this eſtate.

The conſideration of ten ſhillings it is ſaid is only a form in the conveyance, and not ſufficient of itſelf to paſs the eſtate: neither will the conſideration of natural love and affection alone paſs it.

But I do not think theſe obſervations material in the preſent caſe.

Conſider how it ſtood at common law before the ſtatute of uſes; there was no neceſſity then that there ſhould be any conſideration expreſſed to paſs the eſtate.

Uſes were introduced, during the conteſts between the two houſes of *York* and *Lancaſter*, to avoid forfeitures, and were exactly the ſame with what truſts are now.

As for inſtance in the caſe of feoffments, there was no conſideration at all mentioned in them, and yet the eſtate paſſed by them from the operation of law.

In proceſs of time, for the ſake of avoiding forfeitures to the crown, when the conteſts aroſe between the two houſes of *York* and *Lancaſter*, and likewiſe to avoid wardſhips, both of them with a fraudulent intention to cheat the crown, and the lord of what the law gave them, uſes were introduced, and were exactly the ſame with what truſts are now, and I wonder how they ever came to be diſtinguiſhed.

The doctrine of a reſulting uſe firſt introduced the notion that there muſt be a conſideration expreſſed in the deed of feoffment, or otherwiſe nothing could paſs, but it would reſult to the feoffor.

And ſo it is inſiſted on here, that though the legal eſtate paſſes by the ſtatute of uſes, yet the beneficial intereſt will not paſs, as there is not what the court calls a valuable conſideration, and conſequently there is a reſulting truſt for the heir.

Nothing is a reſulting truſt under the ſtatute of frauds and perjuries but what are called ſo by operation of law.

I am now bound down by the ſtatute of frauds and perjuries, to conſtrue nothing a reſulting truſt, but what are there called truſts by operation of law; and what are thoſe? Why *firſt*, When an eſtate is purchaſed in the name of one perſon, but the money or conſideration is given by another; or *ſecondly*, Where a truſt is declared only as to part, and nothing ſaid as to the reſt, what remains undiſpoſed of reſults to the heir at law, and they cannot be ſaid to be truſtees for the reſidue.

When an eſtate is purchaſed in the name of one perſon, and the money is paid by another, he has a reſulting truſt; or where it is declared only as to part, and nothing ſaid as to the reſt, what remains undiſpoſed of reſults to the heir at law.

I do not know in any other inſtance beſides theſe two, where this court have declared reſulting truſts by operation of law, unleſs in caſes of fraud, and where tranſactions have been carried on *Mala fide*.

But in the preſent caſe there is no fraud at all in the grantees, but a ſcheme in the plaintiff's anceſtor to ſecure the charity at all events, ſuppoſing he ſhould revoke his will.

It

It has been ſaid that it was not the intention to give this eſtate to the defendant, and conſequently the heir at law is intitled: for the heir at law does not want an expreſs intention; and it is certainly ſo in the caſe of a will, but it is otherwiſe with regard to a deed.

The heir at law does not want an expreſs intention to take by a will, though it is otherwiſe with regard to a deed.

For there, ſince the ſtatute of frauds and perjuries, the lines are exactly drawn with regard to reſulting truſts, and the heir at law muſt ſhew an expreſs truſt for him in order to intitle himſelf.

A man that conveys a truſt to another, and barely for himſelf, or for the uſe of his heir at law, does not generally inſert a power of revocation, as has been done in the preſent caſe.

Upon the whole, I am of opinion that the legal eſtate did well paſs, and the beneficial intereſt likewiſe; nor do I believe there was any intention that there ſhould be a reſulting truſt for the heir at law, but the whole deſign of the plaintiff's anceſtor was to ſecure the charity at all events.

Lord Hardwicke therefore ſaid, he ſaw no cauſe to vary the decree of the 8th of *November* 1734. and ordered the ſame ſhould be affirmed; but declared that the plaintiffs, the heirs at law of *John Stamp*, were intitled to the two annuities of fifteen pounds each, deviſed to them by the teſtator for their lives, and directed the arrears and growing payments to be paid to the plaintiffs.

Wilkins and his wife verſus *Hunt, the ſame day.* Caſe 134.

LORD CHANCELLOR: It is not a rule in all caſes, that I ſhould charge an adminiſtrator with intereſt on account of perſonal eſtate.

An adminiſtrator is not in every caſe chargeable with intereſt on account of perſonal eſtate.

But here has been a poſſeſſion of a perſonal eſtate in the hands of an adminiſtrator for thirty years, and part of it was out upon mortgage, which produced intereſt; but however this point muſt be deferred till the maſter has made his report.

As to the coſts, let all parties have it to the time of the hearing, and reſerve the conſideration of other coſts till after the maſter's report, for it is by no means an invariable rule that an adminiſtrator ſhall be allowed them at all events.

It is not an invariable rule that an adminiſtrator ſhould be allowed coſts at all events.

Baxter

Caſe 135. *Baxter* verſus *Wilſon*, *the ſame day.*

You muſt make a decree compleat againſt a defendant, though he has made a default, before you can petition for a rehearing.

THOUGH a defendant in a cauſe has made default, you muſt notwithſtanding make a decree compleat and abſolute againſt him before you can petition for a rehearing, and ſerving him with notice of the order, for a rehearing is not ſufficient; but though the Chancellor for this defect diſmiſſed the petition for rehearing, without any prejudice to any new petition in caſe the party ſhould be adviſed to it, after the decree is perfected, yet he would not order the depoſit to be divided among the parties, who appeared before him on the preſent petition, becauſe there is nothing done upon it one way or other.

Caſe 136. *Stiles* verſus *The Attorney General*, *March* 14, 1740.

An annuity granted by the Duke of *Wharton* to Doctor *Young*, in conſideration that the publick good is advanced by the encouragement of learning, and in conſideration likewiſe of the love he bore him; this is not a legal conſideration, nor does it amount to a valuable one in the eye of the law.

THE late Duke of *Wharton* on the 24*th* of *March* 1719. by deed poll under his hand and ſeal, "conſidering that the publick good is advanced by the encouragement of learning, and the polite arts, and being pleaſed therein with the attempts of Doctor *Young*, in conſideration thereof, and of the love he bore him, did give and grant unto the ſaid Doctor *Young* an annuity of 100*l.* to hold during his life, out of all and every his manors, meſſuages, lands, tenements and hereditaments, to be paid him or his aſſigns half yearly, or quarterly, with a clauſe of diſtreſs in caſe of non-payment."

By an indenture dated the 10*th* of *July* 1722. inrolled in chancery, and made between the ſaid *Philip* Duke of *Wharton* of the one part, and Doctor *Young* of the other part, reciting the above deed poll, and alſo reciting that the ſaid Duke was indebted to Doctor *Young* on the ſaid annuity in 250*l.* to *Midſummer* laſt, and alſo in 100*l.* more, making 350*l.* and alſo reciting that the ſaid Doctor *Young* had at the Duke's ſpecial inſtance and requeſt quitted the ſervice he was in, in the Earl of *Exeter*'s family, and thereby loſt an annuity of 100*l.* and alſo reciting that the ſaid Duke being willing to make the ſaid Doctor *Young* ſome amends for his ſaid loſs in quitting the Earl of *Exeter*'s family, had propoſed to give him a further annuity of 100*l.* to be paid quarterly in lieu of the ſaid 350*l.* and of his ſaid loſs in quitting the Earl of *Exeter*'s family; It is witneſſed, that in conſideration, *&c.* the Duke did give, grant, bargain and ſell to Doctor *Young* one other annuity of 100*l.* beſides the ſaid annuity granted by the abovementioned deed poll, to hold unto the ſaid Doctor *Young* and his aſſigns during his life, clear of incumbrances; and the ſaid Duke did thereby charge all his manors, *&c.* he was intitled to in law or equity, with the ſaid two annuities of 100*l.* each, payable quarterly.

By a deed dated the 12*th* of *July* 1722, the Duke charges the lands in truſt to Mr. Juſtice *Denton*, *&c.* with the 200*l.* annuity of Doctor *Young*.

A bill brought by the Duke of *Wharton*'s judgment creditors in *Hilary* term 1722. in *Auguſt* 1723. there was a decree for a ſale of the truſt-eſtates, and that the money ariſing therefrom ſhould be paid to the creditors according to their priority, and the reſidue to the Duke.

Doctor *Young* in his examination on the 4*th* of *Feb.* 1730. before the Maſter ſets forth at large the conſiderations of the annuities; and likewiſe the Duke of *Wharton*'s giving him a bond dated the 15*th* of *March* 1721. in the penalty of 1200*l.* conditioned for the payment of 600*l.* in conſideration of his taking ſeveral journies, and being at great expences in order to be choſen a member of the houſe of Commons at the deſire of the ſaid Duke, and in conſideration of his giving up two livings of 200*l.* and 400*l.* *per ann.* value in the gift of all *Soul's college*, on the promiſſes made by the ſaid Duke, of ſerving and advancing him in the world.

On the 26*th* of *April* 1740. the bond creditors of the late Duke of *Wharton* brought their bill, ſetting forth the decree in the former cauſe; and inſiſted that all the judgment and other creditors provided for by the ſaid decree, had been paid, and that there remained ſufficient in the truſtees hands to pay the bond debts, and that the claim of Doctor *Young*, is to be conſidered as a gratuity or preſent only, and ought to be poſtponed to their demands.

The Maſter on the 16*th* of *December* makes a report of Doctor *Young*'s demands, and ſtates the ſeveral facts before mentioned relating to the two annuities and the bonds, and ſays that he did not find any pecuniary conſideration either for the bond, or the annuities, and alſo ſtates that ſeveral of the creditors of the late Duke for money really lent him are ſtill unpaid, and therefore whether the ſaid demands of Doctor *Young* amounting to 365*l.* ſhould take place of any of the debts ſubſequent in time, which were for a conſideration in money, he ſubmits to the judgment of the court.

LORD CHANCELLOR.

I cannot determine now how far Doctor *Young* is to be preferred to general creditors, or poſtponed, who are not parties to the decree, as they are not before the court.

The grant of his firſt annuity is on conſideration that the publick good is advanced by the encouragement of learning and the polite arts, and of the Duke of *Wharton*'s being pleaſed with Doctor

Young's attempts therein, and in conſideration likewiſe of the love he bore him.

The ſecond annuity is on conſideration of the Duke's being indebted to Doctor *Young* in the ſum of 350*l.* and in conſideration of the Doctor's leaving my Lord *Exeter*'s ſervice, and thereby loſing an annuity of 100*l. per ann.* during his life, which the Earl of *Exeter* had before agreed to ſettle upon him.

As to the firſt annuity, I am of opinion, that it is not a legal conſideration; for though it may be a very good inducement to a perſon for his doing it, yet it will not amount to a valuable conſideration in the eye of the law.

Giving up a pecuniary advantage at the time an annuity is granted, amounts to a valuable conſideration, as much as a ſum of money paid down at the time.

But then Doctor *Young* in his examination before the Maſter ſwears that he quitted the *Exeter* Family, and refuſed the 100*l. per ann.* annuity, which had been offered him for his life, provided he would continue as a tutor to Lord *Burleigh*, and this merely upon the preſſing ſolicitations of the Duke of *Wharton*, and the aſſurances he gave him of providing for him in a much more ample manner.

If this be the truth of the fact, and it is no where contradicted, it does certainly amount to a valuable conſideration.

For it has been truly ſaid that it will equally ariſe, where a perſon gives up a certain pecuniary advantage at the time of the grant, as where a ſum of money is actually paid down at the time.

There being arrears due on the firſt annuity, the promiſing not to ſue for them, was a good conſideration, and from that time it ceaſed to be a voluntary grant.

And though the grant of the firſt annuity may be voluntary, taken ſingly, yet the recital in the ſecond will alter the nature of it, and turn it into a valuable conſideration; for as there were arrears on the firſt, there is no doubt but this was a juſt and lawful debt, and the promiſing not to ſue for thoſe arrears was a good conſideration, and from that time the firſt annuity ceaſed to be a voluntary grant.

The bond can never be ſupported in any other light than a voluntary one, for it is recited to be given in conſideration of Doctor *Young*'s being at a very great expence, when he was candidate for a ſeat in parliament.

The expence a perſon was put to in ſtanding for member of parliament, is not a valuable conſideration to ſupport a bond given for that purpoſe.

I cannot conſider this as a valuable conſideration, for Doctor *Young* cannot be ſuppoſed to be a candidate for a ſeat in the houſe of commons upon any other view but ſerving his country, and the part the Duke of *Wharton* took in the affair can be conſidered no otherwiſe than as a deſire or requeſt at moſt.

The Doctor's annuities were by *Lord Chancellor* directed to be paid out of the money remaining in the hands of the truſtees, and which aroſe from the ſale of the truſt-eſtates, ſo as not to diſturb any payments that have been already made, and which are comprized in the ſchedule to the Maſter's report, that was confirmed in 1729.

Kampſhire verſus *Young*, *March* 16, 1740. Caſe 137.

AN award was made a rule of the court of the King's Bench according to a ſubmiſſion for that purpoſe, and an attachment has been granted for not obeying the award.

The court of King's Bench was the proper court to examine into the partiality of the arbitrators, as the award was made a rule of court there, which the plaintiff might have done by ſhewing cauſe why the rule for an attachment on the non-performance of the award ſhould not be made abſolute.

The plaintiff here has brought a bill ſuggeſting fraud and corruption in the arbitrators, and praying that the award may be ſet aſide.

The defendant pleads the award in bar to the plaintiff's bill, and inſiſts it is a fair and juſt award.

Lord Chancellor ſaid to the plaintiff's counſel, Why did you not proceed in the court of King's Bench, the proper court to examine into the partiality and corruption of arbitrators, which you might have done by ſhewing cauſe, why the rule for an attachment on the non-performance of the award ſhould not be made abſolute.

I remember, ſaid his Lordſhip, but one inſtance in this court of a bill brought for this purpoſe, which was in the caſe of *John Ward*.

But as the anſwer of the defendant to this bill is very looſe and general, and there is an expreſs ſubmiſſion to amend any errors which the arbitrators may have made in reſpect to the mutual accounts delivered in to them by the parties: let the plea ſtand for an anſwer, with liberty to except.

Cottington verſus *Fletcher*, *the ſame day*. Caſe 138.

MR. *Cottington*, who was formerly a papiſt, while he was of the *Romiſh* perſuaſion aſſigned an advowſon to the defendant for the term of 99 years.

The plaintiff, whilſt a papiſt, aſſigned an advowſon to the defendant for the term of 99 years, and having conformed has brought his bill for a reaſſignment of the term, ſuggeſting he had only aſſigned it in truſt for himſelf, and to avoid the penalties of the ſtatute of 3 *Jac.* 1. and 1 *W. & M.*

The defendant pleaded the Statute of Frauds and Perjuries in bar to the diſcovery, but by his anſwer admitted that the advowſon was aſſigned to him for the purpoſes charged by the bill.

Lord *Hardwicke* held the plea muſt be over-ruled, being coupled with an anſwer which admits the facts.

Since

Since his conformity to the proteſtant religion, he has brought a bill againſt the defendant for a reaſſignment of the term ſuggeſting that he had only aſſigned it in truſt for himſelf, and in order to avoid the penalties in the ſtatute of 3 *Jac.* 1. *cap.* 4. *ſec.* 1, *&c.* and 1 *W. & M. c.* 26. which veſt the preſentation of livings in the gift of papiſts in the two univerſities.

To this bill the defendant pleads the ſtatute of frauds and perjuries in bar to the diſcovery, and ſays that there was no declaration of truſt in writing, but by his anſwer, admits that the advowſon was aſſigned to him for the purpoſes charged by the bill, and that he never intended to take any benefit to himſelf, otherwiſe than in preſenting the other defendant Mr. *Loggin* to the church upon the next avoidance, for that he was recommended by Mr. *Loggin* to the plaintiff as a proper perſon for a grantee, and that he did not know the plaintiff above a month before the grant.

LORD CHANCELLOR.

I am of opinion that the plea ought to be over-ruled.

Undoubtedly, if the plea ſtood by itſelf, it might have been a ſufficient plea, but coupled with the anſwer, which is a full admiſſion of the facts, it muſt over-rule the plea.

If the admiſſion and confeſſion by the anſwer amounts to an admiſſion and confeſſion of a truſt for the defendant *Loggin* as to the firſt avoidance, the conſequence of this, is a reſulting truſt for the plaintiff after the preſentment to *Loggin* is performed.

And this is the caſe upon the ſtatute of frauds and perjuries, where the admiſſion of an expreſs truſt to one perſon, is likewiſe the admiſſion of a reſulting truſt for another.

If the defendant had demurred to this part of the bill, it might have been of a different conſideration.

For as this aſſignment was done in fraud of the law, and merely in order to evade the ſtatute of 3 *Jac.* 1. *ch.* 5. and 1 *Will. & Mar. ch.* 26.

Lord *Hardwicke* was inclined to think if the defendant had demurred to this part of the bill, ſuch a fraudulent conveyance would at the hearing have been made abſolute againſt the grantor,

I doubt at the hearing whether the plaintiff could be relieved, ſuch fraudulent conveyances being made abſolute againſt the grantor.

The

The act of 12 *Anne*, *ſtat.* 2. *ch.* 14. does not in the caſe of a papiſt make the whole truſt void, but only the turn upon an avoidance, which is veſted in the univerſities; in the preſent caſe the plaintiff conformed before there was any avoidance, and conſequently there was nothing veſted in the univerſities.

The act of 12 *Ann.* does not in the caſe of a papiſt make the whole truſt void, but only the turn upon an avoidance which is veſted in the univerſities.

The acts of papiſts are purged upon their conformity to the proteſtant religion, and are freed and diſcharged from any penalties and loſſes which they might otherwiſe ſuſtain in reſpect of their recuſancy. *Vide* 1 *Jac.* 1. *c.* 4. *ſect.* 2, 3.

Papiſts, on their conformity, are freed from any penalties they might otherwiſe ſuſtain in reſpect of their recuſancy.

Abraham verſus *Dodgſon*, *the ſame day.* Caſe 139.

A Bill was brought for a diſcovery.

The defendant anſwered to part, and demurred to part of the diſcovery.

When a defendant has anſwered to a diſcovery prayed by a bill, he cannot afterwards demur to it.

LORD CHANCELLOR.

The demurrer muſt be over-ruled, for it is an abſurdity after the defendant has anſwered to the diſcovery, that he ſhould afterwards demur; you may indeed anſwer to a bill of diſcovery, and demur to the relief, but that is quite different from what the defendant has done in the preſent caſe.

Though you anſwer to the diſcovery, yet you may demur to the relief.

More verſus *More*, *April* 6, 1741, *came before the court on petition.* Caſe 140.

MR. *Charles*, a clergyman of *Harrow on the Hill*, who married Miſs *Sophia More*, a ward of this court, without leave, to one *John Peck*; and Mr. *Ubank* and others, who were preſent when ſhe was married, appeared alſo, to anſwer the contempt of this court.

Several perſons appeared to anſwer the contempt in marrying Miſs *More*, a ward of this court, to one *John Peck*.

LORD CHANCELLOR.

Theſe are miſchiefs that want the correction and reformation of the legiſlature as much as any caſe whatever, and I believe it will very ſhortly come under the conſideration of parliament.

No caſe calls more for the interpoſition of the legiſlature than this.

Lord *Hardwicke* ſaid, the giving away a woman at her marriage, as the father, though not an eſſential thing, yet is a ceremony always required, and therefore committed the perſon who did it.

John Ubank muſt in the firſt place ſtand committed, who aſſiſted in conducting Miſs *More* out of her guardian's houſe, and gave her away at the wedding.

The giving away a woman at the time of her marriage, as the father, though it is not an eſſential thing, yet it is a cuſtom or ceremony which clergymen always require, and conſequently call for at the time.

To make perſons liable to a contempt, they muſt be concerned in the original contrivance, and be apprized of her being a ward of the court.

Indeed it is not barely having ſome hand in the tranſaction of the marriage which will make perſons liable to the cenſure of the court, but they muſt appear to have been concerned in the original contrivance of the marriage, and to have been apprized of the infant's being a ward of this court, which Mr. *Ubank* is proved to have been, and not denied by affidavits on his part.

Mr. *Charles*, the clergyman, who married Miſs *More* to *Peck*, comes next under conſideration.

The *canons* which have not the authority of an act of parliament are not binding on laymen.

It is very ſurpriſing when canons with reſpect to marriages have laid down directions ſo plainly for the conduct of eccleſiaſtical officers and clergymen (which though they have not the authority of an act of parliament, and conſequently are not binding upon laymen, yet certainly are preſcriptions to the eccleſiaſtical courts, and likewiſe to clergymen) that there ſhould be ſuch frequent inſtances of their departing from them, and introducing a practice entirely repugnant to them. *V.* 62. *Can.* 102, *&c. in* 1603. all of them extremely plain in their directions to eccleſiaſtical officers and clergymen: one would think no body ever read them, neither the officers of the ſpiritual courts, nor clergymen, or they could not act ſo diametrically opppoſite to them.

Proctors ſometimes ſtand at the door of the commons, and ſollicit perſons to take out licences, juſt in the ſame manner as the runners to fleet parſons do, which is not a very reputable behaviour in them.

Three pariſhes are put into the licences by the officer of the ſpiritual court.

I ſhould imagine that this is done in order to comply with the canon, by mentioning the pariſhes where the man and woman inhabit, and probably naming the third may be only upon a ſuppoſition that the perſons may have a houſe both in town and country, and therefore left to their option to marry in either.

No eccleſiaſtical perſon can diſpenſe with a canon, for they are obliged to purſue the directions in them with the utmoſt exactneſs, and it is in the power of the crown to do it only;

The canons muſt be purſued with the utmoſt exactneſs by eccleſiaſtical perſons, and a clergyman who preſumes to marry a perſon out of the pariſhes in which the man and woman reſide, is liable to penalties.

What Mr. *Charles* ſwears, I believe is true, that it is very frequent for ſurrogates to fill up the blanks in licences with the name of any other pariſh, and this in ſome meaſure may juſtify him, as it is the common method among clergymen; but then this will not excuſe with regard to the penalties in the canon, which expreſsly direct that no clergyman ſhall preſume to marry a perſon out of the pariſhes in which the man and woman reſide.

Upon the whole, as I ſaid in the caſe of the other perſon, Mr. *Charles* does not ſeem to me to have been at all concerned in the contrivance or deſign of doing this wrongful act, and therefore is not guilty of a contempt of the court; but I would recommend it to him to be more cautious for the future.

The clergyman not appearing to be concerned in the contrivance of this wrongful act, is not guilty of a contempt of the court.

However, I will not part with the licence, but will order it to be left in the regiſter's hands, that, if there ſhould be occaſion, the petitioner may apply to him for it.

The licence ordered to be left in the regiſter's hands, that the petitioner might have recourſe to it, if occaſion.

Smith verſus *The Duke of Chandos*, *upon exceptions*, *April* 9, 1741. Caſe 141.

LORD CHANCELLOR: Though this court have gone a good way in ſupporting a book of accounts which relates to a partnerſhip, yet I do not know any inſtance where they ſupported *items* in ſuch a book, that relate to the particular intereſt of the officer, deputed by the partners to keep this general book of account, ſeparate from the partnerſhip affairs.

Items in a partnerſhip account, relating to the particular intereſt of a bookkeeper, will not be ſupported in this court.

Waite verſus *Whorwood*, *on exceptions*, *April* 10, 1741. Caſe 142.

IF an executor changes and alters the nature of a teſtator's eſtate, it has been inſiſted that this is a converſion by the executor, and that as money has no ear mark, you cannot follow it, but the executor by ſuch tranſactions has made himſelf liable to a *devaſtavit*: now in general this rule is right; but if an executor, for the benefit of the teſtator's eſtate, ſhould inveſt part of it in the funds, or ſhould transfer the money from one particular ſtock, and inveſt them in another, this is not a converſion, but you may ſtill follow it, as much as if it had continued in the ſame condition as at the teſtator's death.

If an executor, for the benefit of the teſtator's eſtate, ſhould inveſt part of it in the funds, or transfer money from one ſtock to

other

other, this is not a converſion or appropriation by the executor of a teſtator's eſtate, but you may ſtill follow it, as much as if it had continued in the ſame plight or condition as it ſtood in at the death of the teſtator; for in the nature of the thing it ſelf, the executor could do no otherwiſe, where a teſtator's eſtate is ſtanding out in the funds, for of courſe they will require to be varied and changed according to the circumſtances of things.

Caſe 143. *Heron* verſus *Heron*, *April* 18, 1741.

A freeman of *London* taking the advantage of his ſon's neceſſities, in conſideration of a bond for ſecuring the ſon an annuity of 50 *l.* prevails on him to releaſe the ſhare he had in the orphanage part; the father alſo prevailed on another of his ſons, to give him a releaſe of his ſhare of the orphanage part, in conſideration of an annuity of the ſame nature: but there were not the ſame proofs of his being forced into the releaſe, and the father had at times advanced him 3 or 400 *l.* Lord *Hardwicke held, the plaintiff being turned out of doors, left deſtitute, and void of maintenance, a leaſe extorted cannot be ſupported.*

Lord Hardwicke was alſo of opinion, the other ſon was equally intitled to be relieved.

A Father taking the advantage of his ſon's neceſſities, to which he was reduced by his unkind uſage, prevails upon him (in conſideration of a bond for ſecuring to the ſon an annuity of 50 *l. per ann.*) to give a releaſe of the ſhare he might be intitled to in the orphanage part of his father's eſtate, who was a freeman of the city of *London*.

By the cuſtom of *London* the orphanage part muſt go in equal ſhares, and if the father turns the money into any other ſhape, which he thinks may take it out of the cuſtom, yet the court has relieved the children.

The father likewiſe prevails upon another of his ſons to give him a releaſe (in conſideration of an annuity of the ſame nature) of his ſhare of the orphanage part; and at the foot of the releaſe the ſon is bound in the penalty of 8000 *l.* not to make any claim hereafter to his orphanage ſhare, but there are not the ſame proofs of this ſon's being forced into the releaſe, for the ſake of maintenance or mere neceſſity, and it appeared in evidence too, that his father in his life-time had advanced him with ſmall ſums to the amount of 3 or 400 *l.*

LORD CHANCELLOR.

There is no doubt, by the general rule of the law of the land, but a father may judge of the merits of his children, and may diſpoſe of his eſtate in ſuch ſhares and proportions amongſt them as he thinks proper.

But the cuſtom of *London* has laid a reſtriction as to a freeman's perſonal eſtate, that the orphanage part ſhall go in equal ſhares among the children, and he cannot deprive them of it; this has produced certain rules in this court which have long prevailed, to prevent any evaſion by a father of the cuſtom; and therefore if the father turns his money into any other ſhape, and which he thinks may take it out of the cuſtom, yet the court has relieved the children.

Notwithſtanding

Notwithſtanding, this a father may, by laying out his perſonal eſtate in land, take it out of the cuſtom, which is latitude enough, and a ſufficient power over the cuſtomary eſtate.

The city of *London* goes upon this conſideration, that as a father in the way of trade has great occaſion for the perſonal eſtate, it would be prejudicial, even to the father himſelf, to alter the nature of it.

As it is the intent of the cuſtom, that the children of a freeman, by means of it, may either be advanced in marriage, or put out in the world by way of trade, there is no doubt but agreements for ſuch purpoſes between a freeman and his children will be ſupported in equity. *Vid. The caſe of Metcalf and Ives, June* 18, 1737. 1 *T. Atk.* 63.

Conſider then if the preſent is in any reſpect like theſe caſes, I think clearly it is not; I ſpeak as to the plaintiff in this cauſe.

Whether the children, by acts of diſobedience, or any other miſbehaviour, had merited this uſage from the father, I cannot enter into, nor is it of any weight in the preſent conſideration.

The plaintiff was turned out of doors, left intirely deſtitute, and void of a maintenance, therefore it is impoſſible to ſupport a releaſe extorted from a ſon under ſuch circumſtances.

Suppoſe the plaintiff had been intitled to a tenancy in tail of real eſtate, and the father a bare tenant for life, had taken ſuch an advantage of his ſon's neceſſities, to draw him in to join in any conveyance which would deſtroy his remainder, this court, upon very ſlender evidence of ſuch a practice in a father, has relieved the ſon.

Where a father, tenant for life, draws in a ſon, tenant in tail, to join in a conveyance which would deſtroy his remainder, this court, on ſlender evidence, will relieve the ſon.

The rule of this court is, that if the father leaves no wife, (and ſome of the children are barred by any agreement between the father and them) the child who is not barred muſt take the whole of the orphanage ſhare, and the father ſhall not have the advantage of the other children's being excluded from their ſhares in the orphanage part.

I take it to be the rule of the cuſtom of *London*, that if a father will oblige a ſon merely for the ſake of maintenance, and not for advancement in marriage or trade, to releaſe his right to the orphanage ſhare, that ſuch releaſe is abſolutely void; for a father, by the laws of nature, is obliged to maintain his children, and ſuch an attempt in a father is a plain fraud upon the cuſtom.

If a father, merely for the ſake of maintenance, and not for advancement in marriage or trade, oblige his ſon to releaſe his right to the orphanage ſhare, ſuch releaſe is abſolutely void.

Therefore, not only the plaintiff, but the other ſon, who is one of the defendants, though he does not appear by any evidence to have been under the ſame difficulties with the plaintiff, yet ſhall be equally relieved.

The executors under the will of the father, have each 100*l.* given them for their trouble in looking after the eſtate; the queſtion in reſpect to them was, whether they ſhould abate in proportion with the reſt of the legatees, the perſonal eſtate being deficient to anſwer the whole.

Lord *Hardwicke* inclined they ſhould; but Mr. Attorney General inſiſting, there was a caſe lately determined at the *Rolls*, that the executor ſhould not abate in proportion with the other legatees; the counſel for the executors were at liberty to ſearch for caſes, and to mention it another day.

Caſe 144.

Ex parte Angel, April 14, 1741.

Where ſome of the undertakers under the act of 4 *Ann. c.* 14. in regard to briefs, are dead, in a bill for an account, their repreſentatives need not be brought before the court, for they are each anſwerable, the one for the other.

IN 1731 a very dreadful fire happened at *Blandford* in *Dorſetſhire*, and very ſoon after the fire, great contributions were voluntarily made in the counties of *Dorſet* and *Somerſet*, on behalf of the ſufferers. In 1732 a brief iſſued on behalf of theſe unfortunate people; in the ſame year 11,500 printed briefs were delivered by the ſufferers to the undertakers, who had been appointed according to the ſtatute of 4 *Ann. c.* 14. one *Stanley* was agent for the undertakers, in receiving all the money from them, which they uſed to ſend to the ſufferers, and in paying that money to the ſufferers; and in *London* he was a general agent in negotiating the whole affair relating to the briefs: the number of the undertakers were at firſt ſeventeen, the major part of them lived at *Stafford*, kept an office there, and likewiſe the book which the act of parliament in the 2d *ſect.* directs, wherein entries are to be made of the number of printed briefs they receive, of the times when thoſe briefs are ſigned, and ſent away, to what pariſhes and places, and the time of receiving the ſame back, and the money collected thereon, and the ſaid printed copies ſo received back, are to be depoſited and left with the regiſter of the court of Chancery.

Soon after the undertakers received the briefs, they circulated them throughout the kingdom, and ſhortly after they had ſo done, they received directions from the ſufferers not to ſend any briefs into the counties of *Dorſet* and *Somerſet*, but thoſe directions came too late.

At *Eaſter* 1733 the undertakers had received from collections which had been made by the briefs 6077*l.* on the 8th of *February* following,

following, they ſent to Mr. *Stanley* 4000*l.* on behalf of the ſufferers, who paid the money to them accordingly: the undertakers made no other payment till the 3d of *July* 1735, and then they paid the ſufferers a further ſum of 3000*l.* by the 8th of *Auguſt* they had received in the whole 7914*l.* 7*s.* 7d. and on that day they made a further payment of 500l.

On the tenth of *March* 1740 a petition was preferred to this court, on behalf of the ſufferers, againſt the undertakers, and likewiſe againſt *Stanley*, complaining amongſt other things, that the undertakers had not depoſited with the regiſter of the court any of the briefs, according to the direction of the act of parliament; and that by the negligence of the undertakers, a great number of the briefs were never returned, and that they had not duly accounted.

After filing of this petition, the undertakers brought before the regiſter, and depoſited with him, 10845 briefs, and ſaid that they had 73 in hand ready to be delivered, ſo that 582 were not returned at all; and even of thoſe that were returned, 629 had no money marked upon them.

It was ſworn, on the behalf of the undertakers, that there are always a great number of briefs that are never returned; but it was proved that there was never ſo great a number miſſing as in the preſent caſe.

At the time this petition was preferred ſeven of the undertakers out of the ſeventeen were dead, and it was ſubmitted on the part of the ſurvivors, that the repreſentatives of the undertakers that were dead ought to be brought before the court.

LORD CHANCELLOR.

I am of opinion that it was not neceſſary to bring theſe repreſentatives before the court, and that an order for accounting ought to be made againſt the ſurvivors; I do not at all like the behaviour of theſe undertakers in what they have done.

The undertakers are to be conſidered as one body, and they are each of them anſwerable the one for the other, for which reaſon the objection for want of bringing the repreſentatives of the dead undertakers before the court is quite immaterial.

It has been ſaid on the part of Mr. *Stanley*, that he at leaſt is by no means to blame in the preſent tranſaction, for that he was merely an agent for the undertakers, in receiving and paying their money to the ſufferers.

But Mr. *Stanley* ought not to be conſidered in ſo confined a light, for he was generally intruſted with the management of the briefs in *London*; conſider then how this matter ſtands with regard to the defendants.

At *Eaſter* 1733 the undertakers had received 6077*l.* on the 8th of *February* following they only paid 4000*l.* part of that money, and kept the reſt of it in their hands till the 3d of *July* 1735; then, indeed, they made another payment of 3000*l.* by the eighth of *Auguſt* 1736 they had received in the whole 7914*l* 7*s.* 7*d.* and on that day it is they only make a further payment of 500*l.* there is no great weight indeed to be laid upon this latter circumſtance, but on the former there is a ſtrong foundation for charging the undertakers with male practice.

There are two methods which the ſtatute of queen *Anne* preſcribes, in order to provide for the undertakers acting fairly; one, that a book be kept by them, wherein entries are to be made of the number of the printed briefs they receive, of the times when the briefs were ſigned and ſent away, to what pariſhes and places, the times of the receiving the ſame back, and the money thereon collected; this book the managers had kept at *Stafford*, and perhaps that may not be an improper place, as that town is about the center of the kingdom: however, it was proper that they ſhould have had a duplicate of this book in *London*, where the general reſort of people is, for the act directs that all perſons ſhall have free acceſs to it.

The other method which the act preſcribes is, that the undertakers ſhould depoſit the briefs with the regiſter of this court, after they are returned to them, and yet, till the petition was actually preferred, not one brief was left with the regiſter.

This is a very extraordinary neglect in the undertakers, for the words of the act are, *ſect.* 2. " That if the whole number of printed copies of ſuch briefs, ſo received of the printer, ſhall not " be duly returned, as is hereby required, the undertaker or under- " takers ſhall, for every printed copy which ſhall be found wanting, " and not returned as aforeſaid, by default of them or their agents, " forfeit the ſum of 50*l.* unleſs he or they ſhall make ſufficient " proof to the ſatisfaction of the court of Chancery, of the ſaid " briefs ſo wanting being loſt or deſtroyed by inevitable accident, " and of what money was really and truly collected thereon, and " fully account for and pay the ſame".

In this act there is another clauſe, *ſect.* 4. and that relates to the manner of accounting.

The

The words of that clauſe are, " That the ſaid undertaker or un-
" dertakers ſhall within two months after the money's reſpectively
" received, and after due notice thereof to the ſufferers (who are to
" be admitted to controvert the ſame), account before one of the
" maſters of the court of Chancery, to be for that purpoſe appoint-
" ed by the Lord Chancellor, Lord keeper, or commiſſioners for the
" cuſtody of the great ſeal of *England* for the time being, for all
" the money by them received on account of ſuch letters patents
" and proceſs, and ſhall produce before him an exact account of
" the reſpective printed briefs by them delivered out, and re-
" ceived back, and left with the regiſter as aforeſaid, and there-
" upon the ſaid Maſter ſhall proceed to make his report of what
" ſhall be found due on ſuch account; and the report, being con-
" firmed by the court of Chancery as uſual, ſhall be a charge on
" the ſaid undertaker, or undertakers, and ſhall be carried into exe-
" cution againſt him or them, as if decreed in a ſuit there depending."

In reſpect of the number of briefs which the undertakers have at laſt returned, they have only left with the regiſter ten thouſand eight hundred and forty-five; they ſay indeed they have ſeventy-three more, ready to be produced; but even when thoſe are deducted, there are five hundred and eighty-two which remain unaccounted for, and of thoſe which are produced there are ſix hundred and twenty-nine, which have no money marked upon them at all.

The loſs of eight hundred and eighty-two briefs is a very great one, and though the affidavits made on the part of the defendants do ſet forth, that there are always a great number of briefs which never come back to their hands, yet they do not pretend to ſay, that ever the number was ſo great as in the preſent caſe.

In order to account for this great number of briefs that are miſſing, it has been ſaid, that very ſoon after the fire, the ſufferers received great collections from the counties of *Dorſet* and *Somerſet*, and upon that account the ſufferers ſent directions to the undertakers, that they ſhould not circulate briefs in thoſe two counties, but thoſe directions came too late, and that is one reaſon why many of the briefs were never returned to the undertakers.

And it is indeed true that this reaſon may account for a great part of the 629 briefs whereof no money is marked; but it does not ſeem to account for the 582.

Therefore his Lordſhip was pleaſed to order the undertakers and *Stanley* to account accordingly.

Caſe 145. *Guriſh* verſus *Donovan*, *April* 14, 1741.

A bill here praying relief as well as a diſcovery, whilſt the plaintiff was proceeding at law on the ſame account, he amended by ſtriking out the part which prayed relief, and the bill thereupon was diſmiſſed of courſe, as praying nothing but a diſcovery, and the coſts of the diſmiſſion were taxed to the defendant at 38*l.* The plaintiff recovered judgment againſt the defendant in damages and coſts to the amount of 440*l.* and petitions to ſet off the coſts at law againſt the coſts here. *Lord Hardwicke thought it reaſonable, and if the precedents (which he ordered to be ſearched) would juſtify him, ſaid, he would grant the petition.*

THE plaintiff brought his bill againſt the defendant, and by that bill prayed relief as well as a diſcovery: he likewiſe proceeded at law in an action againſt the defendant, on the ſame account; upon this an application was made to the court that the plaintiff ſhould make his election in which court he would proceed; thereupon he elected to proceed at law, but was allowed to proceed in this court likewiſe with regard to ſo much of his bill as ſought a diſcovery, and amended his bill on payment of coſts by ſtriking out that part of it which tended to pray relief.

The bill was thereupon diſmiſſed of courſe by reaſon it prayed nothing but a diſcovery, the coſts of the diſmiſſion were taxed to the defendant at 38*l.*

The plaintiff recovered judgment againſt the defendant in his action at law, and the damages together with the coſts amount to 440*l.*

For thoſe damages and coſts at law the defendant was taken in execution and now lies in cuſtody; but notwithſtanding he has thought proper to take out an attachment againſt the plaintiff for the coſts in this court.

A petition is thereupon preferred to the court on behalf of the plaintiff, praying that he might deduct the coſts which he had incurred in this court out of the coſts and damages which he had recovered againſt the defendant at law.

Lord Chancellor ſaid the petition ſeemed to him to be very reaſonable, and if the precedents of the court would juſtify him in granting it he would certainly do it: but he doubted whether the practice of the court would allow of it by reaſon that the bill of diſcovery had been diſmiſſed out of court: his Lordſhip ſaid he would not make any order on this petition: but directed it to ſtand over, that the plaintiff might ſearch for precedents.

Lady

Lady Coddrington verſus *England*, *April* 18, 1741. Caſe 146.

AN iſſue had been directed in this court to try a cuſtom ſet up by the plaintiff, who was a landholder in a pariſh in *Glouceſterſhire*, whether ſhe had a right of incloſing, excluſive of all right of common in the houſeholders, which was tried at *Glouceſter* at the laſt ſummer aſſizes, and a verdict found for the cuſtom; it comes now before this court upon the equity reſerved, as to coſts againſt the defendant in this court.

If this had been barely a bill to perpetuate the teſtimony of the witneſſes to the cuſtom, and the plaintiff had gone to the examination of her witneſſes, and had had the fruit of her bill, I ſhould not have thought either the plaintiff or the defendant intitled to coſts in this court.

Where a plaintiff on a bill to perpetuate the teſtimony of witneſſes, has examined, and thereby had the fruit of her bill, neither herſelf, nor the defendant, are intitled to coſts.

But the plaintiff in this caſe was under a neceſſity of coming into this court for relief againſt the vexation of the defendants who had brought a multiplicity of actions, no leſs than eight, four at one time and four at another, when the cuſtom might have been tried at once, and in one action: I muſt decree therefore that the cuſtom found by the verdict be eſtabliſhed, and that the plaintiff be quieted in the enjoyment and poſſeſſion of her incloſures, and that the defendant do pay the plaintiff her coſts both in law and equity.

When a multiplicity of actions have been brought where the cuſtom might have been tried in one, it is ſuch a vexation, that the plaintiff ſhall have the coſts both in law and equity.

Lord Sidney Beauclerk and Topham Beauclerk his ſon verſus *Doctor Mead, executor of Richard Topham, Eſq; James Mead and James Pearce, executors of Lord Chief Juſtice Reeve*, *April* 15, 1741. Caſe 147.

RICHARD *Topham* Eſq; by his will dated the 2d of *June* 1729. deviſed all his freehold and copyhold lands, manors, rents, tenements and hereditaments whatſoever lying in the burrough of *New Windſor*, *&c.* in the counties of *Berks* or *Bucks*, to his ſiſter *Arabella Reeves* for life, without impeachment of waſt, remainder to truſtees to preſerve contingent remainders, remainder to the firſt and every other ſon of the body of his ſaid ſiſter, remainder to the uſe of the heirs female of his ſaid ſiſter, and for default of ſuch iſſue to *Thomas Reeve*, Eſq; for his life, and from and after his deceaſe to the Lord *Sidney Beauclerk* for his life, remainder to truſtees during Lord *Sidney*'s life to preſerve contingent uſes, remainder to the firſt ſon of Lord *Sidney*'s

A will is ambulatory till a teſtator's death, nor till then can money directed to be laid out in land, be conſidered as land.

Sidney's body, and the heirs male of the body of ſuch firſt ſon, with like remainder to every other ſon of Lord *Sidney*'s body, and ſeveral remainders over: and as to his leaſehold eſtate, he deſired that it might go to the ſame perſons, and for the ſame eſtates as his freehold is limited, as far as by law it may: and makes *Arabella Reeve*, Lord Chief Juſtice *Reeve*, and Doctor *Mead*, his executors: the ſurpluſage of his perſonal eſtate he deſired might be laid out in the purchaſe of lands of inheritance to be ſettled to the ſame uſes as his freehold lands are above ſettled.

By a codicil dated the 19*th* of *June* 1730. he gave to the plaintiff Lord *Sidney* an annuity or rent-charge of 100*l. per ann.* to commence from and immediately after the teſtator's death, until the eſtate limited to him and the heirs males of his body ſhall come to be poſſeſſed by him, to be paid quarterly, which annuity ſhall be iſſuing out of the teſtator's freehold lands, whereof the remainder is limited to the ſaid plaintiff and the heirs of his body, and reciting that he had by his will, after the deceaſe of his ſiſter *Arabella Reeve*, and in default of iſſue male and female from her body, deviſed all his freehold and copyhold lands, manors, *&c.* lying in the burrough of *New Windſor*, *&c.* to *Thomas Reeve*, Eſq; during his natural life; he ſays now my will is, that in caſe the ſaid *Thomas Reeve* and the ſaid Lord *Sidney Beauclerk* ſhall ſurvive the ſaid *Arabella Reeve*, that then my dwelling-houſe, *&c.* ſhall immediately come to the ſaid *Thomas Reeve*, to be enjoyed by him for his ſole uſe during the term of his natural life, and after his deceaſe to the ſame perſons reſpectively as his lands.

A teſtator ſays, As to the reſt and reſidue of his lands, *&c.* his will is, that the annual profits ſhall be equally divided between Mr. *Reeve* and Lord *Sidney*, and nothing ſaid about the perſonal eſtate.

But as to the reſt and reſidue of his lands, tenements and hereditaments, by the ſaid will given to the ſaid *Thomas Reeve* for and during his natural life, the teſtator's will is, and he thereby deviſes, limits and appoints, that the annual profits of the ſame ſhall from and immediately after the deceaſe of his ſaid ſiſter be equally divided between the ſaid *Thomas Reeve* and Lord *Sidney Beauclerk*, ſhare and ſhare alike, during their joint lives; and his will is, that the annuity or yearly rent-charge of 100*l. per ann.* be taken and accounted as part of his dividend of the ſaid annual profits of the ſaid lands, tenements and hereditaments.

By all the rules of grammar as well as law, the words *reſt and reſidue* muſt relate to ſomething that went before, and where the teſtator calls it by the name of real eſtate, can never be ſaid to affect his perſonal.

The will and codicil was proved by *Thomas Reeve* alone in his life-time, and there was a ſurplus of Mr. *Topham*'s perſonal eſtate, conſiſting of 2000*l. Bank* ſtock and about 3500*l.* upon a mortgage, in the names of *Richard Topham* and *Thomas Reeve*, which ſtock and money on mortgage continued till after the death of Lord Chief Juſtice *Reeve*, who died the 16*th* of *January* 1736. and made his

will, and thereof the defendants *James Mead* and *Pearce* executors, and received the dividends and intereſt of the ſaid ſtock and mortgage during his life from and after the death of the ſaid *Arabella Reeve*: and after his death the defendant Doctor *Mead*, as ſurviving executor of *Topham*'s will, proved the ſame, and became poſſeſſed of the ſaid *Bank* ſtock, and received the money due upon the mortgage.

Richard Topham died in *September* 1730. and *Arabella Reeve* died the 20*th* of *September* 1732.

This cauſe was heard upon bill and anſwer; and the only queſtion in it was, whether the plaintiff Lord *Sidney Beauclerk* was intitled to a moiety of the intereſt and profits of the ſurpluſage of *Topham*'s perſonal eſtate, during the life-time of the Lord Chief Juſtice *Reeve*, and from and after the death of *Arabella Reeve*.

LORD CHANCELLOR.

To judge of the words, and likewiſe of the intention of the teſtator, it is neceſſary that the will and codicil ſhould be taken together; and it is obſervable in the firſt place that all the charges in this will relate merely to the freehold and copyhold lands.

If conſidered merely upon the words, and taken abſtractedly without any regard to the deſign or intention of the teſtator, there is no colour in the world to ſay that they can extend to make any diſpoſition of the profits, and produce, ariſing out of the ſurpluſage of his perſonal eſtate.

For the reſt and reſidue of his lands, tenements and hereditaments, can never mean any thing more than the reſt of the real eſtate of Mr. *Topham*.

But then it has been inſiſted on for the plaintiff, that the words of the will are not to carry much weight in the conſideration of the court, but the will muſt be conſtrued in conformity to the intention of the teſtator, which appears pretty plainly to have been, that Lord Chief Juſtice *Reeve* and Lord *Sidney* after the death of *Arabella Reeve* ſhould take in moieties.

And that if a man makes a will and diſpoſes of lands, that ſuch deviſe will paſs, not only what the law will paſs, but what equity paſſes likewiſe, which is money directed to be laid out in land.

But I am of opinion this conſtruction can never prevail without the utmoſt force and torture of the words.

I allow that the rule laid down by the bar, that money directed to be in, veſted in land, muſt be conſidered as land, is very right, but then it is truly ſaid the will muſt be compleat, for it is ambulatory till the teſtator's death, nor till then can it be conſidered as land; for would not his perſonal eſtate have been ſubject to all intents and purpoſes to his debts, ſuppoſing there had been any, notwithſtanding the deviſe that the ſurplus ſhould be inveſted in land?

Suppoſe Mr. *Topham* had given by his codicil all his lands to another perſon and his heirs, can any body doubt whether this would not have made a total variation as to the deviſees under the will?

Thus much for the words, next for the intention of the teſtator.

Now it is very far from being clear to me that it was his intention, that the intereſt and produce of the ſurpluſage of the perſonal eſtate, during the joint lives of Lord Chief Juſtice *Reeve* and Lord *Sidney*, ſhould go in moieties to them in the ſame manner with the rents and profits of the real eſtate; but poſſibly it may be doubtful what his intention was in this reſpect, and then it will come to this queſtion, whether he has uſed proper words to manifeſt ſuch intention, and if he has not, the law muſt take place.

When in the codicil he begins with a recital of the words of the will, that he had deviſed all his freehold and copyhold lands, manors, rents, tenements and hereditaments, *&c.* that he ſhould not likewiſe take notice of the money directed to be veſted in land and ſettled to the ſame uſes, is very extraordinary, ſuppoſing it to be his intention, as the plaintiff's counſel contend, that the intereſt and produce of it ſhould go in moieties till laid out in land.

The words *reſt and reſidue* muſt be taken by all the rules of grammar, as well as law, to relate to ſomething that went before; and it is abſurd to ſay that this part of *Topham*'s eſtate, which is now in queſtion in the cauſe, ſhould be equally affected, whether the teſtator calls it by the name of his perſonal or his real eſtate.

Beſides too, when the teſtator in the codicil ſays, that the annuity or yearly rent-charge of 400 *l. per ann.* above granted to Lord *Sidney Beauclerk*, ſhall be taken and accounted as part of his dividend of the ſaid annual profits of the ſaid lands, tenements and hereditaments, how can it have been imagined that the teſtator would have with ſo much nicety and care provided againſt Lord *Sidney*'s incumbring the real eſtate by his demand on account of the rent-charge, when Lord Chief Juſtice *Reeve* might ſo eaſily have ſatisfied the annuity out of the intereſt and produce of the ſurpluſage of the perſonal eſtate, if it had been *Topham*'s intention, this ſhould likewiſe have gone in moieties. *The bill diſmiſſed.*

April 24, 1741. Caſe 148.

IN the cauſe of *Heron* verſus *Heron*, which came on again to day, the *Attorney General* mentioned to the court the caſe of *Newton* verſus *Houghton*, heard at the *Rolls*, *October* 31, 1734. to ſhew that the executors of *Heron* ought to retain their legacies of 100*l.* and not to abate in proportion with the reſt of the legatees.

Where a legacy is given to an executor generally, or for his care and pains, it makes no difference; for if there is a deficiency of aſſets, he muſt abate in proportion with other legatees.

LORD CHANCELLOR.

The caſe of the *Attorney General* verſus *Robins*, 2 *Wms.* 23. * is directly contrary to this reſolution, and determined ſo by the very ſame judge Sir *Joſeph Jekyl* about twelve years before the caſe of *Newton* verſus *Haughton*.

There is another caſe in 2 *Vern.* 434. called *Fretwell* verſus *Stacy*, which is alſo differently determined: "a legacy given to executors "for care and pains; if a deficiency of aſſets, they muſt abate in "proportion with the other legatees.

I muſt own theſe two laſt fall in with my own opinion much more than the latter caſe.

For where legacies are given to executors for their care and pains, I am very unwilling to diſtinguiſh them from common legatees; becauſe whether the words *care and pains* are expreſſed in the will, or whether it is given generally without theſe words, it intirely depends upon the whim of the drawer of the will, and is ſtill but a legacy, and not more ſo than any other, and therefore there ought not to be ſuch a diſtinction as Mr. *Attorney General* contends for upon ſuch ſlight grounds.

Beſides, it would be attended with great inconveniences; therefore let the executors abate in proportion with the reſt of the legatees.

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* In the caſe of *The Attorney General* verſus *Robyns*, it was urged the 60*l.* given to the executors being ſaid to be for their care and pains, the ſame became a debt: and the executors *virtute officii*, being intitled to a preference, might pay ſuch their own debt firſt.

Sed per cur. The executors, if they pleaſe, may renounce; and the legacies to them are but legacies, and ſhall abate in proportion: it cannot be a debt, in regard that can never be a debt to the executors, that was not ſo to the teſtator. 2 *Wms.* 25.

Caſe 149. *Bainton and others* verſus *Ward*, *April* 24, 1741.

G. W. having a power to charge his eſtate with 2000 *l.* by his will gives 500 *l.* a-piece to his two ſiſters, and dies in debt to the plaintiffs: conſidered as the perſonal eſtate of G. W. and ſubject to his debts.

GEORGE *Ward* having a power to charge *Iſabella* his wife's eſtate with a ſum not exceeding 2000 *l.* and having by his will deviſed 500 *l.* a-piece to his two ſiſters, and dying in debt to the plaintiffs,

The queſtion was, whether that appointment to the two ſiſters ſhould be good to defeat the creditors from having ſatisfaction out of the 2000 *l.* as part of *George Ward*'s perſonal eſtate.

Mr. *Brown* for the plaintiff cited *Laſſells* verſus *Cornwallis*, 2 *Vern.* 465. and *Shirley* verſus *Ferrars*, the 3d or 4th cauſe before Lord *Talbot*.

This power was given by a ſettlement after the marriage of *George Ward*, as follows: " provided always, and it is hereby further de- " clared by and between the parties to theſe preſents, that *George* " *Ward* ſhall, by appointing two truſtees under any deed in his life- " time, or by his will at his death, charge all the wife's eſtate with " a ſum not exceeding 2000 *l.*"

LORD CHANCELLOR.

I am of opinion that this ought to be conſidered as the perſonal eſtate of *George Ward*; where there is a general power given or reſerved to a perſon for ſuch uſes, intents and purpoſes as he ſhall appoint, this makes it his abſolute eſtate, and gives him ſuch a dominion over it, as will ſubject it to his debts.

For it would be a ſtrange thing, if volunteers, as the legatees are, ſhould run away with the whole, and that creditors for a valuable conſideration ſhould ſit down by the loſs without any relief in this court.

The caſe of *Shirley* verſus *Lord Ferrars* is directly in point.

This money was not ſettled at all, but abſolutely in the power of *George Ward*, and conſequently there can be no doubt but his creditors muſt have the benefit of it.

If a power to diſpoſe by appointment of a reverſion in fee, be not made uſe of, yet it ſhall be aſſets.

Suppoſing a man has a power to diſpoſe by appointment of a reverſion in fee, and makes no diſpoſition of it, yet it ſhall be aſſets to ſatisfy ſpecialty creditors.

April

April 24, 1741. Caſe 150.

MR. Juſtice *Mitchell* this day by petition prayed to be diſcharged out of the cuſtody of the *Fleet*, as a cloſe priſoner within the walls thereof: he was committed for being a principal contriver in marrying Miſs *Hughes*, a ward of this court, a fortune of thirty thouſand pounds, to a ſchoolmaſter of *Iſlington*, one *Science*, by trade a watchmaker.

Serjeant counters who have been guilty of male practices, by the ſtat. of *Weſtm.* ſhall not be allowed to be heard any more in the way of the profeſſion.

There were ſeveral aggravating circumſtances in this caſe, and upon the whole the moſt flagrant contempt of the court that ever appeared before it, which was the reaſon of the Chancellor's ſetting a mark upon him, by making it part of the order of commitment, that *Mitchell* as well as *Science* ſhould be kept cloſe priſoners within the walls of the *Fleet* at the peril of the warden.

In purſuance of this order *Mitchell* had been a cloſe priſoner about five weeks, and now by affidavits ſets forth the deplorable condition of himſelf and family from the unwholeſomneſs of the priſon, the illneſs of his ſon and wife from their conſtant attendance upon him, his own ill ſtate of health, and ſeveral other circumſtances, and ſubmits to make any reparation to the relations of the Lady which the court ſhall direct, ſubmits likewiſe to be reſtrained from acting as a council: the *ſuperſedeas* to diſcharge him from the commiſſion of the peace iſſued ſome time before this application.

The counſel for Mr. *Hughes* the uncle of the young Lady not very much oppoſing it, my *Lord Chancellor* made an order for his diſcharge upon his attorney's undertaking to pay the whole expence of the former petition againſt him by the uncle Mr. *Hughes*, and all other proceedings in conſequence of the petition.

But as to Mr. *Mitchell*'s ſubmiſſion to be reſtrained from acting as a barriſter, I ſhall at preſent, ſaid *Lord Chancellor*, give no other directions but that according to his own ſubmiſſion he ſhall be reſtrained from acting as ſuch till further orders.

Becauſe from any inquiries that I have hitherto made, I am not ſatisfied what is the proper courſe to remove him from practiſing as a barriſter.

Where a ſolicitor is guilty of male practices, he may be degraded by applying to ſtrike him out of the roll of ſolicitors.

If Mr. *Mitchell* had continued a ſolicitor there had been no difficulty, for the ready and proper way would have been to have ſtruck him out of the roll of ſolicitors: and ſurely it would be very hard when he

has advanced himſelf to a degree of greater rank and honour in the law, that there ſhould not be ſome precedents for degrading a perſon who by his male practices and miſbehaviour has rendered himſelf highly unworthy of the character he has taken upon him of a barriſter at law.

But whether this ought to be done by diſbarring him, or whether the court by it's own power and authority will ſilence him for the future, I ſhall not at preſent determine: but have already mentioned it to Lord Chief Juſtice *Lee*, who will aſſiſt me in finding out precedents in ſuch caſes.

The ſtatute of *Weſtm.* 1. *c.* 29. ſays, that attornies and ſerjeant counters who have been guilty of any male practices, and have acted unbecoming their profeſſion, may be ſilenced, and not be allowed to be heard any more in the way of the profeſſion.

My Lord *Coke* in his 2d *Inſtitute & Expoſition*, upon *Weſtm. prim. c.* 29. *page* 214. is clearly of opinion, that apprentices at law, which is another name for barriſters, are included under the head of ſerjeant counters.

But however I will make no other order at preſent than what I mentioned before.

N. B. Science the huſband was ſtill left in cuſtody.

Caſe 151. *Garth* verſus *Ward*, *April* 25, 1741.

An heir at law is as much at liberty to invalidate the will, as the deviſees to eſtabliſh it; and ſuch a ſuit is to all intents a *lis pendens*.

A Bill was brought by three deviſees againſt the heir at law of the teſtator, to perpetuate the teſtimony of witneſſes, and to eſtabliſh the will.

It was filed in *May* 1736. *Willis*, one of the defendants in the preſent cauſe, purchaſed the third of the eſtate from one of the deviſees the 2d of *January* following, the anſwers did not come in till the latter end of *January*.

It was objected by *Willis*'s counſel, that depoſitions taken in the former cauſe on behalf of the heir at law, the plaintiff in the preſent, to prove the deviſees papiſts, could not be read againſt the defendant *Willis*, becauſe this is merely a bill for eſtabliſhing a will, and does not make ſuch a *lis pendens* as will affect this defendant, eſpecially as the anſwer did not come in till after the purchaſe.

LORD

LORD CHANCELLOR.

It would be attended with great inconveniences, and evade the juſtice of this court, if theſe depoſitions ſhould not be allowed.

The anſwers not coming in till after *Willis*'s purchaſe, will make no alteration, becauſe, by the neceſſary forms and delays of this court, very probably they could not be put in ſooner.

In bills of this nature for eſtabliſhing a will, and perpetuating the teſtimony of witneſſes, the advantage ought to be mutual, and the heir at law is as much at liberty to invalidate the will, as the deviſees are to eſtabliſh it, and muſt be conſidered, to all intents and purpoſes, as a *Lis pendens*, or otherwiſe it would make the only method, which by the law of *England* is pointed out for proving a will, vain and nugatory.

Suppoſe an heir at law to get into poſſeſſion of the anceſtor's eſtate immediately upon his death, and that during a ſuit in this court, for eſtabliſhing the will of the anceſtor in favour of the deviſees, the heir conveys this eſtate to a ſtranger, and afterwards the will is eſtabliſhed in this court, can it be contended that the grantee of the heir is not bound, and that this ſuit will be looked upon as no *lis pendens* as to ſuch grantee?

If an heir conveys an eſtate to a ſtranger whilſt there is a ſuit for eſtabliſhing a will, and it is afterwards eſtabliſhed, the grantee of the heir is bound.

So in the caſe of a mortgagor who comes here for redemption of a mortgage, if during ſuch ſuit he ſhould aſſign the equity of redemption, and, in the final hearing of the cauſe, there ſhould be a decree againſt the mortgagor, will not the aſſignee of the equity of redemption be bound by this decree?

If, during a ſuit to redeem, the mortgagor aſſigns the equity of redemption, and there is a decree againſt him, the aſſignee is bound by it.

So, on the other ſide, is it not equal juſtice (if an heir at law in a bill brought againſt him by deviſees to eſtabliſh a will, ſhould prevail to invalidate, or ſet aſide the will, from an incapacity in the teſtator to deviſe) that ſuch heir at law ſhould have the benefit of the evidence in that cauſe, againſt a perſon purchaſing from the deviſee *pendente lite*? for theſe reaſons the depoſitions were allowed to be read.

If an heir at law in a ſuit to eſtabliſh a will, prevails to ſet it aſide, he ſhall have the benefit of the evidence in that cauſe, againſt a purchaſer *pendente lite*.

Gryle

Caſe 152. *Gryle* verſus *Gryle*, *April* 27, 1741.

A will executed in the preſence of two witneſſes, afterwards teſtatrix ſaid, this is my will, in the preſence of a third, but did not put her ſeal, nor ſay her name was of her hand-writing. Lord *Hardwicke* inclined this was a void will, becauſe not exactly conformable to the ſtatute.

A Will was executed firſt in the preſence of two witneſſes, afterwards the teſtatrix ſaid this is my will, in the preſence of a third, and deſired he would atteſt it, but did not put her ſeal, neither did ſhe ſay that her name was of her own hand-writing.

Caſes cited in ſupport of this will, were *Can* verſus *Can*, *February* 25, 1718, before Lord *Macclesfield*. 3 *Mod.* 218. 2 *Chanc. Caſ.* 109. *Precedents in Chancery* 184. *Cook* verſus *Parſons*. *Lodge* verſus *Jennings*, *Caſes in the exchequer in Ireland* 289.

Sealing her will, without ſigning, in the preſence of a third witneſs, would have been ſufficient to make it a good will.

Lord Chancellor gave no abſolute opinion, but was inclined to think that this was a void will, and mentioned the caſes of *Lea and Libb* *, becauſe it is not exactly conformable to the ceremonies required by 29 *C.* 2. *the Statute of Frauds and Perjuries*, unleſs it had been re-ſealed by the teſtatrix in the preſence of the third witneſs, and unleſs ſhe had declared it to be her hand-writing; ſealing without ſigning in the preſence of this witneſs, he ſeemed to think, would have been ſufficient to make it a good will, but ſaid it was a point proper to be determined at law; on ſuggeſtion of the plaintiff's counſel that acts had been done which might amount to a confirmation of the will, the cauſe was ordered to ſtand over †.

Sir

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* The teſtator made his will in writing, ſubſcribed by two witneſſes, and deviſed all his lands to *W. R.* afterwards he made a codicil, in which the will was recited, and this alſo was atteſted by two witneſſes, one of which was a witneſs to the will, but the other was a new one; the queſtion was, whether this new witneſs ſhould make a third to the will, *the ſtatute requiring that there ſhould be three*; and adjudged that he ſhould not. *Lea* verſus *Libb*, *Carthew* 35.

† A ſpecial verdict was found upon an ejectment; the caſe was this, the teſtator ſigned and executed his will in *December* 1735, in the preſence of two witneſſes, who atteſted the ſame in his preſence; afterwards, in the year 1739, he with his pen went over his name, in the preſence of a third witneſs, who ſubſcribed his name in his preſence, and at his requeſt; and the queſtion was, whether this be a due execution of the will under the ſtatute of frauds and perjuries, 29 *Car.* 2. *c.* 3. *ſect.* 5.

Mr. *Healy* argued for the heir at law, that the ſtatute requiring three witneſſes to ſubſcribe in the teſtator's preſence, muſt intend they ſhould be all preſent together, elſe there is not that degree of evidence the ſtatute requires, for an atteſtation of three witneſſes at different times, has only the weight of one witneſs.

Witneſſes to a will not only atteſt the due execution of a will, but likewiſe the capacity of a teſtator at the time of the execution, a man may be *ſane* at the time two witneſſes atteſt, and *inſane* when the third atteſts: it cannot be conſidered as a will, till the third witneſs has ſigned, for that compleats the act.

The will here is dated in 1735, ſuppoſe lands purchaſed after the date, and before the atteſtation by the third witneſs, will the lands paſs? certainly not! He cited *Lea* verſus *Libb*, *Carth.* 35. and *Shower* 69. and *Juſtin. Inſtit. lib.* 2. *tit.* 10. *de teſtamentis ordinandis.*

Mr.

Sir Thomas Standiſh verſus *Radley*, *April* 29. 1741, Caſe 153.

A Bill was brought in 1713, by the repreſentatives of the five younger children of Sir *Richard Standiſh*, *viz.* *Alexander*, *Ralph*, *John*, *Hugh*, and *Peter*, againſt Sir *Thomas Standiſh*, who was deſcended from the eldeſt ſon of Sir *Richard Standiſh*, and no evidence appearing of an actual payment of any of the portions, nor any releaſe produced, except with regard to *Ralph Standiſh* only, Sir *Thomas Standiſh* was decreed by Sir *Joſeph Jekyll*, at the hearing of the cauſe in 1717, to ſatisfy the plaintiffs for the ſeveral ſums due to them for portions, as the repreſentatives of the younger children of Sir *Richard Standiſh*. Since this decree, Sir *Thomas Standiſh* found two releaſes, one from *Peter Standiſh*, and another from *Alexander*, and three receipts from *Hugh*, for their ſeveral portions, and all of them in the hands of a perſon who claims under the purchaſer of Sir *Richard Standiſh*'s eſtate, which was charged with the portions.

To oblige a man to ſign and inrol a decree made againſt himſelf, in order to intitle him to bring a bill of review, is altogether unneceſſary.

Upon this foundation the preſent bill was brought as a ſupplemental bill by Sir *Thomas Standiſh*, praying that he might have the benefit of the releaſes, and likewiſe a petition of rehearing in the nature of a bill of review, to reviſe and conſider the decree in the former cauſe, as it has never been ſigned and inrolled, though made as long ago as 1718.

Mr. *Banks e contra* for the deviſee; he argued, that a will executed before three witneſſes, though at three different times, is good within the ſtat. of frauds and perjuries, the ſtatute not requiring they ſhould all be preſent at the ſame time.

The requiſites under the ſtatute are, that the teſtator ſhould ſign in the preſence of three witneſſes at leaſt, and that they ſhould atteſt in his preſence; it would therefore be adding new requiſites which the act does not mention, and in effect be making a new law: He cited *Cook* verſus *Parſons*, *Prec. in Chan.* 184. and 2 *Ch. Caſ.* 109. *Anon*'.

Lord Chief Juſtice Lee. This caſe depends upon the words of the ſtatute; the requiſites in the ſtatute are, that the three witneſſes ſhould atteſt his ſigning, but it does not direct the three witneſſes ſhould be all preſent at the ſame time.

There has been no determination as to this point. In the caſe of *Cook* verſus *Parſons*, the teſtator's ſigning was held good though it was not before three witneſſes at the ſame time; and the court only doubted whether the teſtator's barely owning the ſubſcription to be his before one of the witneſſes, was good, but there was no doubt as to the validity of the will, from the execution at different times.

Here you have the oath of three atteſting witneſſes, this is the degree of evidence required by the ſtatute, and the ſame credit is given to three perſons at different times as at the ſame time.

We cannot carry the requiſites further than the ſtatute directs, the act is ſilent as to this particular, it would therefore be making a new requiſite; the ſigning is the ſame act reiterated; the teſtator in the principal caſe, went over his name again, and declared it to be his laſt will. Judgment againſt the heir at law. *Jones* verſus *Lake*, *February* 1, 1742. in the court of King's Bench.

LORD CHANCELLOR.

I am of opinion Sir *Thomas Standiſh* is intitled to be relieved: and firſt I ſhall conſider the method of proceeding in this cauſe.

Where a decree has not been ſigned and inrolled, a bill in the nature of a bill of review, a proper one.

The bringing a bill in the nature of a bill of review to reviſe a decree in a former cauſe which has not been ſigned and inrolled, is a very proper one: and it is a very fruitleſs thing to put a man to ſign and inroll a decree which is made againſt himſelf, in order to intitle him to bring a bill of review, beſides the great expence which attends it.

Therefore I think this method of proceeding will anſwer the deſign of the court beſt in bringing new matter before them, diſcovered ſince the former decree.

Next, as to the merits of the caſe: it cannot be ſaid that it is abſolutely clear, but, however, the weight of the evidence is greatly in favour of Sir *Thomas Standiſh*.

Portions which became due in 1673, ſued for in this court in 1717, ſuch a length of time creates a ſtrong preſumption they are paid, and it almoſt amounts to proving a negative to induce the court to believe they are ſtill unpaid.

It was originally a demand for younger childrens portions, ariſing under a ſettlement in 1657, and a will made in conſequence of the ſettlement, and which portions became payable ſo long ago as 1673, ſuch a length of time muſt create a very ſtrong preſumption of their having been paid, and it muſt almoſt amount to proving a negative to induce the court to believe that they are ſtill unpaid, and the *Maſter of the Rolls* has ſtretched a good deal to decree in 1717 that the portions were unpaid, when the preſumption from length of time muſt even then have had conſiderable weight.

The Maſter of the Rolls, upon a releaſe being produced from *Ralph Standiſh*, one of the younger children, for his portion, by the decree in 1717, diſmiſſed the bill as to his repreſentative.

As to the portion of *Peter Standiſh*, it is inſiſted by Sir *Thomas*, that ſince the decree for *Peter*'s repreſentatives, he has found a releaſe from *Peter*, which is the foundation for the bill of review.

The diſcovery of new matter in being, at the time of a decree, but not known till after, intitles the party to a review.

The rule to review and reviſe a former decree is, the diſcovery of new matter, ſince the making of ſuch decree, which was in being at the time, but was not known to the party till afterwards.

There can be no reaſon why this releleaſe ſhould not weigh with me as much now, as the releaſe produced by *Ralph* did with the *Maſter of the Rolls* in the former cauſe.

Next as to *Alexander*'s portion, the releaſe he has given for it is in the ſame form and words with *Peter*'s, and therefore theſe releaſes are a bar to the demand ſet up by each of their repreſentatives.

In order to ſhew that *Hugh Standiſh*'s portion was paid, three receipts under his hand were produced as evidence.

It has been objected, theſe receipts cannot be read in this cauſe, becauſe they were in the hands of ſome of the parties to the former cauſe after publication had paſſed, and the rule in bills of review is, that it muſt be new matter diſcovered after the decree.

Papers in the hands of a party to a former cauſe, after publication had paſſed, though not produced then, may be read upon a bill of review.

But I think this would be too ſtrict, for as they were not diſcovered till after publication in the cauſe, they could not poſſibly be made uſe of then; and beſides, it appears that the preſent plaintiff Sir *Thomas Standiſh* did not know any thing of theſe receipts till long after the decree.

Next as to the parol agreement between the repreſentatives of *Hugh Standiſh* and Sir *Thomas Standiſh*, before the bringing the preſent bill.

Now this was not by way of compromiſe on conſideration of the doubts and difficulties which aroſe in the caſe, but it was only on Sir *Thomas Standiſh*'s agreeing to pay 3000*l.* by inſtalments, provided they would abate 278*l.* odd money, and therefore does not bring it within the reaſoning in the caſe of *Can* verſus *Can.* 1 *P. W.* 723. and conſequently does not prevent Sir *Thomas Standiſh* from availing himſelf of this diſcovery, in relation to the receipts of *Hugh Standiſh*, for his part of the marriage portion.

On the 4th of *May* 1741, Lord *Hardwicke* declared that the releaſes given by *Peter* and *Alexander* to their brother Sir *Richard Standiſh*, dated the 16th of *January* 1673, and the 24th of *March* 1675, are ſufficient bars to the demands made by the plaintiffs in the original cauſes of the original and additional portions of *Peter* and *Alexander*, and of any intereſt for the ſame, and therefore decreed, that ſo much of the former decree as relates to theſe portions of *Peter* and *Alexander* be reverſed; and that the plaintiffs bill in the original cauſe, ſo far as it relates to theſe demands, do ſtand diſmiſſed; and Sir *Thomas Standiſh* ſhould be allowed what has been paid by him ſubſequent to the former decree.

Groſvenor

Caſe 154. *Groſvenor* verſus *Lane*, *on exceptions*, *April* 29, 1741.

P. gives a 3d of a moiety of the reſidue of his perſonal eſtate to *S. P.*

MR. *Phipps* by his will gave a third part of a moiety of the reſidue of his perſonal eſtate to his daughter *Suſan Phipps*.

ſhe marries, and whilſt out of the kingdom, aſſigns with her huſband this 3d of a moiety which was to ariſe out of *P.*'s eſtate, in truſt for their daughter, provided they died before they came to *England*: *S. P.* afterwards married a ſecond huſband, who ſurvived her: *If the mother had continued a widow, ſhe would have been intitled to a decree for this 3d, and no notice would have been taken of the child's intereſt.*

LORD CHANCELLOR.

This is an unliquidated thing, and properly a choſe in action.

Afterwards *Suſan* marries one Mr. *Lane*, but ſurvives her huſband, who left one daughter *Catherine Lane*; while the father and mother were in *Africa*, they had aſſigned over this third of a moiety which was to ariſe out of Mr. *Phipps*'s eſtate, in truſt for the daughter, provided they ſhould die before they came to *England*.

But I am of opinion, if the mother had continued a widow, the court muſt have decreed it to her without taking any notice of the child's intereſt.

Before any decree in this cauſe, and before the money was reduced into poſſeſſion, ſhe marries a ſecond huſband, Mr. *Peake*, who ſurvived her.

A huſband cannot ſue for a wife's choſe in action, till he has adminiſtered.

A huſband, after the death of a wife, cannot ſue at law for choſes in action of the wife in his own right, but he muſt firſt take out adminiſtration to the wife.

The next is the principal point to be conſidered with regard to the infant, in a court of equity, and what proviſion ſhe is to have out of her mother's fortune.

Now, though the law may give this money to the huſband, yet equity will not do it.

Suppoſe Mr *Lane*, the firſt huſband, had come before the court for this ſum of money, the court would not have decreed it, unleſs he had agreed to make ſome proviſion for the wife, in caſe ſhe had ſurvived, and likewiſe by way of portion for the infant.

The

The wife being dead, and the ſecond huſband alſo, the reſiduary legatees under this will claim an intereſt in the money.

At the hearing of the cauſe, the court then took ſo far care of the infant, as to order a maintenance for her out of the portion; and directed Mr. *Peake*, who was then living, to lay propoſals before the Maſter what he would ſettle out of this money as a portion for the infant.

Therefore I muſt take it from this decree, that they would not ſuffer Mr. *Peak* to meddle with the money till he had agreed to make ſome proviſion for the infant.

Beſides this, there was a decree in 1732, made by Lord Chancellor *King*, who always leaned as ſtrongly in favour of the huſband, and in ſupport of legal rights, as any Chancellor who ever ſat here, and yet the equity was ſo ſtrong for making ſome proviſion for the infant *Catherine Lane*, that he yielded to it.

Mr. *Peake*, by two letters to the aunt of the infant, in 1731, has declared he was very deſirous of allowing her the whole produce of her mother's fortune, ariſing from a third of Mr. *Phipp's* reſidue of his perſonal eſtate, as he believes, according to his own expreſſion in the letters, that it would maintain the daughter like a gentlewoman, provided he was indemnified from the charges and expences in Chancery.

As he is dead, I muſt take theſe letters not as a mere propoſal only, or a bare hint of his intention, but an abſolute appropriation of the fortune by the ſecond huſband for the benefit of the infant.

The ſecond huſband, having by letters in his life-time, declared he was willing the daughter ſhould have the mother's whole fortune, as he is dead, theſe letters are not to be taken as a bare hint, but an appropriation of the fortune for the benefit of the infant.

There is all the equity in the world, that there ſhould be ſome proviſion for the daughter out of this ſum of money as her mother's portion.

As to the *quantum*, it depended upon the father-in-law; and by theſe letters, according to the opinion I have given of them, he has very honeſtly and conſcientiouſly aſſigned the whole as a proviſion for the infant.

Haly verſus *Lane*, *May* 4, 1741. Caſe 155.

THOUGH a note given by a wife to a huſband is void, yet if it is indorſed over by the huſband, as between him and the indorſee, it is certainly good.

If a huſband indorſes a note given him by the wife, as between him and the indorſee, it is good.

Indorſee of a note may recover againſt an indorſor, though the original drawer was an infant.

In caſes of like nature I have, at the ſittings of *niſi prius*, directed a jury to find for an indorſee, notwithſtanding the indorſor had the note from an infant, the original drawer.

Though former indorſees might not pay a valuable conſideration, yet if the laſt gave money for it, it is a good note as to him.

Where there is a negotiable note, and it comes into the hands of a third or fourth indorſee, though ſome of the former indorſees might not pay a valuable conſideration, yet if the laſt indorſee gave money for it, it is a good note as to him, unleſs there ſhould be ſome fraud or equity againſt him appearing in the caſe.

Caſe 156. *Mackworth* verſus *Briggs*, *exceptions*, *May* 6, 1741.

A bill referred for impertinence, the Maſter reports it pertinent, the defendant excepts generally, without ſpecifying the parts of the bill which are impertinent; the objection as being irregular, was over-ruled; for though taken in ſo general a manner, the party may go upon it, without pointing out particular paſſages.

A Bill was referred to the Maſter for impertinence, he reports it pertinent, the defendant takes a general exception to this part of the report without ſpecifying the particular parts of the bill which are impertinent.

It was objected that the exception is irregular for this reaſon, and contrary to the courſe of the court, becauſe the original bill being 100 ſheets, and the amended bill 200, the court muſt neceſſarily conſider the whole as the exception is ſo general.

The chancellor over-ruled the objection, and ſaid, notwithſtanding the exception is taken in ſo general a manner, yet they may go upon it without pointing out particular paſſages: ſuppoſe, for inſtance, from the 20th to the 100th ſheet ſhould be intirely impertinent, how could they have the benefit of their exception, unleſs they had couched it in ſuch general terms.

Caſe 157. *Gibſon* verſus *Smith*, *May* 9, 1741.

If a perſon has only threatened to open mines, a plaintiff may certainly come into this court, to reſtrain a defendant from doing it.

THE plaintiff being a truſtee of the late Duke of *Wharton*'s eſtate, for the benefit of creditors, and having ſold a part to the defendant, with a particular exception and reſervation of the waſte of the manor, and all mines in the ſaid waſtes, by virtue of a *proviſo* in the deeds of conveyance, has brought this bill to prevent the defendant from committing waſte, by opening mines, *&c.*

It was objected, that the bill is not properly brought, as this is not a matter for the determination of a court of equity, that it is a mere legal right, and a legal eſtate, and conſequently there was no occaſion to come into this court.

LORD CHANCELLOR.

The plaintiff may certainly come into this court to reſtrain the defendant from opening the mines, *&c.* even if he has only threatened to do it; nor is it neceſſary the plaintiff ſhould have waited till the waſte is actually committed, where the intention appears, and the defendant, even by his anſwer, inſiſts on his right to do it: there are a great many caſes where ſuch bills have been allowed; and indeed, if the defendant by his anſwer had diſclaimed any right, there would have been no grounds for ſuch a ſuit.

It is not neceſſary to ſtay till waſte is actually committed, where the intention appears, and the perſon inſiſts on his right to do it.

If a bill is brought by an owner of a reverſion againſt a tenant for life, and no proof appears of any waſte, yet if tenant life inſiſts upon his right, and it is proved that he has none, this court will grant an injunction.

Though no proof appears of waſte, yet if tenant for life inſiſts on a right to do it, and has none, the reverſioner may have an injunction.

As to the merits of the cauſe, the firſt point is with reſpect to the grounds, that are called the common of paſture, which the defendant inſiſts are confined to a cow paſture only.

But the plaintiff charges by his bill that they are the waſte of the manor, and that there is an exception of all mines which are in the waſte.

The defendant on the other hand ſays that this is not properly waſte, but injoyed by the cuſtomary tenants, and is part of the ſoil belonging to theſe tenants; and if he had made out this fact, there could have been no pretence for the claim the plaintiff ſets up by virtue of the reſervation.

But I am of opinion that they are to be conſidered as part of the waſte of the manor, and the common of it; for by the evidence it is plain that the common of paſture lies intermixed with the other commons which are injoyed with the reſt of the manor: from the middle of *September* to the middle of *April* the gates of theſe grounds, which were ſtinted for four months, are thrown open and laid to the other common, and are injoyed by all the inhabitants.

In ſeveral manors there are ſome part of the tenants only which have a right of commoning, and yet it does not follow but it may be waſte, and belong to the lord as much as if it was a general common.

This ſort of tenure, called tenant-right eſtate, is now well ſettled, and is in no diſfavour of the court, though it was otherwiſe at the time of the decree in the reign of *Jac.* 1. when *Philip* Lord *Wharton*, Lord of this manor, was plaintiff, and ſome of the cuſtomary tenants defendants.

The

The being ſtinted does not at all prove that they are not waſte, but only for the benefit of the tenants, and are not for this reaſon leſs the waſt of the lord than before.

It would be very hard upon a bill *quia timet*, where there is not the leaſt ſyllable of proof that the defendant has opened any mines, to grant an injunction on a ſuſpicion or a threatning to do it, where the defendant inſiſts not upon his right.

The next point is as to the free rents, and I am clear of opinion that they paſs by the general word *rents*, and would even have paſſed under the word *manor*, if they had not in the drawing of theſe conveyances been ſo explicit, and therefore there is no ground for the defendant to reconvey as to the free rents; and as to this part the plaintiff's bill ought to be diſmiſſed.

Caſe 158. *Underwood and Agnes his wife* verſus *Morris*, *May* 13, 1741. at the *Rolls*.

A. gives 2000 *l.* to *Agnes* his daughter, payable at her age of 21 or marriage, if ſhe marries with the conſent of his executors.

A Father by his will gives the plaintiff *Agnes* his daughter the ſum of 2000 *l.* payable at her age of 21 or day of marriage, if ſhe marries with the conſent of his executors under his will, provided if either of the legatees die before their legacies become payable as aforeſaid, then ſuch legacy to be divided between the ſurvivor of her brother and ſiſters.

provided if either of the legatees die before their legacies become payable, ſuch legacy to be divided between the ſurvivor of her brother and ſiſters. *Agnes* married at fifteen without the conſent of the executors. Mr. Juſtice *Parker* held it to be a deviſe *in terrorem*, and that the legacy is veſted, as marriage, one of the contingencies, has happened.

Agnes marries the plaintiff *Underwood* at her age of 15 without the conſent of the executors.

The queſtion, whether as *Agnes* has married without the executors conſent, this deviſe is not to be conſidered as a deviſe over, and that conſequently the legacy will not veſt unleſs ſhe arrive at her age of 21.

Mr. Juſtice Parker. It is objected the time of payment is not come, becauſe it is a marriage without conſent of truſtees, and that it muſt wait the event of *Agnes*'s attaining her age of 21.

But as this is a mere perſonal legacy, I am of opinion it is a deviſe *in terrorem* only, and that it veſts abſolutely in the daughter, and that marriage, one of the contingencies upon which it became payable, having happened, the executors muſt be decreed to pay it to the plaintiffs with intereſt at 4 *l. per cent.* to be computed from the death

death of *Agnes*'s father the teſtator. But the plaintiff *Underwood* muſt firſt make a proper proviſion for *Agnes* before he is allowed to touch the money.

Combe verſus *Combe*, *June* 1, 1741. Caſe 159.

BRYAN Combe had one ſon named *Bennet*, and in 1713 he intermarried with a ſecond wife; previous to that marriage and in conſideration thereof articles were entred into, whereby it was agreed that the ſum of 1000 *l.* which was the fortune of the wife, together with the ſum of 2000 *l.* which came from the huſband, ſhould be veſted in the hands of truſtees on the following truſts, that the 3000 *l.* ſhould be put out at intereſt in the names of theſe truſtees, and that they ſhould pay the intereſt thereof to *Bryan* during his life, and after the death of *Bryan* that they ſhould pay the intereſt of the ſum of 2000 *l.* to *Ann* for her life for her jointure, and in full ſatisfaction of her dower: the truſt was further declared to be, that after the death of *Bryan*, the truſtees ſhould employ ſo much of the intereſt of the remaining 1000 *l.* as they ſhould think fit, in the maintenance and education of ſuch child and children as *Bryan* and *Ann* ſhould happen to have, and leave behind them, and that the ſurplus of the intereſt of that 1000 *l.* if any, ſhould be put out, and continue to carry intereſt under the ſame truſt, as is hereafter mentioned relating to the other money.

Under marriage articles 2000 *l.* part of 3000 *l.* veſted in truſtees, is to be paid to ſuch ſon as ſhall live to attain the age of 21. when and at ſuch time as he ſhall have attained the age of 23. The eldeſt ſon attained his age of 21. but died *before* 23. Lord *Hardwicke* held that he became abſolutely intitled to the money, and the time of payment only was poſtponed to the age *of* 23.

The truſt was further declared, that after the death of *Bryan* and *Ann* and the ſurvivor of them, the truſtees ſhould pay this ſum of 2000 *l.* to ſuch ſon of the body of *Ann* by *Bryan* to be begotten, as ſhould live to attain the age of 21, when and at ſuch time as ſuch ſon ſhould attain the age of 23.

The truſt was farther declared, that the truſtees ſhould out of the intereſt of the 2000 *l.* in the mean time imploy and pay ſo much thereof, as they ſhould think convenient for the maintenance and education of ſuch ſon, and that they ſhould employ the reſidue of the intereſt of the 2000 *l.* for the benefit of the other children of that marriage, in ſuch Manner as *Bryan* ſhould by any writing under his hand and ſeal appoint; and in default of ſuch appointment, that the truſtees ſhould pay the reſidue of the intereſt of the 2000 *l.* unto ſuch of the children of that marriage, except the eldeſt ſon, as ſhould attain the age of 21.

The truſt was farther declared, that as for and concerning the remaining 1000 *l.* the truſtees ſhould pay the ſame unto the children of that marriage, other than the eldeſt ſon, in ſuch proportion as *Bryan* ſhould appoint; and in default of ſuch appointment, that the truſtees ſhould pay this ſum amongſt the children ſhare and ſhare

alike at their reſpective ages of 21 or marriage, which ſhould firſt happen.

The truſt was further declared to be, that in caſe there ſhould happen to be only one ſon of this marriage, or in caſe the other children ſhould happen to die before they ſhould attain their age of 21 or marriage, that then the truſtees ſhould pay the reſidue of the intereſt of 2000 *l.* to the eldeſt ſon of that marriage; and upon this further truſt, that in caſe there ſhould happen to be no ſon of that marriage, or if ſuch ſons ſhould die before they ſhould attain the age of 21, that then the truſtees ſhould pay the ſame to ſuch daughter as ſhould be of that marriage, in ſuch proportion as *Bryan* ſhould appoint; and in default of ſuch appointment, the truſtees ſhould pay the ſame to thoſe daughters ſhare and ſhare alike.

And upon this further truſt, that in caſe there ſhould be no children of that marriage, the truſtees ſhould pay the ſum of 3000 *l.* to ſuch perſons as *Bryan* ſhould appoint.

Then came the following proviſo: Provided always, and it is further agreed by and between all parties to theſe preſents, and hereby ſo declared, that the ſaid ſum of 3000 *l.* ſhall be laid out in an eſtate as ſoon as conveniently may be, and that ſuch eſtate which ſhall be purchaſed with the ſaid 3000 *l.* ſhall be purchaſed in the name or names of the ſaid *Francis Bennet* and *Henry Humber*, and *Ann* the intended wife, or the ſurvivor of them, or ſuch others as they ſhall nominate, direct and appoint, and that the ſaid eſtate ſo to be purchaſed, when the ſame ſhall be purchaſed, ſhall be under the ſame truſts, and to the ſame uſes and limitations, and ſubject to the ſame proviſoes, conditions and agreements, which are herein declared and appointed of, for and concerning the ſaid ſum of 3000 *l.* to this deed a ſchedule was annexed of the ſeveral mortgages and other ſecurities of which the 3000 *l.* conſiſted.

Soon after this deed was made, the marriage took effect, and by this marriage there was iſſue an eldeſt ſon named *Bryan*, and there was a ſecond ſon named *Joſeph*, and two or three other children. After the marriage 2296 *l.* part of the 3000 *l.* was laid out by the truſtees in the purchaſe of lands: all the lands were fee-ſimple, excepting a ſmall part thereof, which was a leaſehold eſtate; that leaſehold eſtate conſiſted of a long term, the purchaſe of it was 300 *l.* and it was bought before the fee-ſimple eſtate was.

Ann died in 1732. *Bryan* the father died in 1736. *Bryan* the ſon being then of the age of 19, who lived to attain his age of 21, but died before he was 23. on the death of his father he had entred upon the lands which were purchaſed by the truſtees: *Joſeph* became his heir at law, and the preſent bill was brought by him

againſt *Bennet Combe*, againſt the younger children of the ſecond marriage, and againſt others, praying that he might have the benefit of the eſtates which were ſo purchaſed by the truſtees, and that the 2000 *l.* agreed to be laid out in land for the benefit of the eldeſt ſon of the ſecond marriage, might be conſidered as land.

Lord Chancellor ſaid his opinion was, that the plaintiff was not intitled to this part of the prayer of the bill: he ſaid the only queſtion of weight in the cauſe is, whether this is to be conſidered as a real or perſonal eſtate; and this is a matter of ſome nicety, conſidering the manner in which the articles are framed.

But two queſtions have been made in the preſent cauſe; firſt, whether this is to be conſidered in equity as money; and ſecondly, ſuppoſing that it is, whether it ought to be conſidered as a veſted intereſt in *Bryan* the ſon on his attaining the age of 21.

With regard to the ſecond of theſe queſtions, his Lordſhip ſaid, it might be thrown out of the caſe; for his opinion clearly was, that this was a veſted intereſt in him upon his attaining his age of 21.

The words of the articles are, "That after the death of *Bryan* "*Combe* and *Ann* his wife, and the death of the longeſt liver of "them, that the ſaid truſtees ſhall pay the ſaid ſum of 2000 *l.* part "of the ſaid 3000 *l.* to ſuch ſon of the body of the ſaid *Ann* by "the ſaid *Bryan Combe* begotten or to be begotten, as ſhall live to "attain the age of 21 years, when and at ſuch time as ſuch ſon "ſhall have attained to the age of 23 years compleat.

It has been objected by Mr. *Floyer*, that this is a mere direction for payment of the money to ſuch ſon as ſhall attain his age of 23. and that the words relating to the ſon's attaining his age of 21. are only part of the deſcription of the perſon who is to take.

And it is indeed true, that in this clauſe of the articles there is no particular direction concerning the veſting of the 2000 *l.* but the words relating to it only direct the payment of the money: and therefore if this had been a legacy given by a will, the party would not have been intitled to it, in as much as he died before his age of 23. But were theſe articles to receive this conſtruction, that it ſhould not be conſidered as a veſted intereſt in *Bryan*, by reaſon that he died before his age of 23, it would defeat the whole intention of the articles: it is indeed true that the articles are oddly penned.

For though they ſeem to be general, and to relate to all ſuch ſons as ſhould live to attain the age of 21. and that the money ſhould be paid them when they ſhould attain the age of 23, yet the eldeſt ſon was only meant in thoſe words; and when there was an eldeſt ſon

that

that attained his age of 21. he became abſolutely intitled to the money, and the time of payment was poſtponed only to his age of 23.

The other queſtion his Lordſhip ſaid was more difficult, but as far as he was able to form any judgment, his opinion was, that this muſt be conſidered as money, notwithſtanding the general determination of theſe caſes was to the contrary: in the ordinary ones of this nature the original and primary intention of the parties appears to be, that the money ſhould be laid out in land; and the other directions about veſting it in the hands of truſtees, are only temporary proviſions till that can be done.

But what is the method taken in the preſent caſe; in the firſt place the whole ſum of money is immediately veſted in the hands of truſtees, and then the articles carve out certain proportions of the money, directing in what manner it is to be applied; 2000 *l.* is to be paid to the eldeſt ſon, and the 1000 *l.* for the benefit of the younger children in ſuch manner as the articles direct; there is likewiſe a direction given concerning the intereſt, how that is to be diſpoſed of; and after this is done, then follows the proviſo, which creates the doubt in the preſent caſe.

3000 *l.* is veſted in truſtees for the purpoſes following, *viz.* 2000 *l.* thereof to be paid to the eldeſt ſon, and 1000 *l.* for the benefit of younger children, and agreed under the articles before marriage *the* 3000 *l.* ſhould be laid out in land, and the eſtate ſo purchaſed ſhall be to the ſame uſes, *&c.* and ſubject to the ſame conditions which are declared concerning *the* 3000 *l.* *Decreed that the lands ſhall be taken as money, the laying it out upon real eſtate being merely to make the fund for the benefit of the children more permanent and ſecure.*

Provided always, and it is farther agreed by and between all the parties to theſe preſents, and hereby ſo declared, that the ſaid ſum of 3000 *l.* ſhall be laid out in an eſtate as ſoon as conveniently may be, and that ſuch eſtate ſhall be purchaſed with the ſaid 3000 *l.* in the name or names of the ſaid *Francis Bennet*, *Henry Humber* and *Ann* the intended wife, or the ſurvivor of them, or ſuch others as they ſhall nominate, direct and appoint; and that the ſaid eſtate ſo to be purchaſed ſhall be under the ſame truſts, and to the ſame uſes, limitations and intentions, and ſubject to the ſame proviſoes, conditions and agreements, which are herein declared and appointed of, for and concerning the ſaid ſum of 3000 *l.*

It is indeed true, that the proviſo directs this money ſhould be laid out in the purchaſe of an eſtate; but then it expreſsly declares that the eſtate ſo purchaſed ſhall be under the ſame truſts as are appointed concerning the ſum of 3000 *l.* This is a plain direction that the lands ſhall be taken as money: conſider this then upon the intention of the parties, as there is the ſame direction about inveſting the 1000 *l.* it is impoſſible to be conceived that it could be their intention that the land which was to be purchaſed with the 1000 *l.* ſhould always be conſidered as land, and go to the younger children and their heirs.

The

The plain intention of theſe articles certainly was that the money ſhould only be laid out in land, in order to make it more permanent and ſecure, and that the land ſhould be ſold again when the children ſhould have occaſion for their money, and his lordſhip was pleaſed to decree accordingly.

Dean and Chapter of Ely verſus *Warren*, *June* 2, 1741. Caſe 160.

THE end of the bill was to prevent waſte in digging and carrying away the ſoil in manors that lie in the Levells in *Cambridgſhire*.

Evidence of cuſtoms in a neighbouring manor, offered to be read, to ſhew the cuſtoms of the manor in queſtion.

The evidence of a neighbouring manor ſhall not in general be admitted to ſhew the cuſtom of another manor.

LORD CHANCELLOR.

It is certainly the rule of law in general, that the evidence of neighbouring manors ſhall not be admitted to ſhew the cuſtom of another manor, becauſe every manor is to be governed by its own cuſtoms.

But this rule is not ſo univerſal as not to be varied in ſome inſtances; as in mine countries, *Derbyſhire*, *&c.* the courts of law have admitted evidence with regard to profits of mines, *&c.* out of other manors where they are analagous and ſimilar, to explain or corroborate the cuſtom of the manor in queſtion.

Courts of law have admitted evidence with regard to profits of manors out of other manors, where they are ſimilar, to explain the cuſtom of the manor in queſtion.

Now, in the preſent caſe, there is a great ſimilitude in the manors, becauſe this is a fen country which is of very large extent, and the nature of fens and marſhes throughout *England* are pretty much the ſame.

The cuſtom here is, to dig up the Lord's ſoil for turf, which is a very odd cuſtom if applied to any other ſoil: but fenny and marſhy lands are often overflowed, and lie buried under water for ſeven or eight years, and produce no profit at all to the copyholder, and therefore, by way of compenſation, when the water is drained, and the land improved from the additional ſoil brought by the floods, the copyholder may be intitled to common of turbary; and this ſeems to be a plauſible pretence for ſuch a right; and therefore the evidence offered by the plaintiff muſt be read.

Copyholders in fenny lands may be intitled to dig up the lord's ſoil for turf.

It is too late at the hearing of the cauſe to object to depoſitions taken *de bene eſſe*; you ſhould have moved to diſcharge the order for publication.

Though depoſitions taken *de bene eſſe* are irregular, yet at the hearing of the cauſe it is too late to make the objection for irregularity; but in ſuch caſe you ought to have moved the court to diſcharge the order for publication.

An occupant who is only a tenant at will, can never have a right to a common of turbary.

The nature of common of turbary is very well known, which is nothing more than ſuch a quantity of turfs as may be ſufficient for the houſe to which the common is appendant; but here the cuſtom is laid not only in the tenants but the occupants, which is a very great abſurdity, for an occupant, who is no more than a tenant at will, can never have a right to take away the ſoil of the Lord.

This court will not put perſons to ſet forth a cuſtom with the exactneſs as is requiſite at law, or as the Exchequer expects.

The Court of Exchequer, where there has been an imperfect *modus*, have taken a ſhort method, by decreeing the defendant to pay tithes; but this court will not put perſons to ſet forth a cuſtom with ſo much exactneſs as is requiſite at law, or with ſo much nicety as the court of Exchequer expects.

The cuſtom in this caſe is ſo extraordinary, that if the evidence had not been very ſtrong in the ſupport of it, I ſhould not have directed an iſſue to try the cuſtom, but ſhould have decreed an injunction to ſtay waſte in digging up the Lord's ſoil.

Before the act of parliament in 15 *Car. 2. ch.* 17. for the improvement of the great level of the fens, the lands in queſtion were common, and then they might take away turf, but being ſevered by this act (*Vid. ſect.* 38.) and annexed to particular tenements, it might very probably lead the tenants into a miſtake, that they had the ſame right to dig turf after ſeverance as before.

Caſe 161. *Roy* verſus *The Duke of Beaufort*, *June* 5, 1741.

The bill was for relief againſt a judgment on a bond, in which the plaintiff was jointly bound with his ſon, in the penalty of 100*l.* that the ſon ſhould not commit any treſpaſs in the Duke of *Beaufort*'s royalty, by *ſhooting, hunting, fiſhing, &c.* except with the licence of the game-keeper, or in company with a qualified perſon: the ſon having catched two flounders with an angling rod, the bond was put in ſuit, and judgment for the penalty: the game-keeper's brother-in-law, and another ſervant of the Duke's, aſked the plaintiff's ſon to angle with them, when he catched the two flounders; and the verdict was found merely on their evidence. *Lord Hardwicke decreed the plaintiff ſhould be relieved againſt the verdict, and that the duke ſhould refund the* 100*l. recovered on the bond, and the* 40*l. damages.*

THE bill is brought to be relieved againſt a judgment obtained at law on a bond in the penalty of 100*l.* and likewiſe exceſſive damages of forty pounds, and for a perpetual injunction.

The plaintiff was jointly bound with his ſon in a bond in the penalty of 100*l.* that the ſon ſhould not commit any treſpaſs in the Duke's royalty, by ſhooting, hunting, fiſhing, *&c.* unleſs with the

the licence of the gamekeeper, or in company with a qualified perſon.

The ſon afterwards having catched two flounders, with an angling rod, in the Duke's royalty, the bond was put in ſuit againſt the plaintiff, and judgment for the penalty.

Two of the Duke's ſervants, one of them brother-in-law to *Marks* the game-keeeper, aſked the ſon of the plaintiff to go with them, and divert himſelf with fiſhing, they angled about two hours, in a navigable river, and catched two flounders.

The verdict was found by the jury merely upon the evidence of theſe two ſervants.

The plaintiff (his ſon being dead) has been obliged to pay the 100*l.* the 40*l.* coſts of ſuit, though the value of the flounders was proved to be two-pence only.

The bond was given in 1729, while the plaintiff was under a proſecution, and in cuſtody before a juſtice of peace, at the information of *Marks* the game-keeper, for carrying a gun in the Duke's manor, and for killing a dog belonging to the Duke.

It was not pretended that the plaintiff's ſon killed any game, but that he carried a gun only.

Marks took him before a juſtice of peace that lived fifteen miles from the place, when there were ſeveral neighbouring juſtices within three miles.

When the plaintiff's ſon was before the juſtice of peace, they threatened him with being intirely ruined by the Duke, if he would not agree to give this bond.

From the year 1729 till 1732, it does not appear that he ever was guilty of any treſpaſs; and even after the two flounders were catched, which was in 1732, no manner of notice was taken of it till 1734, when an information for a riot having been tried at *Winchester* (in which theſe very ſervants that decoyed the ſon into this fiſhing were convicted, on the evidence of the plaintiff in this cauſe) immediately after the trial, the ſuit was commenced upon the bond.

LORD

LORD CHANCELLOR.

The firſt general queſtion is, Whether the bond was obtained by oppreſſion, and by the impoſition of the Duke of *Beaufort*'s ſervants?

Secondly, Suppoſing there is an evidence of ſuch impoſition, whether the bond will be conſidered only as a ſecurity that the ſon ſhould not poach for the future?

Thirdly, Whether an ill uſe has been made of this bond?

As to the firſt head of relief, *oppreſſion and impoſition*, I am of opinion there is no evidence of either which ought to induce the court to relieve.

The plaintiff's ſon appears to have been a perſon who made a practice of carrying a gun, and likewiſe was warned ſeveral times by *Marks* the game-keeper not to come into the Duke's manor: afterwards *Marks*, being upon his lawful buſineſs, finds this young man, with a gun in his hand, and might have juſtified ſeizing the dog, and though he ſhot him, it does not make any great alteration, becauſe, if any body has ſuffered, the Duke has, who loſt the benefit of the dog, which ſhould have been ſecured to his own uſe. The carrying a gun and ſhooting the keeper's dog, in return for his own being killed, was a ſufficient juſtification of *Marks* for taking the plaintiff's ſon before a juſtice of peace.

As to the point of taking him before a juſtice of peace who lived at the diſtance of fifteen miles, it is not a thing to be commended, but, however, that does not prevent his having equal juriſdiction as if he had lived in the neighbourhood; it appears, beſides, that the plaintiff's ſon had more aſſiſtance at *Wincheſter* than he would have had in any other part of the country, for he had the recorder for his council, and it is very probable the game-keeper had an eye to having council himſelf, or he would not have thought of carrying him ſo far.

An unqualified perſon ſhooting a game-keeper's dog, will juſtify a judge in directing conſiderable damages.

No evidence has been attempted to be given of the juſtice of peace miſbehaving in the affair; on the contrary, he was ſo favourable as not to levy the penalty of five pounds, which the ſtatute gives againſt a perſon carrying a gun being unqualified; nor was there any notice taken of killing the Duke's dog; and however trifling it may be called, if ſuch a thing had come before me at *niſi prius*, on the inſolent behaviour of the perſon at the time he ſhot the dog, and other circumſtances, I ſhould have made no ſcruple of directing very conſiderable damages.

As counſel appear to have been preſent the whole time before the juſtice of peace, though it is not ſaid they adviſed the bond, yet I muſt preſume they did, as nothing is ſhewn to the contrary.

Bonds taken for the preſervation of the game, and to prevent poaching, are not only for the benefit of lords of manors, but even of the young perſons who enter into them, as this ſort of idleneſs generally leads them to worſe conſequences.

The taking bonds to prevent poaching is for the benefit of the obligor, as this ſort of idleneſs leads to worſe conſequences.

As to oppreſſion, if there had been any illegal advantage taken whilſt he was in cuſtody before the juſtice of peace, he might have been relieved at law, and there was no occaſion for a ſuit in equity.

But there could be none here, becauſe his being before a juſtice of peace was lawful, nor was there any improper method uſed to draw him into the executing of this bond: in the common caſe of a warrant of attorney to confeſs judgment by a perſon in cuſtody, if he has counſel preſent, it will not be ſet aſide for dureſs, where the impriſonment was legal.

If a perſon in cuſtody confeſſes a judgment, whilſt his council is attending, it will not be ſet aſide for dureſs.

Though there is no act of parliament which directs taking bonds in this particular caſe, yet there are ſtatutes which approve of it in ſimilar caſes; as for inſtance, the acts that relate to the cuſtoms, expreſsly direct and command ſuch bonds to be taken, to prevent and guard againſt offences for the future. The act likewiſe againſt deer ſtealing commands ſuch bonds to be taken. *Vid.* 5 G. 1. *c.* 15. *ſect.* 4. and though there is no authority in the preſent caſe, yet it ſhews the doing of it is, not *malum in ſe*.

There is no act of parliament which directs taking bonds in this particular caſe but the acts which relate to the cuſtoms, and the act againſt deer-ſtealing directs ſuch bonds, ſo that the doing of it is not *malum in ſe*.

The council for the plaintiff have inſiſted it is an exceſſive penalty, and to be ſure it is a large one, but I do not know that courts of equity, where a bond is entered into voluntarily, have gone ſo far as to take into their conſideration, the greatneſs or ſmallneſs of the penalty. I ſhall be extremely cautious how I give an opinion that will ſet aſide ſuch bonds, which, if rightly uſed, may be of great ſervice in the preſervation of the game, and an equal benefit to the obligors themſelves, in taking them out of an idle courſe of life, which poaching naturally leads them into.

As to the head of ſecurity: it is moſt abſurd to think that bonds of this kind were intended merely as a ſecurity, and that nothing is to be recovered upon them.

I am of opinion when theſe ſort of bonds are given by way of ſtated damages between the parties, it is unreaſonable to imagine that the obligor ſhall not offend for the future, but are by way of ſtated damages between the parties.

Theſe bonds are not intended as a bare ſecurity,

they could only be intended as a bare ſecurity that the obligor ſhould not offend for the future; was this the caſe, in what reſpect is a gentleman in a better condition, who has ſuch a bond, than he was before, if after he has obtained judgment at law, a court of equity will give him no other ſatisfaction than the bare value of the price of the game that is killed.

Theſe two heads of relief may therefore be laid out of the caſe.

The third is the moſt material conſideration, and that is the ill uſe which has been made of the bond.

No evidence has been offered to ſhew that ever the plaintiff's ſon has been guilty of ſhooting, fiſhing, hunting, *&c.* from the time of the giving the bond in 1729, till *May* 1732, after this fact of catching the two flounders, which muſt be admitted to be a breach, it reſts for two years, and no action was brought upon the bond; then it appears that the plaintiff here was a witneſs in an information for a riot tried at *Wincheſter* aſſizes in *Trinity* term 1734. where the Duke's two ſervants were convicted, and chiefly on the plaintiff's evidence.

It is a very material circumſtance that the plaintiff's ſon had a licence, or at leaſt an encouragement to fiſh, by being in company with two of the Duke's ſervants, one of which was brother-in-law to *Marks* the game-keeper.

Where the motives to an action are unjuſt, though the cauſe of action was juſt, a court of equity will always take this into conſideration, though they cannot at law.

It frequently happens there may be a juſt cauſe of action, yet the real motives may be very unjuſt, which a court of equity will always take into their conſideration, though they cannot at law pay any regard to it.

Fiſhing with an angling rod is not poaching, nor ever eſteemed ſo.

It appears by the evidence that *Marks*, who was the game-keeper, who had the authority of the Duke, who has been a witneſs to the tranſaction of the bond, gave a licence, or at leaſt an incouragement to this fiſhing, which, as it was with an angling rod only, could not be called poaching, nor was it ever ſo eſteemed.

Beſides, in ſuch a tract of time as two years, it is impoſſible to ſuppoſe *Marks*, the game-keeper, could be ignorant of this fiſhing, eſpecially as his own brother-in-law was in company.

According to the condition of this bond, the plaintiff could not be relieved at law, becauſe his ſon could not fiſh without expreſs leave from the game-keeper, or in preſence of a qualified perſon, ſo that if the Duke of *Beaufort* himſelf had given leave, there muſt

at law have been a verdict, becauſe it is not within the expreſs terms of the condition of the bond.

Now when a man has made this moderate uſe of his liberty of fiſhing, and manifeſtly appears to have had leave, it would be hard not to relieve againſt the judgment, and penalty recovered upon this bond at law.

The next conſideration will be, as to the coſts in this court; though I am of opinion the money muſt be refunded, yet it would be too much to make the Duke of *Beaufort* pay coſts, becauſe he does not appear to me to have had the leaſt knowledge of the circumſtances of this caſe, being carried on merely by his agent; but if *Marks* had been before the court, I would have decreed coſts againſt him in equity, but as he is not a party, I muſt decree for the plaintiff that he ſhall be relieved againſt this verdict, and that the duke ſhall refund the 100*l.* recovered upon the bond, and alſo the 40*l.* damages, but give no coſts in this court on either ſide.

Langley verſus *Brown*, *June* 6, 1741. Caſe 162.

JUDGMENT was given in this cauſe.

A bill has been brought by the ſiſter and heir at law of *Richard Benthall*, to be relieved againſt the deeds executed by *Richard Benthall* in his life-time, to Mrs. *Elizabeth Brown*, and for inſpection of the title deeds of Mr. *Benthall*'s eſtate, which, after his death, came to the hands of Mrs. *Elizabeth Brown*, and are now in the defendant's cuſtody, and in caſe the legal eſtate does not paſs by the deeds, then the plaintiff inſiſts upon her right as heir at law.

Lord *Hardwicke* held, there was no ground in this caſe to relieve either under the head of fraud or miſtake; nor any pretence to ſet aſide the deeds, and diſmiſſed the bill.

The material queſtion is, whether deeds executed by Mr. *Richard Benthall*, an old man, in view and contemplation of a marriage very much to his own prejudice, and greatly to the benefit of Mrs. *Elizabeth Brown*, the intended wife, ſhall be eſtabliſhed in this court, notwithſtanding the marriage never took effect; 1050*l.* a debt due from Mr. *Richard Benthall* to Mrs. *Elizabeth Brown* for ſome years before, is recited to be part of the conſideration of the following deed of leaſe and releaſe, dated *October* 20, 1718.

Made between *Richard Benthall* of the firſt part, *Elizabeth Brown* of the ſecond part, and truſtees of the third and fourth parts; reciting, that *Robert Benthall* was indebted to *Elizabeth Brown* in 1050*l.* and in conſideration thereof, he grants to truſtees, and their heirs, to the uſe of *Elizabeth Brown* for life, then to truſtees to preſerve contingent remainders, then as and for all manors, lands, *&c.* or

ſuch

ſuch part thereof as ſhe the ſaid *Elizabeth Brown* ſhall think proper, to the uſe of truſtees and their heirs, during the life of ſuch perſon only as ſhe the ſaid *Elizabeth Brown* ſhall, by any writing or writings, executed by her in the preſence, *&c.* or by will executed, *&c.* either abſolutely or conditionally direct, limit, and appoint in truſt for ſuch perſon, *&c.*

And for want of ſuch appointment as aforeſaid, to the uſe of *Thomas Wild* his executor, *&c.* for the term of 500 years, without impeachment of waſte, ſubject to the proviſoes, powers, *&c.* herein after declared concerning the ſame, and from and after the expiration, or other ſooner determination of the 500 years term; to the uſe and behoof of the heirs of the body of the ſaid *Elizabeth Brown*, and for want of ſuch iſſue, then to the uſe of ſuch perſon and perſons, his, her, or their heirs, for ſuch eſtate and eſtates, and in ſuch manner as the ſaid *Elizabeth Brown*, whether ſole or married, and with or without the conſent of any huſband ſhe ſhall happen to have, ſhall, by any writing, *&c.* or by will or writing purporting a will, direct, limit, and appoint, and chargeable with any ſum, *&c.* not exceeding 1000*l.*

And it is agreed by and between the ſaid parties, that all and every appointment made by the ſaid *Elizabeth Brown*, by virtue of the powers in this deed may *from time to time be revoked and a new appointment made.*

And for want of ſuch appointment, then to the uſe of the ſaid *Elizabeth Brown*, her heirs and aſſigns for ever.

A power to *Elizabeth Brown* to ſell the premiſſes to pay incumbrances.

A general warranty by Mr. *Richard Benthall*, who covenants that he is ſeized in fee, has full power to grant, that Mrs. *Brown* and her heirs ſhall peaceably enjoy; that the premiſſes are free from incumbrances, except a mortgage of 1200*l.* and the recognizance of 1000*l.* and that he will at his own expence do further acts to aſſure.

The term of 500 years is declared to raiſe portions out of the eſtate for the younger children of the ſaid *Elizabeth Brown*, not exceeding 1000*l.*

The deed of appointment of *November* 3, 1718, recites the powers created by the foregoing ſettlement in the firſt place, and then follows the appointment.

" Now know ye that I the ſaid *Elizabeth Brown*, in purſuance " of, *&c.* do by theſe preſents, *&c.* appoint, limit, give, and grant all

" all and ſingular the ſaid manor of *Benthall*, and all and every " the lands, *&c.* and the reverſion and reverſions thereof, expectant " upon my death, in caſe I ſhall die before my intermarriage with " the ſaid *Richard Benthall*, to hold to him the ſaid *Richard Ben-* " *thall*, his heirs and aſſigns for ever, ſubject nevertheleſs, and upon " this expreſs condition, that the ſaid *Richard Benthall*, his heirs or " aſſigns, ſhall, within the ſpace of 12 months next after my de- " ceaſe, pay to my brother *John Brown* the ſum of 300*l.* to *Ralph* " *Brown* 200*l.* and to *Mary Brown* 200*l.* but in caſe the ſaid *Ri-* " *chard Benthall* ſhall marry me the ſaid *Elizabeth Brown*, then I " do hereby declare the appointment and all and every thing contain- " ed therein ſhall be void."

The ſecond deed of appointment bears date *March* 11, 1719, recites the leaſe and releaſe, and the foregoing appointment, and then follows,

" Now, know ye, that I the ſaid *Elizabeth Brown*, for good " and valuable conſideration me hereunto moving, and in execution " and performance of the ſaid power reſerved to me in and by the " ſaid in part recited indenture of releaſe, and alſo in execution and " performance of all and every other power, *&c.* reſerved in and " by the ſaid indenture, or otherwiſe; I the ſaid *Elizabeth Brown*, " by theſe preſents, under my hand and ſeal, by me atteſted in the " preſence of *J. M. C. M.* and *El. B.* do appoint, limit and direct " all and ſingular the manor, *&c.* in the ſaid recited indenture, ſhall, " from and after the deceaſe of me the ſaid *Elizabeth Brown*, be " had, held, and injoyed, *&c.* unto and to the uſe of the ſaid " *Richard Benthall* for his life: And I do by theſe preſents aſſign " and ſet over all, *&c.* to the ſaid *Richard Benthall*, and his aſſigns, " for the term of his natural life, and from and after the ſeveral " deceaſes of me the ſaid *Elizabeth Brown*, and the ſaid *Richard* " *Benthall*, then to the heirs of the body of me and the ſaid *Ri-* " *chard Benthall*; and for want of ſuch iſſue, to the uſe of my " brother *John Brown*, and the heirs of his body; and in default " of ſuch iſſue of *John Brown*, the like limitation to *Ralph Brown*, " and in default of ſuch iſſue of *Ralph*, the like limitation to *Mary*, " with remainder to ſuch perſons as *Elizabeth Brown* ſhould ap- " point, with a power of revocation by the ſaid *Elizabeth Brown*."

A ſtated account between *Richard Benthall* and *Elizabeth Brown* with relation to the 1050*l.* produced by the defendant, and not controverted by the plaintiff.

Elizabeth Brown levied a fine in *Trinity* term 8 *G.* 1. two years after the death of *Richard Benthall*, and declared the uſe of it to herſelf and her heirs.

In 1735, long after the fine, was the preſent bill filed.

To this *Elizabeth Brown* pleaded a purchaſe for a valuable conſideration, which was over-ruled, and ſhe was ordered to anſwer.

After the plea was over-ruled, *Elizabeth Brown* in *Eaſter* term 1737. ſuffered a common recovery, in which ſhe comes in as vouchee, and declares the uſe of it to herſelf in fee.

This being the ſtate of the caſe, the plaintiff prays that as ſhe is heir at law of *Richard Benthall*, the court either upon the foundation of her having the legal eſtate, will decree the poſſeſſion to her, or that the deeds may be ſet aſide on account of fraud and impoſition.

LORD CHANCELLOR.

Firſt, As to the plaintiff's legal right to the eſtate in poſſeſſion.

Secondly, If ſhe has no ſuch legal right, then whether ſhe ought not to be relieved on the point of fraud and impoſition.

Thirdly, If there is no fraud or impoſition, whether ſhe ought not to be relieved on the ſuggeſtion of miſtakes and blunders in the drawer of the deeds, contrary to the intention of the parties.

There has been one general objection made againſt this bill, that the plaintiff ought to be left to her remedy at law by ejectment.

Where perſons cannot ſhew a title at law, by the writings being out of their hands, they may properly come into this court.

In the firſt place the plaintiff is heir at law, and where ſhe cannot protect herſelf by ſhewing her title, as the deeds and writings are admitted to be out of her hands, ſhe may properly come into this court.

A ſecond reaſon for the bill is the applying by way of redemption, for this eſtate is allowed to be incumbred with 700 *l.* and therefore ſhe was regular in coming here to compel defendants to take their money.

A third reaſon, that the charge of 700 *l.* is by way of condition that the heirs do pay within 12 months, *&c.* now as the condition is broken by the 700 *l.* not being paid within 12 months, *&c.* I doubt they could not prevail at law.

As to the merits of the title at law it depends upon two points:

Firſt, Upon the effect of the deed poll of the third of *November* 1718. out of which ſeveral points ariſe.

Secondly, What is the effect of the acts ſubſequent to this deed poll of the third of *November* 1718. and alſo what kind of eſtate *Elizabeth Brown* took under the indenture of leaſe and releaſe of the 20th of *October* 1718.

She took an eſtate for life with a remainder in tail, *&c.* *Vide* the words of the deed itſelf.

As to the appointment under the deed poll of the third of *November* 1718. it certainly was a good appointment of the remainder in fee expectant upon her eſtate-tail.

The next thing to be conſidered on the deed poll is, whether this conveyance only operated out of her power, or out of her intereſt alſo.

And it is neceſſary for this purpoſe to conſider the words of the deed.

Now know ye, that the ſaid *Elizabeth Brown* in purſuance of, *&c.* doth by theſe preſents, *&c.* appoint, limit, give and grant all and ſingular, *&c.* and the reverſion, *&c.* in caſe I ſhall die before my intermarriage with the ſaid *Richard Benthall*, to hold to him the ſaid *Richard Benthall*, his heirs and aſſigns for ever.

By the words of the deed it is confined to ſome power; it is plain therefore nothing paſſed by this deed in point of law, but the remainder in fee, and her eſtate-tail remained undiſturbed, and not touched by the power: now ſhe does not only limit and appoint, but ſhe gives and grants; conſider then whether it can take effect out of the intereſt abſtracted from the power. In the firſt place there is no conſideration, in the next place no livery, and therefore there is no way of ſupporting it but to make it operate by way of releaſe to *Richard Benthall*, as being in poſſeſſion. *Co. Litt. ſec.* 460. *p.* 270. *b.*

If taken upon this foot, it will be ſufficient to create a baſe fee to Mr. *Benthall*, voidable by the iſſue in tail; for if tenant in tail, remainder in fee, grants any eſtate to *A.* to commence in poſſeſſion after the death of tenant in tail, and afterwards levies a fine to other uſes, the eſtate of *A.* is merged in the fine. *Vide Symonds* verſus *Cudmore*, *Salk.* 338.

If tenant in tail, remainder in fee, grants an eſtate to *A.* to commence after the death of tenant in tail, and then levies a fine to other uſes; *A.*'s eſtate is merged in the fine.

The queſtion then will come to this, whether the grant to *Richard Benthall* can amount to a conveyance in poſſeſſion; and I think it cannot, for it was intended only to take effect after her death, and not to paſs any eſtate in poſſeſſion.

The

The next queſtion will ariſe upon the acts which were ſubſequent to the deed poll.

The firſt tranſaction was the deed of the 11th of *March* 1719. being an appointment to new uſes.

A ſtrong objection has been made on the part of the plaintiff, that it is intirely void, becauſe *Elizabeth Brown* had made the former appointment without reſerving a power of revocation; and for this purpoſe the caſe of *Heli* verſus *Bond* has been very much relied on as the governing caſe. *

The decree in *Heli* and *Bond* on appeal to the houſe of Lords was affirmed by the unanimous opinion of the Judges of the Common Pleas, and Exchequer.

But I am very doubtful whether that caſe will govern the preſent, though I inclined at firſt that it would. This caſe was heard before Lord *Harcourt*, who had it ſtated for the opinion of the Judges of the court of King's Bench, and on appeal to the houſe of Lords, the decree was affirmed by the unanimous opinion of the Judges of the court of Common Pleas, and court of Exchequer.

In the preſent caſe here are two powers in the very creation; a power to appoint uſes, and a power to revoke uſes: now the power to appoint uſes, *Elizabeth Brown* has executed by the deed of the third of *November* 1718. but the power of revocation has never been executed at all till the deed of the 11th of *March* 1719. then the queſtion will be, whether both might not be executed once, as they ſeem to be diſtinct and ſeparate powers: In *Heli* and *Bond* the power of revocation was executed, and the doubt was, whether the uſes could be revoked *toties quoties*, without reſerving a power of revocation.

There is no occaſion to give a determinate opinion on this point; for even ſuppoſing the uſes of the deed in *March* 1719. are void, I think the uſes of the deed in *November* 1718. are well barred by the recovery in 1737.

What is the conſequence of the fine? why ſhe has barred her eſtate-tail by virtue of the ſtatute of 4 *H.* 7. and likewiſe diſcontinued the remainder in fee.

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* A man makes a ſettlement, wherein was a power from time to time to revoke the uſes, and to limit and declare new uſes; in purſuance of this power he revokes the old uſes, and by the ſame deed limits new, without annexing any new power of revocation to thoſe new uſes; afterwards, thinking he had by the firſt ſettlement a power of revocation *toties quoties*, he by another deed revokes the laſt, and again declares other uſes of the ſame lands.

It was decreed that his power of revocation by the firſt deed was executed, and at an end, and by conſequence that the revocation afterwards was without any warrant, and the uſes limited on the firſt revocation muſt ſtand. *Eq. Ca. Abr.* 342.

But

But it is ſtill ſtronger, if you conſider the deed of *November* 1718. as operating only out of her power according to *Symonds* verſus *Cudmore*, 1 *Salk.* 338.

The next conſideration is the recovery; I am of opinion that as the remainder in fee was diſcontinued by the fine, ſo it was well barred by the recovery.

It was made a queſtion 150 years ago, whether, if tenant in tail, remainder in fee, levied a fine, a common recovery would have barred the fee. *Cro. El.* 388. *Barton* verſus *Lever*. *Poph.* 100. But this point is now fully ſettled, and there is not ſo much as a *ſcintilla juris* remaining to the iſſue in tail.

A doubt 150 years ago; but is now ſettled, that if tenant in tail, remainder in fee, levies a fine, a common recovery bars the fee, and the iſſue in tail have not a *ſcintilla juris*.

Suppoſing it poſſible the deed of the third of *November* 1718. was intended to take effect out of the intereſt; I think it would be void, becauſe it is not to take effect in poſſeſſion till after her death, and the conſequence of this is that ſhe remained tenant in tail with remainder in fee to *Richard Benthall*, and ſo was barred by the recovery.

Another point to be conſidered, which is as to the effect of the fine.

I take it to be a fine, with proclamations and non-claim.

By the deed of appointment in *November* 1718. in caſe *Elizabeth Brown* did not marry *Richard Benthall* in her life-time ſhe makes him tenant in fee; he dies, ſhe enters and gains a poſſeſſion by abatement, levies a fine, and five years paſs; conſider then whether the plaintiff by this means is not effectually barred of any legal right.

The counſel for the plaintiff have founded their relief in equity on three grounds.

Firſt, On account of fraud and impoſition.

Secondly, That as this deed was made in view of marriage, as it has not taken effect, it is conſequently void.

Thirdly, Upon the miſtake and miſapprehenſion of the drawer of the conveyance, contrary to the deſign and intention of the parties conveying.

As to the firſt, *fraud and impoſition*; here is no proof in the cauſe of actual fraud: it appears in evidence that *Richard Benthall* was a man of very good underſtanding, and likewiſe bred to the law; that he did not raſhly and precipitately engage in this deed,

but took three days to conſider, and give inſtructions about this ſettlement: neither is there a ſyllable of proof, that Mrs. *Elizabeth Brown* herſelf uſed any art to impoſe upon him, or to draw him in to execute this deed in her favour.

If there is no proof of actual fraud, then conſider the circumſtance of fraud ariſing from the internal evidence in the deeds themſelves; now it muſt be admitted that there are ſuch marks of fraud upon the face of it, as may juſtly create ſuſpicion in any court whatever: it cannot be called a purchaſe, becauſe 1050 *l.* the pecuniary conſideration, is by no means equal to the value of the eſtate; but then the queſtion will be, whether this objection may not be anſwered by the apparent intention of Mr. *Richard Benthall*, that the whole eſtate ſhould paſs to her in poſſeſſion in his life-time, which is manifeſt from his declarations both before and after the execution of the deed.

It is no ground for a court of equity to ſet aſide a deed, that a perſon put an unguarded confidence in another.

That a perſon puts a groundleſs and unguarded confidence in another, is not a foundation in a court of equity to ſet aſide a deed; but it is plain that ſhe had an equal confidence at leaſt, for it appears in the cauſe that ſhe truſted him for a long time with 1050*l.* of her money, without taking ſo much as a note of hand, or any other ſecurity whatever.

The ſecond ground of relief is, that as the deed was made in view of marriage, which never took effect, the deed is conſequently void.

This court will not judge according to ſtrict rules of law, on a gift of lands *cauſa matrimonii prælocuti.*

The law of *Scotland* on this point, is, *Cauſa data non ſecuta*, like an exchange between parties, if not executed on one ſide, it is void on the other: but I do not think I am to judge here according to the ſtrict rules of law with relation to a gift of lands *cauſa matrimonii prælocuti.*

Though the conſideration is not expreſſed in a deed, yet if the court ſees what was the material conſideration, it has great weight, notwithſtanding the ſtatute of frauds.

It is objected by the defendant's counſel, that to go upon this ground of relief, *the marriage not taking effect*, would be contrary to the ſtatute of frauds and perjuries, becauſe here is no conſideration of marriage expreſſed in the deed it itſelf; but there are many caſes in this court where though *the conſideration* is not expreſſed in a deed, yet if it appears to the court, what was the real and material conſideration, it has had great weight with the court, notwithſtanding the ſtatute of frauds and perjuries.

But the ſtrongeſt part of the defendant's caſe is, that though there was a marriage intended, yet this deed was not to be the marriage ſettlement, but if the marriage took effect a new one was to be executed, and it appears in proof that this was the deſign.

But however abſurd the intention of this deed ſeems to be, yet *Elizabeth Brown* might provide for all the uſes of the marriage ſettlement under it, if ſhe thought fit.

The third ground of relief is, miſtakes and miſapprehenſions in the drawer of the deeds contrary to the deſign of the parties.

Miſtakes and miſapprehenſions in the drawers of deeds, are as much a head of relief as fraud and impoſition.

And to be ſure this is as much a head of relief as fraud and impoſition, and under this head it is inſiſted on, that the deed was intended only by way of mortgage or ſecurity; but on looking into it, nothing of this kind appears upon the face of it; the only thing that has at all the air of it, is the ſtated account of the ſame date with the leaſe and releaſe *October* the 20*th* 1718. But I am of opinion this was only done with regard to the 1050*l.* and to create an evidence of the debt.

The next thing inſiſted on in behalf of the plaintiff is, that if the conſtruction of the deed of *October* 20, 1718. ſhould prevail, which the defendant endeavours to put upon it, then there is not ſo much as an eſtate for life given to *Richard Benthall* before the marriage, which is always uſual in marriage ſettlements.

I do take this to be a blunder in the drawer of this conveyance, and therefore if Mr. *Benthall* in his life-time had come into a court of equity to be relieved, the court would have done it on conditions; but this is of no conſequence to the plaintiff.

The great point for the plaintiff is, that taking the deed poll of the third of *November* 1718. as part of the agreement, the drawers of it have ſo framed it as to let Mrs. *Elizabeth Brown* bar the remainder by the eſtate-tail being left in her power, and that ſhe has taken an undue advantage.

If this had appeared in the cauſe, I ſhould have been of opinion to relieve; but I muſt own, after conſidering the evidence with all the care and circumſpection I am maſter of, I cannot find ſufficient proof of an undue advantage: three witneſſes ſpeak fully to Mr. *Benthall*'s mind and declarations with regard to his great love and affection for Mrs. *Elizabeth Brown*, and his deſire that ſhe ſhould have the whole eſtate, and that he expreſſed himſelf ſo, both before and after the execution of the deed.

I am very doubtful, as the deed of the 20*th* of *October* 1718. is worded, if Mrs. *Elizabeth Brown* might not *toties quoties* revoke the uſes of any deed: but if ſhe could do the ſame by a fine, a court of equity will not take the Power from her.

Though

Though there is only parol evidence of Mr. *Benthall*'s intention that Mrs. *Elizabeth Brown* ſhould do what ſhe thought fit with the eſtate, yet this is ſufficient to rebut an equity: and in this light is like the caſe of *Standard* verſus *Metcalf* before Lord *Talbot*.

Length of time is a material ingredient for the defendant, becauſe it may have prevented her from having the benefit of ſuch evidence, as ſhe might have had if the plaintiff had applied ſooner for relief.

On the whole I do think there is not any room to relieve upon the ſeveral heads of fraud, intended marriage or miſtake, or to ſet aſide the deed, and therefore as to this the bill muſt be diſmiſſed.

But however I will leave it to the plaintiff's choice, whether ſhe will try the right at law; and if ſhe has a mind to try it, I will give her the aſſiſtance of this court in clearing all difficulties by removing the term for 500 years, out of her way, ſo that ſhe may be able to come at the right.

Caſe 163. *Kinaſton* verſus *Clark*, *Trinity* vacation 1741.

T. D. on his marriage ſettled his eſtate on himſelf for life, on his wife for life, remainder to truſtees to preſerve, &c. remainder to his firſt and every other ſon in tail male, remainder to himſelf in fee; a ſon born, the father dies indebted by bond, the ſon afterwards dies without iſſue, but by his will deviſes the eſtate to the defendant in fee. *Lord Hardwicke held, the reverſion being come into poſſeſſion, was aſſets to pay the father's debts, notwithſtanding the deviſe of the ſon.*

THOMAS *Delahay* on his marriage ſettled his eſtate on himſelf for life, on his wife for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and every other ſon in tail male, remainder to himſelf in fee; there was iſſue a ſon; *Thomas*, the father, died indebted by bond, the ſon afterwards died without iſſue, but by his will had deviſed the eſtate to the defendant *Clark* in fee.

LORD CHANCELLOR.

The queſtion is, whether the reverſion in fee, which is now come into poſſeſſion, ſhall be aſſets to pay the bond debts of *Delahay* the father.

I am of opinion that this reverſion being come into poſſeſſion is aſſets to pay the debts of the father, notwithſtanding the ſon has deviſed it to the defendant.

The defect in 13 *Eliz. cap.* 5. of fraudulent conveyances, is remedied by 3 *W. & M. cap.* 14.

Before the ſtatute of 3 *W.* 3. *cap.* 14. the heir was not bound by lands deſcending to him where ſold or aliened before action brought, and if an obligor deviſed his land, the deviſee ſo ſelling was not liable to the obligee: this ſtatute was to remedy the defect in 13 *Eliz.*

Eliz. cap. 5. of fraudulent conveyances, and to extend it to fraudulent deviſes.

Firſt, I will conſider whether this caſe is within the intention of the ſtatute of 3 *W.* 3.

Secondly, whether there are words to explain that intention.

The general view of the act is to prevent creditors from being defrauded of their debts, and to make all deviſees equal with the heir where lands deſcend upon him.

The known rule upon ſtatutes made to prevent frauds is, that they ought to have the moſt liberal conſtruction, as in *Twine*'s caſe. *

There are many caſes where the enacting part in a ſtatute extends further than the preamble even in criminal matters, as in an act made in 33 *Hen.* 8. *cap.* 23. for trying treaſons and murders, where the words being within *the King's dominions or without*, it has been extended to trials in the *Weſt-Indies*, and perſons have been tried there and executed by virtue of this act.

The enacting part of a ſtatute extends further than the preamble in many inſtances, even in criminal matters.

The 33 *Hen.* 8. *cap.* 23. for trying treaſons, &c. within the King's dominions *or without*, has been extended to trials in the *Weſt-Indies*.

It has been objected, that where a preamble is tied up to a particular caſe, the court will carry it no further, unleſs there are expreſs words in the enacting part which extend it further.

Now in this ſtatute there are two parts of the preamble, and both are not tied up to one caſe; for the firſt part is general, and the latter only confined to a particular caſe.

The heir is as much debtor upon the bond as the obligor, and ſo laid down in *Plowden* 440. who is more large upon this head than any of the ſubſequent reporters; an heir muſt be charged in the *debet* as well as the *detinet*, and before the ſtatute of *Jeofails* it would have been error if otherwiſe, which ſhews plainly the heir is to be conſidered as a debtor: if judgment go by default againſt an executor, it can only be *de bonis teſtatoris*; but if judgment be by default againſt the heir, it may be againſt him perſonally, which is another proof of the laws conſidering him as a debtor.

An heir muſt be charged in *the debet* as well as *the detinet*, and before the ſtatute of jeofails, it would have been error if otherwiſe, which ſhews he is to be conſidered as a debtor.

If judgment be by default againſt an executor, it can only be *de bonis teſtatoris*; but if againſt the heir, it may be *de bonis propriis*.

* *Twine*'s caſe, 3 *Co.* 82. it was reſolved in this caſe by the whole court, that all ſtatutes made againſt fraud, ſhould be liberally and beneficially expounded to ſuppreſs the fraud, and according to their opinions divers reſolutions have been made.

A ſon and a daughter by one venter, a ſon by the ſecond, the father dies indebted, the ſon by the firſt enters, is ſeiſed, and dies, the daughter is intitled, being a *poſſeſſio fratris*, and is liable to her father's debt.

Mr. *Murray* council for the defendant put this caſe: a ſon and a daughter by one venter, a ſon by the ſecond venter, the father dies indebted, the ſon by the firſt venter enters, is ſeiſed, and dies, the daughter is intitled being a *poſſeſſio fratris*, and, ſaid Mr. *Murray*, ſhe is not chargeable with the father's debts; but I deny his poſition, for ſhe is plainly liable to the debt.

The act is to prevent the defrauding the creditors of any debtors.

If lands had come to an heir in poſſeſſion, and he had deviſed them before the writ brought, it is certainly within the ſtatute; why not if it comes to him in reverſion? if in the preſent caſe there had been no deviſe, but the lands had deſcended to the heir of the ſon, and then the eſtate-tail determined, and ſo *in infinitum*, they would have been chargeable.

It is an inaccurate expreſſion, to ſay a reverſion after an eſtate tail is not aſſets, for there is a liableneſs which makes it aſſets *in futuro*.

Though the law ſays that a reverſion after an eſtate-tail is not aſſets, yet it is a groſs and inaccurate expreſſion, and is only *ſub modo*, for there is a liableneſs which makes it aſſets *in futuro*, or in other words a quality to be liable to the debt *in futuro*.

The ſon's recovery would have barred the creditors; a fine would not have done it, for the reverſion in fee would ſtill have been liable.

Indeed the ſon might have ſuffered a recovery, and barred the reverſion in fee, and there the father's creditors would not have come in; if he had levied a fine only, it would have barred the eſtate-tail, but the reverſion in fee would have been liable.

This court carries it's power further than the law in ſome caſes: for inſtance, in reſpect to an advowſon in groſs, however doubtful it may be at common law, whether it is aſſets, or is extendable on an *elegit*, as no yearly value can be put upon it, yet Lord Chancellor *King* in *Tong* and *Robinſon*, *Michaelmas* term 1730. decreed it to be ſold to pay debts by ſpecialty.

The eſtate now comes into poſſeſſion, is liable to the ſpecialty debts of the father, and by circuity the ſimple-contract creditors are to ſtand in the place of ſatisfied bonds.

Upon the whole, I think even at law an action might have been maintained againſt the heir and this deviſee, and ſuch a pleading is warranted in *Clift's Entries*. I am of opinion too that this eſtate, which is now come into poſſeſſion, is liable to the ſpecialty debts of the father, and by circuity the ſimple-contract creditors are to ſtand in the place of ſatisfied bonds.

Bates

Bates verſus *Dandy*, *July* 16, 1741. Caſe 164.

DANDY's wife was one of three ſiſters intitled to her brother *John Dyer*'s perſonal eſtate, who died inteſtate, and adminiſtration was granted to two perſons, the three wives and their huſbands, and one of the adminiſtrators came to an agreement to divide the perſonal eſtate in thirds, a third allotted to each: a memorandum under the account was ſigned by all; two mortgages, one in fee, the other for a term, each for 150*l.* were allotted to *Dandy*'s wife, but the legal intereſt was not aſſigned, but by the memorandum was agreed to be aſſigned: before any aſſignment, *Dandy* borrowed 200*l.* of the plaintiff on note, and by agreement under hand took notice that he had, the better to ſecure the 200*l.* left two mortgages with the plaintiff, which he was intitled to, and promiſed forthwith to aſſign them to the plaintiff. Before any thing done, *Dandy* died; the plaintiff's bill is brought againſt the wife of *Dandy*, againſt *Dandy*'s adminiſtrator, and againſt the mortgagors, to be paid his 200*l.* and intereſt, or to foreclоſe the mortgages.

J. D. who died inteſtate, left three ſiſters, his perſonal eſtate being agreed to be divided into thirds, two mortgages, one in fee, the other for a term, each for 150*l.* were allotted to the defendant, one of the ſiſters; before any aſſignment, her huſband borrowed 200*l.* of the plaintiff on note, and as a further ſecurity left the two mortgages with him, and gave his note, promiſing to aſſign them, and then dies. Bill brought againſt his adminiſtrator, and againſt the mortgagors, to be paid principal and intereſt, or to foreclоſe. *Lord Hardwicke held, that the huſband's promiſe to procure an aſſignment of the mortgages, amounted in equity to a diſpoſition of them* pro tanto, *ſo as to ſatisfy the plaintiff's debt, which being done, they belong to the wife as her* choſes in action.

The wife inſiſted that the mortgages were her *choſes in action*, and not having been aſſigned by her huſband ſurvived to her, or at leaſt that ſhe was intitled to them on paying the plaintiff.

The adminiſtrator of the huſband inſiſted that in equity what *Dandy* had done amounted to an aſſignment, and that he was intitled to redeem the plaintiff.

LORD CHANCELLOR.

The agreement amongſt the three ſiſters, and ſeparating the mortgages from other parts of the eſtate, was an appropriation of the mortgages to *Dandy* and his wife, and *Dyer*'s heir and adminiſtrator were truſtees for *Dandy* and his wife in the two mortgages. Secondly, That *Dandy* being intitled in right of his wife to the truſt of theſe mortgages, he had a power to aſſign them for his own uſe. Thirdly, That leaving them with the plaintiff, and giving his note, promiſing that he would procure them to be aſſigned, amounted in equity to a diſpoſition of them for ſo much as to ſatisfy the debt to the plaintiff, but not more; for though he might have diſpoſed of the whole in the manner he did, his intention was only to ſecure the plaintiff's debt, which being done, they belong to the widow as her *choſes in action*, and not to the huſband's adminiſtrator.

Although

If a bond be given to a *feme ſole*, who marries afterwards, the huſband and wife muſt join in the action; otherwiſe, if made to the wife after marriage, the huſband alone may bring the action and recover.

Although one of the mortgages was in fee, it made no difference; if a bond be given to a feme ſole, who afterwards marries, the huſband and wife muſt join in the action, and both muſt recover; but if a bond be made to the wife ſubſequent to her marriage, the huſband alone, without the wife, may bring the action and recover.

A huſband may aſſign the truſt of the wife's term, unleſs it be a truſt from himſelf for the wife's benefit; ſo likewiſe he may diſpoſe of her mortgage in fee, as well as her mortgage for a term.

That as the huſband may aſſign the wife's term, ſo he may the truſt of the wife's term, unleſs it be the truſt of a term from him for the wife's benefit; he may likewiſe diſpoſe of the wife's mortgage in fee, as well as her mortgage for a term.

A huſband may aſſign a wife's poſſibility, if it be for a valuable conſideration, but he can releaſe her bond without receiving any part of the money.

The huſband may aſſign the wife's choſe in action, or a poſſibility that the wife is intitled to, as well as her term, ſo that it be not voluntary, but for a valuable conſideration; but though he cannot diſpoſe of her choſe in action without a valuable conſideration, yet he may releaſe the wife's bond without receiving any part of the money.

The caſes that have been cited of *Theobalds* verſus *Deffay*, and *Packer* verſus *Windham*, *Prec. in Chanc.* 412. conſiſted of many particular circumſtances, and ſo are not applicable to this caſe.

Caſe 165. *Hill* verſus *Adams*, on appeal from the *Rolls*, *July* 16, 1741.

The defendant purchaſed a real eſtate of the plaintiff's huſband, and the eſtate being in mortgage for a term, he agreed to pay it off out of the purchaſe money, and to aſſign the term to a truſtee for the purchaſer to attend the inheritance, which was accordingly done; the huſband died in 1719, and in 1737 the plaintiff brought her bill againſt the defendant, for an account of profits, and to be paid her dower: *Sir Thomas Abney, ſitting for the Maſter of the Rolls, decreed dower for the plaintiff, but Lord Chancellor reverſed the decree, and diſmiſſed the bill without coſts.*

IN 1711, the defendant purchaſed a real eſtate of the plaintiff's huſband, and the eſtate being in mortgage for a term, it was agreed that the mortgage ſhould be paid off out of the purchaſe money, and the term aſſigned to a truſtee for the purchaſer to attend the inheritance, which was done accordingly; the huſband died in 1719, and in 1737, the plaintiff brought her bill againſt the defendant for an account of profits, and to be paid her dower.

It was admitted by the defendant's council, that the wife may be let into dower againſt a mortgage, and may be let in to redeem for that purpoſe againſt a purchaſer; but if a purchaſer takes in a term prior to the wife's right of dower, whether it be a ſatisfied term, or money paid for it, it is a bar to the wife's having dower, and, if any thing, the payment of money for the aſſignment of the

the term makes it rather ſtronger; ſo if a purchaſer takes in a mortgage, the feme cannot redeem: a truſt term attendant on the inheritance is the inheritance it ſelf: notice to the purchaſer of the marriage and right of dower make no difference: a woman cannot be endowed of a truſt eſtate, though the huſband may be tenant by the curteſy of it.

It was inſiſted for the plaintiff, that in the preſent caſe, the huſband did not join with the mortgagee in aſſigning the term, but it was anſwered that the aſſignment of the term, and the purchaſe, was all one tranſaction, and done at the ſame time, and that the wife cannot be in a better condition againſt the purchaſer than the huſband would have been. Caſes cited, *Radnor* and *Vandebendy*, *Shower's Parl. Caſ.* 69. *Banks* verſus *Sutton*, 2 *W.* 632. *Wray* verſus *Williams*, 1 *P. W.* 137. *Brown* verſus *Gibbs*, *Preced. in Eq.* 97.

Sir *Thomas Abney*, in the abſence of the *Maſter of the Rolls*, decreed dower for the plaintiff; but on an appeal to my Lord Chancellor, he reverſed the decree, and diſmiſſed the bill without coſts; and ſaid, ſince the caſe of *Radnor* verſus *Vandebendy*, it was a ſettled rule of the court, that if a purchaſer took in a term precedent to the right of dower, whether it was a ſatisfied term, or money paid for it, it was a bar to the wife's dower; but if the mortgage had ſubſiſted at the huſband's death, the wife might have redeemed, and been intitled to her dower; or if the huſband had paid off the mortgage, and taken an aſſignment of the term to attend the inheritance, and died ſeized, the wife would have been endowed; but if a purchaſer come in after the mortgage is paid off, and the death of the huſband, and takes an aſſignment of the term, that would prevent dower.

Since the caſe of *Radnor* verſus *Vandebendy* it has been a ſettled rule, that if a purchaſer has taken in a term precedent to the right of dower, be it a ſatisfied one, or money paid for it, it is a bar to the wife's dower; But if the mortgage had ſubſiſted at the huſband's death, the wife might have redeemed and been intitled *to dower*; or if he had paid it off, and taken an aſſignment of the term to attend the inheritance, and died ſeized, the wife would have been endowed.

He ſaid the term in *Radnor* verſus *Vandebendy* was not a ſatisfied term, but he thought there was no difference, whether the term was ſatisfied or not, or whether the purchaſer paid for it, but of the two, the latter was moſt favourable.

Radnor verſus *Vandebendy* is the rule to go by; and it has been generally ſaid in courts upon theſe occaſions, they would not go a jot further than that caſe, nor will I; but I think the preſent caſe rather ſtronger againſt dower.

It might have been as well at firſt, if caſes of dower and curteſy had been left to common law, but commiſeration to dowreſſes hath ariſen from indulgency to tenants by the curteſy, but all the caſes are ſettled and reconciled in *Radnor* and *Vandebendy*, and therefore the term here muſt be prior to the wife's right of dower.

All the caſes in relation to the point of dower are ſettled and reconciled in *Radnor* and *Vandebendy*.

Caſe 166. *Michaux* verſus *Grove*, *July* 22, 1741.

The proteſtant next of kin are only intitled to the profits in caſe of deſcents, for in caſe of a purchaſe, or grant by a papiſt, they are void by the ſtatute of 11 & 12 *W.* 3.

THE bill was brought by a proteſtant, next of kin, to have an account of a rent-charge ſettled on the defendant upon marriage, ſuggeſting ſhe was a papiſt.

On a demurrer to the relief prayed by the bill, *Lord Chancellor* ſaid, in the ſtatute of 11 & 12 *W.* 3. *c.* 4. intitled, An act for the preventing the growth of popery, there are two clauſes in the fourth ſection.

The firſt part reſpects *deſcents.*

The ſecond reſpects *purchaſes.*

It hath been ſettled that the proteſtant next of kin are only intitled to the profits in caſe of deſcents, for in the caſe of a purchaſe or grant by a papiſt, they are utterly void by the ſtatute, and therefore allowed the demurrer.

Mr. *Attorney General* ſaid, in the caſe of *Hill* verſus *Filkin*, 2 *Wms.* 9. Lord *Macclesfield* was of opinion, that a deviſe to an infant papiſt, if he was of ſuch an age as was capable to profeſs the popiſh religion, was a void deviſe, for taking by deviſe is a taking by purchaſe: but Lord Chancellor *King* held, if ſuch deviſee did conform at eighteen, that was ſufficient.

Caſe 167. *Anonymous*, *July* 24, 1741.

There is no inſtance of a *ne exeat regno* being granted, where it is not a mere equitable demand, except where a wife ſued in the ſpiritual court for alimony, and the huſband threatened to leave the kingdom, and to aid that court, and out of compaſſion to her it was granted.

A Motion for a *ne exeat regno* upon a bill filed by one who had brought an action at law on a marriage contract, and recovered a verdict the laſt ſittings for conſiderable damages, the defendant threatning, that before the plaintiff could have final judgment, ſo as to take out execution, which was within four days, in the next term, he would leave the kingdom.

Lord Chancellor upon a former motion ordered precedents to be ſearched, and it came on this day again, when ſerjeant *Kettleby*, council for the plaintiff, cited *Read* verſus *Read*, *Ch. Ca.* 115. where ſeveral other caſes are mentioned.

This

This bill is merely for a *ne exeat regno*, on which no decree can be made, and if I was to grant the motion, I muſt diſcharge it upon the defendant's putting in bail, which the plaintiff might have had when he brought his action, upon an application to a judge at his chambers, and an affidavit of ſpecial damages; though generally in ſuch actions bail is not requiſite: a *ne exeat regno* hath been granted only in a ſingle inſtance, where a wife ſued in the ſpiritual court for alimony, and the huſband threatened to leave the kingdom, and it was done out of compaſſion to her, and to aid that court; there is no other inſtance of its being granted where it is not a mere equitable demand; his lordſhip denied the motion.

The Drapers Company and others verſus *Davis*, *July* 23, 1741.

Caſe 168.

THIS cauſe was ſet down to be heard on the Maſter's report; and the point for Lord Chancellor's conſideration was, whether intereſt ſhould be allowed, (upon the ſeveral liquidated ſums under a former report, dated *April* 13, 1713, thereby ſtated to be due for the arrears of an annuity given under the will of Sir *William Boreman*, to *John Boreman*) in favour of *Thomas Harding*, as the adminiſtrator of *John Boreman*, who died as long ago as *December* 4, 1696.

LORD CHANCELLOR.

There is no certain rule of the court for giving of intereſt on arrears of an annuity; the firſt inſtance of its being done in this court, was in the caſe of *Ferrers* verſus *Ferrers*, *Caſ. in Eq. in Lord Talbot's time*, *p.* 2. but it hath been done in many inſtances ſince, and for the moſt part where it was the bread of the wife or child.

In reſpect to arrears of an annuity, there is no certain rule of giving intereſt; the moſt frequent inſtances are, where it was the bread of a wife or child.

A diſtinction has been made when it ariſes upon a contract, and where it was voluntary, but that is not a good diſtinction, for if an annuity be given by a will for the education and maintenance of the annuitant, the court will do it: in the preſent caſe it was given to him that was heir at law to the deviſor, till he attained his age of 24 years, he died before that age, and the annuity was paid for great part of the time the annuitant lived, but at his death there was about ſeven hundred and ſeventy pounds due; and on the report for further directions, this day his Lordſhip gave intereſt from the time that the report of 1713 was confirmed, which was twenty-eight years, and this in favour of the repreſentative only of the annuitant *Thomas Harding*.

The court gave intereſt on the arrears of an annuity, from the time a Maſter's report was confirmed, which was 28 years, in favour of the repreſentative of the annuitant only.

Lord

Intereſt is often decreed from the time the demand was liquidated, though the debt did not carry intereſt in its own nature.

Lord *Hardwicke* ſaid, the court often decrees intereſt from the time the demand was liquidated, though the debt did not carry intereſt in its own nature, but he would not carry the intereſt any higher than as above directed in the preſent caſe.

And in conſequence of this opinion, his lordſhip ordered the maſter to compute intereſt upon the liquidated ſum reported due by the report of the 13th of *April* 1713, for the arrears of the annuity given by the will of Sir *William Boreman* to *John Boreman* at the rate of 5*l. per cent. per ann.* from the 21ſt of *July* 1713, and that *ſuch intereſt* be added to the principal ſum reported due for the arrears of the ſaid annuity.

Caſe 169. *Attorney General* verſus *Davy*, *in the vacation of* Trin. *Term* 1741.

Where a certain number are incorporated, a major part of them may do any corporate act, though nothing be mentioned in the charter.

KING *Edward* the Sixth by charter incorporated twelve perſons by name, to elect a chaplain for the church of *Kirton* in *Lincolnſhire*, and by another clauſe three of the twelve were to chuſe a chaplain to officiate in the church of *Sandford*, within the pariſh of *Kirton*, with the conſent and approbation of the major part of the inhabitants of *Sandford*.

Upon a late vacancy two of the three choſe a chaplain with the conſent of the major part of the inhabitants of *Sandford*, the third diſſented; and the queſtion was, whether this was a good choice.

LORD CHANCELLOR.

It cannot be diſputed, that wherever a certain number are incorporated, a major part of them may do any corporate act; ſo if all are ſummoned, and part appear, a major part of thoſe that appear may do a corporate act, though nothing be mentioned in the charter of the major part.

It is not neceſſary that every corporate act ſhould be under the ſeal of the corporation.

This is the common conſtruction of charters, and I am of opinion that the three are a corporation for the purpoſe they are appointed, and that the major part of them may do any corporate act; this was a corporate act, and the choice too was confirmed, and conſequently not neceſſary that all the three ſhould join; but if the act to be done by a ſelect number of the twelve had been by a different charter, it would have been otherwiſe; it is not neceſſary that every corporate act ſhould be under the ſeal of the corporation, nor did this need the corporation ſeal.

Taylor verſus *Allen*, *October* 29, 1741. Caſe 170.

A Motion was made for an injunction to reſtrain the defendant from getting in the aſſets of her teſtator, and for a receiver to be appointed.

A wife who was an executrix reſtrained from getting in the aſſets of a teſtator, her huſband being in the *Weſt-Indies*, and not amenable to the proceſs of this court.

The teſtator made the defendant, who was a feme covert, his executrix, the huſband being then in *England*, but at the death of the teſtator, the defendant's huſband was in the *Weſt-Indies*.

An affidavit was read on the part of the plaintiff, in which the deponent ſwears that he has heard and believes the huſband of the executrix is in very indifferent circumſtances, and not a reſponſible perſon.

The defendant in her affidavit admits her huſband may owe debts to tradeſmen, but in other reſpects is not in bad circumſtances.

LORD CHANCELLOR.

There are ſeveral inſtances where this court have interpoſed to prevent an executor from getting aſſets of a teſtator into his hands upon particular circumſtances; and this is one of theſe caſes, for the huſband being in the *Weſt-Indies*, and not amenable to the proceſs of this court, the plaintiff can have no remedy, if the executrix ſhould waſte the aſſets, or refuſe to pay, becauſe the huſband muſt be joined in the action.

A receiver appointed to collect in aſſets, and to bring actions in the name of an executrix, muſt give ſecurity to indemnify the executrix on account of ſuch actions.

The affidavit beſides, on the part of the plaintiff, is very ſufficient to induce this court to appoint a receiver who may collect in the aſſets of the teſtator, and who likewiſe may be impowered to bring actions in the name of the executrix for recovery of debts due to teſtator's eſtate; but then the receiver muſt give ſufficient ſecurity to indemnify the executrix and her huſband on account of ſuch actions brought; and gave directions accordingly.

Caſe 171. *Sir William Stanhope* verſus *Roberts, executor of Spinks, October* 29, 1741.

Counſel have a right to draughts as precedents, but not to detain them, where either party may have a benefit from the inſpection of them.

A Bill was brought to ſet aſide an annuity granted by the plaintiff to *Spinks*, upon a ſuggeſtion of its being obtained by fraud, extortion, *&c.* and to diſcover the real conſideration given by *Spinks* for the annuity, and that the draught of the annuity ſuggeſted to be in the hands of the defendant might be produced at the hearing.

The defendant is the executor of *Spinks*, and a gentleman at the bar, and was the council who drew the draught of the annuity, and who admits by his anſwer he had it in his cuſtody, and ſubmits to produce it as the court ſhall direct, and does not inſiſt on any privilege as a council.

The motion was to produce the draught upon oath before a maſter, or to leave it with the defendant's clerk in court for the inſpection of the plaintiff.

LORD CHANCELLOR.

Two objections have been made to this motion.

Firſt, To the nature of the caſe.

Secondly, With reſpect to the merits of the caſe.

As to the nature of the caſe, it was ſaid that a council is privileged ſo as not to be obliged to produce a draught, becauſe it is his own property, and he has a right to keep it; but in this caſe Mr. *Roberts* is a party concerned in intereſt, which differs it from the common caſe of a council; he is executor of the annuitant, and ſtands in his place, and by his anſwer has ſubmitted to produce the draught as the court ſhall direct; and every body knows ſuch a ſubmiſſion will oblige him to do it even before the hearing, if the court ſhall think it neceſſary.

Councellors have a right to draughts to make uſe of them as precedents only, but not to detain them, when either party concerned may have any benefit ariſing from an inſpection of them.

A demurrer to a bill for the diſcovery of a caſe which the defendant had ſtated to his own council for an opinion over-ruled.

There was a ſtronger caſe in Lord Chancellor *King*'s time, upon a bill brought, among ſeveral other things, for a diſcovery of the

caſe,

caſe, which the defendant had ſtated to his own council for an opinion, and alſo for a diſcovery of the ſeveral facts contained in the caſe.

The defendant demurred to ſuch diſcovery.

Which demurrer Lord Chancellor *King* over-ruled, and upon an appeal to the houſe of Lords the order of the Chancellor for over-ruling the demurrer was affirmed.

As to the merits of the caſe, I do not find any particular circumſtance to ſhew it would be any ways prejudicial to Mr. *Roberts* to produce the draught.

His Lordſhip ordered the draught to be left with the defendant's clerk in court, but not upon oath, to be inſpected by the plaintiff.

Farnham verſus *Phillips*, *October* 24, 1741. Caſe 172.

A. B. a freeman of *London*, having a wife and ſix children, by his will gives his wife her widow's chamber, and the third of his eſtate, which ſhe was intitled to by the cuſtom of *London*, and to his ſix children one other third which they were intitled to by virtue of the cuſtom of *London*, and as to the third, he had a power to diſpoſe of; he directed a debt of one hundred pounds to be paid out of it, and the reſidue to be equally divided among his wife and children.

Where after making a will, a father advances a child with a portion as great or greater than the legacy, ſuch proviſion has always been held an ademption; but when the deviſe has been of a reſidue, no inſtance where a ſubſequent portion has been held to be an ademption.

After making his will, he married one of his daughters to the plaintiff, and gave her one thouſand pounds, which in the marriage articles was called her portion or proviſion, and *A. B.* being now dead, this bill was brought by the huſband and wife for their ſeventh part of their teſtamentary third. For the defendants, the other children, it was inſiſted, that the portion was a ſatisfaction for the whole, and that as they did not offer to bring the thouſand pounds into hotchpot, to make all the children equal, they ought not to claim this thouſand pounds (which was more than their ſhare of the teſtamentary third, the whole eſtate being but ten thouſand five hundred pounds) and the ſhare of the Teſtamentary part too, by which they would have two hundred and ninety pounds more than the other children; that the will intended an equality among all the children, and as they refuſe to bring in this thouſand pounds, they claim under the will as far as it makes for them, and againſt the will, when it makes againſt them, which equity will not permit.

Parol evidence was offered to prove that the father, after giving the thouſand pounds portion, had often declared that all his children ſhould have an equal ſhare of this eſtate.

LORD

LORD CHANCELLOR.

That evidence cannot be read, being to explain a will by matter extrinſick to it, which would introduce great uncertainty in the conſtructions of wills; and therefore ſuch evidence has often been refuſed to be read.

As to the caſe itſelf, I cannot make the childrens portions equal by any rule of equity.

Where a father after making his will advances his child with a portion as great or greater than the legacy given by the will, ſuch proviſion has always been held an ademption.

But there is no caſe where the deviſe has been of a reſidue (that is uncertain, and at the time of the teſtator's death may be more or leſs) in which a ſubſequent portion given has been held to be an ademption; here this is not a deviſe of one third, but of a reſidue after payment of a debt charged on that third.

And here is likewiſe ſomething to which this portion may be properly applied as a ſatisfaction, *viz.* the orphanage part.

And he calls this a portion or proviſion in the marriage articles, which ſeems as if he then conſidered this as an advancement in his life-time in bar of the cuſtom.

There is no declaration in the will that he intended all equal, but what he has ſaid of equality is of the reſidue, which is a part of the eſtate remaining after what is given away in the teſtator's life-time.

Lord Hardwicke directed an account to be taken of the perſonal eſtate of the teſtator *Michael Phillips*, and alſo of what is due to *Mary Phillips* the teſtator's widow, for her paraphernalia, and widow-chamber, which are to be paid, and retained by her, after the teſtator's debts are paid; and his clear perſonal eſtate is to be divided into three equal Parts, and one third part thereof to be paid to the teſtator's widow, and one other third part to be divided between and paid to *Michael*, *Thomas*, *Amy*, *Mary*, and *Sarah Phillips*, the teſtator's five children, the plaintiff *Ann Farnham* admitting herſelf fully advanced of her orphanage ſhare in her father's life-time, and as *to the remaining third*, after the deductions out of it, according to the directions of the teſtator's will, his Lordſhip ordered the reſidue thereof to be divided into ſeven parts, and one ſeventh thereof to be paid to the plaintiff *Farnham*, and his wife, and the other ſix parts to be equally divided between the defendant the teſtator's widow, and the five other defendants her children.

Marſhall verſus *Blew*, *November* 7, 1741. Caſe 173.

A Deviſe from a huſband to the wife of the uſe of all houſhold goods, furniture, plate, jewels, linen, &c. for Life or Widowhood, afterwards to children and grandchildren.

The wife is not barred of her paraphernalia by a deviſe of the uſe of all houſhold goods, furniture, plate, jewels, linen, &c. for life.

LORD CHANCELLOR.

This does not bar the wife of her paraphernalia.

She may likewiſe by this deviſe uſe the goods in her own, or any other perſon's houſe, alone, or promiſcuouſly with other goods, or may let them out to hire.

Such a deviſe intitles her to uſe the goods any where, or even let them out to hire.

Strachy verſus *Francis*, *November* 12, 1741. Caſe 174.

A Motion was made on behalf of the plaintiff, who was patron of the living, againſt the rector, for an injunction to ſtay waſte in cutting down timber in the church-yard.

A rector may cut down timber for the repairs of the parſonage-houſe or chancel, but not for any common purpoſe.

LORD CHANCELLOR.

A rector may cut down timber for the repairs of the parſonage-houſe or the chancel, but not for any common purpoſe; and this he may be juſtified in doing under the ſtatute of 35 *Edw.* 1. *ſtat.* 2. intitled *Ne rector proſternat arbores in Cæmeterio.*

If it is the cuſtom of the country he may cut down underwood for any purpoſe, but if he grubs it up, it is waſte.

He may cut down timber likewiſe for repairing any old pews that belong to the rectory; and he is alſo intitled to botes for repairing barns, and outhouſes, belonging to the parſonage.

He is intitled to botes, for repairing barns and outhouſes belonging to the parſonage.

An injunction was granted till the hearing of the cauſe to ſtay the rector from cutting down timber, except in the particular inſtances before mentioned.

Caſe 175. *Long* verſus *Burton*, *November* 12, 1741.

If after a croſs bill filed, a plaintiff in an original bill will amend it in material parts, and thinks fit to compel an anſwer to the amendments at the ſame time with the original bill, he waves his priority of anſwer to the original.

THE anſwer to an original bill was reported inſufficient, the defendant filed a croſs bill, and the plaintiff obtained an order that the original bill ſhould be anſwered before he anſwered the croſs bill; the plaintiff too on the anſwer's being reported inſufficient, obtained an order to amend his bill, and the amendments to be anſwered when the exceptions were, and amended his bill in ſeveral material matters.

Mr. *Chute* moved to diſcharge the order obtained, and relied on the caſe in 2 *P. Wms.* 435. *Steward* and *Roe*.

LORD CHANCELLOR.

Where a bill is amended both in diſcovery and relief, the pendency of ſuit, as to thoſe parts, is only from the time of the amendment.

By the courſe of the court the plaintiff in the croſs cauſe cannot have an anſwer till he has himſelf anſwered the original bill: But this is a privilege the plaintiff in the original bill has in right of his original bill; for if after the croſs bill is filed he will amend the original bill in material parts, I do not think he is intitled to have an anſwer to the amendments; for as the bill may be amended both in diſcovery and relief, the pendency of ſuit, as to thoſe parts which are amended, is only from the time of the amendment.

The preſent caſe goes further than the caſe in Mr. *Peere Williams's Reports*, becauſe here the anſwer to the original bill is inſufficient.

The plaintiff in the original bill inſiſts, the amended bill is ſo tacked to the original, that the defendant is obliged to anſwer both; but I am of opinion he is not intitled to ſuch an anſwer, and it might tend to great delay if he was.

The grounds of the order for anſwering the amended bill are, that by this means the plaintiff ſaves expence, and has an anſwer the ſooner; for if it was not an inſufficient anſwer, he muſt have new proceſs to compel an anſwer to the amendments, but in the preſent caſe he may take up the old proceſs.

But this is no reaſon for gaining priority of ſuit; for if he thinks fit to compel an anſwer to the amendments at the ſame time with the original bill, he waves his priority of anſwer to the original bill; and there is no inconvenience in this, becauſe the court can give time generally to anſwer the croſs bill.

Mr.

Mr. *Clark*, council for the plaintiff in the original bill, ſaid, if we pray time, we ſhall have an injunction againſt us.

Lord Chancellor made anſwer, I cannot help that, you have loſt your priority. His Lordſhip diſcharged the order.

Philpot verſus *Hoare and Robinſon*, *November* 26, 1741. Caſe 176.

A Leaſe was made by the plaintiff for eleven years at a rack rent of 140*l.* in 1738. leſſee covenanted for himſelf, his executors and adminiſtrators, that he, his executors and adminiſtrators, but does not mention *aſſigns*, will not without the expreſs conſent of the leſſor aſſign over the leaſe, and afterwards becomes a bankrupt; the defendant was choſen aſſignee under the commiſſion, and enters on this farm, being particularly aſſigned to her as part of the bankrupt's eſtate, ſells off the crop and the ſtock, and pays the *Michaelmas* rent 1739, and the day before the next rent-day, *viz.* on the 24th of *March* 1740, having received but a little profit from the term for this half year, aſſigns over the leaſe to the defendant *Robinſon*, ſubject to the rents and covenants in the leaſe.

A leſſee for 11 years at 140*l.* rent, who had covenanted for himſelf, his executors and adminiſtrators, but not *aſſigns*, that he would not without the leſſor's conſent aſſign over the leaſe, becomes a bankrupt; the defendant

Hoare, the aſſignee under the commiſſion, enters on the farm, ſells off the crop and ſtock, pays the *Michaelmas* rent 1739. and the day before the next rent-day aſſigns over the leaſe to *Robinſon*. The bill is brought to oblige Mrs. *Hoare* to keep the leaſe during the term. It appearing in proof that *Robinſon* never ploughed or ſowed the land, never reſided on the farm, but occnpied it rather as an agent, *Lord Hardwicke held it to be a fraudulent tranſaction between Mrs. Hoare and Robinſon, and decreed her to anſwer the rent to the time, and the aſſignment to be ſet aſide.*

The bill is brought to prevent the aſſignee of bankrupt from aſſigning the leaſe, and to oblige her to keep it during the term.

LORD CHANCELLOR.

I am clearly of opinion the defendant ſhall anſwer for the half year's rent due at *Lady-day* 1740. the day after the aſſignment, on account of the profits, upon the authority of the caſe in 1 *Vern.* 165. *Treacle* v. *Coke*. *

As to the accruing rents it is a point of more difficulty, for the covenant in this leaſe not *to aſſign* does not run with the land to the aſſignee, becauſe *aſſignees* are not bound by name in the covenant.

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* In that caſe an aſſignee of a leaſe rendring rent, having enjoyed the land ſix years, aſſigned over; the bill was to call him to an account for the rent for ſuch time; and Lord Keeper held he was liable in equity for the rent during the time he enjoyed the land.

N. B. The council alledged there were 20 precedents; and Lord Keeper *North* ſaid, if there had not been one, he ſhould not have doubted to have made a precedent in this caſe. *E. T.* 1683.

The

The covenants which run with the land will bind the aſſignee, but I do not ſay this is ſuch a covenant.

The defendant *Robinſon*'s not producing the aſſignment ſhews fraud, and makes it very ſuſpicious there is no aſſignment; yet if the plaintiff had accepted any rent from *Robinſon*, it would have bound him to accept him as tenant.

The caſe of landlords is of very great conſequence, and if ſuch a contrivance is allowed to prevail, eſpecially near this town, landlords are in a very bad condition in regard to covenants in leaſes.

It appears in proof, that the defendant Mrs. *Hoare* knew *Robinſon* to be inſolvent; he is miſrepreſented in the aſſignment, for he is called of *Warburton* in *Lincolnſhire* grazier, at the ſame time he lived at *Weſtminſter*. He never ploughed or ſowed the land, never reſided on the farm, but occupied it rather as an agent; nor do I believe he ever had the aſſignment in his hands: taking theſe circumſtances together, it looks like a colluſive aſſignment. Therefore I ſhall decree Mrs. *Hoare* the defendant to anſwer the rent to this time, as it is a fraudulent tranſaction, and likewiſe the aſſignment itſelf to be ſet aſide.

His Lordſhip directed at firſt an action to be brought in a *quantum damnificatus*, againſt the defendant Mrs. *Hoare* for removing the ſtover from off the farm; an action of covenant he ſaid would not lie, as there is no privity between the defendant and the leſſor: but in order to prevent any further litigation, his Lordſhip propoſed that in conſideration of paying the plaintiff all the rent which is due, the leaſe for the reſidue of the term ſhould be void, and the plaintiff take the farm into his own hands, which the parties agreed to accordingly.

Caſe 177. *Buffar* verſus *Bradford*, *November* 27, 1741.

A teſtator having divided his perſonal eſtate into eight ſhares, gave four parts to his niece *Buffar*, *and the children born of her body*; the plaintiff was born after the will was made, and Mrs. *Buffar* dies in the teſtator's life time; *this is not a lapſed legacy, for ſhe did not take an eſtate-tail, but as a jointenant with the plaintiff, and as ſhe is dead, he takes the whole by ſurvivorſhip.*

THIS caſe aroſe upon the words and conſtruction of the following will:

" As to my houſehold goods, plate, &c. I give one moiety to " my ſiſter *Mary Bradford*, the value of the other half to be placed " to the account of my perſonal eſtate, yet ſo nevertheleſs that ſhe " ſhall have the uſe of the whole ſo long as ſhe continues a widow; " all the reſt and remainder of my eſtate, to be valued; and to pre- " vent diſputes, the whole amount of the value of the ſaid eſtates,

" whether real or perſonal, to be divided into eight parts, whereof " I give the uſe of the whole to my ſiſter *Mary Bradford*, for her " ſupport and maintenance during the time ſhe ſhall remain a wi- " dow, *ſans* waſte, ſo as the ſame be divided on her marriage; " two 8ths to herſelf, two other parts thereof to her daughter my " niece *Ann*, *and the remaining four parts to my niece Buffar*, *and* " *the children born of her body*; but in caſe my ſiſter remain a widow, " and her daughter *Ann* marry with her approbation, that then her " ſaid daughter ſhall have one 8th part of her fortune, but no more, " during her mother's life, until her ſaid mother ſhould marry; " and for the other 8th part, which will make up a quarter ſhare, " I leave the valuation and eſtimation of the ſaid eſtates to be made " by my ſiſter, and nephew *John Buffar*, to be divided by them; " but in ſuch manner, that if any part ſhall be thought too highly " valued, that then ſuch part ſhall, when the time of poſſeſſion " comes, go to Mrs. *Buffar* and her children, becauſe they will " have then four of the eight parts. Thus I have as equally, as I " thought reaſonable, divided my eſtate for my ſiſter during her life, " in caſe ſhe ſhall remain a widow, without being accountable to " any for the income or profits thereof, that ſhe at her death may " be able to give good legacies to ſuch of her children as ſhall " pleaſe her beſt; I leave alſo to *John Buffar* and his wife, my " nephew and niece, and to their children, for mourning 40*l.* and I " appoint my ſiſter *Mary Bradford* and *John Buffar* executors."

The bill was brought to have the perſonal eſtate of the teſtator ſecured, and the deeds and writings.

LORD CHANCELLOR.

The queſtion is, what eſtate the teſtator's niece *Buffar* and her children take.

She had no child at the time the will was made, but the plaintiff was born afterwards in the life-time of the teſtator, the mother of the plaintiff dies in the teſtator's life-time.

It was inſiſted on the part of the defendant *Mary Bradford*, who had the eſtate for life, and who is likewiſe heir at law, that it is a lapſed deviſe, for that the plaintiff's mother took an eſtate-tail, and that *her children* are words of limitation, and not of purchaſe, where the deviſee has none at the time of the deviſe made; and therefore, as the plaintiff's mother died before the teſtator, no eſtate veſted in her, and conſequently it is a lapſed legacy; and for an authority her counſel relied on *Wild*'s caſe, 6 *Co.* 17.

Children are words of purchaſe, and not of limitation, except it is to comply with a teſtator's intention, and it can take effect no other way.

On the other hand it muſt be allowed, that children in their natural import are words of purchaſe, and not of limitation, unleſs it is to comply with the intention of a teſtator, where the words cannot take effect in any other way: but ſuppoſe a deviſe was to *A.* and after his death to his children, here it is a word of purchaſe.

It has been admitted very candidly by the counſel, that as to the perſonal eſtate, the children, though born after the making of the will, muſt take equally with the mother as joint-tenants; for where a man gives perſonal eſtate to *A.* and her children, to conſtrue the word *children* to be a word of limitation, and not of purchaſe, would be a ſtrained and remote conſtruction, and would defeat the children intirely, and the firſt taker would have all. *Vide Cook* v. *Cook*, 2 *Vern.* 545. and *Forth* and *Chapman*, adjudged on the ſame words in Lord *Macclesfield*'s time, 2 *Wms.* 663.

It is the time of poſſeſſion, in the preſent caſe, which takes it out of the reaſoning in *Wild*'s caſe; for here Mrs. *Buffar* and her children are to have four 8ths, and are to take at the ſame time as joint-tenants.

The will in this caſe confines it to ſuch children as ſhould be born in the life-time of the teſtator, and therefore is not liable to the objection made by the defendant's counſel, that the remainder muſt divide and ſplit as in common marriage ſettlements, where there is an eſtate-tail to daughters, and one is born in the life-time of the father, and another after his death. *Vide* the caſe of *Stephens* v. *Stephens*, *Caſ. in Eq. in Lord Talb. Time* 228.

The plaintiff being born in the life-time of the teſtator, would have taken with his mother as joint-tenants, if ſhe had lived; as ſhe is dead, he ſhall take the whole by way of remainder.

Where there are two executors, and a legacy is left to one, for mourning for himſelf, his wife and children, he ſhall have a moiety of the reſidue notwithſtanding.

As to the other point, whether a legacy given to one of the executors for mourning for himſelf, his wife and children, ſhould exclude him from the reſidue, I ſhould think it very hard to do it, even ſuppoſing him ſole executor; but as there are two in this will and a legacy to one, both ſhall take the ſurplus equally, and the executor notwithſtanding his legacy of 40*l.* for mourning for himſelf, his wife, and children, is not excluded.

Reeve

Reeve and others verſus *the Attorney General, November* 27, 1741. Caſe 178.

FULHAM being ſeiſed in fee of the eſtate in queſtion, by his will deviſed it to his wife for life, and after her death to one *Hacon* to ſell, and out of the profits ariſing from the ſale of the eſtate, in the firſt place to pay ſome legacies, and after debts and legacies paid, to diſpoſe of the reſidue to the plaintiffs.

F. ſeiſed in fee of the eſtate in queſtion, deviſed it to his wife for life, and after her death to one *Hacon* to ſell, and in the firſt place to pay debts and legacies, and the reſidue to the plaintiffs. *Hacon* who had a bare power is dead, and for want of heirs to *F.* the eſtate is eſcheated to the crown. *The bill was brought againſt the Attorney General on behalf of the crown, to have the will eſtabliſhed and eſtate ſold; the court of Exchequer might do this, as it is a court of revenue, but it cannot be decreed here, and therefore Lord Chancellor diſmiſſed the bill.*

Mr. *Hacon* who had a bare power, and not coupled with any intereſt, is dead, and for want of heirs to *Fulham*, the eſtate is eſcheated to the crown.

The bill is brought by the reſiduary legatees under the will. againſt the Attorney General, who was made defendant on behalf of the crown, to have the will eſtabliſhed and proved, and likewiſe to have the eſtate ſold.

But here the deviſe is, after the death of the teſtator's wife, to be ſold by *Hacon*, who had only a bare power, and no intereſt in the eſtate, and as he is dead, it dies with him, and does not ſurvive to any perſon.

The queſtion is, whether an eſtate eſcheated to the crown, can be affected with a truſt; for this purpoſe ſee *Hard. Rep.* 469. where there are ſeveral caſes to this point.

I remember a caſe in the court of Exchequer, when I was Attorney General, in which Mr. *Lutwich* the counſel was the plaintiff, his father had a mortgage in fee on Sir *William Perkins*'s eſtate, who was attainted for high treaſon on account of the aſſaſſination plot: Mr. *Lutwich* brought his bill to foreclоſe, and made the Attorney General a party: the court would not decree a foreclоſure againſt the crown, but directed that the mortgagee ſhould hold and enjoy the mortgaged premiſſes till the crown thought proper to redeem the eſtate. *Vide Pawlet* and *the Attorney General, Hard.* 465.

The father of Mr. *Lutwich* the counſel had a mortgage in fee on Sir *William Perkins*'s eſtate who was attainted, the ſon of Mr. *Lutwich* brought his bill to foreclоſe, and made the Attorney General a party; the court would not decree a foreclоſure againſt the crown, but directed the mortgagee ſhould hold and enjoy till the crown thought proper to redeem the eſtate.

Now I cannot decree the plaintiff here to hold and enjoy, becauſe they are only to have certain ſums out of the eſtate, after debts and

legacies are ſatisfied. Suppoſe the land had been ſeiſed and put in charge, can I make a decree that it ſhall be ſold? no, I cannot, but the court of Exchequer may, as it is a court of revenue: the bill muſt be diſmiſſed.

Caſe 179. *Powell* verſus *Knowler*, at the *Rolls*, *December* 1, 1741.

Where a perſon undertakes to make out the title of another to an eſtate, and is to have a part of the lands as a ſatisfaction for his trouble, though the agreement for this purpoſe is artfully drawn in order to keep it out of the ſtatutes of champerty, he will not be intitled to have a ſpecific performance decreed here, but will be left to his remedy at law.

UPON the death of Sir *Thomas Coleby*, the plaintiff came to Mr. *Gilbert Knowler* the brother of the defendant, and told him that he was poſitive he could make it out, that he Mr. *Gilbert Knowler* was the ſole heir, or at leaſt a coheir of Sir *Thomas Coleby*; Mr. *Gilbert Knowler* (it being extreamly doubtful at that time who was heir or coheir of Sir *Thomas Coleby*) declined it, and was unwilling to ingage in it; but upon the preſſing ſolicitations of the plaintiff, and upon his offering to defray the whole expence of any ſuit that ſhould be commenced, Mr. *Gilbert Knowler* liſtened to the propoſal, and executed the following articles of agreement.

" *May* the 11th 1732. *Memorandum*, A wager was made, and " this day entered into between *Gilbert Knowler*, Eſq; and *Francis* " *Powell*, clerk, the ſaid *Gilbert Knowler* wagers with the ſaid " *Francis Powell* 4000*l.* that he the ſaid *Gilbert Knowler* is not heir, " coheir, or one of the coheirs of Sir *Thomas Coleby* late of *Kenſington*; and the ſaid *Gilbert Knowler* doth bargain and promiſe " with and to the ſaid *Francis Powell*, that he the ſaid *Gilbert* " *Knowler*, his heirs, executors, *&c.* will pay to *Francis Powell*, " his executors or adminiſtrators. 4000*l.* ſo ſoon as it ſhall be " proved, that the ſaid *Gilbert Knowler* is heir, coheir, or one of " the coheirs to the ſaid Sir *Thomas Coleby*: and the ſaid *Francis* " *Powell* wagers with the ſaid *Gilbert Knowler* 500*l.* that he the " ſaid *Gilbert Knowler* is heir, coheir, or one of the coheirs to Sir " *Thomas Coleby* deceaſed, and this day enters into bond in the " penalty of 1000*l.* to pay the 500*l.* to the ſaid *Gilbert*: *Item*, " the ſaid *Gilbert Knowler* doth promiſe to proſecute ſuits both in " law and equity for recovery of this claim: and the ſaid *Francis* " *Powell* promiſes to gather neceſſary evidence together in order to " prove the ſaid *Gilbert*'s right: *Item*, it is alſo agreed between the " ſaid parties, that if the value of the eſtate and rents recovered " by the ſaid *Gilbert* as heir, *&c.* be leſs than 8000*l.* the ſaid " *Gilbert* ſhall be obliged to pay the ſaid *Francis Powell* one full " half of the value of the eſtate ſo recovered: *Item*, it is alſo " agreed that the ſaid *Francis Powell* ſhall take his bond (he has " this day entered into to bind himſelf for payment of 500*l.* to " the ſaid *Gilbert Knowler* on the 20th of *December* next) at 500*l.* " in part of the ſum of 4000*l.* or ſuch leſs ſum as may ariſe from " this wager, according to the foregoing articles, if the ſaid *Francis* " wins the ſaid wager: *Item*, the ſaid *Francis* conſents and agrees " that

" that he the ſaid *Gilbert* ſhall over and above the ſaid 500*l.* deduct " and keep back out of the ſaid 4000*l.* or ſuch leſs ſum as ſhall or " may ariſe from the wager, all ſuch money as he the ſaid *Gilbert* " ſhall have any ways expended, or be liable to pay in or about " the proſecuting any ſuit or ſuits for recovering this claim: *Item*, " the ſaid *Francis* conſents that he the ſaid *Gilbert* ſhall no other- " wiſe be liable to pay to the ſaid *Francis Powell* the ſaid 4000*l.* " or leſs ſum, than by giving ſecurity for it upon the ſaid eſtate ſo " to be recovered; and if the ſaid *Gilbert* or his heirs is or are ready " to execute any deed or writing whereby to ſecure the ſaid 4000*l.* " or leſs ſum, according to this agreement, to the ſaid *Francis*, " or his executors or adminiſtrators, by way of ſale or mortgage " upon the ſaid eſtate, or any ſufficient part thereof, within two " months after the ſaid *Gilbert* ſhall be in quiet poſſeſſion of the " ſame, then it ſhould be underſtood that the ſaid *Gilbert* has fully " performed his part of this agreement.

To which articles *William Knowler* the defendant in the preſent cauſe was one of the witneſſes, and the ſaid articles are now in his cuſtody.

Soon after the execution of the articles, *Gilbert Knowler* brought a bill in the court of Chancery, and iſſues were directed to try whether *Gilbert Knowler* was heir, or one of the coheirs of Sir *Thomas Coleby*, and a verdict was found in the affirmative, that he was one of the coheirs, and when the cauſe came on upon the equity reſerved poſſeſſion of one third of the eſtate was decreed to Mr. *Gilbert Knowler*. In a ſhort time after the decree, ejectments were brought by one perſon claiming to be the ſole heir of Sir *Thomas Coleby*, and a bill was preferred by other perſons againſt *Gilbert Knowler*, ſetting up different rights to the eſtate; but the bill was diſmiſſed, and a perpetual injunction granted: before a writ of partition could be taken out, Mr. *Gilbert Knowler* died, but by a codicil dated *July* the 15th 1737. " he deviſes " all his undivided third part in the meſſuages, lands, *&c.* ſituated in " *Middleſex* and *Eſſex*, or elſewhere, (which he, as one of the coheirs " of Sir *Thomas Coleby*, lately recovered) to his brother *William Know-* " *ler* the defendant, in truſt that he ſhall with all convenient ſpeed, " after the ſaid meſſuages, lands, *&c.* ſhall be divided and allotted " into three equal parts, convey and aſſure in fee-ſimple unto the " reverend Mr. *Francis Powell*, rector of *All Saints* in the town of " *Colcheſter*, and unto his heirs and aſſigns, ſuch part and ſo much " of my ſaid premiſſes and lands as ſhall be valued at the ſum of " money he the ſaid *Francis Powell* is, ſhall or may be intitled unto, " by virtue of a contract or agreement bearing date, *&c.* now in " the cuſtody or power of my ſaid brother Doctor *William Knowler*, " *Item*, my mind and will is, that my agreement with the ſaid " *Francis Powell* ſhall be fully performed and ſatisfied out of the " meſſuages, lands, *&c.* lately belonging to the ſaid Sir *Thomas* " *Coleby*, and not out of any other part of my eſtate real or perſonal.

After the ſaid agreement with *Francis Powell* is fully performed, he gives to his ſon *Gilbert Knowler*, and his heirs, all the reſt and reſidue of the ſaid meſſuages, lands, *&c.* and makes the defendant Doctor *Knowler*, and *Gilbert Bouchery* his nephew, executors to this his codicil.

Doctor *Knowler*, who was privy to the whole tranſaction between his late brother and Mr. *Powell*, with regard to the propoſal for recovering of the eſtates of Sir *Thomas Coleby*, and a witneſs likewiſe to the articles of agreement that were executed in purſuance of this propoſal, and who has alſo had them in his cuſtody ever ſince, refuſed to comply with Mr. *Powell*'s demands; upon his application to him, ſoon after the death of the late Mr. *Gilbert Knowler*. The bill therefore is brought by Mr. *Powell* againſt Doctor *Knowler*, executor of the late *Gilbert Knowler*, for a ſpecifick performance of the articles. Caſes cited for the plaintiff, *Bickley* verſus *Newland*, 2 *P. Wms.* 182. *Wyat* verſus *Slater*, *before Lord Chancellor* Talbot. Caſes cited for the defendant, *Pool* verſus *Sacheverell*, 1 *P. Wms.* 675. *Walker* verſus *Gaſcoigne*, *heard in Dom. Proc.* 1726. *Walmſley* verſus *Booth*, *May* 2, 1741. *Proof* verſus *Hines*, *July* 3, 1735. *Caſ. in Chan. in Lord* Talbot's *time* 111.

Maſter of the Rolls: I ſhall give ſuch an opinion as is agreeable to the notion which I have of the caſe at preſent, but ſo as not to tie myſelf down if I ſhould ſee any reaſon for varying my opinion.

And as it appears to me, at firſt ſight, the plaintiff is very proper in bringing a bill for a ſpecifick performance of this agreement, and nothing more uſual in this court than bills of ſuch a nature.

But whether he is intitled to the relief that he prays, is another conſideration, and that will depend upon two queſtions.

Firſt, Whether the court will relieve the plaintiff ſingly on the agreement, excluſive of the codicil.

Secondly, If the agreement ſhould not be good in equity, whether the plaintiff is intitled to relief upon the foot of the codicil.

With regard to the *firſt* queſtion.

Though at the ſetting out of the agreement it is framed in the nature of a wager, yet, taking the whole articles together, it ſeems to me to be an agreement only for a part of the eſtate to be recovered, upon the events taking place, of Mr *Gilbert Knowler*'s recovering and being in poſſeſſion of the whole or part of Sir *Thomas Coleby*'s eſtate, amounting to 8000*l.* in value, or upwards.

I am

I am far from thinking the perſon who drew theſe articles framed them in this manner out of ignorance, but, on the contrary, contrived it artfully to keep them out of the ſtatutes of champerty: for though by way of wager in the out-ſet, yet, in the latter part, it is plain, part of the lands were intended to go in ſatisfaction of the agreement, and the 4000*l.* mentioned in the beginning of the articles, is only intended as a ſecurity for the performance of the agreement.

But, without entring any further into this part of the caſe, I will very readily own, if it ſtood only upon the agreement, that the plaintiff could not be intitled to have a ſpecifick performance in this court, but muſt have been left to his remedy at law.

I ſhould have had a much better opinion of the plaintiff, if he had not tied himſelf down by bond in the penalty of 1000*l.* to gather evidence in ſupport of Mr. *Knowler*'s title.

Secondly, Whether if the agreement is not good in equity, the plaintiff is not intitled to relief upon the foot of the codicil.

And as I am at preſent adviſed, I do think he is intitled to relief under this head.

The council for the defendant, aware of the ſtrength of this will, as to the real intention of the teſtator to eſtabliſh the agreement, have endeavoured to put a forced conſtruction upon the words, that the teſtator did not intend abſolutely to confirm and make good the agreement, but has directed only in what manner he would have it done, provided the law ſhould think it ſuch an agreement as ought to be carried into execution.

But to me it ſeems extremely clear, from the words of the codicil, that it was the teſtator's intention the agreement ſhould be eſtabliſhed, and that he has expreſſed himſelf very fully for that purpoſe, and that he confirms the agreement in the firſt place, and then directs the manner how it ſhould be carried into execution.

The caſe of *Wyat* verſus *Slater* comes the neareſt to the preſent caſe.

Upon the whole, the articles of agreement are of no further uſe than to ſerve only as an explanation of the teſtator's intention, and by way of direction for carrying that intention into execution.

The laſt conſideration is, what decree I ſhall make.

I do

I do not think the plaintiff is intitled to payment upon the value of the eſtate recovered, with the addition of arrears of rents and profits, for, to be ſure, an agreement of this kind ought to be taken as ſtrictly and ſtrongly as poſſible againſt the plaintiff, and therefore I ſhall only decree him a moiety of the eſtate recovered, excluſive of the arrears of rent.

The next queſtion is, when I ſhall decree the plaintiff to be intitled to this moiety, and I am clear of opinion, that the time ought to be computed from the date of the perpetual injunction, and not ſo far back as the decree for poſſeſſion; for Mr. *Gilbert Knowler*, till the injunction, could not be ſaid to be in quiet poſſeſſion, which were the expreſs terms of the agreement, therefore let the conveyance be prepared accordingly.

No coſts were given as to this ſuit of either ſide.

Caſe 180. *Man* verſus *Ward*, *December* 8, 1741.

In a caſe of fraud, the evidence of a perſon who joined in granting away her eſtate was admitted, though it invalidated her right to the eſtate.

MRS. *Haughton* had conveyed away all her right and title in an eſtate, to the defendant, by a deed executed for that purpoſe, but there were not the common covenants on the part of a vendor, but only that ſhe had done no act to incumber; the plaintiff, notwithſtanding this conveyance, offered to read Mrs. *Haughton*'s depoſition, to impeach her right to this eſtate, and to ſhew that it was a pretended title only, and done with no other view than to aſſiſt the defendant in carrying on a fraud.

It was objected by the defendant's council, that the evidence of a perſon who has joined in granting and conveying her eſtate, cannot be admitted to invalidate her right to the eſtate which ſhe has ſo granted and conveyed, eſpecially as there is a pecuniary conſideration expreſſed in the deed, and the receipt of the money indorſed upon it.

LORD CHANCELLOR.

At law where a perſon has granted and conveyed, the very words *grant* and *convey* imply a warranty on the part of the grantor, and cannot be examined as a witneſs to overturn the right granted by the deed.

To be ſure, by the ſtrict rules of law, ſuch evidence would not be admitted, for where a perſon has granted and conveyed, be the right real or pretended, the very words *grant and convey* imply a warranty, and a covenant for quiet enjoyment on the part of the grantor, and therefore cannot be examined as a witneſs, to overturn and invalidate the right and title granted by the deed.

It is very well known at law, that they are ſo ſtrict, that no perſon who is made a defendant can poſſibly be examined as a witneſs, but it is every day's experience in this court, that if a plaintiff makes a perſon defendant for form-ſake, it is a motion of courſe to examine ſuch defendant in the cauſe ſaving juſt exceptions.

At law no defendant can be examined as a witneſs; but in equity, a perſon, made a defendant for form's ſake, may be examined in a cauſe, ſaving juſt exceptions.

In the caſe of a truſtee who has the legal intereſt in the eſtate, but is merely nominal in every other reſpect, you cannot examine him at law as to the merits or intention of ſuch deed, but there is no manner of doubt he may be a witneſs in equity.

A truſtee, though merely nominal, cannot be examined at law, but he clearly may in equity.

In crown proſecutions no defendant can be examined in behalf even of the king, but the Attorney General at the bar enters a *noli proſequi* againſt that particular defendant, before he can be admitted as a witneſs; this was done in a caſe by *Trevor*, when Attorney General, who was afterwards Lord Chief Juſtice of the Common Pleas.

The Attorney General muſt enter a *noli proſequi* againſt a defendant before he can be admitted as a witneſs, even in the caſe of the king.

I would not have it underſtood, as if I laid it down, that rules of evidence at law, and in equity, differ in general; but only in particular caſes, where fraud is charged by a bill, or in caſes of truſts, this court does not confine it ſelf within ſuch ſtrict rules as they do at law, but, for the ſake of juſtice and equity, will enter into the merits of the caſe, in order to come at fraud, or to know the true and real intention of a truſt or uſe declared under deeds.

It is in particular inſtances only, as where fraud is charged by a bill, or in caſes of truſt, that this court does not confine it ſelf within ſuch ſtrict rules as they do at law, but in general, the rules of evidence here and at law do not differ.

It would therefore very much abridge the power and juriſdiction of this court, which is chiefly converſant in caſes of fraud and truſts, if I did not admit ſuch evidence: his Lordſhip therefore over-ruled the objection.

Green verſus *Suaſſo*, *the ſecond ſeal after* Michaelmas *Term*, *December* 10, 1741.

Caſe 181.

SEVERAL actions had been brought againſt *Green* upon the loſs of ſix of the galleons, inſured by *Suaſſo* on a policy of inſurance intereſt or no intereſt; *Green* brought a bill in this court for an injunction to ſtay the proceedings at law, which was granted upon a former motion; and now moves for a commiſſion to *America* generally, for the examination of witneſſes, which cannot be

A point which materially concerns the merchants in general, will induce the court to continue an injunction.

be produced *viva voce* here: It was founded upon the following caſe.

The defendant in this court, in 1735, applied to the plaintiff to inſure the ſum of 6000 *l.* on ſix of the galleons in their voyage from *Cales* to *Porto-Bello*; the policy was conceived in general terms, to inſure from all dangers, and the detention of princes; the galleons ſailed from *Cales*, and came to *Carthegena* the latter end of 1736; the war broke out between *England* and *Spain* in 1739, and the forts of *Porto-Bello* being deſtroyed by vice admiral *Vernon*, which were a protection to the place at the time the fair was held; the galleons, after the deſtruction of the forts, &c. never ventured to *Porto-Bello*, notwithſtanding a fair is held there annually, though the time of the year is not always the ſame; the ſix galleons lay in the harbour of *Carthegena* till the year 1741, when *Don Blaſs*, the *Spaniſh* admiral, and commander in chief there, ordered them to be ſunk, to choak up the harbour, and by that means prevent the *Engliſh* men of war, under *Vernon*, from entring it.

It was inſiſted, by the council for *Green*, the plaintiff in equity, that, upon the uncommon circumſtances of this caſe, the injunction to ſtay trial ſhould be continued till a commiſſion for the examination of the facts in *America* had iſſued, and is returned.

The council on the other ſide inſiſted, that there are perſons now in *England*, who are very well acquainted with all theſe facts, and can explain them very ſufficiently to a jury, ſo that the defendant at law can ſuſtain no prejudice by going immediately to trial.

LORD CHANCELLOR.

This is a very unuſual caſe, and upon all the circumſtances, I think that the injunction ſhould be continued till a commiſſion has iſſued and is returned from *America*, but then it ought to be limited to ſome particular places in the *Weſt Indies*, and not left ſo much at large as the plaintiff would have it.

Indeed, it would be a great hardſhip upon the defendant at law to go to trial upon ſuch ſhort warning on facts that do not ariſe in *England*, but altogether in *America*.

Now, there are two very material facts which will come under the conſideration of a jury at the time of the trial, both which muſt depend upon proof that muſt naturally ariſe in the *Weſt Indies*.

Firſt,

Firſt, Whether the voyage was determined at *Carthegena*, and that depends upon a *ſecond* fact, Whether the deſtroying the caſtles, *&c.* at *Porto-Bello*, made it impracticable to hold a fair there, and whether in the opinion and imagination of the merchants, it could not be held there for that reaſon, and if ſo, whether it muſt not be admitted that the galleons had no intention of proceeding any further, but had determined their voyage at *Carthegena*, which is a very material conſideration at the trial.

It may poſſibly be the caſe, that this was an inſurance on behalf of the king of *Spain* himſelf, who, on the breaking out of the war with *England*, might reſtrain theſe galleons from proceeding on their voyage to *Porto-Bello*, and order them to continue in the harbour of *Carthegena*: if this ſhould happen to be the fact, it would be a very material point for the defendant at law, as the perſon for whoſe benefit the galleons were inſured, may then be ſaid to have determined this voyage himſelf.

And then it may be compared to the caſe, where houſes are on fire in this town, when, for the ſake of preventing the flames from ſpreading, firemen are under a neceſſity of blowing up ſome neighbouring houſes; ſuppoſing the houſes ſo blown up ſhould be inſured, the terms of the policy are not broken, as this is an unforeſeen accident, and a loſs not at all guarded againſt, and the inſurer ſhall not be obliged to make it good.

The preſent caſe does not only affect the defendant at law, but in it's conſequences muſt materially concern the merchants in general, whether as publick or private inſurers, which if there was no other argument, is of conſiderable weight with me for not hurrying on the trial, but to continue the injunction till the defendant is fully prepared for his defence.

It was agreed by the parties in court, that the commiſſion ſhall iſſue to two places only, *Jamaica* and *Carthegena*.

Sir William Stanhope verſus *Anthony Cope and John Roberts, Eſqrs; executors of the laſt will and teſtament of William Spinks, December* 14, 1741.

Caſe 182.

A junctim annuity decreed to be redeemed on clearing the arrears,

WHEN the plaintiff was about the age of nineteen, his father, the late Earl of *Cheſterfield*, in 1721, did ſettle upon him, on his marriage, eſtates of the yearly value of 7000*l.* and

and paying the whole principal ſum advanced, and intereſt to the time only; the plaintiff having offered to redeem.

upwards, to the uſe of the plaintiff for life only, with the common remainders: in a very few years afterwards, he had been unwarily drawn in to loſe ſeveral large ſums in gaming, and being in very great diſtreſs for money, the late Mr. *Spinks* hearing of it, and being uſed to help gentlemen in ſuch difficulties, applied to him, and offered to lend him 800*l.* provided he would give ſuch ſecurity as he ſhould deſire, which the plaintiff, being under great neceſſities, accepted of. Accordingly, on the 13th of *June* 1737, a deed was executed, whereby the plaintiff, in conſideration of 800*l.* did grant to *William Spinks*, and his aſſigns, one annuity or yearly rent-charge of 100*l.* iſſuing out of lands of 700*l. per ann.* value, to hold and enjoy the ſame unto the ſaid *William Spinks* for the term of ninety-nine years, if the plaintiff ſhould ſo long live, to be paid quarterly, with a clauſe of diſtreſs, if the annuity ſhould be in arrear twenty days after any one day of payment; and a clauſe for receiving the rents and profits of the eſtate till *Spinks* was ſatisfied; and in the deed was an agreement, that if the plaintiff ſhould, at the end of three years next enſuing the date, or at any time before be minded to redeem the ſaid annuity, and ſhould, at or before the end of the three years, give notice of his intention in writing to *Spinks*, his executors, *&c.* at or on any of the days of payment, and ſhould at the end of ſix calendar months after ſuch notice pay unto *Spinks*, his executors, *&c.* 850*l.* and all arrears of the ſaid annuity, that in ſuch caſe the whole ſhould be void; and in this deed the plaintiff was made to covenant, that in caſe *Spinks* ſhould be minded to purchaſe another annuity of 100*l.* from the plaintiff, and ſhould, on or before the thirteenth of *September* then next, pay to the plaintiff 800*l.* that he ſhould grant him another annuity of 100*l.* iſſuing out of the ſame lands, and upon the ſame terms with the firſt, in every reſpect, and with the like clauſe of redemption; there was a further covenant, that if *Spinks* ſhould be minded to purchaſe another annuity of 100*l.* and ſhould, on or before the thirteenth of *December* next enſuing, pay unto the plaintiff the further ſum of 800*l.* that he ſhould grant another annuity of 100*l.* iſſuing out of the ſaid lands, upon the ſame terms with the two former, and ſubject to the like proviſo of redemption: In about three months after the execution of this deed, *Spinks* made a propoſal to the plaintiff, that he would deliver up this indenture of the 13th of *June* 1727, and would advance a further ſum of 1000*l.* ſo as to make up the whole 1800*l.* and that the plaintiff ſhould grant to him one annuity, iſſuing out of the ſaid premiſſes, of 300*l.* during the joint lives of him and the ſaid *Spinks*; and by deed, of the 12th of *September* 1727, an annuity was granted accordingly, and a clauſe for redemption indorſed. In the beginning of *December* following, *Spinks* made a new propoſal of advancing a further ſum of money, upon the plaintiff's granting him an annuity of 300*l.* during the plaintiff's life only, in lieu of the junctim annuity; and on the 13th of

December 1727, the plaintiff executed a deed accordingly, and ſigned a receipt for 2250*l.* the conſideration therein mentioned, with a proviſo of redemption at or before the end of three years, if the ſaid plaintiff ſhall give notice in writing of his intention to *Spinks*, his executors, *&c.* at or on one of the quarter days appointed for payment, and ſhall, at the end of ſix calendar months, after ſuch notice, pay to *Spinks*, his executors, *&c.* the ſum of 2400*l.* and all arrears of the annuity, the ſaid annuity of 300*l.* to be void: on the 2d of *April* 1728, the plaintiff executed a deed of truſt to the Earl of *Cheſterfield* and Mr. *Rudge*, of his whole eſtate, for the ſatisfaction of his creditors, reſerving only 2000*l. per ann.* for himſelf and family, the reſidue to pay debts; afterwards a private act of parliament in 5 *G.* 2. was procured for a ſale of ſome of the manors; and the plaintiff by his ſteward applied in *July* 1738, to *Spinks* to redeem the annuity, upon payment of all the principal money advanced, but *Spinks* made anſwer, that he did not know what the plaintiff meant, that he did not want money, and that the plaintiff had no right to redeem; upon which the plaintiff filed a bill againſt *Spinks*, on the 6th of *December* 1739, but the defendant dying before he could put in an anſwer, a bill of revivor was filed againſt his executors on the 25th of *February* following; the prayer of it was, that the plaintiff may be admitted to redeem the annuity of 300*l.* upon the payment of what ſhall appear to be due for principal and intereſt upon a fair account, and if upon ſuch account it ſhall appear, that *Spinks* was fully paid all his principal and intereſt, that the ſeveral deeds may be delivered up, and if *Spinks* ſhall appear to be over paid, that the defendants may refund.

It was proved in the cauſe, that *Spinks* was of no trade, but that his ſole buſineſs was in buying of annuities for ſingle or joint lives; and that one *Rogers*, a broker, purchaſed for *Spinks*, only by his directions, annuities to the value of 2000*l.* a year, whilſt the witneſs was a clerk to *Rogers*.

There were no proofs offered of the plaintiffs diſtreſs at the time *Spinks* applied to him; but depoſitions on his part that none of the deeds were peruſed by any council for him, but by *Roberts* only as the council for *Spinks*.

It appeared likewiſe in evidence, that *Rogers* was one of the advertizing brokers for ſecurities of this kind. The caſes cited for the plaintiff were *Boſanquet* verſus *Daſhwood*, *Nov.* 11, 1734, caſes in Lord *Talbot*'s time 38. reheard before Lord *Hardwicke*, this was relied on as the ſtrongeſt caſe. *Burton*'s caſe, 5 *Co.* 70. *Cro. Jac.* 507. *Roberts* verſus *Tremain*. *Barney* verſus *Beak*, 2 *Ch. Ca.* 136. *Nott* verſus *Hill*, 2 *Ch. Ca.* 120. *Comes Arglaſs* verſus *Muſchamp*, 1 *Vern.* 75. *Wiſeman* verſus *Beak*, 2 *Vern.* 121. *Twiſleton* verſus *Griffith*, 1 *Wms.* 310. *Curwin* verſus *Milner*, heard

June 19, 1731. before Lord Chancellor *King*, 3 *Wms.* 292. *Barnadiſton* verſus *Lingood*, before Lord *Hardwicke*, *February* 9, 1740. *Hall* verſus *Potter*, *Shower's Parliament Caſes* 76. *Duke of Hamilton & ux'* verſus *Lord Mohun*, 1 *P. Wms.* 118.

The council for the plaintiff, and particularly Mr. *Murray*, went upon the general rule of inconvenience to the publick, and endeavoured to introduce the ſame reaſoning here, as in ſeveral other heads of fraud; and caſes under the following heads were cited; 1ſt, On marriage-brokage bonds, for which *Vid. Hall* verſus *Potter*, and the caſe of the *Duke of Hamilton* verſus *Lord Mohun*, 1 *Salk.* 158. under the ſecond head, ſelling of contingent intereſts and eſtates in expectancy, *Vid. Curwin* verſus *Milner*; under the third head of caſes, they mentioned bonds given to lewd women. *Lord Liſburne* verſus *Hains*, *July* 4, 1734. *Robins* verſus *Cocks*, *July* 13, 1741. and under a 4th head of caſes, bonds given to attornies pending ſuits, *Proof* verſus *Hines*, in Lord *Talbot's* time. *Walmſly* verſus *Booth*, *January* 29, 1739, reheard *May* 2, 1741. and under the 5th head were mentioned, bonds given for quartering upon offices, before Lord *Hardwicke*, in *Mich.* 1736.

At the time the plaintiff executed the laſt deed, he gave an abſolute bond for the 2250*l.* and there was no reference to the redemption in the deed.

It was inſiſted on for the defendant, by Mr. Attorney General, that the plaintiff had paid the annuity of 300*l.* down to the year 1738, without the leaſt complaint, and that ſuch an acquieſcence was a very ſtrong circumſtance againſt him, for there has not been ſo much as a ſingle witneſs to ſhew that the plaintiff was in debt, or in any diſtreſs at the time of theſe tranſactions between him and *Spinks*, and that preſumptions only, without proof, will not prevail in a court of equity; and that it appears too, by the plaintiff's own depoſitions, that he applied to *Rogers* to find him out a perſon who would lend money on annuities.

LORD CHANCELLOR.

As I am at preſent adviſed, I have no doubt but the plaintiff is intitled to a redemption; the queſtion is, whether he is intitled *ab initio*, or only from the year 1738, the time the plaintiff offered to redeem.

Upon the recommendation of Lord Chancellor, the affair was compromized on the following terms.

The money already paid into court was to be applied, in the firſt place, to clear the arrears of the annuity to *Midſummer* 1738,

and the ſurplus towards the payment of the 2250 *l.* and what it ſhall want of clearing the whole principal advanced, to be paid in two months, but no intereſt from 1738 to the preſent time.

After the regiſter had drawn up minutes of the agreement, Lord Chancellor declared he had a very great averſion to contracts of this kind, and that he was very inclinable to decree a redemption *ab initio*, if it could have been done conſiſtent with the rules of equity.

Lord *Hardwicke* ſo averſe to theſe contracts, that he declared he would have decreed a redemption *ab initio*, if conſiſtent with the rules of equity.

Brace verſus *Harrington*, *December* 14, 1741. Caſe 183.

LORD CHANCELLOR.

It is not neceſſary in every caſe of aſſignments, where all the equitable intereſt is aſſigned over, to make a perſon who has the legal intereſt a party, but if an obligee has aſſigned over a bond, and a preſumption of its being ſatisfied ariſes from the great length of time, as in the preſent caſe, where the bond was given by Sir *James Harrington*'s father in 1709, and aſſigned over in 1717, and no demand has been made in 22 years, till the bringing of this bill by the aſſignee in 1739, the cauſe muſt ſtand over to make the repreſentative of the obligee a party, becauſe it is poſſible the obligee himſelf may have been paid, and therefore neceſſary to have an anſwer as to that particular, either from him, or his repreſentative.

A perſon who has a legal intereſt need not in every caſe be a party, where the whole equitable intereſt is aſſigned over.

Cocks verſus *Worthington*, *the third ſeal after* Michaelmas *Term*, *December* 14, 1741. Caſe 184.

IT was moved by the *Attorney General* to diſcharge an order for referring depoſitions to the maſter for ſcandal and impertinence, for he inſiſted that you cannot have ſuch an order againſt a party in whoſe behalf the depoſitions were taken, where the interrogatories are rightly framed; but the proper application would have been againſt the commiſſioners for ſuffering a witneſs to inſert in their depoſitions either ſcandal or impertinence: He cited two caſes determined by Sir *Joſeph Jekyll*, *Iriſh* verſus *Rooke*, *Auguſt* 1, 1728. *Skerme* verſus *Voguel*, *March* 18, 1732. The bill here was brought for a ſpecifick performance of articles on a purchaſe of a ſmall eſtate.

This court will order depoſitions to be referred, for ſcandal and impertinence, to a Maſter.

LORD

LORD CHANCELLOR.

I do remember the caſes cited by Mr. Attorney General; but I own I had ſome doubt at the time; it ſeems to me very ſtrange, that depoſitions ſhould not be referred for ſcandal; as to the impertinence is another queſtion; but ſuppoſing interrogatories ſhould lead to ſcandal, is it not very fitting that they ſhould be referred in order to expunge the ſcandal; but if coſts ſhould be inſiſted on, it would be another conſideration, becauſe, as there is nothing of this kind ariſing out of the interrogatories, the party on whoſe behalf they are taken, is in no fault; then the next queſtion will be, Whether the examiners or commiſſioners who ſuffer ſcandal or impertinence to be inſerted, ought to pay the coſts; let it ſtand over to the next ſeal, to look into the caſes cited, and likewiſe to ſearch for orders made on motions of this ſort.

Caſe 185. *Cocks* verſus *Worthington, the laſt ſeal after* Michaelmas *Term, December* 18, 1741.

LORD CHANCELLOR.

The caſes cited by Mr. Attorney General at a former ſeal do not come up to the preſent, but ſeem only to be haſty declarations of the court, without taking any time to conſider: one of them was for impertinence both in the interrogatories and depoſitions, and therefore could admit of no doubt: but the caſe of *Horſey* verſus *Horſey*, before Lord *Macclesfield*, in *May* 1724, is exactly in Point, for it was to refer depoſitions for impertinence only, and the order was made on hearing council of both ſides, but there were no coſts either given againſt the plaintiff in that caſe, or his commiſſioners, becauſe the defendant's commiſſioners were equally in fault: on the 18th of *March* 1740, on a motion before me, I made an order for referring interrogatories and depoſitions both for ſcandal and impertinence; the Maſter certified that neither of them were ſcandalous and impertinent; and the court, upon exceptions, held only the 5th interrogatory was ſo, but at the ſame time determined that ſome of the depoſitions were both ſcandalous and impertinent, and ordered the ſcandal and impertinence to be expunged, but gave no coſts; his Lordſhip therefore did the ſame in the preſent caſe, and declared it was out of decency, and for the honour of this court, who would not ſuffer any thing ſcandalous or impertinent to ſtand in the proceedings here, but that they ſhould be purged of both, and likewiſe, for the ſake of the party, that nothing reflecting upon his character might appear.

Anonymous, *December* 15, 1741. *the third ſeal after Michaelmas term.* Caſe 186.

THE Attorney General moved to ſuperſede a writ of replevin ſued out of this court.

In the Sheriff's court at *Briſtol* there was a condemnation of a ſhip upon a foreign attachment; the perſon who was the owner of the ſhip ſued out a writ of replevin againſt the plaintiff below; it was moved now on his behalf, that it might be ſuperſeded.

LORD CHANCELLOR.

The writ of replevin is of courſe, and is not of grace but of right, and unleſs there is a fraudulent uſe made of it, 'twould be of dangerous conſequence for me to ſuperſede it upon an interlocutory motion only: you ſhould have pleaded that you had property in the ſhip, and then the plaintiff in the replevin muſt have taken out a writ *de proprietate probanda*, (*Vide Reg. Brev.* 83. *a.* and 85. *b.*) and the whole affair would have been regularly heard in the courts at *Weſtminſter*, for after the writ has once iſſued here it is *de officio*, and this court has nothing further to do in it.

The court will not on motion ſuperſede a writ of replevin, unleſs there is a fraudulent uſe made of it.

After a writ has once iſſued here, it is *de officio*, and this court has nothing further to do in it.

There was ſomething of the ſame nature before Lord *Macclesfield*, in the caſe of *Ward* v. *the Duke of Buckingham*, upon a ſeiſure of a large quantity of allom, when his Lordſhip cited all the old learning upon original writs, and pointed out this method of proceeding to Mr. *Ward* by pleading property.

Yates verſus *Hambly*, *December* 17, 1741. Caſe 187.

AN objection was made for want of parties.

The bill in this caſe was brought to redeem a mortgage of long ſtanding.

Where a mortgagee in fee has made an abſolute conveyance with ſeveral limitations and remainders over, the firſt tenant in tail at leaſt muſt be brought before the court.

The objection was, that as there has been an abſolute conveyance made of this eſtate by the mortgagee without any clauſe of redemption, with ſeveral limitations over, the perſons in remainder under this conveyance ought to have been parties.

LORD CHANCELLOR.

Where a mortgagee, who has a plain redeemable intereſt, makes ſeveral conveyances upon truſt, in order to intangle the affair, and to render

render it difficult for a mortgagor or his repreſentatives to redeem, there it is not neceſſary that the plaintiff ſhould trace out all the perſons who have an intereſt in ſuch truſt, to make them parties.

But where the redemption depends upon equitable circumſtances, and the plaintiff is not in the common caſe of redemptions, and where the mortgagee in fee has made an abſolute conveyance with ſeveral limitations and remainders over, the decree cannot be compleat without bringing at leaſt the firſt tenant in tail before the court.

Caſe 188.

Aylet verſus *Dodd*, *January* 26, 1741.

The owner of land charged with an annuity, for the payment of a ſchoolmaſter, will not be excuſed from the payment thereof on account of there being none for ſix years.

THOMAS Aylet by his will charged his lands in *Eſſex* with the ſum of ten pounds *per ann.* for the maintenance of a ſchoolmaſter, but the repairs of the ſchool to be at the expence of the maſter himſelf; the annuity is directed to be paid half-yearly at *Lady-day* and *Michaelmas*, and if either of the payments ſhould be in arrear 42 days after it became due, then 5*s.* *per* week, was allotted by way of *nomine pœnæ*.

A commiſſion of charitable uſes iſſued out of this court, and by the inquiſition it was found that there were ſix years vacancy, in which there was no ſchoolmaſter from 1728 to 1734.

The commiſſioners ſummoned the owner of the land charged with the annuity to appear before them, but he making default, they awarded that he ſhould pay all the arrears of the ſix years, and the *nomine pœnæ*, amounting to 45*l.* and coſts beſides.

The exceptant took two exceptions.

1ſt, That he ought not to pay the arrears of the annuity for the ſix years, becauſe the teſtator gives it only while there is an actual ſchoolmaſter, and the vacancy is not owing to any fault of the land owner.

2d Exception, That ſuppoſing he ſhould be decreed to pay the arrears, yet the *nomine pœnæ* will be relieved againſt in a court of equity, upon paying ſuch ſums as have been found in arrear.

Though there are not perſons in a pariſh ſufficient to anſwer the deſcription of a charity, yet the land charged with the payment, is not diſcharged during that time.

Lord Chancellor over-ruled the firſt exception, and compared it to the caſe of a charity for a maintenance of a ſelect number of alms people, where notwithſtanding there are not perſons in a pariſh ſufficient to anſwer the deſcription of the charity, yet the land charged with the payment of the charity is not diſcharged during that time,

but

but ſhall accumulate, and be applied towards the advancement and increaſe of the charity.

With regard to the ſecond exception, *Lord Chancellor* ſaid, that the *nomine pœnæ* ſhould ſtand according to the intention in all theſe caſes, as a ſecurity for legal intereſt, when the principal ſum is not regularly paid at the particular days appointed for it: but would not decree the exceptant to pay a groſs ſum, to be computed at five ſhillings *per* week, after default of payment made.

Five ſhillings *per* week allowed by way of *nomine pœnæ*, if either of the half yearly payments of an annuity

was in arrear 42 days after it became due, the court will direct it only to ſtand as a ſecurity for legal intereſt when the principal ſum is not regularly paid.

Where there is a clauſe of *Nomine pœnæ* in a leaſe to a tenant, to prevent his breaking up, and ploughing old paſture ground, it is otherwiſe; for the intention of it there, is to give the landlord ſome compenſation for the damage he has ſuſtained, from the nature of his land being altered, and therefore in that caſe the whole *nomine pœnæ* ſhall be paid, and not at the rate of *five per cent.* only for the rent reſerved.

The whole *nomine pœnæ* in a leaſe to a tenant to prevent his ploughing up old paſture ground ſhall be paid, and

not at the rate of 5 *per cent.* only for the rent reſerved.

As to coſts, his Lordſhip ſaid, it has been determined upon the conſtruction of the ſtatute of charitable uſes, 43 *Eliz. c.* 4. that commiſſioners have no power to give coſts, but this court can do it; and therefore as the exceptant has been very vexatious, *Lord Chancellor* decreed coſts againſt him to be taxed by a maſter.

Commiſſioners of charitable uſes have no power under the 43 *Eliz. c.* 4. to give coſts, but this court can do it.

Baylis and Church verſus *the Attorney General, January* 29, 1741.

Caſe 189.

TWO hundred pounds were given under the will of Mr. *Lane* to the ward of *Bread-Street* according to Mr.——his will.

L. by will gives to *Bread-Street*

ward 200 *l.* according to Mr.——his will. Lord *Hardwicke* would not allow of parol evidence to explain the teſtator's intention when there is *a blank* only.

The bill brought by the alderman and principal inhabitants of the ward, to have the directions of the court for the application of this charity, and the Attorney General was made a defendant.

LORD CHANCELLOR.

There are inſtances where this court has admitted parol evidence to aſcertain the perſon intended by the teſtator, where he has been

When a perſon is mentioned by a

nickname, or where there have been two who have had the ſame chriſtian and ſurname, parol evidence has been admitted to aſcertain whom the teſtator meant.

mentioned

mentioned only by a nickname, or where there have been two perſons who have had the ſame chriſtian and ſurname; but I do not remember any caſe where the court has gone ſo far, as to allow parol evidence of the intention of a teſtator, where there is only a blank, and therefore would not permit it to be read.

The money in this caſe was decreed to be diſpoſed of in ſuch charities, as the alderman and inhabitants of the ward ſhall think moſt beneficial.

Though the alderman and inhabitants of a ward are not in point of law a corporation, yet as they have made the Attorney General a party in order to ſupport and ſuſtain the charity, I can make a decree that the money may from time to time be diſpoſed of in ſuch charities as the alderman for the time being, and the principal inhabitants, ſhall think the moſt beneficial to the ward.

Caſe 190. *Brereton* verſus *Gamul*, *January* 29, 1741.

A Bill was brought againſt the defendant for a diſcovery of title deeds, and likewiſe of the title to the eſtate in queſtion, and for relief, and to be let into the poſſeſſion of the premiſſes.

Tenant for years, at will, or at ſufferance, cannot by fine deveſt an eſtate, and turn it to a right.

The title ſet up by the plaintiff is a right to a reverſion in fee expectant upon the determination of a leaſe for 99 years. After the term expired, which happened in the year 1715. the defendant continued in poſſeſſion, and paid a reſerved rent of 10*s*. and taking the advantage of the plaintiff's ignorance of his title, as he had no counterpart of the leaſe, the defendant levied a fine of theſe very lands of which he was only tenant at will: the plaintiff having come to ſome knowledge of his title about a year before the fine was levied, he applied to the defendant to deliver poſſeſſion, but he refuſed to do it, upon which the plaintiff in 1722. brought an ejectment, to which the defendant appeared, and nothing further was done upon it.

The defendant to the preſent bill pleads the fine ſo levied, and five years and non-claim, as a bar both to the diſcovery of the title, and the title deeds, and likewiſe to the relief prayed under the bill.

LORD CHANCELLOR.

If a perſon has loſt his right by a legal bar, he can have no remedy.

If the plaintiff has loſt his right by a legal bar, he can have no remedy; but his caſe as ſtated by the bill, and not at all denied by the anſwer, is of ſuch a nature as intitles him to all the favour that this court can ſhew him.

It would be of dangerous conſequence to admit of ſuch practice as appears in this caſe; for nothing is more common than long terms of years with a ſmall rent reſerved, and it very frequently happens thoſe who claim under the original leſſor, from the length of the term, become quite ignorant of their title.

A valuable conſideration ſet forth by the defendant protects him from giving an anſwer to a title ſet up by the plaintiff, but a plea of a bare title only without ſetting forth any conſideration will not do it.

A plea of a bare title only without ſetting forth any conſideration, will not protect a defendant from giving an anſwer to the title ſet up by the plaintiff.

A plaintiff in this caſe is intitled not only to have diſcovery in matters which he cannot prove, but of ſuch matters as may be of eaſe and relief to him in recovering his title.

The facts as they are ſtated by the bill of the defendant's being only a tenant for years, and paying rent after the expiration of the term, I muſt take for granted, as they are not denied by the anſwer.

Tenant for years, at will, or at ſufferance, cannot by fine deveſt an eſtate, and turn it to a right.

But what the defendant inſiſts on, is a diſſeiſin, and the acts to create this a diſſeiſin are matters *in pais*, as length of poſſeſſion, non-payment of rent, *&c.* but the principal thing relied on is the ejectment.

An ejectment every body knows is a fictitious thing only to come at the right in queſtion; therefore the confeſſion of leaſe, entry and ouſter, will only operate to the purpoſe for which the ejectment is intended, and is equally fictitious with the ejectment itſelf; for it would be of extream ill conſequence that ſuch a proceeding ſhould give a ſeiſin to the defendant in ejectment ſo as to enable him to levy a fine.

The confeſſion of leaſe, entry and ouſter, will operate only to the purpoſe for which the ejectment is intended, and is equally fictitious with the ejectment itſelf.

Next as to the fine itſelf, it is levied by a general deſcription of lands lying in ſuch a pariſh in the county palatine of *Cheſter*: now there are frequent inſtances of tenants in fee, who in levying a fine, often put in more parcels of land than do actually belong to the conuſor, but then a court of equity will reſtrain it to ſuch lands as do really belong to the conuſor.

Though in a fine there are often more parcels of land than belong to the conuſor, yet a court of equity will reſtrain it to ſuch lands as really belong to him.

Here the defendant had lands lying in the ſame pariſh, to which he had an indiſputable right, and tho' the plaintiff had notice of the fine by the proclamations according to the uſual courſe in the grand ſeſſions of *Wales*, yet the deed to lead the uſes of that fine was in the conuſor's pocket, ſo that the plaintiff could not know of what lands it was levied, and therefore might reaſonably conclude it was levied of ſuch lands in this pariſh as the defendant had a right to levy it upon.

The plea ordered to ſtand for an anſwer with liberty to except, ſave as to matters of account.

Lowther verſus *Carlton*, *February* 1, 1741.

Caſe 191. LORD CHANCELLOR.

A purchaſer with notice himſelf from a perſon who bought without notice, may ſhelter himſelf under the firſt purchaſe.

THIS is a bill brought to impeach a purchaſe made 32 years ago: the defendant was a purchaſer with notice, from the Marquis of *Wharton*, who bought without notice.

It is certainly the rule of this court, that a man, who is a purchaſer with notice himſelf from a perſon who bought without notice, may ſhelter himſelf under the firſt purchaſer, or otherwiſe it would very much clog the ſale of eſtates.

Where by a tranſaction foreign to the buſineſs in hand, a council or attorney employed to look over a title has notice, this ſhall not affect the purchaſer.

If a council or attorney is imployed to look over a title, and by ſome other tranſaction foreign to the buſineſs in hand has notice, this ſhall not affect the purchaſer; for if this was not the rule of the court it would be of dangerous conſequence, as it would be an objection againſt the moſt able counſel, becauſe of courſe they would be more likely than others of leſs eminence to have notice, as they are ingaged in a great number of affairs of this kind.

Caſe 192. *Barret and others, creditors of John Powell*, verſus *Ann Powell, widow, and others*, *February* 1, 1741.

An aſſignment by the clerk of the peace to creditors under the ſtatute for relief of inſolvent debtors need not be ſealed.

A Bill was brought by creditors againſt an heir of an inſolvent perſon, and likewiſe againſt his widow, to have the benefit of the aſſignment of the inſolvent's eſtate from the clerk of the peace at the ſeſſions, under the ſtatute for the relief of inſolvent debtors.

It was objected by the counſel for the defendant, that the aſſignment in this caſe by the clerk of the peace to the major part of the creditors is informal, becauſe it is only ſigned by the clerk of the peace, and not ſealed; and that as the act of parliament directs an aſſignment, and does not diſpenſe with ſealing, that it ought to be executed like all other aſſignments to convey real eſtates.

Maſter of the Rolls. I am of opinion that the aſſignment without ſealing is ſufficient, as it has been the conſtant method taken by all clerks of the peace ſince the act of parliament for relief of inſolvent debtors took place.

Smith

Smith and Helen his wife verſus *French widow*, *February* 20, 1741. Caſe 193.

THE bill was brought for a ſatisfaction of a breach of truſt, and the plaintiffs by it have made the following caſe: *Helen* the daughter of the defendant, lived with her till ſhe married her firſt huſband Mr. *Segar*; upon his making his addreſſes to her in the way of marriage, Mrs. *French*, the mother of the plaintiff *Helen*, approved of the match, and the day before the wedding agreed to be a truſtee of 1000*l.* the portion of *Helen*, which conſiſted of tallies or Exchequer orders at 3*l.* *per cent.* and for this purpoſe the mother had the orders delivered to her, and aſſigned to her by an indorſement upon each of them: previous to the marriage a ſettlement was prepared, but not executed till after, by which the truſt of this 1000*l.* was declared to be in the firſt place for the ſole and ſeparate uſe of the wife during the coverture, and for the iſſue of this marriage, and n caſe there ſhould be no iſſue, that then the abſolute property ſhould veſt in the ſurvivor of huſband or wife; in a very few years afterwards, Mr. *Segar* being diſtreſſed in his circumſtances, prevailed upon the mother, who was the truſtee, to let him have theſe orders, and ſold them and applied the money to pay his own debts, except 350*l.* which he refunded to the mother upon her preſſing him for it; he died inſolvent, and therefore as the mother was a truſtee for the daughter the plaintiff, the plaintiffs inſiſted ſhe has been guilty of a breach of truſt in delivering up the tallies for 1000*l.* to the power of the huſband, and for that reaſon ought to make good the deficiency, which is 650*l.* to the plaintiffs.

If a huſband even after marriage conveys his wife's fortune to a truſtee for her ſeparate uſe, and the truſtee is guilty of a breach of truſt, this court will oblige him to make ſatisfaction to the *ceſtuy que truſt.*

The defendant Mrs. *French* made this defence: That ſhe diſapproved of the match between her daughter *Helen* and Mr. *Segar*, but upon the ſolicitations of her daughter did agree to it at laſt, and admitted that ſhe had the tallies indorſed over to her for the 1000*l.* the day before the marriage, but in a very ſhort time after the huſband Mr. *Segar* became very neceſſitous, and his creditors very importunate; and that at the joint requeſt, and the repeated importunities both of her ſon-in-law, and daughter, ſhe did deliver over the tallies to Mr. *Segar*, but not with an intention that he ſhould imbezle them to his own uſe, but upon his ſuggeſtion that the land-tax tallies, of which theſe were part, were quite full, and that he muſt ſell them out and buy others; that when ſhe found Mr. *Segar* had impoſed upon her, and had applied the money to pay off his debts, ſhe threatned to ſue him, upon which her daughter fell upon her knees, and begged her mother would deſiſt from her intention, for it was only making bad worſe, and that ſhe would releaſe her mother from any demand ſhe might have againſt her, on account of the truſt:

the mother did not proceed in ſuing the huſband, but by fair means recovered back 350*l.* afterwards till the day of his death, the huſband and the plaintiff *Helen* lived with Mrs. *French*, and were maintained by her, and from his death till her ſecond marriage, which was no leſs than ſeven years, the daughter lived with the defendant, and never inſiſted upon this demand, but ſeveral times offered to give the mother a releaſe.

The fact of the plaintiff's *Helen*'s falling upon her knees, to ſolicit in behalf of her firſt huſband, and of her offering to execute a releaſe to her mother, after *Segar*'s death, was proved by *Judith Powell*, another daughter of the defendant's, who was about eleven years old, when the firſt fact happened, and about thirteen when the ſecond happened of the plaintiff's *Helen* promiſing to releaſe.

The principal caſe relied on for the plaintiff was cited by Mr. *Noel*, and is mentioned in *Needler*'s caſe, *Hob. page* 225. 7 *Ed.* 4. 14. the wife being *ceſtuy que truſt*, ſhe and her huſband ſold the land; ſhe received the money, and they both required the feoffee to make eſtate to the vendee, and yet ſhe after her huſband's death was relieved againſt the feoffee, and might alſo againſt the vendee if he was privy to the uſe.

LORD CHANCELLOR.

The queſtion in this caſe is ſingly between a *ceſtui que truſt* and a truſtee, and therefore it is not at all material whether the ſettlement is volantary, or for a valuable conſideration.

And if there were no other circumſtances, it cannot be doubted, but if a huſband, even after marriage, conveys his wife's fortune to a truſtee for her ſole and ſeparate uſe, and the truſtee is guilty of a breach of truſt, that this court will decree him to make ſatisfaction to the *ceſtuy que truſt*; indeed if there were creditors of the huſband, who had a prior lien upon the property ſo conveyed, it might make a material difference.

The principal queſtion here is, whether upon all the circumſtances of this caſe, the defendant has been guilty of a breach of truſt, and this muſt depend upon the defence which ſhe has ſet up by way of rebutter to the plaintiff's demand; if it ſtood clear of ſuch circumſtances there could not be a plainer breach of truſt than delivering up theſe tallies to the power of the huſband.

But the preſent caſe appears to me to be a very hard, and a very harſh demand in a court of equity as it is circumſtanced, taking the evidence on both ſides to be true.

He

He then run over the material parts of the defence, in the manner I have before ſtated it.

In the firſt place his lordſhip ſaid here is a very ſtrong equity for the mother, that what ſhe did in the affair was at the importunity, and repeated ſolicitations of the daughter, and who ſince the death of her firſt huſband has over and over again offered to execute a releaſe, when ſhe might beyond all contradiction have done it; for though the aſſignment was an unfortunate tranſaction for the daughter, yet as it was done at her own requeſt, ſhe could not blame her mother for it.

Though a witneſs be an infant, his tender years will not invalidate his evidence.

An objection has been made to the moſt material witneſs for the mother, who is *Judith Powell*, becauſe ſhe was but eleven years old when ſhe ſwore to one fact, and thirteen when ſhe ſwore to the other; but notwithſtanding her tender years, this does not at all invalidate her evidence, for ſuch a circumſtance as a brother and ſiſter's being in the utmoſt diſtreſs, and the falling upon her knees to beg and implore a mother not to ruin them, muſt make full as great an impreſſion upon a young mind, as an old one.

There is another obſervation very material for the defendant, that notwithſtanding the plaintiff *Helen* lived with her mother at the time the ſecond marriage was propoſed, yet there is not a ſyllable of proof offered to ſhew, that either *Helen* herſelf, or the plaintiff, mentioned the leaſt tittle of this affair, or even made any demand of the 650*l.* which they have now ſet up by their bill.

If an infant who contracted a debt during his minority, confirms it after he comes of age, it will bind him, though *voidable* at his election.

And as it is an extream harſh one, after all the kindneſs and tenderneſs the plaintiff *Helen* has received at her mother's hands; I am of opinion the defence is very ſufficient to rebut all the plaintiff's equity.

I think it comes very near the caſe the defendant's counſel have compared it to, of an infant under age, who contracting a debt during his minority, ſhews his conſent to it, by confirming it after he comes of age, which ſhall effectually bind him, though it was voidable at his election.

A promiſe during coverture does not bind a wife, but if repeated after the huſband's death, it is a confirmation.

So here, a promiſe by the wife to releaſe during the coverture, it is certain could not bind the wife, but if after the death of her huſband ſhe repeats the promiſe, it is a confirmation of it, and is good.

The caſe of *Thayer* and *Gould*, *Feb.* the 9*th* 1739. (*vide* 1 *T. Atk.* 615.) firſt heard before the late *Maſter of the Rolls*, and afterwards before me, has been compared by Mr. *Noel* to the preſent, but there the circumſtances in ſupport of the plaintiff's demand, were much ſtronger than in the preſent.

A wife in that caſe, after being very hardly and cruelly uſed by a huſband, was prevailed upon to join with him in importuning the truſtee, to convey over a truſt eſtate, which was for the ſeparate uſe of the wife, to the huſband, and as the truſtee was a very near relation, he could not be ſuppoſed to be ignorant of the cruelties the wife had undergone, eſpecially as ſhe was proved to be in tears the whole time, that the conveyance from the truſtee to the huſband was reading, and executing.

There was another ſtrong circumſtance againſt the truſtee, that he actually retained as much out of the truſt, as would ſatisfy a debt of his own from the huſband: beſides too, it was land which had been conveyed in truſt, and I remember very well a great ſtreſs was laid upon the circumſtance of it's being real eſtate; I did not make any decree there, for upon my recommendation the affair was compromized, and a middle way found out by the parties to put an end to the diſpute.

In the preſent caſe the original bill was decreed to be diſmiſſed without coſts, ſo far as it ſeeks relief for the remainder of the 1000*l.* And a croſs bill brought by the defendant for the board and maintenance of the daughter, was likewiſe diſmiſſed without coſts.

Caſe 194. *Bagſhaw* verſus *Spencer*, at the *Rolls*, *February* 18, 1741.

BENJAMIN Alliſon deviſes lands to *B.* and *C.* and their heirs, in truſt by rents and profits, ſale, or mortgage, to pay his debts, and funeral expences, and after in truſt as to a moiety to the uſe of his nephew *Thomas Bagſhaw* for life, without impeachment of waſte; remainder to truſtees and their heirs during the life of the ſaid *Thomas Bagſhaw* to preſerve the contingent remainders, with remainder to the uſe of the heirs of the body of *Thomas Bagſhaw*, with other remainders over. It was adjourned after ſome debate, till a certificate ſhould be made in the caſe of *Colſon* and *Colſon*: But it was ſaid here were two material differences; 1. The clauſe *ſans* waſte. 2. This was a truſt, and the court muſt neceſſarily interpoſe and decree a conveyance. *Vide* the caſe of *Legate* and *Sewell*, 1 *P. W.* 87.

Caſe 195. *Colſon* verſus *Colſon*, *Mich.* 14 *Geo.* 2. 1741. *in B. R.*

THIS was a caſe ſent out of the court of Chancery for the opinion of the court of King's Bench on theſe words: "I give "and deviſe my lands at *C.* to *Robert Colſon* my grandſon for his "life, remainder to *A.* and *B.* and their heirs to ſupport contingent "remainders during the life of *Robert Colſon*, remainder to the heirs

" of the body of *Robert Colſon* lawfully begotten;" and the queſtion was, whether *Robert Colſon* had an eſtate for life or in tail. Mr. *Hollings* argued that he had an eſtate-tail, for that it was a rule in law, wherever the anceſtor took an eſtate for life with words of limitation to his heirs or the heirs of his body, they ſhall not take by purchaſe but by deſcent, and that the teſtator's intention would not controul the operation of a rule of law. *King* verſus *Melling*, *Ventris* 214. & 225. 2 *Lev.* 58. *Blackburn* verſus *Ewer*, 1 *P. W.* 54, 56. 2 *Roll. Abr.* 258. *Trevor* verſus *Trevor*. *Abr. Caſ. Eq.* 387. 1 *Lutw.* 825. *Carth.* 171. *Lord Glenorchy* verſus *Boſvile*, *Caſ. in Eq. in Lord Talbot's Time* 3. 2 *Salk.* 678. There being truſtees to ſupport contingencies makes no difference, as appears from *Papillon* verſus *Voyce*, 2 *P. W.* 471. which to this queſtion is fully in point, there being no truſtees.

Mr. *Bootle* on the other ſide argued, that the teſtator's intent was to give an eſtate for life to the grandſon, by placing truſtees to take advantage of the forfeiture, which could only be in caſe he was tenant for life. 2dly, The intention of the teſtator was the chief rule in the conſtruction of wills, for which he cited *Papillon* and *Bois*, *Eq. Caſ. Abr.* 185. and that the word *heirs* is a word of purchaſe. *Carth.* 272. *Pybus* verſus *Mitford*, 1 *Vent.* 372.

Colſon verſus *Colſon*, *November* 12, 1743. *A rehearing.*

ROBERT Bromley ſeiſed in fee of the reverſion and inheritance of ſeveral eſtates at *Thorpe Bulner* in the biſhoprick of *Durham*, expectant on the death of *Elizabeth Forſter*, by his will dated the 12th of *July* 1712. deviſed the ſame expectant as aforeſaid to *Robert Colſon* for life, remainder to truſtees during his life to preſerve contingent remainders, remainder to the heirs of the body of the ſaid *Robert Colſon*, remainder in like manner to the defendant *William Colſon* and the heirs of his body.

After the teſtator's death, *Robert Colſon* with *Elizabeth Forſter* ſuffered a common recovery, and declared the uſes to the ſaid *Elizabeth Forſter* for life, remainder to *Robert Colſon* and his heirs.

Mr. Attorney General council for the plaintiff *Elizabeth Colſon* ſiſter of *Robert Colſon*.

The principal and only queſtion he ſaid aroſe upon the deviſe in *Robert Bromley*'s will.

It is inſiſted on by the defendant *William Colſon*, that *Robert* was only tenant for life, and conſequently was not intitled to ſuffer the recovery.

This

This cauſe was heard before Mr. *Verney*, the late Maſter of the Rolls, in *July* 1739. who referred it to the Judges of the court of King's Bench upon this point; in purſuance thereof a caſe was made, and there were two arguments before the Judges of the court of King's Bench; but they declined giving any opinion, and therefore the parties have been adviſed to bring it in this ſhape before your Lordſhip.

All the directions prayed by the plaintiff's bill are conſequent of the opinion the court will give in this point.

Mr. Attorney General for the plaintiff: Connecting theſe two eſtates together, I inſiſt makes an inheritance in *Robert Colſon*, and the rule from whence I argue is laid down in 1 *Inſt.* 309. *a.* and *b.* and *Shelly*'s caſe, 1 *Co.* 93. *b.*

It is not at all material, whether there is any eſtate intervening, for it is the ſame if limited to *A.* for life, and to the heirs of the body of *A*, or to *A.* for life, to *B.* for life, and to the heirs of the body of *A.*

Where the anceſtor makes ſuch a limitation as this, it is giving the deviſee every thing, and the ſenſe of the law in this reſpect is ſo very ſtrong, that nothing can be plainer. *Vide* 1 *Inſt.* 28. *b.*

An anceſtor cannot make his heirs purchaſers; and another reaſon is, the law will not ſuffer an eſtate of inheritance to be in abeyance; the rule extends to the caſe of wills as well as to conveyances in the life of the party.

It is not ſufficient to ſay that we are to be governed by the intention of the parties, for a man cannot break through the rule of law, but this intention muſt be conſiſtent with it. *Vide Saul* v. *Gerard*, *Cro. Eliz.* 525.

The next conſideration is, what there is in the particular framing of this will to take it out of the general rule.

It has been inſiſted that *Robert Colſon* took an eſtate for life only, and that his heirs are purchaſers.

But in this will the intention is very plain that the heirs of *Robert Colſon* ſhould take *per formam doni*, for here is all the appearance of an eſtate-tail, heirs of the body of his grandſon lawfully begotten or to be begotten, words moſt peculiarly ſignificant to create an eſtate-tail; and great ſtreſs was laid upon them by Lord Ch. Juſt. *Hale*, in *King* v. *Melling*, 1 *Vent.* 214, 225.

It has been urged by the defendant's council, here are ſtrong words to ſhew the teſtator intended only an eſtate for life as a deviſe to his grandſon for and during his natural life, *&c.*

But then the contingent remainder, preſerved by the limitation to the truſtees is nothing more than the limitation to the heirs of the body, and not to a remote remainder.

Suppoſe the teſtator had ſaid to truſtees to preſerve contingent remainders to the right heirs of *Robert Colſon:* the gentlemen of the other ſide would hardly ſay that right heirs *eo nomine* can take as purchaſers, the law would not admit of it, and yet the intention is equally clear here, as it would have been there.

If the limitation had been to the heirs of the body of a ſtranger, it might have been otherwiſe, for they would have been purchaſers, becauſe there was no anceſtor to take firſt, but there is no caſe where *heirs of the body* take as purchaſers if the anceſtor has the eſtate for life.

I will put the ſtrongeſt caſe; ſuppoſe a deviſe to *A.* remainder to his heirs, and that the teſtator ſhould by expreſs words ſay, I intend the heirs ſhould take as purchaſers, yet it would not prevail againſt the rule of law *that heirs cannot take as purchaſers.*

The ſecond point I would inſiſt upon is, that the rule of law muſt prevail againſt the plain intention of the teſtator: *Goodright* verſus *Pullen*, 12 *Geo.* 1. Deviſe to *Nicholas Liſle* for life, remainder to the heirs of his body and his heirs for ever. Here the latter words were neceſſarily rejected, becauſe they would deſtroy the eſtate; and the court held this was an eſtate-tail, for they were words of limitation and not of purchaſe. *Vide Legate* verſus *Sewell*, 1 *P. W.* 87. and *Morris* verſus *Wood* at the *Cockpit*, a plantation cauſe, the 24th of *March* 1730. held to be an eſtate-tail by Lord Chief Juſtice *Raymond* and *Eyres.* In Lord *Glenorchy* verſus *Boſville*, *Caſ. in Eq. in Lord Talbot's Time* 3. declared there by Lord *Talbot*, that if it had been a deviſe of a legal eſtate, it would have been an eſtate-tail. *Vide Roberts* verſus *Dixwell*, *December* 8, 1738. before Lord *Hardwicke*, (1 *T. Atk.* 607.) *Thruſtout* verſus *Peat*, *Mich. T.* 3 *Geo.* 1.

In all theſe caſes it was plainly the intention of the teſtator, that there ſhould be only an eſtate for life, and yet held to be an eſtate-tail in conformity to the rules of law.

It is obſervable on the caſes upon the words *iſſue of the body and heirs of the body*, that they have never been conſtrued words of purchaſe, but where the teſtator intended to point out particular perſons.

LORD CHANCELLOR.

I would willingly deliver the parties from any further trouble, if I could do it conſiſtently with the rules of the court; but this is a mere queſtion in law, and is already put in a proper courſe; and unleſs there was ſomething executory in it, I ought not to meddle with it in equity, except there were ſome caſe already in point determined: But as there is not one determined where there is an interpoſition of truſtees to preſerve contingent remainders, I will therefore affirm the late Maſter of the Roll's order of reference to the Judges of the court of King's Bench, and then it will go on regularly.

A certificate of the Judges of the court of King's Bench, upon the 8th of *May* 1744. in the caſe of *Colſon* verſus *Colſon*.

WE have heard council in the queſtion referred by your Lordſhip to us, and as it appears by the ſtate of the caſe, there is after the determination of the eſtate for life to *Robert Colſon*, a deviſe to *Iſabell* his daughter, and to *Ralph Robinſon* and their heirs for and during the life of *Robert Colſon*.

We are of opinion, that by reaſon of the remainder interpoſing between the deviſe to *Robert* for life, and the ſubſequent limitation to the heirs of his body, the ſaid *Robert* took an eſtate for life, not merged by the deviſe to the heirs of his body, but by that deviſe an eſtate-tail in remainder veſted in the ſaid *Robert*.

Sir *William Lee*, Knight, Chief Juſtice.

Sir *William Chapple*, Knight,
Martin Wright, Eſq;
Thomas Deniſon, Eſq;
} Juſtices.

Willis

Willis verſus *Jernegan*, *February* 26, 1741. Caſe 196.

THERE had been ſeveral tranſactions between the plaintiff and defendant, in relation to the defendant's lottery or ſale, as it was called, of plate, jewels, *&c.* and particularly an agreement in relation to the receipts or tickets in the ſale, a great number of which, to the amount of no leſs than eleven thouſand had been delivered to the plaintiff, who was to pay a ſtated price for them, and if by ingroſſing ſuch a quantity he could ſell them above par, the profit, let it be ever ſo great, was to go into the plaintiff's pocket: the plaintiff might have ſold them to very great advantage, but by out-ſtanding his market, and inſiſting upon an exorbitant premium, he was a conſiderable loſer; and now brings a bill to be relieved againſt the defendant, ſuggeſting the agreement to be hard and unconſcionable, and likewiſe for an open account between him and the defendant.

If a perſon will enter into a hard bargain with his eyes open, equity will not relieve him upon this footing only.

The defendant ſets forth the whole agreement, and inſiſts that there was no fraud or circumvention, but that it was a tranſaction carried on with the utmoſt fairneſs, and an agreement entered into at the plaintiff's own requeſt; and that if it was not ſo beneficial a one as it might have been, it was intirely owing to the miſmanagement of the plaintiff; and, as to the open account prayed, the defendant pleads a ſtated account in bar, which had been ſettled between him and the plaintiff ſometime after the ſale or lottery was finiſhed, and entered in a book that related merely to the tranſaction between him and the plaintiff, and to no other purpoſe whatever; and that the adjuſting of this account had taken up a week's time at leaſt; and the plaintiff, at the time, and often ſince, had declared himſelf extremely well ſatisfied with it.

There were ſeveral witneſſes on the part of the defendant to ſupport the agreement, and the ſeveral facts inſiſted on by the anſwer, but there was not a tittle of evidence on the behalf of the plaintiff to ſupport the allegations in his bill.

LORD CHANCELLOR.

It is not ſufficient to ſet aſide an agreement in this court, to ſuggeſt weakneſs and indiſcretion in one of the parties who has engaged in it; for, ſuppoſing it to be in fact a very hard and unconſcionable bargain, if a perſon will enter into it with his eyes open, equity will not relieve him upon this footing only, unleſs he can ſhew fraud in the party contracting with him, or ſome undue means made uſe of to draw him into ſuch an agreement, which is not

pretended by the plaintiff in the preſent caſe; for, from the evidence, he appears to have been ſo fond of this project of a ſale of plate, jewels, &c. that no perſon ever had ſuch an eaſy ſtomach, and quick digeſtion, for he wanted to have monopolized the whole number of tickets.

The plaintiff's council have made two objections to the defendant's plea of a ſtated account.

1. That it was not ſigned by the parties.

2. That the vouchers were not delivered up at the time.

Where Perſons have mutual dealings, ſigning the account is not neceſſary to make it a ſtated one, but it is keeping it any length of time, without making an objection, which binds the perſon to whom it is ſent.

As to the firſt, there is no abſolute neceſſity that it ſhould be ſigned by the parties who have mutual dealings, to make it a ſtated account, for even where there are tranſactions, ſuppoſe between a Merchant in *England* and a merchant beyond ſea, and an account is tranſmitted here from the perſon who is abroad, it is not the ſigning which will make it a ſtated account, but the perſon to whom it is ſent, keeping it by him any length of time, without making any objection, which ſhall bind him, and prevent his entring into an open account afterwards.

The ſecond objection is becauſe the vouchers were not delivered up.

The delivering up vouchers is an affirmation that the account between the parties was a ſtated one, but not abſolutely neceſſary; they ſhould be delivered up at the time the account is ſettled.

Bankers keep the draughts which are made upon them on files, becauſe they are vouchers, and of uſe in clearing up diſputes between their ſhop and a third perſon.

Now there is no doubt, if vouchers are delivered up at the time, it is an affirmation at leaſt, that the account between the parties was a ſtated one, but to make it ſo, it is not abſolutely neceſſary they ſhould be delivered up at the time the account is ſettled; for inſtance, in the caſe of bankers and their cuſtomers, it is ſeldom done, but the draughts which are made upon them are conſtantly kept on files, and at different times when they ſettle accounts with you, they only enter in a book which they give you for that purpoſe the ſeveral receipts and payments during your tranſactions with their ſhops, and it would be imprudent in them to do otherwiſe, becauſe the vouchers are very often of uſe to them in clearing up any diſputes between their ſhop and a third perſon.

Lord Chancellor decreed the plaintiff's bill to be diſmiſſed with coſts.

Brace

Brace verſus *Taylor*, *February* 10, 1741. Caſe 197.

WILLIAM Taylor, who was ſeiſed of certain lands in *Brecknockſhire* in *Wales*, a few years ago thought proper to make a conveyance of them to *William* his ſon, in fee, rendring an annuity of 37*l. per ann.* to himſelf for life, and 10*l. per ann.* to *Judith* his wife for life; under this conveyance *William*, the ſon, entered into poſſeſſion, and for ſome time paid the annuity both to his father and mother: on *Lady Day* 1736, *William* the father gave a receipt to *William* the ſon, for ſix pounds five ſhillings, in full for that quarter of his annuity, which was due at that day. *William*, the ſon, acknowledged by his anſwer, that there were other little money tranſactions between his father and him, and that at divers times he had borrowed ſmall ſums of his father, but he ſwore theſe ſums of money were all diſcharged: in *April* or *May* 1736, *William* the ſon, made his father another payment of about 5*l.* very ſoon after *William* the father died, and left *Brace* his executor; the preſent bill was brought by *Brace*, againſt *William* the ſon, praying, amongſt other things, that *William* the ſon might pay to *Brace* what was in arrear for the father's annuity at the time of his death, and that he might come to an account with him for what other money he owed him on the account of his father.

Where a matter which ariſes within the juriſdiction of the courts of *Wales* is of value or difficulty, parties may take their remedy here, but if of ſmall conſequence, it is an inducement with this court to diſmiſs the bill with coſts.

Lord Chancellor ſaid, his opinion was, that the bill ought to be diſmiſſed with coſts; he ſaid this was a queſtion which ariſes within the juriſdiction of the courts of *Wales*, and though that is not a reaſon to prevent the parties from taking their remedy in this court, where the matter in queſtion is of great value and difficulty, yet where the diſpute relates to a matter of ſmall conſequence, that is an ingredient which this court ought to conſider; one objection therefore, which the council for the defendant have made in the preſent caſe, is, that the matter in queſtion appears to be of ſmall and trifling conſequence, though the defendant has not demurred to the preſent bill on that account, yet that objection may be taken advantage of now at the hearing; for it very often happens that a bill may be drawn in ſuch a manner as to prevent a demurrer of this ſort, eſpecially in a matter relating to an account, and therefore it would be very unreaſonable that an objection of this ſort might not be taken at the hearing: in the time of Lord *Harcourt* a bill was brought in this court relating to tithes, it was clearly admitted that the plaintiff had a right to ſome tithes of the defendant; but as the tithes which were due appeared to be only of the value of five pounds, the Chancellor diſmiſſed that bill at the hearing; what is the nature of the preſent caſe? here is a bill brought to have a decree made for the payment of the arrears of an annuity which were incurred in the life of the plaintiff's teſtator. A receipt is produced on the part of

Though a defendant has not demurred to a bill as being too trifling for this court to entertain, yet he may take advantage of the objection at the hearing; for a bill may have been ſo drawn as to have prevented a demurrer.

the defendant, whereby it appears, that at *Lady Day* 1736, he paid his father 6*l.* 15*s.* for one quarter of his annuity, due at that time; this is an evidence there were no other arrears of the annuity, and the father died within a little more than three months after; ſo that at the time of his death there could have been but one quarter that was in arrear, and that ſo ſmall a ſum as 6*l.* 15*s.* but then it has been ſaid, that the defendant has admitted by his anſwer that he at different times borrowed ſmall ſums of his father, and though he does ſwear he has diſcharged thoſe ſums in his father's life-time, yet it has been urged that this is a ground for directing an account to be taken, and upon the account it may come out that there was ſo much money owing from the defendant to his father, that together with the 6*l.* 15*s.* before mentioned, it may amount to a ſum for which this court allows a bill to be brought; and it is indeed true, if the defendant had acknowledged by his anſwer any particular ſum due, though he ſwears that thoſe ſums were diſcharged, that might have been a ground for directing an account to be taken; but, in the preſent caſe, the only acknowledgment which he has made is, that there were ſmall ſums of money, which he at different times borrowed of his father, and as the plaintiff has made no proof what thoſe ſums were, and as the defendant has ſworn he has diſcharged them, there is not a foundation for directing an account to be taken relating to thoſe ſums, and this made the more clear, by reaſon of a piece of evidence produced on the part of the defendant, by which it appears, about *April* or *May* following, he paid his father about five pounds, which might probably be the diſcharge of theſe ſums mentioned in his anſwer, and there is no occaſion to apply that payment to the annuity; theſe are reaſons to ſhew the plaintiff had no ground to come into this court, and his natural remedy was a diſtreſs, or an action of covenant upon the deed; "And his lordſhip declared, he ſaw no cauſe to give the plaintiff "any relief in equity, and ordered the plaintiff's bill to be diſ-"miſſed out of court with coſts."

If a defendant by his anſwer acknowledges any particular ſum due, though he ſwears that thoſe ſums were diſcharged, yet it is ſtill a ground for directing an account.

Caſe 198. *Young* verſus *Peachy*, *February* 11, 1741.

SIR *Robert Bredon* on the 21ſt of *January* 1719. made his will, and thereby gave certain houſes in *Bond-ſtreet*, and *Old-ſtreet*, of the value of about 340*l.* *per Annum* to *Zaccheus* his ſon for life, the remainder to the firſt and other ſons in tail, remainder to his daughters and their heirs; and in caſe of ſuch daughter or daughters dying without iſſue, then to the ſurvivor or ſurvivors of their heirs.

Where a father obtained an abſolute conveyance from a daughter, in order to anſwer one particular purpoſe, and afterwards makes uſe of it for another, this court will relieve under the head of fraud.

Sir *Robert Bredon* died, and upon his death *Zaccheus* entered into poſſeſſion of the tenements both in *Old-ſtreet* and *Bond-ſtreet*; *Zaccheus* had no ſons, but had iſſue two daughters *Margaret* and *Lydia*;

Margaret intermarried with Mr. *Joſeph Fox*, and the plaintiff *Lydia* intermarried with Mr. *Young* in 1726. *Joſeph Fox* was in very bad circumſtances, and one *French* examined in the cauſe ſwore that about that time he heard *Zaccheus* complain of *Joſeph*'s extravagancies, and ſaying, that if he was to die *Joſeph* would waſte all that would come to him, for which reaſon he would endeavour for a little matter to get *Joſeph* to join with him to bar the eſtate-tail in that moiety, which he would be intitled to, in order to protect the eſtate from his creditors.

And with this intent, " *Zaccheus* repreſented to his daughter " *Margaret*, that it was probable he ſhould not have any more " children, and that it would be for her benefit to join in a " common recovery of a moiety of the premiſſes ſo limited in " remainder in tail to his daughter, and deſired her to perſuade " her huſband to join in the ſame, and that thereby, and by a " deed to be made thereupon declaring ſuch recovery to be to the " uſe of *Zaccheus* and his heirs, this moiety would be protected " from the creditors of *Joſeph Fox*, and at the ſame time promiſed " *Margaret* that he would take the eſtate ſo to be created by the re- " covery, and deed to declare the uſes thereof, as a truſtee only for " her and her heirs, and that the operation of law would be ſuch " thereupon, he not paying any conſideration for the ſame, and " that he would not claim or inſiſt upon any benefit or advantage " thereby."

A recovery was accordingly ſuffered of this moiety in *Hilary* term 1726. in which *Zaccheus* was tenant to the *Præcipe*, and *Margaret* and her huſband were vouched, and a deed was perfected to which they were parties, and the recovery was thereby declared to be to the uſe of *Zaccheus* and his heirs, but no conſideration whatſoever was paid by *Zaccheus*, or any other on his behalf, to *Margaret* and her huſband.

Soon after *Joſeph* and his wife, on account of other circumſtances, were forced to go to *South Carolina*, in order to ſecrete themſelves from their creditors.

However *Zaccheus* from the time the recovery was ſuffered, conſtantly paid to *Margaret* an annuity of thirty pounds *per ann.* Afterwards *Zaccheus* had the misfortune to become a bankrupt, and Sir *Robert Peachy* and others were choſen his aſſigns: *Zaccheus* died in *March* 1734. and *Joſeph Fox* in *Auguſt* 1735. and his wife ſome few days after died without iſſue, without having made any diſpoſition of this moiety: The preſent bill brought by *Young*, and *Frances* his wife, againſt the aſſignees of *Zaccheus*, and againſt a mortgagee of this eſtate, under a mortgage from *Zaccheus* after he got the poſſeſſion of this moiety under the recovery, praying, amongſt

amongſt other things, that the recovery might be ſet aſide as being unduly obtained, and that in conſequence of this the plaintiffs might be allowed to redeem the mortgage, as this moiety is deſcended and of right belongs to the plaintiff *Lydia* and her heirs.

Upon the hearing of this caſe, Lord Chancellor aſked the counſel for the plaintiffs, whether they were willing to conſent that the 30*l.* *per ann.* which *Zaccheus* had paid to *Margaret* ſhould be refunded, and upon their declaring that they were, Lord Chancellor ſaid, his opinion was, that the recovery ought to be ſet aſide as being unduly obtained, and in conſequence of this, that the plaintiffs were intitled to redeem this mortgage. He ſaid the ſtate of the caſe was no more than this: Sir *Robert Bredon* gave his eſtate by his will to his ſon *Zaccheus* for life, the remainder to truſtees, to preſerve contingent remainders, remainder to his firſt and other ſons in tail, the remainder to his daughters and their heirs, as tenants in common: Sir *Robert Bredon* died, and on his death *Zaccheus* entred into poſſeſſion, and had only two daughters, ſo that he was tenant for life, with remainder to them in tail: *Zaccheus* joins with *Margaret*, one of his daughters, and her huſband, in ſuffering a recovery of a moiety of the premiſſes; by the uſes of this recovery, *Zaccheus* is made the owner of this moiety in fee: In the deed which declared the uſes, the conſideration is recited to be for barring all entails in the premiſſes, and the remainder and reverſion expectant thereon, and in conſideration of five ſhillings, and, as the deed ſays, for divers other valuable and good conſiderations; as the conſideration is ſo looſely expreſſed, in point of law, it leaves it open to the parties to aver any other conſideration; and the queſtion is, whether in the preſent caſe there is not room for a court of equity to ſay, that here is either a truſt reſulting by operation of law for the benefit of the daughter, that joined in ſuffering this recovery; or whether there is not a ground in the preſent caſe to direct that the aſſignees, under the commiſſion of bankruptcy which iſſued againſt *Zaccheus*, ſhall execute a reconveyance under the head of fraud.

With regard to the truſt by operation of law, it has been urged on the part of the plaintiffs, that there is ſuch a one in the preſent caſe, becauſe, though in point of law there is a conſideration appearing on the face of the deed, yet it is inſiſted, that here is no valuable conſideration, to prevent a truſt ariſing by implication.

LORD CHANCELLOR.

Truſts by implication ariſe where one perſon pays the purchaſe money, and the conveyance is taken in the name of another; but the rule is not ſo large as to extend to every *voluntary conveyance*.

Now, as to that, I am of opinion that there was no ſuch truſt; for if a truſt by implication was to ariſe in the preſent caſe, it would

be

be to contradict the ſtatute of frauds; for it might be ſaid, in every caſe, where a voluntary conveyance is made, that a truſt ſhall ariſe by implication; but that is by no means the rule of the court; truſts by implication, or operation of law, ariſe in ſuch caſes, where one perſon pays the purchaſe money, and the conveyance is taken in the name of another, or in ſome other caſes of that kind; but the rule is by no means ſo large as to extend to every voluntary conveyance; for theſe reaſons, his Lordſhip ſaid, that the plaintiffs could not be relieved under the notion of a truſt; however, he thought that they had a proper ground to be relieved upon under the head of fraud.

It manifeſtly appears, the conveyance from *Fox* and his wife was obtained in order to anſwer one particular purpoſe, but that the father has attempted to make uſe of it for a very different one; and there have been a great many caſes, even ſince the the ſtatute of frauds, where a perſon has obtained an abſolute conveyance from another, in order to anſwer one particular purpoſe, but has afterwards made uſe of it for another, that this court has relieved under the head of fraud; for a practice of this ſort is a deceit and fraud which this court ought to relieve againſt, the doing it is *dolus malus*, and that appears to be the preſent caſe: This may be collected from the evidence of *French* and *Sanguin*; *French* ſwears, that before the recovery was ſuffered, he heard the father ſay, that his ſon *Fox* was guilty of great extravagancies; and that if he had the eſtate, he would certainly waſte it, for which reaſon he would endeavour, for a little matter to get *Joſeph* to join with him to bar the intail in that moiety, which he would be intitled to, in order to protect the eſtate from his creditors; what *Sanguin* ſwears, was ſubſequent to the recovery, and therefore I do not lay ſo much weight upon it.

A court of equity will never ſuffer a deed of this ſort to ſtand; in 2 *Vern.* 307. *Wilkinſon* verſus *Brayfield*, there is a caſe which is material to this purpoſe; there it is ſtated, " The defendant *Bray-*
" *field* having by the means of *Fogg*, an attorney, prevailed upon
" *Elizabeth Corey* to levy a fine of ſome houſes in *Norwich*, and
" to execute a deed, leading the uſes thereof to *Brayfield* and his
" heirs; and it being proved that ſhe, at the time of levying the
" fine, declared ſhe muſt make uſe of ſome friend's name in truſt;
" and afterwards by will declaring ſhe had levied ſuch fine only in
" truſt, and the better to enable her to diſpoſe of the eſtate, and
" thereby deviſed it to *Wilkinſon* and his heirs, ſubject to the pay-
" ment of her debts; and although *Brayfield* proved a great fami-
" liarity and friendſhip between him and *Elizabeth Corey*, and that
" ſhe had declared he ſhould have her eſtate; yet it was decreed,
" not only that the eſtate ſhould be liable to the creditors debts,
" but that he ſhould convey the eſtate to the deviſee *Wilkinſon*

" and his heirs:" It has been ſaid, in the caſe which has been cited, here were two different declarations of the uſes of the fine, contrary one to another, and likewiſe there were creditors in that caſe, and therefore thoſe might be reaſons for that determination; but I do not think they were; and it ſeems to me that caſe was ſomething ſimilar to the preſent one; it is indeed true, in the preſent, the defendants are aſſignees under a commiſſion of bankruptcy, which iſſued againſt *Zaccheus*, but they can be in no better caſe than *Zaccheus* himſelf would have been.

The preſent caſe is a good deal like one which I very well remember, and was to this purpoſe: A man intended to make a mortgage of his eſtate by two different deeds, the one an abſolute one, the other a defeazance upon payment of the mortgage money, which was the old way of making mortgages, he executed the abſolute conveyance, but when he had ſo done, the other party refuſed to execute the defeazance, but the court, without any difficulty, decreed him to do it; his Lordſhip ſaid, that other caſes of the like kind have been likewiſe cited, where conveyances have been made of eſtates in truſt, in order to ſcreen them from forfeitures for felony, and thoſe conveyances have been ſet aſide, but his Lordſhip ſaid he would not make any particular obſervations upon thoſe caſes.

In the preſent caſe the recovery, as has been ſaid, was ſuffered for one purpoſe, and is attempted to be made uſe of for another, and though it has been objected the allowing the evidence of this ſort is againſt the ſtatute of frauds and perjuries, yet, if that objection ſhould be allowed, the ſtatute would tend to promote frauds rather than prevent them; for theſe reaſons therefore I declare, though there had been no other circumſtances in the caſe, I ſhould have been of opinion that the recovery ought to be ſet aſide.

But the caſe is greatly ſtrengthned when it comes to be conſidered that this was a recovery obtained by a father from his child, and when that is the caſe, it affords another ſtrong circumſtance, in order to relieve the plaintiffs.

Lord King, in the caſe of *Gliſſen* verſus *Ogden*, refuſed to give relief on a conveyance obtained by a father from a child; the Houſe of Lords upon an appeal laid great weight upon that circumſtance, and reverſed the decree.

In the caſe of *Gliſſen* and *Ogden* before Lord Chancellor *King*, that circumſtance was ſtrongly relied upon; but his Lordſhip refuſed to give relief, for he ſaid it was a fair bargain between a father and his child, and he would not weigh in golden ſcales, whether the conſideration was exactly equal or not: In *March* 1731 there was an appeal to the Houſe of Lords from that decree; upon the appeal, the Lords laid great weight upon that circumſtance, that the conveyance was

obtained by a father from his daughter in diſtreſs, and the decree of Lord *King* was reverſed: It is indeed true, from the time the recovery was ſuffered, *Zaccheus* paid to his daughter 30*l. per ann.* and at the time the recovery was ſuffered, he ſeems to have an intention of doing ſo: But the moiety of this eſtate is of the value of 140*l. per ann.*; and therefore thoſe ſums of money can by no means be a ſufficient conſideration: However, on the other hand, it is reaſonable this conveyance ſhould ſtand as a ſecurity for the money which *Zaccheus* had ſo advanced to his daughter: and that was the reaſon I aſked whether the council for the plaintiff were willing to conſent to refund this.

Upon the whole, his Lordſhip declared, "that the plaintiff "ought to be relieved againſt the declaration of the uſes of the "recovery made to *Zaccheus Bredon* and his heirs, by the deed of "the 16th of *July* 1726; upon making an allowance to the aſ-"ſignees under the commiſſion of bankruptcy againſt *Zaccheus* for "the 30*l.* a year, paid by him to his daughter *Margaret*; and it "was further ordered that the aſſignees do convey to the plaintiffs "*Francis Young*, and *Lydia* his wife, and the heirs of his wife, "the moiety of the ſaid eſtate; and upon payment by the plain-"tiffs to the mortgagee of his principal, intereſt, and coſts, he "was ordered alſo to reconvey the mortgaged premiſſes to the "plaintiffs, whom his Lordſhip directed to be admitted creditors "under *Zaccheus*'s commiſſion, for what they ſhall have paid to "the defendant the mortgagee."

Forſter verſus *Forſter*, *March* 10, 1741. Caſe 199.

CHARLES Forſter, the father of *John* and *Francis Forſter*, made a ſettlement, upon the marriage of his eldeſt ſon *John*, of a freehold church leaſe, held by the lives of *Frances* the wife of *Charles*, and *John* the ſon, and *Gabriel* a third ſon, in truſt, to permit the ſaid *John* to enjoy for his life, and then his intended wife for life, and after being ſubject to a charge for younger childrens portions, in truſt for the heirs males of the body of *John Forſter*, and in default of ſuch iſſue, in truſt for the heirs males of the body of the ſaid *Charles Forſter* the father, and in default of ſuch iſſue, to the right heirs of the ſaid *Charles Forſter*.

As a tenant for life, and the perſon in remainder in nature of a tenant in tail of a freehold leaſe may certainly join, and bar the next in limitation, ſo he who had both the intereſts in himſelf, may alſo bar the intail of ſuch a leaſe.

The ſaid *Charles* the father being dead, and the wife of *John* being dead, and the only ſon of *John* by his ſaid wife being alſo dead, and there being daughters of the marriage, the defendant *Catherine*, and two other daughters of *John*, made a ſettlement of the church leaſe, under which the defendants claimed, and levied a fine *ſur conceſſit*, and afterwards died without male iſſue.

Upon

Upon the death of *John* without iſſue male, the plaintiff, *Francis Forſter*, claimed title to the leaſehold premiſſes, inſiſting, that by this ſettlement, *John*, his elder brother, was only tenant for life, and that the limitation to the heirs males of his body were words of purchaſe, and created a contingent remainder to his heirs males, and that the limitation to the heirs males of the body of his father *Charles* was a contingent remainder, to take effect in the perſon who ſhould be the heir male of the body of the father, at the time of the death of *John*, and that *John* could not be the heir male of the body of his deceaſed father, within the meaning and operation of the deed, becauſe a life eſtate was expreſly limited to him, and in the caſe of a deſcendable freehold it veſts in the heir, not as heir, but as ſpecial occupant; and that *John* could never take as occupant under the deſcription of heir male, becauſe the occupancy could not ariſe till after his own death, and therefore, that the heir male who was to take the contingent remainder, muſt be the plaintiff, (*viz.* the heir male of *Charles* the father, at the death of *John* the tenant for life), and that if *John* was but tenant for life, his ſettlement and fine *ſur conceſſit* could not bar the contingent remainder which ought to take place in the plaintiff.

E Contra: It was inſiſted, that the limitation to the heirs of the body of the father was not a contingent remainder, but words of limitation of the eſtate, and muſt mean the heirs male at the death of *Charles* the father; that *John* was the heir male, being the eldeſt ſon, and that his wife being dead, and his ſon being alſo dead, his life eſtate, and the limitation to him as heir male, was united, and in caſe of an eſtate of inheritance, he would be tenant in tail in poſſeſſion; and in caſe of a deſcendable freehold, he had the whole intereſt in him, and might diſpoſe of it as he pleaſed, and bar the plaintiffs.

Lord Chancellor was of this opinion; and ſaid, as tenant for life, and the perſon in remainder, in nature of a tenant in tail of a freehold leaſe, could certainly join, and bar the ſettlement; ſo the ſame perſon who had both theſe intereſts in himſelf, as *John* certainly had, might alſo bar the intail of the freehold leaſe.

A ſecond ſon, tenant for life of a freehold leaſe, remainder to the heirs of the body of the father, the tenant for life, and the elder brother may bar the intail.

And though it ſeemed abſurd, that the perſon who had an expreſs eſtate for his life, ſhould alſo be the occupant, which occupancy in ſtrictneſs did not ariſe till the death of the tenant for life, yet, in reality, the limitation, which in the caſe of an eſtate of inheritance would create an eſtate-tail, does, in the caſe of a freehold, give the party the whole intereſt, ſo as to impower him to diſpoſe of it; and he principally relied upon it, that the ſon of *John* being dead, and the remainder to the heirs males of *Charles* the father, veſting thereupon in *John*, to whom the eſtate for life was limited, he is to be conſidered in nature of tenant in tail, and might

might diſpoſe of it; and put this caſe, Suppoſe a ſecond ſon tenant for life of ſuch a freehold leaſe, remainder to the heirs of the body of the father, the tenant for life, and the elder brother the heir male of the father, might certainly bar the intail, and therefore where the ſame right is in one and the ſame perſon, he could certainly do it.

N. B. As to deſcendable freeholds, *vide* 10 *Co.* 96. *Edward Seymor's* caſe, 1 *Roll. Abr.* 676.

As to intails of freehold leaſes, *vide Waſteneys* verſus *Chappel*, decreed by *Lord Harcourt* 1712. 3 *Wms.* 265. and the *Duke of Grafton* verſus *Sir Thomas Hanmer*, 3 *Wms.* 266.

As to the heirs male being words of purchaſe, *vide Peacock* verſus *Spooner*, 2 *Vern.* 43. and *Daſſorne* verſus *Goodman*, 2 *Vern.* 362.

Dennis Daley, Eſq; and Lady Ann his wife verſus *Sir Edward Deſbouverie and others*, 1738.

Caſe 200.

MR. *Smith* had two daughters, the Counteſs of *Clanrickard*, and Lady *Deſbouverie*; in 1714 he ſettled a houſe in *Ormond-Street*, and ſome leaſehold eſtates in truſt for Lady *Clanrickard* for life, and to ſuch perſon as ſhe by writing ſhould appoint; by his will *July* the 7*th* 1718. he gave a legacy to the plaintiff *Ann*, eldeſt daughter of Lady *Clanrickard*, of 1000*l.* at 21, or marriage, with intereſt at 4*l. per cent.* to *John* her brother 1000*l.* at 21; if one died, the whole to the ſurvivor, and the reſidue of his real and perſonal eſtate to the truſtees, in truſt as to one moiety for the ſole and ſeparate uſe of Lady *Clanrickard*; and by a codicil he directs that in caſe the plaintiff *Ann* ſhould marry in the life-time of the Counteſs, without her conſent, that the plaintiff's legacy ſhould be divided among the reſt of Lady *Clanrickard's* children; Mr. *De Golls* was the ſurviving truſtee: the teſtator died, and the Earl of *Clanrickard*. On the firſt of *Auguſt* 1732. Lady *Clanrickard* makes an appointment of her houſe, and the leaſehold eſtates to *Smith* Earl of *Clanrickard* for life, and to his firſt and other ſons in tail male, to daughters in tail general, remainder as to one moiety of the freehold to plaintiff *Ann* for life, and to her ſons and daughters in tail male, remainder to Lady *Mary Burke*; as to the other moiety in the ſame manner with croſs remainders; and by another deed poll of the ſame date, appoints Mr. *De Golls* to aſſign the real and perſonal eſtate deviſed by her father to the ſame truſtees, Sir *Edward Deſbouverie*, *John Manley*, and *Thomas Ward* and their heirs, in truſt to ſell and lay out in lands, and ſettle to the ſame uſes as the freehold by the laſt deed, and till ſo inveſted, to be placed out to intereſt, and be

Whether a condition be *precedent*, or *ſubſequent*, if they are in reſtraint of marriage, the court have always put a favourable conſtruction upon them to prevent a forfeiture.

Where there is no objection to the perſon or eſtate of the gentleman who propoſes, and the young lady herſelf is inclined to the match, truſtees ſhould conſider themſelves in the light of a parent, and readily come into a content.

applied for the benefit of the perſons intitled to the rents and profits of the eſtate: In both deeds is the following proviſo, that if her ſon the Earl of *Clanrickard*, the plaintiff *Ann*, and Lady *Mary Burk* ſhould marry without the conſent of Sir *Edward Deſbouverie*, *John Manley*, and *Thomas Ward*, or the major part of them, or the ſurvivor of them, if any of them ſhould be then living, that then he, ſhe or they, marrying without ſuch conſent, and his or their iſſue, or deſcendants, ſhould forfeit or loſe all his, her or their right to the premiſſes; and the next perſon in remainder, purſuant to the appointment aforeſaid, ſhould and might in ſuch caſe enter thereunto, and enjoy the ſame as if he, ſhe, or they ſo marrying without conſent as aforeſaid, was or were actually dead without iſſue: by her will ſhe confirms the deeds poll, and makes Sir *Edward Deſbouverie*, *John Manley* and *Thomas Ward*, executors and reſiduary legatees on the ſame uſes, and alſo guardians to her children: on the firſt of *January* 1732. the Counteſs died, and on the 9th of *July* 1734. Mr. *De Golls*, purſuant to a decree in Chancery, aſſigned all the truſt eſtates to Sir *Edward Deſbouverie*.

In 1734. a treaty of marriage was propoſed by and between the plaintiffs, and after it had been carried on about five months, the plaintiff *Daley* acquainted Sir *Edward Deſbouverie* with his intentions: upon which Sir *Edward* took down in writing from *Daley*'s mouth the following propoſal for a ſettlement on the marriage: 4000 acres of land in *Ireland* worth 1200*l.* *per ann.* of which ſix hundred pounds *per ann.* were propoſed to be ſettled in preſent for their maintenance, the remaining 600*l.* *per ann.* in reverſion after the father's death; in caſe ſhe is a widow, and has iſſue, 500*l.* *per ann.* in caſe ſhe has no iſſue 600*l.* *per ann.* jointure, her own fortune to be ſettled together with the 1200*l.* *per ann.*

Sir *Edward Deſbouverie* communicated the propoſal to *Manley* and *Ward* the next day, who did not approve of it, in regard Mr. *Daley*, the father of the plaintiff, was to have the intereſt of the plaintiff *Ann*'s portion, which was about 8000*l.* for his life: the truſtees agreed at that meeting not to conſent, unleſs the plaintiff *Ann*'s fortune was ſettled with the 600*l.* a year for the preſent maintenance of the plaintiffs: on the 29*th* of *May* 1735. Mr. *Manley*, at the requeſt of the other truſtees, tranſmitted the ſaid propoſal (which had been before delivered to the truſtees in writing and ſigned by the plaintiff *Daley*) to Mr. *Tayler*, by letter, who was guardian to the preſent Earl of *Clanrickard*.

The letter in ſubſtance as follows:

We take the liberty to give you ſome further trouble in relation to Lady *Ann*, who we find has an inclination to marry the ſon of Mr. *Dennis Daley*; the young gentleman has ſent the incloſed propoſals

poſals to Sir *Edward Deſbouverie*; as we are intire ſtrangers to Mr. *Daley*, we deſire you may inquire into his circumſtances, and how far he is able to make the ſettlement propoſed by his ſon, and if his father ſhould deſire to treat, it is our opinion my Lord's counſel ſhould be conſulted thereupon. Lady *Ann*'s fortune at preſent is from her grandfather *Smith* about 3400 *l.* beſides what was left by her father out of his *Iriſh* eſtate, which will make the whole as we compute upwards of 7000 *l.* and ſhe has a further expectancy, in caſe of my Lord's death, of a moiety of what my Lady *Clanrickard* left my Lord, if ſhe marry with our conſent; if not, ſhe will loſe it, and the whole will go to her ſiſter, unleſs ſhe ſhould likewiſe marry without our conſent, in which caſe the whole goes to Sir *Henry Parker*; this is all the influence we have over Lady *Ann*, and ſhe might with her fortune marry much better: yet if Mr. *Daley*'s father will make the ſettlement propoſed, we believe the young folks are too far engaged for us to attempt to break off the match, and therefore we ſhall be obliged to conſent to it. Lady *Ann* very ſoon after her mother's death went to her father's relations without our privity or conſent, and how far they may have perverted her we cannot tell, but ſhe and the young gentleman both declare themſelves proteſtants, and ſay that is the reaſon my Lady's father's relations are againſt the match: We are your moſt humble ſervants, *John Manley*, *&c. London*, the 29th of *May* 1735.

Poſtſcript; The above letter was prepared for all the truſtees to ſign, but Sir *Edward Deſbouverie* going out of town in a hurry, deſired I would forward it to you.

Mr. *Tayler*, in anſwer to this letter, on the 18th of *June* ſends the truſtees the following propoſal from Mr. *Daley* the father.

4000 acres of land to be ſettled to the uſe of *Dennis Daley*, *ſenior*; for life, remainder to *Dennis Daley*, *junior*, for life, with remainder to his firſt and every other ſon in tail; the ſaid *Dennis Daley* hath agreed that he will lay out the portion at intereſt, or in the purchaſe of lands which ſhall be ſettled to the ſame uſes, 600 *l. per ann.* preſent maintenance, 600 *l. per ann.* jointure, if no iſſue, but if iſſue 500 *l. per ann.*

It appears by a letter from Sir *Edward Deſbouverie* to Mr. *Tayler*, that all the truſtees refuſe to conſent on any other terms than on Lady *Ann*'s portion being ſettled with 600 *l. per ann.* for their preſent ſupport and her jointure; and the reaſon they give is, that if the father of *Daley* ſhould have the intereſt of Lady *Ann*'s fortune, which at 6 *l. per cent.* the common intereſt in *Ireland*, produces 540 *l. per ann.* he in effect parts with nothing at preſent.

The plaintiff Mr. *Daley* applied ſeveral times afterwards to Mr. *Manley* for his conſent, but he told the plaintiff he thought the terms inſiſted on by him and Sir *Edward Deſbouverie* and *Ward*, were reaſonable, and that he never would give his conſent on any other, and cautioned the plaintiff againſt the ill conſequences of marrying without the conſent of the three truſtees; and told him if he would conſult council, and they ſhould be of opinion what was inſiſted on by the truſtees was unreaſonable, he would be ready to ſubmit, but not otherwiſe.

It appeared in evidence that the plaintiffs were married by *John Gaynam*, the famous *Fleet* parſon, on the 5th of *June* 1735.

The plaintiff *Daley* never applied to the truſtees *Manley* and *Ward* for their conſent till he had been married ſometime.

The bill is brought to compel Mr. *Daley* the father to a ſpecifick execution of the marriage agreement, or ſuch other reaſonable ſettlement as this court ſhall direct may be executed by him: that the truſtees may join in the ſettlement, or ſign their conſent, ſo as to prevent a forfeiture, and that they may execute the truſts in the two deeds poll.

The two material points for the defendants the truſtees were, Firſt, Whether what the truſtees have done amounted to a conſent to the marriage of the plaintiffs.

Secondly, If the truſtees have done amiſs in refuſing their conſent to the match.

On the 11th of *December* 1738. *Lord Chancellor* gave judgment.

That the marriage of the plaintiff was ſubſtantially with the conſent of the truſtees.

Firſt queſtion, Whether the condition annexed to the power is ſuch a condition as Lady *Clanrickard* could annex.

Secondly, Whether there is evidence ſufficient on the part of the plaintiffs to ſhew, that their marrying was with the conſent of the truſtees.

As to the firſt, I think Lady *Clanrickard* had a power to annex this condition.

As to the ſecond, I think the condition has been well performed.

The proviſo in both the deeds is very harſh and unreaſonable, and therefore a court of equity will be juſtified in taking as great a

latitude as may be in the conſtruction of it, to prevent a breach: if the marriage was ſuch as was fit, there could be no objection either to the perſon, or to the eſtate of the plaintiff Mr. *Daley*; neither was it a diſparaging ſettlement: it appears through the whole cauſe that the Lady had a ſtrong inclination for the match, and therefore in ſuch a caſe the truſtees ſhould have conſidered themſelves in the light of a parent, and ſhould have readily come into a conſent.

It is manifeſt both from the letter and diſpoſition of Mr. *Manley*, one of the truſtees, that he agreed to the propoſal, and gave his conſent that it ſhould be a match; and the letter is likewiſe evidence that the truſtees in general approved of the perſon, behaviour and quality of Mr. *Daley*; and it is alſo evidence of their conſent to the marriage, provided Mr. *Daley* the father will make the ſettlement he propoſed.

The words in the letter, *we ſhall be obliged to conſent*, mean from the neceſſity of the thing, and for the happineſs of the Lady, and ought to be conſtrued a preſent conſent, that if the father would make the ſettlement, they would not break the match.

Truſtees ſaying in a letter *we ſhall be obliged to conſent*, for the happineſs of the Lady, will be conſtrued a preſent conſent.

I have been conſidering of the evidence of the conſent.

As to conditions whether precedent or ſubſequent, where they are in reſtraint of marriage, the court have always put the moſt favourable conſtruction upon them, to prevent a forfeiture; and for this purpoſe *Farmer* verſus *Compton*, 1 *Ch. Rep.* 1. is a very ſtrong caſe, and *Boſtock* and *Ireton*, 2 *Ch. Rep.* 13. under the names of *Wiſeman* contra *Foſter*, before Lord *Nottingham*, is a Caſe in point.

The truſtees have ſignified their conſent that a ſettlement ſhould be made according to the prayer of the plaintiffs bill.

And therefore I will decree accordingly.

Meure verſus *Meure*, at the *Rolls*, *May* 16, 1737. Caſe 201.

ABRAHAM Meure being ſeiſed of ſeveral meſſuages, lands and tenements in *Surry* and *Suffolk*, on the 18th of *February* 1731. made and duly publiſhed his laſt will, and did thereby deviſe all the ſaid lands in the ſaid counties to *John Knight* of *Goſfield*, Eſq; ſince deceaſed, and to the defendant *Andrew Meure*, and to the ſurvivor of them, and to the heirs, *&c.* of ſuch ſurvivor, in truſt to ſell the ſame as ſoon as conveniently may be after his deceaſe, and

To one for life, and to the heirs of his body, has always been held to be an eſtate-tail; but where it is to one for life, and after his death to the iſſue of his body, there is no inſtance where it has been ſo conſtrued.

with the money ariſing by the ſale, to purchaſe other freehold lands, or long annuities, or ſtock, or ſome other publick fund, as the truſtees ſhould think fit, and then in truſt to permit the defendant *Andrew Meure* and his aſſigns, to receive to his and their own proper uſe the intereſt and profits thereof during his life; and the teſtator did further direct that the defendant *Andrew Meure* ſhould receive the rents and profits of the ſaid eſtates till ſold to his own uſe, and after the defendant's deceaſe, then in truſt to permit the plaintiff and his aſſigns to receive the intereſt and profits of the ſaid money as aforeſaid, or the rents and profits of the ſaid land if unſold, or ſuch other lands as ſhould be purchaſed during his natural life, and after his deceaſe, then in truſt for the uſe of the iſſue of the body of the plaintiff lawfully begotten; and in default of ſuch iſſue, the teſtator deviſed the principal and intereſt ariſing by ſale of his ſaid eſtates, or his ſaid eſtates, if unſold, to *John Knight* for his life, and after his deceaſe to the defendant *Peter Meure*, and his heirs for ever.

Mr. *Knight*, one of the truſtees under the will, died before the eſtates were ſold, but proved the will with *Andrew Meure*, the other executor.

The bill was brought by *Iſaac Meure*, the natural ſon of the teſtator, to have the eſtates ſold by a decree of this court, and that the money ariſing thereby may be diſpoſed of according to the will, and that the defendant *Peter Meure* may ſet forth whom he claims under, and what in the ſaid premiſſes.

Maſter of the Rolls. This is a very particular caſe.

By the death of Mr. *Knight* the power devolves upon the court in what manner to lay out the money.

It muſt be a purchaſe of lands which only are capable of carrying all the remainders.

The principal queſtion in this cauſe is, whether an eſtate-tail is to be limited to the plaintiff, or an eſtate for life only.

Where lands are to be ſettled to one for life, and to the heirs of his body, there is no caſe where ſuch a limitation has not been held to be an eſtate-tail: on the other hand, there is no caſe where it is to be ſettled to one for life, and after his death to the iſſue of his body, that ſuch a limitation has been conſtrued an eſtate-tail.

In the caſe of *Sweetapple* verſus *Bindon*, 2 *Vern.* 536. there was no eſtate for life particularly given before the word *iſſue*, which differs it from the preſent caſe; and yet Lord Keeper *Wright* ſaid

upon the like words in marriage articles, it would not have been conſtrued an eſtate-tail, when it appeared the eſtate was intended to be preſerved for the iſſue. *Vide the caſe of Bale* verſus *Coleman*, 1 *P. W.* 142. where it is laid down, that there is a difference between a deed, and will, as to conſtruction.

There is ſomething in this will that denotes the intention of the teſtator, that the plaintiff ſhould only take an eſtate for life, for there is a diſtinction between the wording and framing of the limitations: In the firſt place, the eſtate is during the lives of the defendant *Andrew*, and the plaintiff, to continue in the truſtees; and when the teſtator limits it to the plaintiff for life, it is to permit and ſuffer the plaintiff to receive the rents and profits, *&c.* and when the limitation is to the iſſue, it is to their uſe and behoof, and the court ſhould, as much as they can, preſerve the intention of the teſtator.

The words, *in default of ſuch iſſue to Peter*, ſhew the teſtator intended that *Peter* ſhould not take while there was iſſue of *Iſaac*, *iſſue of his body* takes in both male and female, and there muſt be croſs remainders to the iſſue female.

Lord *Glenorchy* verſus *Boſville*, *Caſes in Chancery in Lord Talbot's time*, 3. is in point *; and I ſhall in this caſe make my decree accordingly.

Cholmley verſus *Counteſs Dowager of Oxford*, *March* 2, 1741.

Caſe 202.

Praying relief where a mortgagee is a party, is the ſame as praying to redeem; and if on a reference to a maſter, they do not redeem him, the court will diſmiſs the bill, which is equivalent to a foreclоſure.

WHERE a mortgagee is made a party to a bill, praying relief is the ſame thing as praying to redeem, for redemption is the proper relief; and if upon a reference to a maſter, to ſee what is due for principal, intereſt, and coſts, they do not redeem the mortgagee, the court will, at his application, diſmiſs the bill as againſt him, which is equivalent to decreeing a foreclоſure.

* There a deviſe to truſtees in truſt for *A.* for life, without impeachment of waſte, voluntary waſte in houſes excepted, remainder to the iſſue of her body, *&c.* was conſtrued only an eſtate for life *ſans waſte*, and a ſtrict ſettlement decreed.

Caſe 203. *Brudenell* verſus *Boughton*, *March* 5, 1741.

THE queſtions in this cauſe aroſe on the wills of Mr. *Richard Boughton*, the brother of the defendant.

The firſt will was dated *October* the 12th, 1738.

The queſtions were, Whether the legacies given under a firſt will were a charge upon the real eſtate, and whether revoked by a ſecond? Lord *Hardwicke* decreed only the leſſer ſums to be raiſed out of the real eſtate of the teſtator.

In the name, *&c.* I *Richard Boughton* of, *&c.* do give and diſpoſe my worldly eſtate as follows:

Imprimis, I give and deviſe to my ſiſter *Elizabeth Brudenell* the ſum of 800*l.* to be laid out for the advantage of herſelf during life, and afterwards to her children; and likewiſe I beg ſhe will take the advice of my executor.

Item, I give to my ſiſter *Meliza Layng* the ſum of 400*l.* to be laid out in the ſame manner, and to the ſame purpoſe as Mrs. *Brudenell*'s.

The teſtator gives ſome ſmall pecuniary legacies; and then follow theſe words:

Laſtly, I give the remainder of my eſtate at *Neaſham* and *Dunſdale*, in the biſhoprick of *Durham*, and all my freehold and perſonal eſtate whatſoever, not herein otherwiſe diſpoſed of, after payment made of my juſt debts and legacies, to my brother *Shuckborough Boughton*, whom I alſo appoint my executor to this my laſt will, thereby revoking all others: Witneſs my hand,

Richard Boughton.

Signed and publiſhed in the preſence of

M. S. H. B. J. C.

The ſecond will was made at *Lyons*, dated the 22d of *May*, *N. S.* 1741.

In the name of God, *&c.*

I *Richard Boughton*, fellow of *All Souls* college, *Oxford*, make and appoint this my laſt will and teſtament, hereby revoking all other wills.

Imprimis, I give and bequeath to my dear ſiſter *Layng* the ſum of 100*l.* *Secondly*, I give and bequeath to my dear ſiſter *Brudenell* the ſum of 400*l.*

Laſtly,

Laſtly, I give and bequeath to my dear brother *Shuckborough Boughton* all the reſt of my eſtate, real and perſonal, and appoint him my executor.

Signed *Richard Boughton.*

There were no witneſſes; but the whole was wrote with his own hand.

To *Shuckborogh Boughton*, Eſqr.

I beg to recommend my ſiſter *Brudenell* to your kindneſs; and beſides the legacy left her, I beg you would give to my godchild 200*l.* and in caſe that child ſhould be dead, I deſire you may give that ſum to her eldeſt ſon; I deſire this only in caſe you make uſe of the laſt will.

Richard Boughton.

Lions, June 9, 1741.

This bill was brought by Mrs. *Brudenell* and her huſband, to have the legacies left to her raiſed and paid by the defendant, out of the teſtator's real eſtate.

The firſt will was executed by the teſtator, in the preſence of three witneſſes, and in every reſpect according to the ſtatute of frauds and perjuries.

The ſecond was made at *Lions*, in his laſt illneſs, but was not executed according to the ſtatute; alterations are here made in the legacies to Mrs. *Brudenell* his ſiſter, and likewiſe to Mrs. *Layng* another ſiſter; and by the laſt clauſe, the reſidue of his real and perſonal eſtate is given to the defendant.

The principal queſtions are, Whether the legacies given under the firſt will, are a charge upon the real eſtate, and whether they are revoked by the ſecond will.

It was inſiſted by Mr. *Smith*, now one of the barons of the Exchequer, council for the plaintiffs, that the legacies are a charge upon the land, and is exactly the ſame as if the teſtator had given a part of the land to the legatees, and falls within the intention of the ſtatute.

That the legacies muſt take place out of the real eſtate, or be void, becauſe there is not ſufficient perſonal aſſets to ſatisfy them, and that giving them out of land and money, a mixed fund, will have the ſame conſideration as if ſingly given out of land, and for this purpoſe, he cited the caſe of *Onyons* and *Triers*, *Eq. Ca. Ab.* 408. and *P. W.* 343. and *Precedents in Chan.* 459.

Mr. *Joddrell*, council of the ſame ſide, ſaid that the ſtatute of frauds and perjuries was made upon the plan of the civil law, and that it was drawn by Lord Chief Juſtice *Hale*, aſſiſted by civilians, and therefore the civil law was of uſe in determining this queſtion, for which purpoſe he cited ſeveral paſſages out of the Digeſt to ſhew the ſame ſolemnity neceſſary in cancelling, as in making wills.

Mr. *Murray*, council for the Defendant, ſaid, he never heard that the civilians had any thing to do with the ſtatute of frauds, but only with the ſtatute of diſtributions.

He inſiſted that the diſpoſition of a teſtator is revocable to the time of his death, and that Mr. *Richard Boughton* had wholly revoked the firſt will; that his intention as to the real eſtate was the ſame in the ſecond will as in the firſt, and his intention as clear by the ſecond to revoke the perſonal legacies given by the firſt.

That in the Commons, no other will but the laſt had been admitted to be proved; that the truſts in the former will did never ariſe, and therefore it is ſufficient for the defendant to ſhew that thoſe are not legacies, becauſe they are clearly revoked.

He put this caſe as ſome thing ſimilar with regard to the courts diſpenſing with formalities in revocations.

Suppoſe an eſtate is mortgaged in fee, or for a term of years; now the intereſt is veſted in the mortgagee, and at law cannot be taken from him, but by reconveyance to the mortgagor, or ſurrender of the term, which is a neceſſary ceremony; and yet in this court, if the mortgagor ſhews that he has diſcharged the debt, the mortgagee ſhall be obliged to reconvey or ſurrender; he cited the caſe of *Richards* and *Syms*, before *Lord Hardwicke July the 9th*, 1740. *Barnard. Rep.* 90.

What has been inſiſted on by the plaintiffs council, that the legacies are diſcharged as to the perſonal eſtate, and yet affect the real, would introduce an abſurdity, becauſe the teſtator intended the real eſtate to the defendant in both wills.

He ſaid this is not a caſe to be mooted now at the bar, for he apprehended the point had been determined in *Heyde* verſus *Heyde*, the words of the decree, as mentioned in the report of that caſe, in *Eq. Caſ. Abr.* 409. *are, that ſuch legatees of the perſonalty in the firſt will as are left out in the ſecond will, muſt loſe them.*

But

But, in the Regiſter, the words are, That the legacies deviſed by the firſt, *and not revoked by the ſecond*, were to continue charges upon the real eſtate.

The caſe of *Onyons* and *Triers* is not applicable; for as the prerogative court have admitted the ſecond will to be proved, it is rejecting the firſt, and is concluſive as to the perſonal eſtate.

That there has been no caſe cited to ſhew, that the words *all the reſt of my eſtate real and perſonal will extend to affect the real with legacies.*

Mr. *Smith*, in reply for the plaintiff, drew an argument from the outſet of the firſt will, that by the words *worldly effects*, the land was originally and primarily charged at one and the ſame time with the perſonal, and the latter did not come in aid only of the real, and therefore the council for the defendant beg the queſtion, when they call the perſonal the original fund, and the land only auxiliary, for they were both primarily charged.

That in the latter clauſe of the firſt will, the word legacy (for the words are, after payment made of my juſt debts and legacies) is applicable to land, as well as perſonal eſtate, and for this purpoſe, cited the writ of *ex gravi Querela*, where, though it is a deviſe of lands, yet the word *legatum* is made uſe of. *Vid. The new ed. of Fitzherb. Nat. Brev.* 459, 462. where there is the form of the writ to the mayor and bailiffs of *Oxford.*

LORD CHANCELLOR.

This is a caſe of ſome nicety, and admits of ſome diſtinction from all the caſes that have been cited on either ſide.

The *firſt* queſtion is, Whether the legacies given by the firſt will, are revoked by the ſecond?

The *ſecond*, queſtion is, Whether the leſſer legacies under the ſecond will, are a charge upon the teſtator's real eſtate?

The teſtator had a ſmall perſonal eſtate, and a real eſtate; by the firſt will, which was duly executed; he gives to his ſiſter *Brudenell* 800*l.* *&c.* and to his ſiſter *Layng* 400*l.* and the reſidue of his real and perſonal, not before diſpoſed of, after payment of debts and legacies, to the defendant.

By the ſecond will he expreſly revokes all former wills, and gives to his ſiſter *Layng* only 100*l.* and to his ſiſter *Brudenell* only 400*l.* the reſidue of the eſtate as before to the defendant; this was not executed

executed according to the ſtatute, but being ſufficient as to perſonal eſtate, was admitted to be proved in the eccleſiaſtical court; there is likewiſe a codicil accompanying it, or, as it is called in the Commons, a teſtamentory ſchedule.

The bill is brought by Mrs. *Brudenell* and her huſband, to have the legacies given to her under the firſt will, raiſed out of the teſtator's real eſtate.

This muſt depend upon the conſtruction of the ſtatute of frauds and perjuries, and the conſequences of law ariſing upon it.

Where a ſum of money is given originally out of land, a will with that charge muſt be equally executed with the ſame ſolemnity, becauſe it is conſidered in this court as part of the land.

It is very certain, no deviſe of lands can be made, but with ſuch ſolemnity accompanying the execution of it, as is directed by this act; and it is equally clear, where a ſum of money is given originally and primarily out of land, a will with that charge muſt be equally executed with the ſame ſolemnity; becauſe it is conſidered in this court as part of the land, ſince it can only be raiſed by ſale or diſpoſition of part of the land; and this is analogous to the rule of law, that a deviſe of rents and profits is a deviſe of the land it ſelf.

The rule is the ſame as to revocations of a deviſe of lands, and a revocation of a ſum of money charged on lands, they muſt be revoked in the ſame manner.

The rule is likewiſe the ſame as to revocations of a deviſe of lands; and with reſpect to a revocation of a ſum of money charged by a will upon lands, they muſt both be revoked in the ſame manner.

There are virtual, as well as expreſs revocations, as by extinguiſhing or deſtroying the thing deviſed, which are out of the ſtatute, and remain as they did before.

But then it muſt be conſidered that there are different ſorts of revocations, or ademptions, call it which you will; there are expreſs revocations of the teſtament or inſtrument itſelf, which muſt purſue the directions of the ſtatute in the ſixth ſection, by cancelling or obliterating, *&c.* but, beſides theſe expreſs revocations, there are virtual ones, even ſince the making of the ſtatute; as by extinguiſhing or deſtroying the thing deviſed; and where that is done by the teſtator in his life-time, it muſt prevail, and this is founded upon maxims of law. *Ceſſante cauſa ceſſat effectus, ſublato fundo tollitur id quod fundi poteſt*, therefore theſe are out of the ſtatute, and remain as they did before.

Suppoſe a will is made according to form, and afterwards the lands ſold and conveyed to others, though the form of revocation the ſtatute preſcribes is not purſued, yet it is a virtual revocation.

Suppoſe a man makes a will according to form, and afterwards ſells or conveys away the lands he had deviſed to other perſons, notwithſtanding the form of revocation preſcribed by the ſtatute is not purſued, yet it is a virtual revocation, for it is not abſolutely neceſſary a deed ſhould have witneſſes, it is good without it.

Suppoſe, after making a will, a man makes a feoffment to the uſe of himſelf and his heirs, it is a revocation: Suppoſe a man charges his lands with a debt, and afterwards pays that debt, it is extinct, and yet here is no formal revocation; or ſuppoſe he charges his lands with a portion for his daughter of 1000*l.* and gives her the ſame in his life-time, this is a revocation of the charge, though there is no actual one.

A feoffment to the uſe of a teſtator and his heirs, is a revocation; if a man charges his lands with a debt, and afterwards pays that debt, it is extinct, though there is no formal revocation: Lands charged with a portion by a will, and the ſame given by teſtator in his life-time, is a virtual revocation, though no actual one.

So in the preſent caſe, this gentleman makes his will, and gives general legacies, which muſt be taken originally for perſonal; the latter words indeed create a charge upon the land, but in their primary intention perſonal; and without controverſy, if there had been perſonal aſſets, they would have been firſt applied, and the land only a collateral ſecurity; but if the thing ſecured be taken away, how can the ſecurity it ſelf ſubſiſt.

It has been ſaid that the real eſtate under the firſt will is to be conſidered as originally charged: But I am of opinion that the real eſtate is not originally charged, but given only by way of ſecurity: The caſe of *Hyde* and *Hyde* is a caſe in point; and in all thoſe caſes where a man gives a perſonal legacy charged upon real eſtate, and the will is revoked, the legacies are gone.

In all caſes where a man gives a perſonal legacy charged on real eſtate, and the will is revoked, the legacies are gone; for where the land is meant only as a collateral ſecurity, if the thing ſecured be taken away, the ſecurity it ſelf cannot ſubſiſt.

There is more difficulty in the ſecond general queſtion, whether the leſſer legacies under the latter will are a charge upon the land: And I am of opinion that they are. Conſider it in two lights: *Firſt*, As if new legacies were given originally and *de novo*: And *ſecondly*, Whether they are not part of the ſame legacies deduced, and newly modified; it would be a very unfortunate circumſtance if the fund ſhould be gone, and taken away.

The words of the ſecond will:

" I give the reſt of my eſtate, real and perſonal, to my dear " brother *Shuckborough Boughton*, and appoint him my executor:" *Vide the ſecond will.*

So that the land, as well as the perſonal eſtate, is given to the ſame perſon that he makes executor: All the legacies conſidered as *de novo* are charged upon the land.

Lands charged by a will with the payment of debts, all the debts contracted by a teſtator during his whole life, will be a charge.

A man may, by way of power, by any writing ſigned by him, be enabled to charge the land. *Vide Sir Joſeph Jekyll's Opinion as to ſuch power in the caſe of Maſters* verſus *Maſters in* 1 *P. W.* 421. I ſee no greater inconvenience in this, than where a man charges his lands by will with the payment of his debts, for then all the debts he contracts during his whole life will be a charge.

When a firſt will charges real eſtate with legacies, and a ſecond giving general pecuniary ones, though not executed in form, yet the latter legacies will be equally a charge upon the land.

Suppoſe a man makes two wills, as is often done, the firſt charging the real eſtate with his legacies: by the ſecond will, there are general pecuniary legacies, but is not executed in form, yet I make no doubt but the latter legacies in the ſecond will would be equally a charge upon the land.

The ſmaller ſums given here under the ſecond will, is but a leſſening of the *quantum* of the money given by the former, and is only new modelled or qualified, and equally a charge on the real eſtate.

But, in the preſent caſe there is no occaſion to go ſo far, becauſe the legacies given by the ſecond will, may be conſidered as part of the money given by the firſt, only new modelled or qualified: Theſe are leſſer ſums, 100*l.* inſtead of 400*l.* and 400*l.* inſtead of 800*l.* if given exactly in the ſame manner, and to the ſame perſons, there could have been no doubt but there being leſſer ſums would have been a revocation *pro tanto*, and undoubtedly a charge upon the land; but the being given differently, and to different perſons, makes the nicety.

However, I am of opinion, this is no more than a leſſening of the *quantum* of the money given by the former will, and only differently modified.

By the teſtator's doubt, indeed, *viz.* I deſire this only in caſe you ſhould make uſe of the laſt will: it looks as if he had an intention to leave it in the diſcretion of the defendant, whether he would make uſe of the laſt will or not, though it is a little odd this ſhould be his intention, becauſe the one was for, and the other againſt the intereſt of his brother; therefore, upon the whole, I muſt decree the raiſing the leſſer ſums out of the real eſtate of the teſtator.

Hine

Hine verſus *Dodd*, *March* 13, 1741. Caſe 204.

THE bill was brought by a judgment creditor, to be let in upon an eſtate of one *Proof* and his wife in *Middleſex*, preferably to the defendant, who was a mortgagee of the ſame eſtate, upon a ſuggeſtion that the defendant had notice of the judgment before the mortgage was executed, and likewiſe to inquire into the conſideration of the mortgage.

The plaintiff, a judgment-creditor upon an eſtate in *Middleſex*, prays to be let in upon it preferably to the defendant a mortgagee of the ſame eſtate, on a ſuggeſtion he had notice of the judgment before the mortgage was executed.

The judgment was entred on the 12th of *March* 1733. *but not regiſtred till the 12th of June* 1735, the mortgage was made the 24th of *May* 1735. and regiſtred *June* the 2d. 1735. *There being only a defendant's confeſſion of notice proved, in direct contradiction to his anſwer, and contrary to a poſitive act of parliament made to prevent perjury, Lord Hardwicke decreed, ſo far as the bill ſeeks to poſtpone the defendant's mortgage, it ſhould be diſmiſſed with coſts.*

The judgment was entered upon the 12th of *March* 1733. but not regiſtred till the 12th of *June* 1735.

The mortgage was made the 24th of *May* 1735. and regiſtred *June* the 2d 1735.

LORD CHANCELLOR.

This caſe depends upon the notice the defendant had of the judgment before his mortgage was regiſtred.

The regiſter act, the 7th of *Ann. c.* 20. is notice to the parties, and a notice to every body; and the meaning of this ſtatute was to prevent parol proofs of notice or not notice.

The regiſter act is notice to every body, and the meaning of it was to prevent parol proofs of notice.

But notwithſtanding there are caſes where this court have broke in upon this, though one incumbrance was regiſtred before another, but it was in caſes of fraud: the firſt was an *Iriſh* caſe in the houſe of Lords, the next was a *Yorkſhire* cauſe before Lord Chancellor *King*.

There may poſſibly have been caſes upon notice diveſted of fraud, but then the proof muſt be extreamly clear.

It is only in caſes of fraud, this court have broke in upon the act, though one incumbrance was regiſtred before another.

But though in the preſent caſe there are ſtrong circumſtances of notice before the execution of the mortgage, yet upon mere ſuſpicion only I will not overturn a poſitive law.

The firſt evidence is *Elizabeth Hine*; but I cannot lay any great ſtreſs upon her depoſition, it is only an account of a converſation at the *Devil* tavern, where the plaintiff was preſent with *Dodd* and *Burton*,

Burton, the agent of *Dodd:* the next is *Thomas Price*, who ſwears that the plaintiff told *Burton* he knew of this judgment before *Dodd*'s mortgage, and that defendant *Dodd* did not deny what the plaintiff ſaid to *Burton*, but then he does not ſwear that *Dodd* heard what the plaintiff ſaid.

The moſt material evidence is *Sarah Hine*, who was preſent with the plaintiff *Burton* and *Dodd*, on the 18*th* of *June* 1738. at a meeting, in order to adjuſt all matters in difference between them: ſhe ſwears that the plaintiff then charged *Dodd* with notice of the judgment prior to the execution of the mortgage, and that *Dodd* anſwered, it was true he knew of the judgment, but that he knew at the ſame time it was not regiſtred, and what were acts of parliament for, unleſs they were effectually obſerved.

Undoubtedly this is a material evidence, but then it is only one witneſs againſt the anſwer of the defendant: it is true his anſwer is very looſe by referring from one anſwer to another, but in the laſt he ſwears to his belief, that he did not know of the judgment till after the mortgage was executed.

So that here is barely the evidence of a defendant's confeſſion, in contradiction to his anſwer, and contrary to a poſitive act of parliament made to prevent any temptation to perjury from contrariety of evidence.

Some ſtreſs has been laid upon *Burton*'s being an agent of *Dodd*, and likewiſe the ſolicitor in the cauſe of *Hine* and *Proof*; but as this ſuit was two years before *Dodd*'s mortgage, it will not affect *Dodd* with notice.

But what weighs principally with me, is the great danger of overturning an act of Parliament, and making it mere waſte paper.

Clear notice is a proper ground of relief, but ſuſpicion of notice, though a ſtrong one, will not juſtify the court in breaking in upon an act of parliament.

To be ſure apparent fraud, or clear and undoubted notice, would be a proper ground of relief; but ſuſpicion of notice, though a ſtrong ſuſpicion, not ſufficient to juſtify the court in breaking in upon an act of parliament.

His Lordſhip therefore decreed, ſo far as the plaintiff's bill ſeeks relief by poſtponing the defendant *Dodd*'s mortgage to the plaintiff's judgment, that it be diſmiſſed without coſts.

But being doubtful as to the conſideration of the mortgage, he referred it to a maſter to take an account of what was juſtly and *bona fide* due to the defendant *Dodd*, before and at the time the mortgage was executed.

But would not direct the inquiry as to ſums of money pretended to be advanced by him after the mortgage, becauſe there was no poſitive evidence as to ſums advanced afterwards, but only hearſay and information from the defendant *Dodd*, that ſuch a one heard him ſay, and another was informed by him, that he paid part of the conſideration after the mortgage was executed.

Car verſus *Car*, *upon an appeal from the Rolls*, *March* 17, 1741.

Caſe 205.

THE bill was brought by *John Car* a child, advanced with 200 *l.* by his father in his life-time, who was a freeman of *London*, to be let into his ſhare of the cuſtomary part, upon bringing the money ſo advanced into hotch-pot; and that *Charles Car*, another child of the freeman's, might not be let into the cuſtomary ſhare without bringing his 200 *l.* likewiſe into hotch-pot.

A father, a freeman of *London*, who had left a ſon a legacy of 200 *l* on his application two years after the will was made, gave him 100 *l.* and took a receipt for ſo much in part of a legacy, and a ſhort time after the father gave him the other 100 *l.* and took a receipt from him in full of what was intended him by the will. The teſtator died without altering his will. *Lord Hardwicke held the* 200 *l. muſt be conſidered as an advancement, and brought into hotchpot.*

Charles Car, who is the principal defendant in this cauſe, makes this caſe, that he had a legacy of 200 *l.* left him by his father's will, and the reſidue of the teſtamentary part being given to his ſiſter and another perſon, that he ought to have the preference in the teſtamentary part, and the reſiduary legatees take ſubject to his legacy.

It appeared in evidence that *Charles Car* two years after the will was made, came to the teſtator, and ſaid it would be of advantage to him to have it in the life-time of his father, upon which he gave him 100 *l.* and took a receipt for 100 *l.* in part of a legacy intended him by the will, and a ſhort time after gave him the other 100 *l.* and took another receipt from him in full of what was intended him by the will.

The teſtator died without making any alteration at all in his will.

The plaintiff's counſel inſiſt that it muſt be taken as an advancement of *Charles*, and cannot be a legacy, for nothing can be a legacy which is given in the life-time, becauſe the will is intirely under the controul of the teſtator, who might have laid his money out in land, or revoked the legacy, and therefore muſt be conſidered as an advancement, and brought into hotchpot.

Mr. *Murray* for the defendant inſiſted, that it cannot be look'd upon as the payment of the legacy, but only accelerated in the life-time of the father; and notwithſtanding he received it in the life-time, is yet intitled to 200 *l.* from the dead man's ſhare, and the reſt of the freeman's children have no right to interfere, becauſe they have nothing to do but with the cuſtomary ſhare.

This is a diſpute ſtarted chiefly by the reſiduary legatees of the dead man's ſhare.

But inſiſted either that it ſhall not be conſidered as an advancement, and then *Charles Car* is intitled to the legacy; or if it is an ademption of the legacy as to the dead man's part, that then he ſhall come in upon the cuſtomary ſhare, without bringing the 200*l.* into hotchpot.

LORD CHANCELLOR.

Here was 200 *l.* given to *Charles Car* under his father's will; if it ſtood upon that foot, it is undoubtedly a legacy; but two years after the will was made, upon the ſon's ſolicitations the father at two different payments gives him the 200 *l.* and takes receipts.

The conſequence of this is, that it would have been a ſatisfaction of the legacy in the caſe of a common perſon, but the teſtator being a freeman of *London*, and having no wife, one moiety belongs to the children, and the other moiety is the dead man's part; ſo that if *Charles Car* had not taken the 200 *l.* in the life-time of the freeman, he would have been infallibly intitled to the legacy out of the dead man's part.

But it has been inſiſted on by the other children, that this is an advancement, and that if *Charles* will claim any ſhare of the cuſtomary part, he muſt bring the 200*l.* into hotchpot.

It is an eſtabliſhed rule, that the legatee cannot take his legacy, and claim his cuſtomary part too, unleſs the teſtator mentions the legacy ſhall come out of his teſtamentary ſhare.

Suppoſing *Charles*'s legacy had not been releaſed, where a freeman of *London* gives a legacy generally to a child, the legatee cannot take the legacy, and claim his cuſtomary part too, unleſs the teſtator expreſſly mentions, that the legacy ſhall come out of his teſtamentary ſhare; and this is the eſtabliſhed rule of the court.

I am of opinion *Charles*'s 200*l.* muſt be brought into hotchpot, for it would be a moſt miſchievous thing, and a fraud upon the cuſtom, if it was otherwiſe; for then a freeman might give a great ſum of money to one child by his will, and afterwards takes a receipt for it as a legacy; and if I was only to conſider it as a legacy releaſed out of the dead man's part, and therefore not to be brought into hotchpot, this would be an indirect method contrived by a freeman to leſſen *his cuſtomary ſhare* in favour of one child, to the detriment of the reſt.

So, for this reaſon, I think if a freeman gives a groſs ſum to a child, whether by way of advancement, or upon a child's releaſing a legacy intended under his will in the freeman's life-time, that money muſt be conſidered as an advancement, and brought into hotchpot.

The

The reſiduary legatees of the dead man's part, who are the ſiſter of *Charles Car*, and another perſon, inſiſt the 200*l.* received by *Charles* in the freeman's life-time, ought to be taken as a ſatisfaction of the legacy: but notwithſtanding this court is compelled by the cuſtom to ſay this is a groſs ſum, and an advancement, and that *Charles* muſt bring the money into hotchpot, upon the cuſtomary ſhare, yet it is inſiſted there is an equity for *Charles* to have ſo much out of the ſurplus of the dead man's ſhare, before it is divided between the reſiduary legatees, as he may ſuffer by bringing his 200*l.* into hotchpot upon the cuſtomary ſhare.

But I do not know whether it would not be better for this court to determine, that the defendant *Charles Car* ſhould bring his two hundred pounds at all events into hotchpot, and take his fate there, whether he ſhall get any thing or not by ſo doing, without allowing him the liberty of coming upon the dead man's ſhare to the prejudice of the reſiduary legatees, for ſo much as he ſhall ſuffer by bringing the two hundred pounds into hotchpot.

But his Lordſhip reſerved the conſideration, whether the defendant *Charles* is intitled to any, and what compenſation out of the ſurplus of the dead man's part, for ſo much as he ſhall ſuffer by bringing the two hundred pounds, into hotchpot, till it comes back upon the Maſter's report, becauſe it was ſaid by council, it is doubtful whether there will be any ſurplus after the legacies charged upon the dead man's part are paid, it being apprehended they will exhauſt the whole.

Baſkerville verſus *Baſkerville*, *March* 19, 1741. *upon exceptions.* Caſe 206.

ON the firſt of *April* 1699. by articles on the marriage of *Richard Baſkerville*, *Richard*'s father covenants to ſettle lands upon him, on payment of 3000*l.* the portion of *Richard*'s wife.

Though there were no truſtees in a will to preſerve contingent remainders, Lord Hardwicke ordered that ſuch truſtees ſhould be inſerted in the conveyance to be ſettled by the Maſter.

On the 10th of *January* 1717. *Thomas* the father made his will, and reciting that the 3000*l.* had never been paid him, bequeathed the ſame to his ſons, *John* and *George Baſkerville*, and directed the 3000*l.* to be laid out in lands lying in *Wiltſhire* and *Herefordſhire*, to be conveyed to them the ſaid *John* and *George* for 40 years, ſubject to the payment of two annuities, and after the expiration of the ſaid term, to the uſe of *Walter Baſkerville* his grandſon for life, and his firſt and other ſons in tail male, afterwards to another grandſon with like limitations, and ſo to a third grandſon, *&c.* then to his the teſtator's three ſons ſucceſſively for life, and their reſpective firſt and every other ſons in tail male, and afterwards to the iſſue male of his own body, and for default thereof to his own right heirs.

There

There were no truſtees in the will named to preſerve contingent remainders.

By an order of this court the 3000*l.* was directed to be paid by *Richard Baſkerville*, and to be laid out in the purchaſe of lands to be ſettled to the uſes in the ſaid will.

A purchaſe has been agreed for accordingly of an eſtate, and by order all parties were to join in a conveyance to ſuch truſtees and their heirs as Maſter *Holford* ſhould approve of, upon the ſeveral truſts and uſes as are mentioned in *Thomas Baſkerville*'s will.

The ſolicitor for *Thomas Baſkerville* the ſon of *Richard*, who takes the exception, and alſo is intitled to the reverſion of the eſtate to be purchaſed after all the eſtates-tail are ſpent, attended before the Maſter, and made no objection to his report, and ſo the Maſter approved of the deeds without naming truſtees to preſerve contingent remainders, and the conveyances were executed by the parties accordingly.

But on the 12th of *February* 1741. *Thomas Baſkerville* the reverſioner, grandſon and heir of *Thomas Baſkerville* the teſtator, obtained an order, that he ſhould be at liberty to file an exception to the Mater's report of his approbation of the deeds of conveyance.

The exception was as follows; for that the Maſter hath approved of a conveyance of the ſeveral lands, whereby they are ſettled and limited to the ſeveral deviſees under the will, in order as they ſtand there for life, with remainder to the firſt and every other ſons in tail male, and yet in the conveyance they are not any truſtees to ſupport contingent remainders, inſerted, between the ſeveral limitations of the firſt and every other ſons of each tenant for life, which ought to have been done.

LORD CHANCELLOR.

This is an executory truſt to be carried into execution in this court.

The queſtion is, whether the ſettlement ought to be made immediately to the ſons, or whether the truſtees ſhould be inſerted in order to preſerve contingent remainders.

I am of opinion the truſtees ought to be inſerted.

The firſt objection is, that by the decree the money being directed to be laid out in land, it is no longer executory.

But theſe are only words of reference to the will, and the decree muſt be expounded accordingly. *Vide Lord Stamford* verſus *Lord Hobart*, which is in point, cited in *Caſ. in Ch. in Lord Talbot's time* 8. as a caſe concerning ſerjeant *Maynard*'s will.

The material queſtion is upon the conſtruction of the will, and the intention of the teſtator, whether there is any ſuch authority.

There have been ſeveral caſes before the court, where queſtions of this ſort have been made, but different from this in the reaſoning of them. *Legate* verſus *Sewell*, 1 *P. Wms.* 87. *Bale* verſus *Coleman*, 1 *P. Wms* 142. But the queſtion in *Legate* and *Sewell* was not whether there ſhould be truſtees to preſerve the remainders, but what eſtate the firſt taker had; and my Lord *Cowper* conſidered it in the ſame light as if it had been upon marriage articles; but in the caſe of *Bale* verſus *Coleman* before Lord *Harcourt*, he ſaid marriage articles and a will were different; for a will proceeds merely from the bounty of the teſtator, but marriage articles are a matter of contract and agreement; not that my Lord *Harcourt* was of opinion (as has been often ſaid at the bar) that the conveyance was to be made in the words of the will, but according to the legal operation of it only, for otherwiſe it would introduce great abſurdity, as words in a will and in a conveyance have different conſtructions, as for inſtance the word *iſſue*.

The teſtator has only given the firſt deviſee an eſtate for life, and therefore the court do not deprive him of any eſtate, but only take the power from him of doing a wrong; for if a ſon is born the remainder is gone, and it becomes a veſted one. But I ſhall not go ſo far as my Lord *Cowper* has done in the caſe of ſerjeant *Maynard*'s will, for he went upon this, that there was a manifeſt and apparent intention, that a ſtrict ſettlement ſhould be made: I ſhall adhere to the rules of conveyancing which have been laid down by the great men before the reſtoration, and during the uſurpation.

Lord *Hardwicke* ſaid, in the directions he gave in this caſe, that he adhered to the rules of conveyancing laid down by the great men, before the reſtoration, and during the uſurpation.

Here it is a bequeſt of a ſum of money to be laid out in land, and therefore merely executory; and the queſtion is, whether the court ſhall carry it into execution ſo as to make it nugatory and of no effect, or ſo as to anſwer the clear intent of the teſtator, which was to have a ſtrict ſettlement; for could it be imagined that this man would have taken all theſe pains to chalk out ſo many limitations to no leſs than ſix different branches of the family, and intend it ſhould be in the power of the firſt taker to deſtroy them?

The exception was allowed, and the Maſter ordered to rectify the conveyance, by inſerting truſtees to preſerve the contingent remainders.

Caſe 207. *Dormer* verſus *Forteſcue*, *March* 20, 1741-2.

Whoever comes here for an account of rents and profits, prays a diſcovery as incident to it, and for that reaſon a defendant cannot demur and plead to the ſame matter.

IN *Eaſter* term 1732. the plaintiff brought his bill for diſcovery of a deed under which he claimed, and that the ſame might be depoſited for ſafe cuſtody, and produced at a trial at law, and for general relief, on hearing, the deed was ordered to be produced, and the bill retained for a twelvemonth, and from time to time retained, and ſtill depending: in *Michaelmas* term 1731. the plaintiff brought ejectments, but could not proceed for want of the deed, which was then concealed by the defendant; a trial was had at the King's Bench bar, and a ſpecial verdict, and judgment for the defendant, for that it did not appear that the plaintiff had made an actual entry on the premiſſes before the day laid in the declaration: on the 10th of *November* 1735. the plaintiff made an actual entry, and in *Michaelmas* term afterwards brought new ejectments; a trial was had at the King's Bench bar in *Michaelmas* term 1738. and a ſpecial verdict. Judgment for the plaintiff in *Michaelmas* term 1740. *and affirmed in parliament February* 28, 1740. *Euſeby Dormer*, the plaintiff's father, died *September* the 3d 1729. and the defendants were in poſſeſſion all the time, and therefore the plaintiff inſiſts they ought to account for the rents and profits from that time, or from the plaintiff's firſt actual entry, which was in *January* 1731. or at leaſt from the filing the original bill for diſcovering the deed of ſettlement, and the prayer of the ſupplemental bill, filed *May* 26, 1741. is to this purpoſe.

To this the defendant has both demurred and pleaded.

As to ſo much of the bill as ſeeks to compel the defendant to come to an account with the plaintiff for all the rents and profits of the eſtate received by the defendant ſince the death of the plaintiff's father, the defendant demurs, and for cauſe of demurrer ſhews, that if the plaintiff has any right or title to rents or profits, he ought to proſecute the ſame at law, and not in this court.

And as to ſo much of the bill as ſeeks to compel the defendants to come to an account, *&c.* the defendants plead in bar, and for plea ſay, that if the plaintiff has any right, *&c.* the ſame accrued due to the plaintiff above ſix years before he exhibited his ſupplemental bill.

Mr. *Attorney General* for the defendant inſiſted, that there was no occaſion for the plaintiff to come into this court for meſne profits, becauſe he might recover them at law in an action of treſpaſs, if over-ruled in this point;—then he inſiſted on the ſtatute of limitations as a bar, and that the plaintiff ought to be confined to the time his ſupplemental bill was filed, which only prays the meſne

profits, for the original bill makes no ſuch demand, and therefore the ſtatute of limitations ought to be a bar to carrying it any further back.

That bills for meſne profits are not very uſual in this court; and the ſingle pretence in this caſe is, that they had not the ſettlement, and therefore they could not recover at law: but it was not the want of the ſettlement, it was the ſlip they made in not making a proper entry, which prevented their recovery at law, and therefore the court will not aid a defect of the plaintiff's, and give him relief here, becauſe his own blunder hindred him from recovering at law.

That it is not a favourable caſe after ſo much litigation both below, and in the houſe of Lords.

The original bill was merely for the diſcovery of a deed, without which the plaintiff could not make out his title; he has had the relief he ſought for; the court ordered the deed ſhould be delivered to be carried down to the trial in ejectment, and therefore there is no connection between the relief prayed by the former bill, and the relief prayed by the ſupplemental bill.

LORD CHANCELLOR.

This is an exceeding plain caſe; the circumſtances of hardſhip will be a conſideration hereafter at the hearing of the cauſe; the only queſtion now is, whether the two defences ſet up are ſufficient to bar the plaintiff's relief.

The demurrer is to ſo much of the bill as ſeeks an account from the death of the plaintiff's father, ſo that it takes in the whole time.

The plea is to ſo much as ſeeks an account of rents and profits before the filing of the ſupplemental bill.

So that the difference between the matter demurred to, and the matter pleaded to, is no more than this; the demurrer takes in the whole time, and conſequently the time precedent to the ſix years, the plea only a part of the time, *viz.* before the filing the ſupplemental bill; which brings it to this queſtion, whether a man can in this court demur and plead to the ſame matter.

Every man who comes here for an account of rents and profits, prays a diſcovery as incident to it, and therefore the diſtinction which has been attempted is without a difference, and for this reaſon I am of opinion a defendant cannot demur and plead to the ſame matter.

There

A man who demurs at law demurs in chief, and 'tis a perpetual bar if judgment ſhould be againſt him; but if a demurrer is over-ruled here, a defendant may inſiſt afterwards upon the ſame thing by his anſwer.

There is no ſuch thing ever known at law as pleading and demurring to the ſame matter, and the act of parliament for the amendment of the law does not allow of this, but only to demur to one matter, and to plead to another; the ſame rule in this court, and the inconvenience much leſs here than at law, for a man who demurs there, demurs in chief; and is a perpetual bar if judgment ſhould be againſt him, and therefore it is at his own peril he does it; but if a defendant demurs here, and is over-ruled, he may inſiſt afterwards upon the ſame thing by his anſwer.

A plea may ſtand for part and over-ruled for part, otherwiſe as to a demurrer.

Where there is a plea which covers too much, the court will allow it to ſtand for part, and over-rule it for part, but as to a demurrer it is otherwiſe.

As to the merits I am of opinion that the plaintiff was very well juſtified in coming here for an account of the meſne profits, notwithſtanding the ſuggeſtion of hardſhip upon a defendant, who lives upon them in the mean time; there are caſes where a man may come here though he has recovered in an ejectment. The original of the plaintiff's applying to this court was, for a diſcovery of the principal deed of ſettlement.

But then it has been ſaid, the plaintiff knew what his title was, and might have brought his ejectment without coming here.

Is a plaintiff obliged to run any riſk becauſe he may poſſibly recover at law, without applying to this court firſt? But there is a much ſtronger part of the plaintiff's caſe, and that is he had no title at law, becauſe here was a term ſtanding out of ninety-nine years under this deed of ſettlement, which might have been ſet up againſt him, and then he would have been nonſuited, even if he had had the ſettlement itſelf, unleſs this court had prevented any advantage being taken of the term at law.

I am of opinion that the court, even upon the reſerving all further directions, might have given any ſubſequent relief which had been incident to the plaintiff's caſe.

Another thing which weighs materially with me is, that if the plaintiff ſhould bring any action of treſpaſs for the meſne profits, Judges have been doubtful where there has been any difficulty in a caſe, whether they ſhould not ſuffer defendants to enter into the title, and if that ſhould happen to be the caſe, the term in the ſettlement might even then be ſet up againſt the plaintiff, and he would be nonſuited.

As to the plea of the ſtatute of limitations, every thing I have ſaid upon the footing of the demurrer, holds more ſtrongly againſt the plea.

Upon the whole, I am of opinion, the plea and demurrer muſt be over-ruled.

As to all equitable circumſtances, and how far the account muſt be carried back, will come more properly before me at the hearing of the cauſe, and there is no occaſion to conſider them at preſent *.

* Vide *poſt*.

Wills verſus *Rich*, *Petitions*, *March* 29, 1742.

Caſe 208.

THE plaintiff Mr. *Wills* petitioned, that he might continue in poſſeſſion of the houſes late Sir *Charles Wills*'s in *Groſvenor-Square*, notwithſtanding a receiver, in purſuance of an order of this court, has been approved of by the Maſter, to take care of the perſonal eſtate of Sir *Charles Wills*, while the will is controverting in the Commons.

An executor, before probate, may ſo far act, as to get in and receive his teſtator's eſtate, or releaſe debts, or even bring actions for them.

The principal argument for the petitioner was his being next of kin, and that as Sir *Robert Rich* has obtained no probate of the will, that though he is executor, he can have no manner of right.

It was inſiſted on the other ſide, that though the houſes are chattles real, yet they are equally included in the order for a receiver upon the perſonal eſtate, with any other part; and that as Sir *Robert Rich*, in purſuance of this order, has paid in the bank bills, the houſes ought alſo to be delivered up by the petitioner, eſpecially as he forcibly came into the poſſeſſion of them, by turning out Sir *Robert Rich*, who, from the death of Sir *Charles Wills*, till that time, had the quiet enjoyment of the houſes.

LORD CHANCELLOR.

If the diſpute was only who had a right to theſe houſes, it might perhaps be juſt for me to order the poſſeſſion to be delivered up to Sir *Robert Rich*, who had it originally, at the death of Sir *Charles Wills*.

For, notwithſtanding a will is not proved, the executor, in the eye of the law, is conſidered as having ſome authority; for even before probate, he may ſo far act, as to get in and receive his teſtator's eſtate, or releaſe debts, or even bring actions for them, though at the trial, indeed, the law will oblige him to produce the pro-

bate, ſo that an heir at law, or next of kin, is very far from being juſtifiable in forcibly turning out an executor.

But, however, as the executor Sir *Robert Rich* has applied to this court, I ſhall make it the condition of my order, upon the petitioner, to deliver up poſſeſſion that he ſhall do it, provided all proceedings at law upon the indictment for a forcible entry be ſtaid.

The ſpiritual court in caſes of controverted wills, appoint an adminiſtrator *pendente lite*, to take care of the eſtate.

If both parties in this caſe had not brought their bills, and ſubmitted the matters in diſpute to chancery, I ſhould have been inclined to have left the whole to the diſcretion of the ſpiritual court, who, in caſes of controverted wills, appoint an adminiſtrator *pendente lite*, to take care of the eſtate.

Where a perſon, whether he is heir at law or next of kin, or any other man whatſoever, keeps poſſeſſion of the teſtator's real or perſonal eſtate, ſuch an adminiſtrator is intitled to bring ejectments for the recovery of the poſſeſſion.

Where a perſon, let him be heir at law, or next of kin, or any other man whatever, keeps poſſeſſion of the teſtator's real or leaſehold eſtate, ſuch an adminiſtrator is intitled to bring ejectments for the recovery of the poſſeſſion; indeed, this did admit of a doubt in courts of law for a conſiderable time, but is now fully ſettled, ever ſince the caſe of *Walker* verſus *Wollaſton, in the court of King's Bench*, 2 *P. Wms.* 576.

The petitioner was allowed a month to provide himſelf with a lodging, before he quits the poſſeſſion.

Caſe 209. *Newſham* verſus *Gray*, *April* 2, 1742.

Where the court did not think the anſwer full enough, and directed an iſſue upon the merits, this is not hearing a cauſe upon bill and anſwer only, but a ſubſequent proceeding, and therefore out of the rule of diſmiſſion with forty ſhillings coſts.

THE plaintiff had obtained letters patent of the crown for a new invention of fire engines.

A bill was brought by him to eſtabliſh his letters patent, and for a perpetual injunction againſt the defendant, who had taken upon him to make and vend theſe engines, notwithſtanding the plaintiff had the ſole right and property under the letters patent.

The defendant, by his anſwer, inſiſted it was not a new invention, ſo as to intitle the plaintiff to an injunction.

There was no replication, but the cauſe came on at the Rolls, upon bill and anſwer, in *September* 1740, before Mr. Juſtice *Parker*, who, not thinking the anſwer ſufficient, directed an action at law to be brought by the plaintiff, for a breach of the letters patent,

tent, and retained the bill for a twelvemonth; the plaintiff was nonſuited at law upon the merits; and the cauſe is now ſet down by the defendant for a diſmiſſion of the bill, and for coſts.

LORD CHANCELLOR.

The only queſtion is, as this is a cauſe upon bill and anſwer, Whether the court is bound to diſmiſs it only with forty Shillings coſts?

It is true, this is the general rule of the court, but in this caſe, I am of opinion it ought to be diſmiſſed with coſts, to be taxed by a Maſter.

The preſent caſe differs from all thoſe where forty ſhillings coſts are given; for this did not properly come upon bill and anſwer only, becauſe here the court did not think the anſwer full enough, and therefore directed an iſſue upon the merits; and therefore I do not hear the cauſe upon bill and anſwer only, but upon the verdict, which is a ſubſequent proceeding beyond the bill and anſwer, and this is a plain diſtinction out of the common rule.

I gave directions to the regiſter to ſearch for caſes in point, but they have not found any as yet, however there are ſeveral that are analogous and ſimilar to this, if not exactly the ſame.

As, ſuppoſe a bill was brought to redeem a mortgage, where the defendant, the mortgagee, ſubmits by his anſwer to be redeemed, and the cauſe is heard upon bill and anſwer, and referred to a Maſter to take an account of what is due for principal, intereſt, and coſts, and to appoint a day to redeem; if the mortgagor does not redeem on the day, the court will diſmiſs the bill with coſts, to be taxed by a Maſter, conſidering the reference as a ſubſequent proceeding beyond the bill and anſwer.

Where a cauſe is referred to a maſter to take an account, the court looks on the reference as a ſubſequent proceeding beyond the bill and anſwer, and will diſmiſs the bill with coſts to be taxed.

So likewiſe, on a bill brought to be relieved againſt the penalty of a bond, where the principal money lent, and intereſt, is not paid on the day fixed by the Maſter, on the cauſe being ſet down again by the defendant, the bill will be diſmiſſed, with coſts to be taxed by a Maſter.

Where principal and intereſt on a bond is not paid on the day fixed by the maſter, or the defendant's ſetting down the cauſe again, the bill will be diſmiſſed with coſts to be taxed.

Before

Where a plaintiff, merely to keep his cauſe alive, replies, and afterwards withdraws his replication, and ſets it down on bill and anſwer only, that it may be diſmiſſed with forty ſhillings coſts, this is evading the juſtice of the court, for otherwiſe he muſt have paid the full coſts.

Before 4 *Ann. c.* 16. *ſect.* 23. for the amendment of the law, this court, upon motion, uſed to diſmiſs bills for want of proſecution, with twenty ſhillings coſts; but the act has provided, upon the plaintiff's diſmiſſing his own bill, or the defendant's diſmiſſing the ſame for want of proſecution, the plaintiff in ſuch ſuit ſhall pay to the defendant his full coſts, to be taxed by a Maſter.

But, ſince the act, another inconvenience has ariſen, which ſhould make the court incline as much as they can, conſiſtently with their own rules and juſtice, for diſmiſſing bills of this ſort, with coſts to be taxed; and that is, a man's bringing a bill upon a frivolous account, who, in order to keep his cauſe alive, replies, and afterwards moves to withdraw his replication, and that he may be at liberty to amend his bill, and, if the motion is granted, he then ſets it down upon bill and anſwer only, that it may be diſmiſſed upon forty ſhillings coſts, which is evading the juſtice of the court; for otherwiſe, if he had not withdrawn his replication, he would have paid the full coſts.

Therefore his Lordſhip ſeemed inclinable to alter the courſe of the court with regard to forty ſhillings coſts only, in caſes of diſmiſſion upon a bill and anſwer, as it is a hardſhip upon the defendants to be put to great expences, with motions and other interlocutory proceedings, and yet not to be allowed any more than forty ſhillings coſts.

Caſe 210.

Eaſter Term, *April* 27, 1748.

In regard to diſmiſſing bills, where the cauſe is ſet down on bill and anſwer only, or where it is ſo ſet down after withdrawing a replication, it ſhall be diſcretionary in the court for the future to diſmiſs with forty ſhillings coſts, or coſts to be taxed, or with no coſts; *and an order for this purpoſe directed to be fixed in the Regiſter's office.*

LORD CHANCELLOR altered this day the courſe of the court, in regard to diſmiſſing bills, where the cauſe is ſet down upon bill and anſwer only, or where it is ſo ſet down after withdrawing a replication, and ordered, that for the future, it ſhould be left to the diſcretion of the court, according to the merits of the caſe, to diſmiſs the bill with forty ſhillings coſts, or coſts to be taxed by a Maſter, or with no coſts; an order was drawn for this purpoſe, was ordered to be read in court, and his Lordſhip directed it afterwards to be fixed in the Regiſter's office.

April 27, 1748.

Ordo Curiæ.

THE Right Honourable the Lord High Chancellor of *Great Britain*, taking into conſideration the preſent courſe of this court in relation to coſts to be ordered upon diſmiſſions of bills, in cauſes brought to a hearing upon bill and anſwer, which coſts are only forty ſhillings, whereby the plaintiffs are frequently encouraged to bring frivolous and vexatious Bills, and to ſet ſuch cauſes down for hearing, to prevent the ſame being diſmiſſed with coſts for want of proſecution (in which caſe the defendant would be intitled to his full coſts, to be taxed by a Maſter) by means whereof much unneceſſary trouble is given to the court in hearing ſuch cauſes, and defendants are frequently put to a very great expence, for which (according to the preſent courſe of the court) they receive no other ſatisfaction than ſuch forty ſhillings coſts.

His Lordſhip therefore, to diſcourage ſuch practice, doth declare and adjudge, that, for the future, the ſaid courſe or practice ſhall be varied and altered; and that where any cauſe ſhall be brought to a hearing upon bill and anſwer, and ſuch bill ſhall be diſmiſſed, this court may and is at liberty to direct and order ſuch diſmiſſion to be either with forty ſhillings coſts, or with coſts to be taxed by a Maſter, or without coſts, as the court, upon the nature and merits of the caſe ſhall think fit: And, that all perſons concerned may take notice hereof, it is ordered, that this order be entered with the Regiſter, and copies thereof ſet up and affixed in the publick office of the Six Clerks, and Regiſter of this court.

The ſame day his Lordſhip made another rule for regulating the practice of the court; that as well upon commiſſions to take anſwers and pleas in the country, as before the Maſters, commiſſioners ſhall ſee that defendants ſign their anſwers or pleas for the future, becauſe as it has been moſt uſual hitherto for commiſſioners to return the anſwers and pleas without being ſigned by the parties, an inconvenience might ariſe from it, as it would be difficult to frame an indictment againſt them, if they ſhould be guilty of perjury in their anſwers.

As well on commiſſions to take anſwer and pleas in the country, as before the Maſters, commiſſioners ſhall ſee the defendants ſign their anſwers or pleas for the future.

The following order drawn up for this purpoſe was read in court.

April 27, 1748.

Ordo Curiæ.

THE Right Honourable the Lord High Chancellor of *Great Britain* taking notice, that anſwers and pleas taken by commiſſion in the country, are frequently returned without being ſigned by the defendants, ſwearing ſuch anſwers or pleas, by means whereof it may be very difficult to convict any defendant of perjury, who ſhall have been guilty thereof in ſuch anſwer or plea; and that it is now the conſtant practice for defendants, who ſwear their anſwers or pleas before a Maſter of this court, to ſign the ſame at the time of taking ſuch anſwers or pleas: His Lordſhip doth therefore order, that, from and after the firſt day of *Trinity* term next, all anſwers and pleas, as well thoſe which ſhall be taken by commiſſion, as thoſe which ſhall be taken before any Maſter of this court, be ſigned by the parties ſwearing ſuch anſwers or pleas in the preſence of the Maſter, or of the commiſſioners before whom the ſame ſhall be taken reſpectively; and that all parties concerned may take notice hereof, and act accordingly, it is further ordered, that this order be entered with the Regiſter, and copies thereof ſet up and affixed in the publick offices of the Six Clerks, and Regiſter of this court.

Caſe 211. *Plunket* verſus *Penſon, a cauſe by conſent, April* 3, 1742.

P. a *ceſtuique truſt* of a real eſtate, made a mortgage upon it in fee, and deviſes the equity of redemption to his ſon and his heirs, ſubject to the payment of his debts, and died indebted by bond and ſimple contract; as this was a mortgage of the whole inheritance, and nothing remaining in the mortgagor, the bond-creditor can have no preference, but muſt be paid *pari paſſu* with other creditors.

MR. *Penſon*, the teſtator, who was the *ceſtuique truſt* of a real eſtate, made a mortgage of it in fee, and the equity of redemption being in him, he by his will gave and deviſed to his dear ſon, and to his heirs for ever, the mortgaged premiſſes, ſubject nevertheleſs to the payment of his debts, annuities, and legacies, and died indebted by bond and ſimple contract.

The queſtion in this caſe was, if the aſſets of the teſtator are legal or equitable; and whether the ſimple contract creditors are to come in *pari paſſu* with the bond-creditor, who is the plaintiff; or whether he ſhall be paid firſt in a courſe of adminiſtration.

Mr. *Cox*, who was council for the bond creditor, inſiſted, that the aſſets of the teſtator muſt be conſidered as legal; becauſe, notwithſtanding the deviſe to the heir, it is exactly the ſame as if the

lands deſcended to him with a charge, and therefore the ſimple contract creditors ought not to come in *pari paſſu.*

He cited the caſe of Lord *Maſſam* verſus *Harding*, *in the court of Exchequer*, 1734, where an equity of redemption was held to be legal aſſets; but I muſt be ſo candid as to own that Lord Chief Baron *Cummins* took this diſtinction, that if it was a mortgage for years, then it would be legal aſſets, becauſe the whole intereſt was not gone from the mortgagor, the reverſion in fee being left in him; otherwiſe where it is a mortgage in fee; and, before Mr. *Verney*, at the *Rolls*, *the caſe of Spencer* verſus *Biffin*, *in Mich. T.* 1734, was determined, upon the authority of *Maſſam* and *Harding*; he cited alſo *Fremoult* verſus *Dedire*, *et e con.* 1 *P. W.* 430. in which Lord *Macclesfield* held, where one deviſes his lands for payment of his debts, *bonds and ſimple contract debts* ſhall be paid equally; but if he only charges his lands with the payment of his debts, ſo that the land deſcends ſubject to the debts, *the bonds* ſhall be preferred before the *ſimple contract debts.*

Mr. Attorney General, for the ſimple contract creditors, inſiſted, that a deviſe to an heir, of an eſtate charged with debts, is exactly the ſame thing as deviſing it in truſt to him for the payment of his debts, and then they are *equitable* aſſets, and all creditors are intitled to come in *pari paſſu.*

The bond-creditor in this caſe cannot recover at law, becauſe the teſtator, who was the obligor, had not the legal eſtate, it being a truſt eſtate, and in mortgage, and therefore was obliged to come into this court for a ſatisfaction.

Mr. *Moreton*, on the ſame ſide, cited the caſe of *Kent* verſus *Craigs*, *between the ſeals after Michaelmas Term* 1741; the queſtion there aroſe upon the will of Mr. *Wrotteſley*, who bequeathed, after his lawful debts are paid, and funeral expences are defrayed, all he is now in poſſeſſion of, or any wife intitled to, to his aunt, Mrs. *Craig*, and made her executrix, and yet held by Lord *Hardwicke* that they are equitable and not legal aſſets, and that creditors muſt come in *pari paſſu.*

LORD CHANCELLOR.

If in the caſe of Lord *Maſſam* verſus *Harding*, it was a mortgage in fee, the bond-creditor could not come at it, as the obligor had not the legal eſtate; for I think my Lord Chief baron *Cummins*'s diſtinction was right in that caſe, between a chattel mortgage, and a mortgage in fee.

I ſhould

No inſtance where an equity of redemption has been held to be liable to the execution of a bond-creditor, in the life of the mortgagor.

I ſhould be glad to be informed whether there is any inſtance, where an equity of redemption has ever been held to be liable to the execution of a bond-creditor in the life of the mortgagor; to which the council in this caſe made anſwer, they could not recollect any inſtance where it had been ſo held.

The particular queſtion here is, whether the creditors ſhall come in *pari paſſu*, or whether a bond-creditor is intitled to the preference.

The teſtator was never intitled any otherwiſe than as *ceſtuyque truſt* of a real eſtate, which he mortgaged, and having conſequently the equity of redemption of a truſt-eſtate, makes his will, and deviſes to, *&c.* (*vide the will as before ſtated*) then dies indebted by bond and ſimple contract.

The firſt queſtion, ſuppoſing the teſtator had been ſeiſed of a legal eſtate, is, whether by force of the will this is not out of the ſtatute of fraudulent deviſes, of 3 & 4 *Will. & Mar. chap.* 14. this depends clearly upon the conſtruction of that ſtatute. By this act " all wills, diſpoſitions or appointments of lands or tenements, *&c.* " whereof any perſons at the time of their deceaſe ſhall be ſeiſed " in fee-ſimple in poſſeſſion, reverſion or remainder, or have power " to diſpoſe of the ſame by their laſt wills, ſhall be deemed and " taken (only as againſt creditors by bond or ſpecialty binding the " heir) to be fraudulent and void; and every ſuch creditor ſhall " have his action of debt upon his and their bonds and ſpecialties, " againſt the heir at law of ſuch obligors and ſuch deviſees jointly."

Now before the making of this act of parliament, at common law, a bond-creditor, where the land was deviſed, had no remedy againſt the deviſee, and therefore this ſtatute has taken care that ſuch a deviſee ſhall not prevent the remedy.

Then comes *the proviſo*: " Provided always, that where there " hath been or ſhall be any limitation or diſpoſition of lands or te- " nements for the raiſing or payment of juſt debts or portions for " children, other than the heir at law, in purſuance of any marriage " contract or agreement in writing, *bona fide* made before marriage, " the ſame and every of them ſhall be in full force."

The conſequence of *this proviſo* is, that it operates by way of exception upon ſuch deviſes as are for payment of debts; for this clauſe does not give any new force to the law in this particular caſe, but leaves it juſt as it ſtood before the making of the act.

The queſtion will be then, whether the deviſe here has broke the deſcent; if it has, then in point of law all the conſequences

inſiſted on by Mr. *Attorney General* will follow: for the bond-creditor is deprived of his remedy at law, and forced to come into this court: but if it has not broke the deſcent, then this court has no right to take from a ſpecialty creditor his remedy at law.

As at preſent adviſed I do conceive it does not break the deſcent; and for this purpoſe *vide Clerk* verſus *Smith*, 1 *Salk.* 241. in Lord Chief Juſtice *Treby*'s time, where the court held that, if the ſame eſtate is deviſed to *H.* which he would have taken by deſcent, he is in by deſcent, notwithſtanding the poſſibility of a charge; if ſo, I do not know that a court of equity has ever taken away from a bond-creditor his right which he has at law. The caſe of *Freemoult* verſus *Dedire* comes very near the preſent.

If the ſame eſtate is deviſed to *H.* which he would have taken by deſcent, he is in by deſcent.

In the fifth ſection of the ſtatute of fraudulent deviſes, which relates to the heirs at law aliening the land deſcended in order to avoid the payment of juſt debts before action brought againſt him, it is enacted, " that ſuch heir ſhall be anſwerable for ſuch debts to the " value of the land ſo aliened, *&c.* in which caſes all creditors " ſhall be preferred as in actions againſt executors or adminiſtrators, " and ſuch executions ſhall be taken out upon any judgment ſo " obtained againſt ſuch heir to the value of the ſame land as if the " ſame were his own proper debt:" but as to that part in the firſt proviſo, which takes notice of a deviſe for raiſing portions, it is ſo darkly penned that I do not well underſtand the meaning of it.

I think this caſe differs from *Kent* verſus *Craig*, cited by Mr. *Moreton*, for there the teſtator firſt charged his lands with the payment of his debts, and then deviſed the eſtate ſo charged to a collateral relation, ſo that being a deviſe to a ſtranger, the deſcent was broke, and there was no remedy but from the ſtatute, and conſequently there was a ground for making it equitable aſſets: but in *Freemoult* verſus *Dedire* the deſcent was not broke: In *Kent* verſus *Craig* the whole reſted upon the ſtatute, for not only a deviſe, but an appointment for payment of debts, are enumerated in the enacting clauſe: here the deſcent is not broke, and the creditor may have his remedy at law ſuppoſing the teſtator to have been ſeiſed of the legal eſtate.

A deviſe of an eſtate charged with the payment of debts to a collateral relation, being a deviſe to a ſtranger, the deſcent is broke, and it is equitable aſſets.

But the ſecond queſtion will be, whether an equity of redemption of a mortgage in fee of a truſt-eſtate ought to be conſidered as legal or equitable aſſets.

I do agree that if a mere truſt eſtate deſcends upon an heir at law, that it will be conſidered as legal, and not as equitable aſſets; and this is founded upon the third clauſe of the ſtatute, which gives a ſpecialty creditor his remedy at law by an action of debt againſt the heir of the obligor, but it has not made a mortgage in fee of a truſt-eſtate ſubject to the ſame thing.

Where a mere truſt eſtate deſcends upon an heir at law, it will be conſidered as legal, and not as equitable aſſets.

A reverſion in fee being in the mortgagor on a mortgage for years, it is legal aſſets, becauſe the bond-creditor may have a judgment againſt the heir of the obligor, and a *ceſſet executio* till the reverſion comes into poſſeſſion.

If there is a mortgage for a thouſand years, and the reverſion in fee left in the mortgagor, it will be legal aſſets, becauſe the bond-creditor might have judgment againſt the heir of the obligor, and a *ceſſet executio* till the reverſion come into poſſeſſion; but where it is a mortgage of the whole inheritance, I do not ſee what remedy a bond-creditor can have to make it aſſets at law; and if the ſpecialty creditor ſhould bring an action againſt the heir, he may plead *riens per diſcent*.

Where a plaintiff a ſpecialty creditor muſt come here for relief, the court will do equal juſtice to all creditors without any diſtinction as to priority.

Therefore if the plaintiff is under a neceſſity of coming here for relief, this court will act according to its known rule of doing equal juſtice to all creditors, without any diſtinction as to priority.

" His Lordſhip declared the will of *Thomas Penſon* ought to be " eſtabliſhed, and the truſts thereof performed; and decreed the " ſame accordingly; and directed an account of his perſonal eſtate, " and to be applied in payment of his debts, in a courſe of admi-" niſtration; and if that ſhould not be ſufficient, then an account " to be taken of the rents and profits of the teſtator's real eſtate, " and to be applied in payment of the teſtator's debts, not ſatisfied " out of his perſonal eſtate, *pari paſſu*. And in caſe the perſonal " eſtate, and rents and profits of the real eſtate of the teſtator, ſhall " not be ſufficient to pay his debts, it was ordered, with the con-" ſent of the mortgagees, that the real eſtate ſhould be ſold, and " the money ariſing by the ſale, after payment of the mortgages, " was directed to be applied in diſcharge of what ſhall be remain-" ing due to the other creditors of the teſtator *pari paſſu*. And if " any of the creditors *by ſpecialty*, have exhauſted any part of the " teſtator's perſonal eſtate in ſatisfaction of their debts, then they " were not to come upon, or receive any further ſatisfaction out " of the teſtator's real eſtate, until the other creditors ſhall there-" out be made up equal to them.

Caſe 212. *Wharton* verſus *Wharton*, *May* 3, 1740. *Petitions*.

The defendant prayed to amend her anſwer by adding a new fact; granted on the particular circumſtances of her caſe.

THE Dutcheſs of *Wharton*, who is the defendant, petitions that ſhe may be at liberty to amend her anſwer by adding a new fact.

LORD CHANCELLOR.

Where a defendant has miſtaken a fact, or a date, the court will give him leave to amend his anſwer.

The moſt common caſe of amending anſwers is, where through inadvertency a defendant has miſtaken a fact, or a date, there the court will give leave it ſhall be amended, to prevent a defendant from being proſecuted for perjury.

But here the queſtion is, Whether the court, upon ſuch an amendment, will likewiſe permit a defendant to add any new fact to the anſwer; and upon, the circumſtances of this caſe, I am of opinion the defendant ought to have this liberty.

The Dutcheſs of *Wharton*, in her anſwer, refers to marriage articles, which were executed in *Spain*, and conſequently makes it incumbent upon her to produce them: Now it ſeems the cuſtom in *Spain* is, to depoſit articles, and other deeds, in places appointed for that purpoſe, ſo that an authentic copy is all that can be had in this caſe.

Therefore, I am of opinion, that the dutcheſs ought to have liberty to amend her anſwer, ſo far as to ſet forth the cuſtom in *Spain*, with regard to the depoſiting of deeds.

Drapers Company verſus *Davis*, *May* 4, 1742. Caſe 213.

A ſolicitor having taken a judgment of his client for 400 l. whilſt the cauſe was depending, and alſo ſeveral extraordinary charges appearing in his bill; Lord Hardwicke, though adjuſted and allowed ſeventeen years ago, referred the bill to be taxed, and ordered the judgment and other ſecurities to be delivered up.

A Petition was preferred againſt *Meredith*, the ſolicitor in the cauſe, complaining of improper and heavy charges in his bill; and of his taking a judgment of one of the parties for 400*l.* whilſt the cauſe was depending, and before it could be known what his bill would come to.

LORD CHANCELLOR.

Notwithſtanding this bill has been adjuſted and allowed ſome time, yet the behaviour of the ſolicitor in taking a judgment, caſts an imputation upon him, and is a practice I can by no means approve; and as it does not appear, that his client was aſſiſted by any perſon of the profeſſion, in looking over and ſettling this bill, and as there are ſeveral very extraordinary *items*, and improper charges upon the face of it, I ſhall, notwithſtanding the great length of time (being ever ſince 1725,) and notwithſtanding the adjuſtment, and allowance, refer this bill to a Maſter, to be taxed; and likewiſe order Mr. *Meredith* to be examined upon oath on interrogatories, as to the ſeveral articles of it, and do order the judgment, and other ſecurities to be delivered up immediately.

Pawlet

Caſe 214. *Pawlet* verſus *The Biſhop of Lincoln*, *May* 6, 1742.

If at the hearing, a plaintiff waves the relief he prays againſt a particular perſon, the objection for want of his being a party will have no weight.

A Plaintiff may, at the hearing of a cauſe, wave the relief that he prays againſt a particular perſon, and then the objection for want of making that perſon a party, will have no weight with it.

On a bill for an account of fees, to eſtabliſh a right, you muſt have all perſons before the court who have any pretence to a right; for they will be bound by a decree here; otherwiſe as to a judgment at law, which will not bind the right of a third perſon.

In an action at law brought for fees, it is not neceſſary to make any perſon a party, but who has actually received the fees; it is otherwiſe in equity, where a bill is brought for an account of fees, to eſtabliſh a right, becauſe there you muſt have all perſons before the court who have any pretence to a right; for, by a decree of this court, they will be bound; but it is not ſo as to a judgment recovered at law for fees, againſt the receiver of thoſe fees; ſuch judgment will not bind the right of a third perſon.

Caſe 215. *Sir William Saunderſon* verſus *Glaſs*, *May* 11, 1742.

LORD CHANCELLOR.

A ſolicitor makes an abſolute conveyance to himſelf of 1000*l.* from the plaintiff's wife, whilſt ſhe was parted from her huſband: *The conſiderations expreſſed in the deed, are for ſervices done, and favours ſhewn*; the bill is brought to ſet aſide the deed as obtained by fraud *Lord Hardwicke, on all the circumſtances of this caſe, decreed the deed ſhould ſtand only as a ſecurity for ſuch ſum as was juſtly due to the defendant.*

THERE is evidence in this cauſe which has weight on both ſides; but it is neceſſary for the court to determine on ſuch circumſtances as weigh moſt ſtrongly.

There are two grounds for this bill.

Firſt, To ſet aſide a deed obtained by the defendant from Lady *Saunderſon*, the plaintiff's wife in her life-time, as a fraudulent one.

The other ground is, That the deed was intended as a conveyance in truſt only for the daughter of Lady *Saunderſon*, though the defendant has not made any declaration of ſuch truſt.

It has been contended by the defendant's council, that the two heads are inconſiſtent, but I think otherwiſe, for not preparing the deed which was to declare the truſt, is equally a fraud, or, at leaſt, an evidence of fraud.

Firſt, I ſhall conſider the particular circumſtances of this caſe.

Secondly, How far the acts themſelves are an evidence of this truſt.

As to the *firſt*, Here was a wife, as the defendant inſiſts, in an extreme bad ſtate of health, very cruelly uſed by her huſband, and under a neceſſity of parting from him.

On the other hand, The plaintiff charges, that ſhe was greatly addicted to drinking, in all parts of the day, and very often intoxicated with liquor, and this is not at all controverted by the defendant.

What is the conſequence to be drawn from ſuch a behaviour, but that ſhe muſt neceſſarily be a weak woman; for, under theſe circumſtances, ſhe muſt ſtand on very unfirm ground, both as to her honour and her fortune: with regard to the latter ſhe had a power to diſpoſe of 1000*l.* whether covert or diſcovert, as ſhe ſhould think proper, by any writing under her hand: now the draught of this deed, which is an abſolute conveyance of the 1900*l.* to Mr. *Glaſs*, the defendant, had been prepared ſix weeks before it was executed, and likewiſe before Lady *Saunderſon* left her huſband; and the deed itſelf was not executed till three weeks afterwards: for, on the 6th of *March* 1737, ſhe left the plaintiff, and went to a lodging, which Mr. *Glaſs* had provided for her; and on the 29th of *March* ſhe executed the deed which is now in conteſt before the court.

Now, what could be a greater inſtance of weakneſs, than at the very time ſhe was upon the brink of parting, to put the only thing out of her power that could ſupport her independent of her huſband; conſider it in another view, with regard to her child, which ſhe is proved to have been very fond of: The huſband too had a daughter by another venter; is it probable then, that Lady *Saunderſon* would give away this 1000*l.* from her ſelf and her child, who might have no other proviſion, for nothing alienates the affection of one parent ſo much, as the other parent's taking away the child from under his power, and therefore the higheſt weakneſs to leave her daughter quite deſtitute, and to the mercy of an inraged father.

It appears in the cauſe, that ſhe had made a will but juſt before this time, by which ſhe gave the 1000*l.* abſolutely for the child's benefit; now, what occaſion or pretence could there be for altering this will.

Mr. *Glaſs*, to be ſure, had done acts of kindneſs privately for Lady *Saunderſon*, but at the ſame time he was her attorney, and in that capacity, was it not his duty to let her know the abſurdity of the act ſhe was doing? I am not at all clear, the woman knew that this deed would abſolutely bind her; it required the ſkill of a lawyer to reſolve that, for powers are given in a different manner, ſome, if once executed, are final, others may be executed *toties quoties*.

The conſiderations in the deed are expreſſed to be for ſervices done, and favours ſhewn.

If an attorney, *pendente lite*, prevails on a client to agree to an exorbitant reward, the court will either ſet it aſide intirely, or reduce it to the ſtandard of thoſe fees to which he is properly intitled.

It is truly ſaid at the bar, that a ſecurity obtained by an attorney, whilſt he is doing buſineſs for his client, or whilſt a cauſe is depending, appears to this court in a quite different light than between two common perſons; for if an attorney, *pendente lite*, prevails upon a client to agree to an exorbitant reward, the court will either ſet it aſide intirely, or reduce it to the ſtandard of thoſe fees to which he is properly intitled; and this was the rule that weighed with me in *Walmſley* verſus *Booth*, *heard May the 2d*, 1741; and if the court did not obſerve ſuch a rule, it would expoſe clients very much to the artifices of attornies, eſpecially *feme coverts* who are in Lady *Saunderſon*'s unfortunate circumſtances.

It is true, there are witneſſes which prove ſome declarations of Lady *Saunderſon*'s great regard for Mr. *Glaſs*; and that ſhe has often ſaid, no body ſhould have the 1000*l.* except himſelf; but then the very ſame witneſſes ſay, it was to make him a ſatisfaction for the ſums he had advanced for her, and likewiſe out of a confidence that he would take care of her daughter.

But, on the other hand, nothing can be ſtronger to encounter this evidence, than what the plaintiff's witneſſes ſwear, one of them in particular, who ſaid ſhe was with Lady *Saunderſon* but two days before her death, and that ſhe then declared ſhe had given all to her child.

A very ſuſpicious circumſtance to ſhew that the defendant was conſcious this deed was never intended as an abſolute conveyance to himſelf, but only in truſt, is, his denying there was any deed at all in his cuſtody, when Sir *William Saunderſon* aſked him at the time he paid him his bill.

The only material reaſon for his concealing it then, muſt be to prevent its being ſifted and inquired into, Lady *Saunderſon* being alive, who could have diſcovered the real deſign and intention of it; for the reaſon he gives in the cauſe is a very ſimple one, for fear of

exaſperating and incenſing Sir *William Saunderſon*, who at that time was reconciled to his lady.

There is one obſervation of the plaintiff's council which is very material, that the defendant has charged in his bill, ſo much for peruſing the draught of this deed, which he would never have done, if he had looked upon it as a voluntary preſent to himſelf; and therefore this circumſtance ſhews very ſtrongly that he conſidered it merely as a truſt.

Lady *Saunderſon* died in *June* 1738; the daughter in *April* following; and the defendant's letter, by which he demanded the 1000*l.* of Sir *William Saunderſon*, by virtue of this deed, was not written till above a year and half after their deaths.

In the beginning of it, he ſays, Your lady having a confidence in my honour and integrity towards yours and her child, and being likewiſe ſenſible of the ſervices I had done her, and the favours ſhe had received from me, did execute, *&c.*

Now, truſt and confidence are convertible terms, and muſt import ſome truſt relative to the act of the deed, for the benefit of the child; and at the ſame time a compenſation to him for favours and ſervices: this latter part materially falls in with Lady *Saunderſon*'s declarations of her having ſecured to Mr. *Glaſs* the ſeveral ſums he had advanced upon her account.

What is the reſult of the whole, but that here is a plain truſt intended for the daughter, mixed and coupled with a recompence for the defendant, for ſums advanced, and ſervices done, and a ſecurity to him at all events, if Sir *William Saunderſon* ſhould refuſe to pay him; and after the defendant was ſatisfied, the reſidue for the daughter; nor can this tranſaction be any otherway reconciled with the declarations of Lady *Saunderſon*.

This way of conſidering the caſe, makes it reconcileable with reaſon; the other makes it abſurd, and the act of a weak woman.

The conſequence of my opinion will be this, if there are any ſums remaining, which are juſtly due to the defendant, the deed, in the firſt place, ought to ſtand as a ſecurity for that ſum, whatever it is, but the ſurplus muſt be deemed to be a truſt for the child, who being dead, the plaintiff, though he has not adminiſtred, is legally intitled to, as, by her death, it devolves upon him; and this decree is exactly conformable to the directions my Lord *Talbot* gave in the caſe of *Proof* verſus *Hines*, *Caſes in the time of Lord Talbot* 111.

Nicholls

Caſe 216. *Nicholls* verſus *Judſon*, *at the Rolls*, *May* 24, 1742.

W. L. gave *A. M.* a bond for 300*l.* and intereſt in 1728, and in 1731, paid her 100*l.* in 1736 he made his will, and gave all his lands in *B.* for a term of 200 years, upon truſt to raiſe and pay, *within two years after his death*, to *A. M.* 200*l.* and alſo deviſed

ONE *William Lowe*, to reward the good ſervices of *Ann Manſell*, who had lived with him a great number of years, gave her a bond in 1728, in the penalty of 600*l.* for payment of 300*l.* and intereſt, on a day fixed, and in 1731, paid her 100*l.* part of the 300*l.* and all intereſt; in 1736 he made his will, and thereby, among other legacies, gave to Mr. *Mangenis*, all his meſſuages, lands, *&c.* in *B.* in the pariſh of *W.* to hold to him, his executors, *&c.* for 200 years, upon truſt out of the rents, *&c.* by mortgage or ſale, to levy, raiſe, and pay to *Ann Manſell*, within two years after his death 200*l.* and ſubject to this term, he deviſed the ſame premiſſes to the plaintiff and his heirs; and alſo deviſes other lands to the ſame truſtee for 300 years, upon truſt to pay 200*l.* to *Ann Manſell*, within one year after his death; in other parts of his will he gave her plate, linen, *&c.* and other perſonal legacies.

other lands to the ſame truſtee for 300 years, on truſt to pay 200*l.* to *A. M. within one year after his death*; the executor of *L.* paid ſome part of the bond to *A. M.* in her life-time; the bill prays that the legacies may be decreed *a ſatisfaction of the bond*, and that her executor may refund what he has received in part payment thereof: *The Maſter of the Rolls held this to be a contingent legacy; for if the legatee had died before the time of payment, it would have ſunk in the land, and that the rule of ademption not extending ſo far as to take in a contingent legacy, this is not a ſatisfaction of the bond.*

The executor of *Lowe* paid off ſome part of the bond to *Ann Manſell* in her life-time.

The prayer of the bill is, that the legacies deviſed by the will of *William Lowe* to *Ann Manſell* may be decreed a ſatisfaction of the bond; and that the defendant *Judſon*, who is her executor, may be directed to refund ſuch ſums as he has received in part payment of the ſaid bond from the executors of *Lowe*.

For the defendant *Judſon* were cited, *Cuthbert* verſus *Peacock*, 1 *Salk.* 155. *Atkinſon* verſus *Webb*, 2 *Vern* 478. *Chancey's caſe*, 1 *P. Wms.* 408. *Eaſtwood* verſus *Winke*, 2 *P. Wms.* 616.

Maſter of the Rolls: The queſtion is, Whether two ſums of 200*l.* and 200*l.* deviſed to *Ann Manſell*, by the will of *Lowe*, and to be raiſed upon the teſtator's real eſtates by different terms of years, ſhall be conſidered as a ſatisfaction of the debt, due upon the bond to Mrs *Manſell*.

It was objected by the council for the plaintiff, that this is not in the nature of a legacy, for that there is a difference in the expreſſion of the will, for in ſome inſtances he ſays expreſsly, I give ſuch things to the ſaid *Ann Manſell*, as plate, linen, *&c.* but as to

the 200*l.* and 200*l.* it is a direction to truſtees to levy, raiſe, and pay the ſaid ſums to Mrs *Manſell.*

But it is anſwered very clearly by this obſervation, that though the money is to be raiſed by the truſt eſtate, yet it is the gift of the teſtator notwithſtanding, for it would have been abſurd to have ſaid, that the truſtees ſhould give, for that would have made them the donors, and not the teſtator; and therefore there is no manner of difference between a direction to truſtees to pay, and a gift.

There is no manner of difference between a direction to truſtees to pay, and a gift, the teſtator is equally the donor in both caſes.

And though the general rule is, that a legacy which is greater, or as great as the debt, ſhall be taken to be a ſatisfaction, and is too well eſtabliſhed to be ſhaken now; yet, in late caſes, where there are circumſtances, or a preſumption that the teſtator's intention was not that the legacy ſhould be in ademption of the debt, the court have leant againſt the rule, ſo far as to hold it not to be a ſatisfaction.

Though it is a rule, that a legacy greater, or as great as the debt, ſhall be taken to be a ſatisfaction; yet where there is a preſumption the teſtator's intention was otherwiſe, the court in late caſes have leant againſt the rule.

So, in the preſent caſe, the teſtator's directing that the 200*l.* and 200*l.* ſhould not be paid till one or two years after his death, is a very conſiderable circumſtance in favour of Mrs *Manſell*, and ſhews ſtrongly, that the intent of the teſtator was not that it ſhould go in ſatisfaction of the debt, for the bond was payable immediately, and the teſtator had no right to ſuſpend the payment of a debt, though he might ſuſpend his legacy; and though executors have a year allowed them to pay legacies, yet that does not extend to debts, but they are liable to be ſued the moment after the teſtator's death; ſo that the payment of theſe legacies at a future time is extremely material, and takes this caſe out of the general rule.

Though executors have a year to pay legacies, yet that does not extend to debts, but they are liable to be ſued the moment after the teſtator's death.

Beſides too, I am inclined to think, this is a contingent legacy; for the truſtees being directed to pay it within two years and one year, does not oblige them to pay it ſooner; and if the legatee had died before the time of payment, it would have ſunk in the land, for the benefit of the plaintiff, according to the ſettled rule of this court, with regard to legacies charged upon land. *Vide Pawlet's caſe*, 2 *Vent.* 366. *Stapleton* verſus *Cheales*, *Preced. in Chan.* 317. *Duke of Chandos* verſus *Talbot*, 2 *P. Wms.* 601. *Hall* verſus *Terry*, *November* 8, 1738. 1 *Tr. Atkyns Rep.* 502. *Prowſe* verſus *Abbington*, *Eaſter term* 1738, 1 *Tr. Atkyns Rep.* 482.

And as the rule of ademptions has never been carried ſo far as to take in a contingent legacy, I muſt decree for the defendant, that the deviſe of the 200*l.* and 200*l.* is not a ſatisfaction of the bond.

Caſe 217. *The Mayor and Corporation of York* verſus *Sir Lionel Pilkington*, *May* 14, 1742.

Whilſt ſuits are depending here, the plaintiffs indict the defendant's agent at the ſeſſions, *where they themſelves are judges*, for a breach of the peace. *Lord Hardwicke* made an order to reſtrain the plaintiffs from proceeding at the ſeſſions, till the hearing of the cauſe, and further order.

THE plaintiffs claim the ſole right of fiſhing in the river *Ouſe*; the defendant claims a right likewiſe; a bill and croſs bill were brought, to eſtabliſh their ſeveral rights.

While theſe ſuits were depending, the plaintiffs cauſed the agents of the defendant to be indicted at *York* ſeſſions, where they themſelves are judges, for a breach of the peace, in fiſhing in their liberty.

A motion was made on behalf of the defendant, to ſtop the proſecution.

LORD CHANCELLOR.

There is no reſtraining power over criminal proſecutions in this court.

This court has not originally, and ſtrictly, any reſtraining power over criminal proſecutions; and, in this caſe, if the defendant had applied to the Attorney General, he would have granted a *noli proſequi*.

The Attorney General of courſe grants a *noli proſequi* to a criminal proſecution, where an action of treſpaſs will lie.

For when a complaint is grounded on a civil right, for which an action of treſpaſs would lie, the Attorney General of courſe grants a *noli proſequi*.

This is a complaint merely for fiſhing in the river, without any actual breach of the peace, which the mayor and corporation ſay, is a treſpaſs upon them.

If it could be made appear at law, that the plaintiffs were both judges and parties, it might come out to be *coram non judice*, but it might be difficult to make out this.

Pendente lite here, this court would have ſtopped an action of treſpaſs *vi et armis*.

If actions of treſpaſs had been brought *vi et armis*, this court would have ſtopped them, but, though I cannot grant an injunction, yet I may certainly make an order upon the proſecutors to prevent the proceeding on the indictment.

Suppoſing

Suppoſing it was a ſuit for a right of land where entries had been made, and the bill was brought to quiet the poſſeſſion, and after that they prefer an indictment for a forcible entry, which is of a double nature, as it partakes of a breach of the peace, and is alſo a civil right, this court would certainly ſtop the proceedings upon ſuch indictment.

Where a bill is brought to quiet Poſſeſſion, if after that the plaintiff prefers an indictment for a forcible entry, this court will ſtop the proceedings upon ſuch indictment.

Where parties ſubmit their right to the court, they have certainly a juriſdiction, and may interpoſe.

Therefore I will make an order, to reſtrain the plaintiffs from proceeding at the ſeſſions, till the hearing of the cauſe and further order.

Lockwood and others verſus *Ewer*, *May* 14, 1742.

Caſe 218.

THE bill in this caſe was brought by the plaintiff as repreſentative of Sir *Thomas Cooke*, to redeem the ſum of 2500 *l.* *Eaſt-India* Stock, transferred to Mr. *Ewer* the firſt of *April* 1708. for the ſecuring the ſum of 2000 *l.* and intereſt at 6 *per cent.* Mr. *Ewer* having executed a defeaſance, whereby he obliged himſelf to retransfer the ſtock on payment of the 2000 *l.* and intereſt on the 2d of *July* following.

The repreſentative of *Sir T. C.* prays to redeem 2500 *l.* *Eaſt-India* ſtock, transferred to the defendant the 1ſt of *April* 1708.

for ſecuring 2000 *l.* and intereſt at 6 *per cent.* to be retransferred on payment of principal and intereſt the 2d of *July* following. Sir *T. C.* died in 1709. the ſon brought this bill in 1729. *Lord Hardwicke refuſing to decree a redemption diſmiſſed the bill.*

Sir *Thomas Cooke* died in 1709. his ſon the ſurviving executor has brought this bill to redeem in 1729.

LORD CHANCELLOR.

This is a very plain caſe for the defendant.

In a mortgage of land, a bill of foreclоſure ought to be brought, but on a mortgage of ſtock it is not neceſſary, and therefore a ſtrong reaſon for the mortgagor's departing from the right.

Not neceſſary to bring a bill of foreclоſure on a mortgage of ſtock.

The admiſſion of a co-defendant to the advantage of the plaintiff will by no means better the caſe, unleſs the plaintiff had entered into proof, by which he would infer ſome other kind of evidence to account for his coming ſo late to redeem.

A Co-defendant's admiſſion to the advantage of the plaintiff, will not make his caſe better.

It would be of miſchievous conſequence if I ſhould decree a redemption in this caſe, for the bill would never have been brought if the *Eaſt-India* ſtock had not increaſed in value, which is merely an accident, and could not be foreſeen at the time the mortgage was

made, and therefore is very far from being any inducement to decree a redemption. His Lordſhip diſmiſſed the bill.

Caſe 219. *Trodd* verſus *Downs*, *May* 18, 1742.

Whatever Words there may be in a will relative to copyhold lands, they can have no effect if there was no ſurrender, for nothing can paſs a legal eſtate but what will paſs it in law.

ADAM Churcher deviſed all his farms and lands to truſtees and their aſſigns, for and during and until his kinſmen *Rogers* and *Bonny* ſhould attain their ſeveral ages of twenty-one, in truſt that they do in the mean time receive the rents and profits for the uſe and benefit and towards the maintenance of *Rogers* and *Bonny*; and after they ſhould attain their reſpective ages of twenty-one, then to the ſaid *Rogers* and *Bonny* for their natural lives, without impeachment of waſte; and from and after their deceaſes, to the uſe of the heirs of the ſaid *Rogers* and *Bonny* for ever as tenants in common, and not as joint-tenants.

Part of the premiſſes were copyhold, and the reſt freehold; the teſtator ſurrendered the copyhold to the uſe of his will: *Bonny*, one of the deviſees, attained his age of 21. and by leaſe and releaſe of the 31ſt of *May*, and 1ſt of *June* 1740. conveyed his moiety in the freehold lands to his ſiſter and her heirs, who married the plaintiff, and afterwards *Bonny* deviſed his copyhold lands in like manner, but made no Surrender thereof.

Bonny is dead; the queſtion made in this cauſe is, whether the deviſees *Rogers* and *Bonny* ſhould take as joint-tenants, or tenants in common.

LORD CHANCELLOR.

There are two points in reſpect of the copyhold:

Firſt, Whether the deviſe in the will of *Adam Churcher* amounts to a deviſe of land in joint-tenancy, or a tenancy in common.

Secondly, If a joint-tenancy, whether there has been a ſeverance of that joint-tenancy before the death of *Thomas Bonny*.

I am of opinion the truſtees took nothing at all in the inheritance but a chattel intereſt, till the *ceſtuy que truſts* attained the age of twenty-one, or the ſurvivor of them attained that age.

The truſt is to apply the rents and profits towards the maintenance, *&c.* and on their reſpectively attaining twenty-one, is deviſed over. Therefore I am of opinion, if one of them had died, ſurviving the other, who had not attained his age of twenty-one, all the profits muſt have been applied to the maintenance of the ſurvivor.

This

This being the conſtruction of the firſt clauſe, will throw a great deal of light upon the ſubſequent clauſe.

As to the latter, I am of opinion it is a deviſe of a remainder of a legal eſtate, and not of a truſt, for the truſt, as I ſaid before, was only a chattel intereſt; for it is to *Rogers* and *Bonny* there is a deviſe for their natural lives, *&c.* This being ſo, conſider the intention of the teſtator; his intention was plain that *Rogers* and *Bonny* ſhould be tenants for lives, and therefore adds the words *without impeachment of waſte.*

If that intention had not been controuled by a rule of law, they had been moſt clearly tenants for life, which brings it very near the caſe of *Tuckerman* verſus *Jeffereys*, *Eaſter* term 6 *Ann. Holt's Caſes* 370 *.

In 1 *Co. Rep.* 104, it is laid down as a rule of law, That when the anceſtor by any gift or conveyance takes an eſtate of freehold, and in the ſame gift or conveyance an eſtate is limited either mediately or immediately to his heirs, in fee or in tail, that always in ſuch caſes, *the heirs* are words of limitations of the eſtate, and not words of purchaſe, and the words *impeachment of waſte* are rejected.

But then the queſtion is, whether this ſhall over-rule the plain intention of the teſtator; for I have ſhewn it was not his intention that they ſhould have the joint inheritance.

Where the rule of law will let the intention take place, it ſhall have its effect, *vide Barker* verſus *Gyles*, 2 *Wms.* 283. before Lord *King*, and afterwards in the houſe of Lords, *Bliſſet* verſus *Cromwell and others*, 3 *Lev.* 373. there by force of the words, *equally to be divided*, it was held a tenancy in common, and the words *longer liver of them* rejected.

This caſe differs from that, as I am of opinion, upon the conſtruction of the firſt clauſe, that the whole profits will go and ſurvive for the education and maintenance of the ſurvivor till twenty-one: now it would be abſurd to think that the teſtator would give the whole profits to be applied for the maintenance of the ſurvivor of *ceſtuy que truſt*, and yet that the moiety, after the ſurvivor attained twenty-one, ſhould go to the heirs of the deceaſed *ceſtuy que truſt.*

* There a man deviſed his eſtate to his two ſiſters *Jane* and *Elizabeth* during life, equally to be divided between them, and after the deceaſe of them to the heirs of *Jane.* The court held that *Jane* and *Elizabeth* were Joint-tenants during life, and the fee to the heirs of *Jane*, but not to take during *Elizabeth*'s life.

But then the freehold is ſevered by *Bonny's deed of conveyance*, and muſt have its effect.

But as to the copyhold, it is not ſevered, for nothing can ſever a legal eſtate, but what will paſs it in law; and here has been no ſurrender of the copyhold, and whatever words there may be in the will, relative to the copyhold, can have no effect; " and therefore " I declare that the defendant *John Rogers* is intitled to the copy- " hold eſtate in queſtion, by ſurvivorſhip during his life, and to the " inheritance of one moiety thereof, and I do direct an account to " be taken of the rents and profits of the freehold and copyhold " eſtates of *Adam Churcher*, to the death of *Thomas Bonny*; and de- " cree, that the balance be divided into two moieties, and that one " moiety thereof be paid to *Martha* the wife of the plaintiff *John* " *Trodd*, and executrix of her brother *Thomas Bonny*; and the other " moiety to the defendant *John Rogers*; and I alſo direct an account " to be taken of the rents and profits of the ſaid freehold eſtate, ac- " crued ſince the death of *Thomas Bonny*, and decree that one moiety " of what ſhall be coming on the account, be paid to the plaintiffs, " and that the freehold eſtate be equally divided between the plain- " tiffs and the defendant *John Rogers*, and that a commiſſion do " iſſue for that purpoſe."

Caſe 220. *Jackſon* verſus *Butler and others*, *May* 24, 1742.

Mortgages were put into *Butler*'s hands, to receive the principal and intereſt, who pawned them to the defendant *Spring* for 100*l*. *Lord Hardwicke held*, *that as the pawner muſt by the deeds appear to have no property, he could not avoid decreeing* Spring *to deliver the deeds to the plaintiff, and leave the pawnee to his remedy at law againſt* Butler.

THE bill was brought againſt the defendant *Butler*, for refuſing to deliver deeds, the one a mortgage, and the other an aſſignment of a mortgage, which were put into his hands, in order to receive the principal and intereſt, and who had abuſed his truſt, by pawning them to one *Spring* for 100*l*. for which *Butler* likewiſe gave a note in his own name for the payment, and took a note alſo of *Spring* to return the deeds upon payment of principal and intereſt on the 100*l*.

LORD CHANCELLOR.

A bill here for the recovery of the deeds proper; for in an action of trover, the plaintiff could only have damages for the detainer.

The plaintiff might have had an action of trover, but then he could only have damages for the detaining, but not the deeds themſelves, and therefore is proper in bringing a bill here for the recovery of his deeds.

3

There

There ſeems to be little or no defence inſiſted on for the defendant *Butler*; and indeed a ſervant who has plate under his care, and who may commit felony of that plate, as he has neither a general or ſpecial property, might full as well juſtify the raiſing a ſum of money for his own uſe, by impoſing it upon the lender as his property, which is a ſtronger caſe than the preſent, as plate may have no mark upon it; but it is impoſſible the defendant *Butler* could impoſe upon another, for, by the deeds themſelves, he muſt appear to have no property; and even ſuppoſing it to be an attorney, who had deeds delivered to him, unleſs there is a bill due to him from the perſon who delivered them, he cannot juſtify detaining them.

The defendant *Spring* not appearing to have acted diſhoneſtly, but indiſcretely, was decreed to deliver the deeds to the plaintiff, but without coſts, and left to his remedy at law againſt the defendant *Butler*, upon the note for 100*l.*

Trelawney verſus *Booth*, *before Lord Hardwicke*, *cited in the cauſe of Petty* and *Barker*, *June* 2, 1742.

Caſe 221.

THE plaintiff, at the requeſt of Mr. *Booth*, lent him 500*l.* upon a note only, which he was incouraged to do, on *Booth*'s aſſuring him, by letter, he was very ſafe, for an aunt of his, by her will, had left him 4000*l.* which the court of Chancery had decreed him; but *Booth* dying ſoon after, and the repreſentative refuſing to pay the 500*l.* the bill was brought againſt him for the money; the defendant made it appear in the cauſe, that the 4000*l.* was not merely as a pecuniary legacy, but directed to be laid out in land, and reſettled upon Mr. *Booth* in fee; and the decree having purſued the will, *Lord Chancellor* was of opinion to diſmiſs the bill, but ſaid, at the ſame time, it was a very cruel caſe, and yet the plaintiff can have no relief, as it is the eſtabliſhed rule of the court, that money deviſed to be laid out in land, ſhall be conſidered as land, and therefore he could not break through it, notwithſtanding the particular hardſhip of this caſe, ſo as to let in a ſimple contract creditor upon money ſo deviſed.

The plaintiff lent *B.* 500l. on note, on an aſſurance that an aunt had left him 4000l. by will; *B.* died ſoon after, and his repreſentatives refuſed to pay the 500*l.* as the legacy was directed to be laid out in land, and ſettled on *B.* in fee: *Lord Hardwicke ſaid, it was a very cruel caſe, but as money deviſed to be laid out in land, is conſidered as land, the plaintiff can have no remedy.*

Caſe 222. *Lord George Beauclerk* verſus *Miſs Dormer*, *heard at Powis Houſe*, *June* 17, 1742.

K. by his will ſays, I make *D.* my ſole heir and executrix, and if ſhe dies without iſſue, *then* to go to Lord *George Beauclerk*: *D.* levied a fine, and ſuffered a recovery of the real eſtate, and inſiſts ſhe has an abſolute right both to the real and perſonal eſtates of the teſtator, and not obliged to account: *Lord Hardwicke held, the limitation over was void, and cannot be confined to the defendant's dying without iſſue living at the time of her deceaſe, and diſmiſſed the bill.*

THE queſtion in this cauſe aroſe upon the following will of General *Kirk*, dated *January* 1, 1742.

" Miſs *Dormer* I make my ſole heir and executrix; if ſhe dies " without iſſue, *then* to go to Lord *George Beauclerk*; he to pay " Lady *Diana Beauclerk* 5000*l.* to *Betty Gibbs*, and her grand- " daughter 100*l.* each, and Miſs *Dormer* to keep the old woman; " he then gives all his cloaths to one ſervant; his horſes to another; " and pecuniary legacies to all the reſt; and the will was ſigned by " him, in the preſence of three witneſſes."

The bill is brought in order to have an inventory from the defendant upon oath, of all the perſonal eſtate of *Kirk*, and that the plaintiff's intereſt in the perſonal eſtate may be eſtabliſhed by a decree of this court, and that the inventory may remain as an evidence of the perſonal eſtate, in caſe the contingency ſhould happen, on which the plaintiff becomes intitled.

The defendant has levied a fine, and ſuffered a recovery of the real eſtate, and inſiſts that ſhe has an abſolute right both to the real and perſonal eſtates, and that ſhe is not obliged to account.

Mr. *Noel*, for the plaintiff, cited *Donne* verſus *Merryfield*, *heard the 22d of October* 1734, *and mentioned in Sabbarton* verſus *Sabbarton*, *Stanley* verſus *Lee*, 2 *P. Wms.* 618. *Atkinſon* verſus *Hutchinſon*, 3 *P. Wms.* 258. *Forth* verſus *Chapman*, 1 *P. Wms.* 663. *Sabbarton* verſus *Sabbarton*, *Caſes in the time of Lord Talbot* 55 & 245.

Mr. *Clark*, of the ſame ſide, cited 1 *Leon.* 285, *Lee's caſe*. *Higgins* verſus *Dowler*, 1 *P. Wms* 98.

What was chiefly inſiſted on by the council for the plaintiff, was the intention of the teſtator, that if the defendant died without iſſue living at her death, that then Lord *George* ſhould take ſubject to the payment of the 5000*l.* to Lady *Diana Beauclerk*.

LORD

LORD CHANCELLOR.

There is no doubt as to the intention; but then the queſtion will be, whether the dying without iſſue is to be reſtrained to the *time of her death*, or at any time indefinitely.

Mr. *Murray*, of the ſame ſide, cited caſes to ſhew that the vulgar meaning of the words, dying without iſſue, *which is leaving no iſſue at the time of the death*, has always been regarded by the court. *Nichols* verſus *Hooper*, 1 *P. Wms.* 198. *Pinbury* verſus *Elkin*, 2 *Vern.* 758. *Target* verſus *Gaunt*, 1 *P. Wms.* 432. *Whitmore* verſus *Weld*, 1 *Vern.* 326. 2 *Vent.* 367. 2 *Ch. Ca.* 167. *Bellaſis* verſus *Uthwatt*, 1 *Tracy Atkyns* 426.

Mr. Attorney General, for the defendant, inſiſted, that the whole real and perſonal eſtate is given to Miſs *Dormer*, till there is a failure of iſſue generally, and if it had ſtood ſingly upon the word ſole heir and executrix, there can be no doubt, but Miſs *Dormer* would have been intitled to the abſolute property in both.

He cited caſes that were ſubſequent to thoſe mentioned for the plaintiff.

Green verſus *Rodd*, *June* 21, 1729, before Lord Chancellor *King*: The teſtator there directed his whole perſonal eſtate ſhould be turned into money, and placed out at intereſt, in the firſt place, to the uſe of his ſiſter *Mary*; and in caſe his ſiſter died without iſſue, then my will and meaning is, that the money directed to be put out to intereſt, ſhall be divided between my two other ſiſters, *Tereſa* and *Frances*, after the death of my ſiſter *Mary* aforeſaid.

Sir *Joſeph Jekyl* held the bequeſt over to be too remote, and therefore a void limitation.

Milward verſus *Milward*, *February* 1, 1734, before the ſame Maſter of the *Rolls*.

One *Milward* made a nuncupative will, directing, that all his mortgages and debts ſhould go to his ſons *John* and *Samuel*, paying 100*l.* each; and in caſe either of them ſhall die without iſſue, his part thereof ſhall go to my wife, and my two other ſons.

His Honour was of opinion, in the firſt place, that this was a tenancy in common, and not a jointenancy; and, in the next place, that the limitation to the wife, and other ſons, was too remote, and therefore void.

Mr. *Brown*, on the ſame ſide, cited *Richards* verſus *Lady Abergavenny*, 2 *Vern.* 324. *Clare* verſus *Clare*, *Caſes in Chan. in the time of Lord Talbot* 21. in order to ſhew that this limitation is to the defendant's iſſue generally, and the remainder to Lord *George* conſequently void, as being too remote.

As to the current of caſes upon this head, the former, he ſaid, went too far one way, and of late quite the contrary, but there is not one of the modern caſes, where there are not ſome words which ſhew the intention of the teſtator, that the firſt taker ſhould only have an eſtate for life, and therefore qualified the general eſtate, which the words would otherwiſe have given. *Love* and *Windham*, 1 *Sid.* 450.

Mr. *Ord*, for the defendant, ſaid, all the caſes cited for the plaintiff are truſts, in which the court lay hold of any minute circumſtance to ſupport the intention.

It is allowed, on all hands, the teſtator intended Miſs *Dormer* ſhould have an eſtate-tail in the real eſtate, and unleſs it is likewiſe conſtrued to give her an eſtate-tail in the perſonal, the words will be inconſiſtent, and have two different meanings, but the conſtruction we contend for, gives the words an uniform and conſiſtent meaning.

Mr. *Noel*, in reply, ſaid he did not apprehend that one general rule is to be laid down in theſe caſes, but the court will, in each particular caſe, put ſuch conſtruction as will beſt ſuit with the teſtator's intention.

That there are circumſtances here which ſhew the intention of the teſtator was to confine the bequeſt to Lord *George Beauclerk*, upon Miſs *Dormer*'s leaving no iſſue at the time of her death, and laid the greateſt ſtreſs upon the word *then*, *if ſhe dies without iſſue*, *then* to go, *&c.* as referring to a dying without iſſue, at the time of her death.

It does not follow, if the court ſhould be of opinion the teſtator has uſed ſuch words with regard to the real eſtate, as will not take effect according to his intention, becauſe repugnant to a rule of law, that therefore his intention ſhall not prevail with regard to the perſonal eſtate.

LORD CHANCELLOR.

There are a great variety of caſes upon the head on which this ariſes, of contingent limitations upon perſonal eſtate, and as they have grown up to a very large number, they have admitted of many niceties, and different determinations.

The *firſt* queſtion is, Whether there is any particular circumſtance in this caſe that can confine the words to *a dying without iſſue at the time of Miſs* Dormer's *death*; the caſes which have been cited are moſt properly applicable to this queſtion.

I am of opinion, that though there are ſome words which look this way, yet, in point of law, they will not admit of this conſtruction.

The word *then*, indeed, firſt occurred to me, but I do not recollect any caſe that has turned upon this word merely, for *then*, in the grammatical ſenſe, is an adverb of time, but in limitations of eſtates, and framing contingencies, it is a word of reference, and relates to the determination of the firſt limitation in the eſtate where the contingency ariſes.

Then, in the grammatical ſenſe, is an adverb of time, but in limitations, a word of reference, and relates to the determination of the firſt limitation in the eſtate.

In the caſe of *Pinbury* verſus *Elkin*, the words were, if ſhe ſhall die without iſſue by the ſaid teſtator, then after her deceaſe 80*l.* ſhall remain to the teſtator's brother.

Lord *Macclesfield* did not lay any ſtreſs upon the word *then*, but conſtrued the words *after her deceaſe*, in the ſame manner, as if it had been *at* her deceaſe, and ſo relative to the death of the party.

And if the court here was to lay any ſtreſs upon the word *then*, it would be going a great deal too far, for it is too ambiguous to be taken as an adverb of time, and therefore in this caſe does not aſcertain the point of time, but is merely relative to the determination of the limitation to Miſs *Dormer*, and the contingencies taking place.

With regard to Lady *Diana Beauclerk*'s 5000*l.* ſomething plauſible might be ſaid, if this was to be conſtrued as merely perſonal to her, and by way of proviſion as a portion, and not to ariſe unleſs Lady *Diana* ſurvived Miſs *Dormer*, for then, indeed, a ſtrong argument might be drawn from thence to ſhew the teſtator's meaning was to confine the dying without iſſue of Miſs *Dormer* to the time of her death.

But this being annexed by way of condition to the deviſe to Lord *George*, makes it a veſted legacy, and tranſmiſſible, though not payable till a future time, which takes away all the argument that might be raiſed from its being perſonal to her only, for a death before the contingency happens, will not defeat the legacy; and ſo laid down in the caſe of *King* and *Withers*, *Caſes in Chan. in the time of Lord Talbot* 117.

Thus

Thus much as to the words of limitation and condition annexed.

Lord Chancellor then aſked the counſel, who they underſtood by the *old woman in this will*; and they agreed on both ſides that it muſt be *Betty Gibs*, mentioned in the preceding words; then ſaid he, I take the 5000 *l.* to be the only contingent legacy: but if this to the old woman had been to ariſe upon the ſame contingency, I ſhould have thought the words, *Miſs Dormer to keep the old woman during her life*, would have ſhewn very plainly that the teſtator's intention was, that this legacy and the preceding ones ſhould take place at Miſs *Dormer*'s death; but now I muſt conſtrue the 100 *l.* to *Betty Gibbs* as a legacy payable immediately, and muſt neceſſarily have the ſame conſtruction with the legacies that follow, *videlicet*, to one ſervant his wearing apparel, and to another his horſes, which it would be abſurd to ſay, muſt wait the death of the defendant.

The ſecond queſtion is, whether a limitation over of perſonal eſtate after the death of the firſt taker without iſſue generally, is a good limitation.

A limitation over of perſonal eſtate after the death of the firſt taker without iſſue generally is void.

It has been allowed that if taken ſo as to include iſſue *in infinitum*, then the limitation over is void as to real, but a difference has been attempted as to perſonal chattels; this is the very firſt time where it has been contended that a limitation over of a perſonal thing, is to receive ſuch a conſtruction by the court as to mean a dying without iſſue at the death of the party, notwithſtanding there are no words in the will that indicate this to be the teſtator's intention.

The firſt caſe of executory deviſes was *Matthew Mannings*, 8 *Co.* 95. afterwards came *Lampet*'s caſe, 10 *Co.* 46. *b.* and ſeveral others which were all on terms for years, and partook of the realty; but the Judges had no notion of extending it to a perſonalty.

The next was the Duke of *Norfolk*'s caſe, *Select Caſ. in Ch.* 26. *vide* Lord *Nottingham*'s firſt argument upon a contingent limitation of a perſonalty.

Courts of equity will carry the limitation of a perſonal chattel, or truſt of it, no further than the Judges have done in the caſe of legal limitations of terms for years.

Courts of equity have gone further ſtill, and have admitted of the like limitations in perſonal, as in chattels real; but then they have declared at the ſame time that they will carry the limitation of a perſonal chattel, or truſt of it, no further than the Judges have done in a caſe of legal limitations of terms for years.

Atkinſon verſus *Hutchinſon* is plainly different from this, though the plaintiff's counſel inſiſt the laſt contingency in that caſe is expreſſed as generally as the contingency in the preſent; and taking it

as a ſingle independent ſentence, it is an authority; but the whole muſt be coupled together, and then the words, *if both die without iſſue*, muſt be conſtrued in the ſame manner as the court had conſtrued the former clauſe. *

Stanley verſus *Leigh*, 2 *P. W.* 618. has been cited.

I cannot think this an authority, becauſe the queſtion there aroſe upon a limitation to the ſons or daughters of the firſt taker, which never took effect, as there was no iſſue at all.

As to *Forth* and *Chapman*, I was council in it myſelf, and by the note I took upon the back of my brief, it appears that Lord *Macclesfield* laid a good deal of weight upon the particular penning of this will, if either of his nephews *William* or *Walter* ſhould depart this life, and leave no iſſue of their reſpective bodies; theſe words, he ſaid, muſt relate to the time of their deaths, and it would be a forced conſtruction to have extended it to a dying without iſſue generally.

According to Lord *Hardwicke*'s Note of *Forth* and *Chapman*, Lord *Macclesfield* held that the words *leave no iſſue*, muſt relate to the time of the deaths of the teſtator's two nephews *William* and *Walter*, and could not be extended to a dying without iſſue generally.

The determination of the caſe of *Pinbury* verſus *Elkin* turned, as I ſaid before, upon the latter words, *after her deceaſe*, which were conſtrued in the ſame ſenſe as *at* or immediately after her deceaſe.

In *Nicholls* verſus *Hooper*, 1 *P. Wms.* 198. the words were *to be paid within ſix months after the death of the ſurvivor of the ſaid mother and ſon*, which confine it clearly to his dying without iſſue at the time of his death, and therefore does not come up to the preſent caſe.

The general argument that the ſenſe of the words *dying without iſſue*, muſt, according to common parlance, mean without iſſue at the time of his death, is only taken in as an auxiliary in arguing theſe ſort of caſes; and I do not know one inſtance where the determination has turned ſingly upon this particular point.

In the caſe of *Kelly* verſus *Roſe*, before the committee of council 1723. I cited the caſe of *Target* verſus *Gaunt*, for the ſame purpoſe as the council for the plaintiff do now. But the *Maſter of the Rolls* ſaid, *dying without iſſue* there is meant ſuch iſſue as the firſt taker might have appointed, which muſt be intended iſſue then living.

* *Atkinſon* verſus *Hutchinſon*, 3 *Wms.* 258. Deviſe of a term to *A.* for life, remainder to the children *A. ſhall have at his death*, and if the children of *A.* die without iſſue, then to *B.* The children of *A.* die without leaving any iſſue living at the time of their death. Lord Chancellor *Talbot* held this a good deviſe over to *B.*

On the part of the defendant ſeveral caſes have been cited, two of them in point.

Milward verſus *Milward* indeed has leſs weight, becauſe there is not an exact account of it; but *Green* verſus *Rod* is a direct authority in point: I was council in it, and took notes upon my brief of what the court ſaid there. Lord Chancellor *King* delivered his opinion, that the main queſtion in the cauſe was, whether there were words in the will, to tie up the meaning to a dying without iſſue living at the time of her death; which ſhews very plainly that he thought there could be no foundation for ſuch a reſtriction, unleſs it was warranted by the words of the will.

There are ſeveral other caſes which might be cited, particularly the *Attorney General* in behalf of the goldſmiths company of *London*, verſus *Hall*, before Lord Chancellor *King*, *Trin.* 5 *Geo.* 2. aſſiſted by Sir *Joſeph Jekyll* and Lord Chief Baron *Reynolds*. *Vide Fitzgibbons's Rep.* 314, 321. and *Vin. Abr.* tit. *Deviſe*, *p.* 103. *pl.* 50.

There is no authority can be produced where it has been held, that a limitation of perſonal eſtate ſhall be confined to a dying without iſſue living at the death of *the firſt taker*.

But I am of opinion that none of the authorities come up to ſupport this point, contended for by the plaintiff's council, that *ex vi termini*, as this is a limitation of perſonal eſtate, it ſhall be confined to a dying without iſſue living at the time of the death of the firſt taker.

If the court ſhould admit of a diſtinction between chattels real and perſonal, it would introduce confuſion.

It would be of very miſchievous conſequence, and introduce great confuſion, if the court ſhould admit of a diſtinction between chattels perſonal and chattels real.

The third queſtion is, in what latitude and extent to conſider this deviſe.

By calling Miſs *Dormer* his ſole heir, he gives her the whole real eſtate: and according to the opinion of Lord *Hale*, in *King* againſt *Melling*, " a deviſe to a man, *and if he dies without iſſue*, is " always conſtrued to make an entail; and if the deviſe be to *B.* " and the iſſue of his body, having no iſſue at that time, it would " be an eſtate-tail; for the law will carry over the word *iſſue*, not " only to his immediate iſſue, but to all that ſhall deſcend from " him."

" The word *iſſue*, ſaid Lord *Hale*, is *nomen collectivum*, and " takes in the whole generation *ex vi termini*; and in all acts of " parliament *exitus* is as comprehenſive as heirs of the body, for " where it ſpeaks of the alienation of the donee, it is ſaid *quo minus* " *ad exitum remaneat.*" By appointing her executrix Miſs *Dormer* is equally intitled to the perſonal, as there is no legacy left to her.

What it is under this will that is to go to Lord *George Beauclerk*, whether one eſtate only, or both, is very uncertain; to apply the words to perſonal eſtate, which whether the teſtator himſelf has applied them to, *non conſtat*, would be going too far.

Indeed, the obſervation ariſing from the condition annexed, he to pay 5000 *l. &c.* is very material to ſhew it muſt extend to both; and then ſuppoſing the real eſtate had not been barred, and Miſs *Dormer* had died, leaving Lord *George* the 5000 *l.* it would have been a charge upon the real, as well as the perſonal.

Upon the whole, I do not think the conſtruction contended for on the behalf of the plaintiff, is ſupported by any caſe whatever; and therefore, as the words of this will are general, and unreſtrained, the limitation over muſt be void, and cannot be confined to the defendant's dying without iſſue living at the time of her deceaſe, and therefore the plaintiff's bill in this cauſe muſt be diſmiſſed.

Ex parte Whitfield, June 17, 1742.

Caſe 223.

WHEN this petition was formerly heard, I had a doubt whether the court could, upon *ex parte* applications, allow a maintenance for an infant, where no cauſe is depending, for it is at the peril of a guardian in ſocage, what he applies for maintenance, and he will be allowed according to the diſcretion he has uſed, and therefore I directed it to ſtand over for precedents.

The court, upon *ex parte* applications, may allow maintenance for an infant, where no cauſe is depending.

It is at the peril of a guardian in ſocage, what he applies for maintenance.

Two have been left with me, in caſes which came before the late *Maſter of the Rolls*, Sir *Joſeph Jekyll*, *July* 26, 1731, *ex parte Odel*, a petition for a guardian, maintenance, and a receiver; and there was no cauſe depending before the court, and yet the court directed according to the prayer of the petition.

This order ſeems to go too far in appointing a receiver.

For, ſuppoſing the court, as a proper incident for a guardian, ſhould direct a Maſter to ſee what is neceſſary for maintenance, yet the court has not a juriſdiction to appoint a receiver, unleſs a cauſe was depending; the caſe of ideots and lunaticks has been inſiſted on as a ſimilar caſe, but the juriſdiction which the court exerciſes with reſpect to them, is a particular one, and therefore not like the preſent.

The court has not a juriſdiction to appoint a receiver, unleſs a cauſe be depending. The juriſdiction the court exerciſes as to ideots and lunaticks, is a particular one.

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The ſecond precedent was on *Auguſt* 14, 1734, *ex parte Peplow*, *before Sir Joſeph Jekyll*, it was a petition to appoint a guardian, and for maintenance, and the court directed accordingly.

I have been looking into caſes, and find one in point, *Lady Tenham* verſus *Barret*; there was a petition to Lord *Macclesfield* in *December* 1723, and afterwards went upon an appeal to the Houſe of Lords, *April* 16, 1724, there Lady *Tenham*, the mother of the infant, was a papiſt; the young gentleman was intitled to two great eſtates, and to a barony in fee, and therefore incumbent upon the court to take care of his education, that he might be brought up a proteſtant.

The grandfather of the infant was named by the court, but being very old, and refuſing to accept of it, Mr. Serjeant *Baynes*, as recommended by him, was appointed guardian; and it was further directed, that a Maſter ſhould examine what Lady *Tenham* would allow for maintenance, and whether her offer would be ſuitable to his rank; ſhe appealed from this order to the Houſe of Lords, and inſiſted upon the guardianſhip; after long debate, they confirmed Lord *Macclesfield*'s order, except with this variation, that, inſtead of Serjeant *Baynes* being guardian, the grandfather ſhould be appointed, becauſe a ſtranger was not ſo proper to be truſted with it: It came before the Houſe of Lords likewiſe upon the order made on the Maſter's report, where he had reported 200*l. per ann.* as proper for maintenance; and the Lords confirmed Lord *Macclesfield*'s order in this reſpect likewiſe.

So here is a precedent in point, where maintenance has been allowed upon the authority of Lord *Macclesfield* and the Houſe of Lords, notwithſtanding there was no cauſe depending.

The convenience in theſe applications is, the inducement to perſons of worth, to accept of the guardianſhip, where they have the ſanction of this court for every thing they do on account of maintenance.

There may be a great convenience in applications of this kind, becauſe it may be a ſort of check upon infants, with regard to their behaviour, and it may be an inducement to perſons of worth, to accept of the guardianſhip, when they have the ſanction of this court for any thing they do on account of maintenance, which otherwiſe would be at their own peril; and likewiſe of uſe in ſaving the expence of a ſuit to an infant's eſtate.

Woodcraft verſus *Kinaſton*, *June* 21, 1742. Caſe 224.

A Motion was made at the laſt ſeal, to quaſh or ſuperſede a writ of *certiorari*, which iſſued out of this court, to remove a plaint of replevin in the Mayor's court of the city of *London*.

Where the tenor of a record, inſtead of the record it ſelf, is removed by *certiorari* out of an inferior court, it is erroneous, as no proceedings can be had upon it.

The writ was directed to the mayor and ſheriffs of *London*; "We "willing, for certain cauſes, to be certified upon the tenor and re- "cord of the proceſs of a certain plaint, what was before you in "your court, without our writ, between *George Woodcraft* gentle- "man, and *Andrew Kinaſton*, of the goods and chattels of the ſaid "*George*, unjuſtly taken, and detained, as it is ſaid, do command "you, that diſtinctly and plainly you ſend the tenor of the record, "and proceſs, of the ſaid plaint, with all things touching the ſame, "by whatſoever names the parties in the ſaid plaint are called, un- "der your ſeal to us in our Chancery, from the day of *Eaſter*, in "fifteen days next enſuing, whereſoever it ſhall then be, and this "writ. Witneſs our ſelf at *Weſtminſter*, *February* 19, in the 15th "year of our reign.

Mr. *Caldecot* objected at the laſt ſeal, that this writ was bad, becauſe the tenor of the record is only directed to be removed, and not the record it ſelf.

Where a replevin is in a court of record, you may remove it by a *certiorari*, either from the court of king's bench, or from this court.

Lord Chancellor, having taken time to conſider it, ſaid, where a replevin is in a court of record, you may remove it by *certiorari*, iſſuing either out of the court of King's Bench, or this court. *Theſau. Brev.* 77. *F. N. B.* 554. 4*to edit.*

As to the exception, that it is not to remove the record and proceſs, but the tenor, I think the writ is erroneous for this reaſon.

There is a great difference between the record it ſelf, and the tenor, for this is only a tranſcript or copy, indeed it muſt be literal, but ſtill it is only a tranſcript; and as this is a *certiorari* to remove a record out of an inferior court, in order to be proceeded upon in a ſuperior court, it ought to be the very record, for otherwiſe, no proceeding can be had upon it.

A *habeas corpus*, and a *certiorari* differ, that removes the body *cum cauſa*, and you declare *de novo* in the ſuperior court.

There is a difference between a *habeas corpus* and a *certiorari*, that removes the body *cum cauſa*, and then you muſt begin in the ſuperior court, and declare *de novo*; but on a *certiorari* you muſt proceed on the record, as it ſtands when removed.

Where a *certiorari* iſſues in order only to uſe the record as evidence, then the tenor, if returned, is ſufficient, and countervails the plea of *nul tiel record*; but when the record it ſelf is to be proceeded upon, the record muſt be returned.

There is another difference between *certioraries* themſelves; this preſent writ was framed, I believe, from *certioraries* brought for another purpoſe, for the precedents found in the Curſitors book, which I looked into, are ſuch, and they are in order only to uſe the record as evidence, for if *nul tiel record* be pleaded, the court cannot have the record but by *certiorari*, and then the tenor, if returned, is ſufficient, as evidence of the record, and will countervail the plea of *nul tiel record*; but when the record is to be proceeded upon, the record it ſelf muſt be returned. *F. N. B.* 548. *in the notes* (*a*) *Regiſter* 288, *b.*

Whether it be before judgment, or after, makes no difference, in both caſes the record it ſelf muſt be removed.

There is no difference when the proceeding upon the record is to be removed, whether it be before judgment or after, in both caſes the record it ſelf muſt be removed; if it was not ſo, this conſequence would follow, that by ſending for the tenor of the record, the inferior court would be tied up, and yet the ſuperior court could not proceed. *Salk.* 147 & 565. *

From theſe authorities, I think this certificate is erroneous, and if I ſend it to the Common pleas by *mittimus*, this exception might be taken there, and give great delay.

The queſtion then is, Whether I ought to quaſh or ſuperſede this writ?

The court may ſuperſede a certificate, but cannot quaſh it, without a view of the record.

And I am of opinion, that I cannot quaſh it, but muſt ſuperſede it, for I cannot quaſh but on a view of the record it ſelf, and ſo muſt wait for the return.

This came in queſtion in the great caſe of Sir *Joſeph Sharp*, and the mayor, aldermen, and commonalty of *London*, in the latter end of Queen *Ann*'s time, in the court of King's Bench.

A *mandamus* iſſued to them by corporate names, and, before the return, it was moved to quaſh it, becauſe miſdirected, for that it ought to have been to the mayor and aldermen only; this was argued, and the judges differed in opinion; but Mr. Juſtice *Eyre* took an objection, that the court could not quaſh the writ, becauſe it was not before them, as not being returned, and that it muſt be a *Superſedeas* only.

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* *Domina Regina* verſus *Paroch' St. Mary's in the Deviſes, Paſch.* 1 *Ann. B. R. Salk.* 147. On a *certiorari* to return an order, it was returned, *cujus quidem* tenor *ſequitur in hæc verba*; and it was quaſhed for this reaſon.

Dominus Rex verſus *North, Hill.* 8 *Will.* 3. *B. R. Salk.* 565. *per Holt* Ch. J. It is an error in the clerks in *London*, that upon a *certiorari* they return only a tranſcript, as if the record remained below; for in C. B. though they do not return the very individual record, yet the tranſcript is returned as if it were the record, and ſo it is in judgment at law.

And

And the whole court were unanimouſly of that opinion, in this reſpect, though they diſagreed in other points.

Let the writ be ſuperſeded, and a *procedendo* awarded.

Richards verſus *Symes*, *June* 26, 1742.

Caſe 225.

THE queſtion was, Whether there is grounds enough for a new trial?

The court will not grant a new trial upon a ſuggeſtion that the party was not apprized of a particular evidence, and therefore not prepared to give an anſwer.

The fact to be tried in the cauſe was, Whether Mr. *George Richards* gave the mortgage in queſtion to the defendant in equity.

Upon the trial, in order to diſcredit the evidence of one *Bere*, the moſt material witneſs for the defendant in equity, the plaintiff brought a perſon to ſwear, that this witneſs for the defendant was not in *England* at the time he ſwore to the fact.

Several affidavits were read, upon the motion, on the behalf of the defendant in equity, to prove that *Bere* was actually in *England* at the time he ſwore to the fact.

It was inſiſted therefore, by his council, that the credit of *Bere* being invalidated, as has been mentioned, weighed greatly with the jury, and was the principal reaſon that induced them to give the verdict for the plaintiff in equity.

It was inſiſted likewiſe, that the defendant in equity was not prepared to do any more than to ſupport the general character of his witneſſes, or otherwiſe could have given the ſame anſwer he is able to do now, if he had been aware of the objection.

LORD CHANCELLOR.

This is an application for a new trial, which comes before the court after a conſiderable length of time, as the verdict was given in *November* laſt.

The ground for the new trial is, that the defendant in this court was ſurprized with evidence he was not aware of, and ſo he was not prepared to anſwer it.

A great many objections have been made to this motion, both upon general and particular reaſons.

The firſt objection, That this is an application for a new trial, after a verdict found by a ſpecial jury upon a trial at bar.

A diſtinction was taken formerly, between trials at bar, and at *niſi prius*;

I do agree, that formerly ſome countenance has been ſhewn to this objection, and a diſtinction taken between trials at bar, and at *niſi prius*, becauſe the latter are ſubordinate to the other, and therefore not of ſo ſolemn a nature.

but in the caſe of the *Queen* and *The Bailiffs and Burgeſſes of Bewdley*, eleven judges againſt one determined a new trial ought to be granted.

But this point was ſolemnly conſidered upon the caſe of the *Queen* and *The Bailiffs and Burgeſſes of Bewdley*, 1 *P. Wms.* 207. where eleven judges againſt the ſingle opinion of Mr. Juſtice *John Powell*, determined that a new trial ought to be granted.

Another general objection was, that it is contrary to the rules in courts of common law.

For it was ſaid, they never grant a new trial there for want of the attendance of witneſſes, or of a party's not being ready.

The reaſon is plain, becauſe the iſſue there is barely drawn out upon the fact which is to be tried, and it is impoſſible to tell, whether a jury found a verdict upon the merits, or upon a diſcrediting of witneſſes; and courts at common law might ſet aſide a verdict nine times in ten, if it ſhould be a ground for a new trial, that one of the parties was not apprized of the evidence on the other ſide.

The intent of directing iſſues here, is only to inform the conſcience of the court, and therefore not tied down to the ſame ſtrictneſs of verdicts as courts of common law.

But then it is ſaid, and materially too, that there is a difference between iſſues at common law, and iſſues directed by this court, becauſe the intent of it here is only to inform the conſcience of the court, and therefore not tied down to the ſame ſtrictneſs and regard for verdicts as courts of common law.

A notice to the defendant before the trial, that the plaintiff will prove a perſon to be abroad, though it does not point out the particular place where, is ſufficient for the defendant to be prepared to encounter this evidence.

But, in the preſent caſe, there are no grounds for a new trial, the perſon who makes an affidavit on behalf of the defendant in equity, ſwears, that he gave *Richards* notice a fortnight before the trial, that they would on the other ſide attempt to prove *Bere* abroad, which though it was not ſo particular as to point out the very place where they would ſhew him to be, yet was ſufficient notice for *Richards* to prepare to encounter this evidence.

The caſe of the *Attorney General* verſus *Montgomery* has been mentioned, in which I granted a new trial, but upon very different reaſons from the preſent.

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I was then aware of the inconvenience which might ariſe from granting new trials, upon the diſcovery of new evidence relating to the ſame fact: But what I placed the chief weight upon was, that the evidence there was in the hands of the relators themſelves, and there was no kind of danger of perjury, and therefore can be no precedent in the preſent caſe.

There is another reaſon that weighs with me, that the new trial is prayed on behalf of the plaintiff at law, and if it had been better made out, I ſhould not have inclined to grant it, becauſe it was in his power to have been nonſuited; for if his council had been of opinion that there was evidence that they were not apprized of, and too ſtrong for them to encounter, they might have adviſed him to ſuffer a nonſuit, and then he might have come back to this court for new directions, who would have ordered another iſſue at law notwithſtanding the nonſuit.

If there is evidence a plaintiff is not apprized of, he may ſuffer a nonſuit, and on his coming back to this court, I would have ordered another iſſue at law, notwithſtanding the nonſuit.

Upon the whole, there are no grounds for a new trial, and of extreme dangerous conſequence, to grant it merely upon a ſuggeſtion, that the party was not apprized of this evidence, and therefore was not prepared to give an anſwer.

Richards verſus *Baker and others*, *June* 26, 1742. Caſe 226.

THE queſtion in this cauſe aroſe upon the words of Mr. *John Richards*'s will, dated *Auguſt* 10, 1736, and came on upon an appeal from the *Rolls*.

The queſtion was, Whether the words in a will, *ſo long as my wife continues a widow, and no longer*, are to be confined to the teſtator's houſe at *Edmonton*, or to be extended to the whole that was deviſed to her: *Lord Hardwicke held, that the houſhold goods, furniture, plate, linen, and china, were put under the ſame reſtriction as the houſe itſelf; but that the jewels, coach, chariot, and coach-horſes, were the wife's abſolute property.*

The teſtator gave two thouſand pounds to his wife *Dorothy Richards*, to be paid in ſix months after his deceaſe; and then ſays, I do alſo *give and bequeath* unto my dear and loving wife, all my houſhold goods, furniture, plate, linen, and china, in my houſe at *Edmonton*, wherein I now dwell, or to the ſaid houſe *belonging*; and alſo the ſaid houſe, gardens, field and land *thereto belonging*, ſo long as ſhe continues my widow, and no longer: And I likewiſe give her my jewels, coach, chariot, and coach-horſes; and the teſtator gave the reſidue of his perſonal eſtate to the child his wife was then enſeint with, if a ſon, and appointed him executor of his will.

This cauſe was heard before the *Maſter of the Rolls*, on the 23d of *December* 1737, who decreed, " that the defendant *Dorothy Ri-* " *chards* ſhould leave with the Maſter, a ſchedule of the ſeveral " things ſpecifically bequeathed to her during her widowhood.

It was inſiſted by the council for the teſtator's widow, that the condition of her marrying again, is to be confined to the firſt part of the legacy, which ends with the words *his houſe at Edmonton*; and that the words *and alſo the ſaid houſe, gardens*, &c. *together with my jewels*, &c. is an abſolute deviſe to the widow, and that ſhe has the whole property in them, and not ſubject to the condition; and as the words, *ſo long as ſhe continues a widow*, are interlined between the firſt clauſe, they ſhall be confined to that only, and the other are abſolute legacies.

The council for the defendant inſiſted it is one intire clauſe, and muſt be taken together, and then the condition extends to the whole; and relied upon *Roll's Abr.* 844. *Tit. Eſtate pur Vie ou auterment*, *ſ.* 3. and upon the caſe of *Leake* verſus *Bennet*, 1 *Tr. Atkyns Rep.* 470.

The Attorney General, in reply, inſiſted the teſtator could not have his ſon much in his contemplation, becauſe he was not born till after his death, and it was uncertain what the iſſue would be, whether a ſon or a daughter, and therefore there is no great weight to be laid on his affection to the ſon.

LORD CHANCELLOR.

The queſtion comes before me upon the conſtruction of the will of Mr. *Richards*; the two thouſand pounds is an abſolute legacy to his wife; but I am to determine what is the relation and extent of the words of limitation *ſo long as ſhe continues a widow, and no longer*, whether they are to be confined to the houſe at *Edmonton*, or to be extended to the whole.

I cannot be of opinion that the words ſhould be ſo reſtrained as not to extend to the houſhold goods, *&c.*

In the firſt place, it is a natural conſtruction, for when the teſtator gives her the houſhold goods, *&c.* it is not a general deviſe of them, and when he gave her too the houſe in the country, it was extremely natural to put the goods, *&c.* under the ſame reſtriction as the houſe it ſelf; the words directly purſue the natural meaning, for they both fall under the ſame deviſing words, give and bequeath, and likewiſe too under the deſignation of the donee, for they are part of the ſame ſentence. *Vide the caſe of Cole* verſus *Rawlinſon*, 1 *Salk.* 234. where the words *and alſo* were held to make it one intire ſentence.

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This caſe is much ſtronger, for the words of limitation follow both the deviſe of the houſhold goods, *&c.* and the deviſe of the houſe, and the putting limiting words in the firſt or laſt part of the ſentence makes no difference.

The putting limiting words in the firſt or laſt part of a ſentence, makes no difference as to the conſtruction.

As to the obſervation from the interlineation, and the inference drawn from thence, as if this was a new intention of the teſtator, for the will was written compleat, and that he afterwards bethought himſelf, he would give her the houſe for life only; it is too uncertain a ſuggeſtion, and I cannot infer that this was an intention by way of new deviſe, for poſſibly it might be an error in the copier, and reſtored only by the teſtator himſelf, for the words *belonging* coming ſo near together, might lead the copier into a ſlip of one line, and there are frequent inſtances in *Greek* and *Latin* manuſcripts, where this ſlip has happened from the ſame words ſtanding too near together, and therefore I am of opinion, the widow has no title to the houſhold goods, *&c.* nor the houſe, garden, *&c.* any longer than her widowhood.

As to the clauſe of the deviſe of the *jewels, coach, chariot,* and *coach-horſes,* it is of a different conſideration.

A teſtator may give one thing to a perſon for life, together with an abſolute property in another, unleſs the latter ſhould be appurtenant to the thing before given.

For I may give one thing to a perſon for life, together with an abſolute property in another, unleſs the latter ſhould be appurtenant and appendant to the thing before given; but here the things are of a quite different nature, and have no manner of relation to the houſe and gardens.

And if Mr. *Fawks*'s obſervation was juſt, that the words of limitation were inſerted upon a new intention, then being placed before the deviſe of jewels, *&c.* are an indication of the teſtator's intention to exclude theſe laſt words, and if they had not been excluded, I ſhould ſtill have been of the ſame opinion, becauſe the limiting words would have been more naturally placed at the end of the whole deviſe to the wife, together with jewels, *&c.* ſo long as ſhe continues a widow, and no longer.

But whether I am right or not in this conſtruction, there can be no great harm in permitting the mother to keep theſe things in her poſſeſſion, till her ſon, who is an infant of very tender years, comes of age.

Lord Hardwicke ordered, " that the decree at the *Rolls* be varied, " by leaving out the clauſe mentioned already at the beginning of " the caſe; and declared, that the defendant *Dorothy Clarke* (late " *Dorothy Richards*), *is intitled* to the abſolute property of the " jewels, coach, chariot, and coach-horſes, given to her by the " will of Mr. *John Richards*, but that *ſhe was intitled only* to the

" uſe of the teſtator's houſhold goods, furniture, plate, linen, and " china, in his houſe at *Edmonton*, wherein he dwelt, or to the " houſe belonging, *during her widowhood:* And ordered and de- " creed, that the defendant *Dorothy*, and *Samuel Clarke* her huſ- " band, do cauſe the ſame to be delivered over to the teſtator's " executors."

Caſe 227. *Bennet* verſus *Vade and others*, *June* 28, 1742.

The plaintiff, as heir at law to Sir *John Lee*, brought a bill to ſet aſide a conveyance of the eſtate of the defendant, on a ſuggeſtion of fraud, impoſition, and undue influence: Lord *Hardwicke* held, the plaintiff ought to be relieved, and decreed the deed ſhould be delivered, and poſſeſſion of the eſtate likewiſe given to him.

A Bill was brought by the plaintiff, as heir at law to Sir *John Lee*, to ſet aſide a conveyance of his eſtate to the defendant, upon a ſuggeſtion of fraud and impoſition, and the undue influence that *Vade* in particular had over him.

LORD CHANCELLOR.

I am of opinion the plaintiff in the original bill ought to be relieved.

Settled ever ſince the caſe of *Powis* and *Andrews*, that a will cannot be ſet aſide for fraud here, becauſe where it is a will of perſonal eſtate, it may be done in the eccleſiaſtical court, and of real eſtate, at law.

The principal queſtion muſt ariſe upon the original bill; ſo far as the bill ſeeks to ſet aſide the will it is improper, for this court cannot make a decree of this kind, but only direct an iſſue, *deviſavit vel non*; for it is ſettled, ever ſince the caſe of *Powis* and *Andrews*, upon an appeal from Lord *Macclesfield*'s decree, *February* 6, 1723, to the Houſe of Lords, that a will cannot be ſet aſide for fraud and impoſition here, becauſe a will of perſonal eſtate may be ſet aſide in the eccleſiaſtical court for fraud, and of real eſtate, at law; and the reaſon is, that the *animus teſtandi*, which is eſſential to the making of a will, is wanting in this caſe, and therefore cannot be conſidered as a will at all.

But the recovery here has very luckily relieved the court from this part of the caſe; for by the over diligence and aſſiduity of the defendant, he has defeated himſelf, which is a very common caſe, and is the interpoſition of providence, to prevent the ill conſequences of fraud.

Where the tenant in a common recovery has not pleaded non-tenure, he gains a new eſtate, though the limitations are to the old uſes, and the will is revoked by it.

Sir *John Lee*, the tenant, has not pleaded non-tenure, therefore he gained a new eſtate, though the limitations are to the old uſes, and the will is revoked by it. *Vide* Lord Chief Juſtice *Holt's* argument upon this point, in the caſe of *Page* verſus *Hayward*, *Salk.* 570.

It

It has been objected that the bill charges inſanity in Sir *John Lee*, and at the ſame time his council put it intirely upon his weakneſs.

The plaintiff, to be ſure, was right in coming here upon the head of fraud and impoſition, to have the deeds delivered up to be cancelled, and for that reaſon, proper in amending his bill, and charging fraud in order to ſet aſide the deeds, or if the court ſhould be of opinion that it is merely a matter triable at law, then they might diſmiſs it to law; nor is there any thing irregular in a perſon's bringing a bill with two different aſpects, that if one fails, the other may as effectually anſwer the purpoſe for which the bill was brought.

A perſon may bring a bill with two different aſpects, that if one fails the other may as effectually anſwer the purpoſe for which the bill was brought.

I ſhall take it for granted, that Sir *John Lee*'s diſorder is neither idiotiſm nor lunacy, from the inquiſition in 1733, but ſtill I think this is rather evidence for the plaintiff than the defendant.

The boundary is ſo narrow and ſtreight between a perſon who is *non compos mentis*, and who is ſo weak as Sir *John Lee* appears to have been, that it ought not to overturn the plaintiff's equity, becauſe ſome of his witneſſes go ſo far as to give ſuch inſtances as amount to lunacy or idiotiſm.

There cannot be a greater inſtance of weakneſs, than the caution Mr. *Onſlow* thought himſelf obliged to give Sir *John Lee*, which was to avoid ſigning any writing or paper whatſoever; it is like a nurſe warning a child not to go near water for fear of being drowned.

It is proved he was addicted to drinking likewiſe, which added to his natural diſability.

It is argued by the witneſſes on both ſides, he was almoſt dark, that one eye was intirely gone, and but a ſmall glimmering of light from the other.

Another great inſtance of weakneſs is proved in this cauſe, that they married him without his ſo much as knowing that he was ſo, or even without the decency of making a previous propoſal to him, and I think this one of the ſtrongeſt marks of weakneſs, and liableneſs to impoſition, that ever I met with.

Sir *John Lee*'s repeating ſcraps of *Latin*, and reading the *Claſſic* authors, is no proof of his ſanity, becauſe what a perſon learns in his youth leaves a laſting impreſſion, and the traces of it are never intirely worn out, and therefore I lay no weight upon it; and though I

I do not ſay the inquiſition upon the commiſſion of lunacy have done wrong in finding him no lunatick on circumſtances laid before them; yet I think I am as right in determining him to be a weak man, upon the circumſtances which are laid before me.

The ſecond conſideration is, the ſtrong proofs likewiſe of the defendant's power and influence over Sir *John Lee*; there is one remarkable inſtance of his ſtanding in awe of *Vade*; that, whenever he was outragious, the bare name of *Vade* would quiet him, as a nurſe does a child.

The third conſideration is, as to the deeds; Sir *John Lee* died *January* 27th, 1736; the ſettlement of the whole eſtate upon *Vade*, by way of leaſe and releaſe, was dated the ninth and tenth of the *December* before, with two very extraordinary proviſoes; firſt, to reſtrain Sir *John Lee*, during his life, from taking any fine or leaſing, without reſerving the full rent; and ſecondly, *the power of revocation*, which is ſo expreſſed as that the deed is not to be revoked by Sir *John*, but in the preſence of *three particular perſons therein named, or of their executors or adminiſtrators.*

By this ſettlement, Sir *John Lee* is made to diſinherit his heir at law abſolutely, and to give his eſtate away from his next of kin, to *Vade* and others, who are no relations, for whom he never had declared any kindneſs, ſo as to create an apprehenſion that he intended to give them his eſtate, nor had they done any thing to merit it at his hands: Here is a voluntary ſettlement, and the grantor himſelf ſo fettered, that he is not able to raiſe one ſhilling, and as much confined as if it had been a marriage ſettlement for a valuable conſideration.

As to the power of revocation, the moſt extraordinary I ever ſaw, for the drawers of this deed foreſaw, if there had been no ſuch power, it would have been almoſt of it ſelf a reaſon to have ſet the deed aſide, and therefore, for form ſake, have inſerted one; but there is no proof that Sir *John Lee* directed this particular revocation; there is no proof that he was acquainted with any one of the gentlemen named in the deed; and how could Sir *John Lee* have got them all together upon any ſudden illneſs, who lived at diſtances from one another, or how could he force them to come if they ſhould refuſe?

A will would have diſpoſed of the whole as well as this conveyance; but in order to ſecure it effectually, the defendant *Vade* thought this method better, for fear Sir *John Lee* might be got out of their hands, and make a new will.

The caſe of the Duke of *Albemarle* was quite different from the preſent; before he ſet out for his government at *Jamaica*, a deed was prepared by his direction, and ſigned by Sir *William Jones*, who peruſed it at his requeſt, and the power of revocation there was in the preſence of any ſix peers, not tied down to particular perſons; is this at all like the preſent, where there were no previous inſtructions from Sir *John Lee*, no peruſal of council on his behalf, and a power of revocation limited to three perſons by name, and almoſt impracticable to be performed?

Next, as to the execution of it; the deed is not proved to be ſo much as read to Sir *John Lee* in the rough draught before the execution, nor in the engroſſment at the time it was executed, but *one part* executed, and not left with Sir *John Lee*, or any body for him; then how could he remember the power of revocation? and therefore *Vade*'s taking away the deed thus executed, amounts in effect to the ſame thing as if it had been an abſolute conveyance, without any power of *revocation* at all.

Not reading a deed to a perſon in the rough draught before the execution, nor in the engroſſment at the time it was executed, is a badge of fraud.

All the conveyances were executed after *Vade* had got an intire influence over him; for beſides this deed, the attorney who drew it, *Wildman*, has an annuity to himſelf and his wife of 40 *l. per ann.* during their joint lives, and to the ſurvivor; they had no merit as to Sir *John Lee*, but was only huſh money from *Vade*, beſides annuities of 30 *l.* to two other perſons. *Vide* the caſe of *Standard* verſus *Lee*, which went up to the houſe of Lords.

It is ſaid by the defendant's council, that if Sir *John Lee* was not inſane, but only weak, he might do an act that will bind him.

And very rightly obſerved, for there cannot, as is truly ſaid, be two rules of judging in law, and in this court, upon the point of inſanity.

The rules of judging here and at law in caſes of inſanity are the ſame.

The only part that deſerves to be conſidered, is the plain intention Sir *John Lee* had to diſinherit his heir; but then it will depend upon this queſtion, whether this too was not owing to the power and undue influence *Vade* had over him, and the frequent opportunities they took of incenſing Sir *John Lee* againſt his heir, upon account of the inquiſition of lunacy.

Therefore, ſuppoſing he had a real intention of diſinheriting his heir at law, if it was owing to fraud and impoſition, this will fetch back and reveſt it in the heir; and if the ſettlement is out of the caſe, no body can have it but the heir; and this is ſettled by variety of caſes. It comes neareſt to the caſe of *Top* and *Stanhope*, which went up to the houſe of Peers *May* 27, 1720. The power of impoſition in that caſe was not the tenth part ſo ſtrong as in the preſent.

Though a perſon has an intention to diſinherit his heir, yet if it was owing to fraud, this will fetch back and reveſt it in the heir.

The

The proviſion for creditors is a very honeſt one; and therefore I ſhall direct the truſtees for this purpoſe under the ſettlement to convey to the plaintiff, with a ſaving of the intereſt of Sir *John Lee*'s creditors, if any ſhould hereafter appear.

The deed was decreed to be delivered up to the plaintiff, and poſſeſſion of the eſtate likewiſe to be given to him immediately, and *Vade* ordered to pay coſts.

An attorney's ſaying that he only followed directions in drawing deeds under fraudulent circumſtances, will not excuſe him from paying coſts.

As to *Wildman*, I would not have it laid down as a rule, that an attorney or ſolicitor, who draws deeds under fraudulent circumſtances, ſhall afterwards, to ſave coſts, excuſe himſelf in court by ſaying that he could only follow directions, and therefore is not to be involved in the blame of the tranſaction; but here, there is an additional circumſtance of the annuity to himſelf and his wife, which puts it out of all doubt that he ought to pay coſts; and ordered accordingly.

Caſe 228. *Attorney General* verſus *Bucknall*, *June* 23, 1741.

LORD CHANCELLOR.

Any perſon, though the moſt remote in the contemplation of the charity, may be relators in an information.

IT is not abſolutely neceſſary that relators in an information for a charity, ſhould be the perſons principally intereſted, for the court will take care at the hearing to decree in ſuch a manner as will beſt anſwer the purpoſes of the charity; and therefore any perſons, though the moſt remote in the contemplation of the charity, may be relators in theſe caſes.

It is doubtful in this caſe, whether the donor of this charity intended the capital ſum to be diſpoſed of for the purpoſe in the information mentioned, or only the intereſt and produce of it.

I do not know any inſtance where this court in any caſe of charity whatſoever have taken to themſelves ſuch an arbitrary diſpoſition, as to confine it to a gift of the intereſt and produce only, when there is no more certainty of the donor's giving the capital than the intereſt, but is left quite obſcure, and in the dark.

The Maſter directed to inquire who come under the deſcription of the donor, as proper objects of charity.

Haughton

Haughton verſus *Harriſon*, *June* 30, 1742. Caſe 229.

A Queſtion aroſe upon the will of *Thomas Haughton*, dated the 14th of *October* 1738. " He gives a legacy of 500 *l.* to be " paid to his grandſon *Thomas Price*, the ſon of *Mary Price*, if he " lived to be twenty-one, and in caſe he ſhould die before, then to " the other child or children of his daughter, *equally*, *arriving to* " *ſuch age.*" And after ſome ſmall legacies gave all the reſt and reſidue of his perſonal eſtate to the plaintiff, and died the 18th of *October* 1738. and ſince his death, *Thomas Price* his grandſon died under the age of twenty-one years, and there being no child or children of *Mary Price* born or living at the teſtator's death, the plaintiff inſiſted *the five hundred pounds* ought not to be raiſed, but ſink into the reſiduum of the teſtator's eſtate for the plaintiff's benefit.

T. H. gives 500 *l.* by his will to be paid to his grandſon *T. P.* if he lived to be 21, and in caſe he died before, then to the other child or children of his daughter *M. P.* equally, arriving to ſuch an age. *T. P.* died before 21, and no child of *M. P.* was born or living at the teſtator's death. *The grandchildren born after the death of* T. H. *were intitled to the* 500 *l. for not being* in eſſe *in his life-time, he muſt have had in his view the future children of his daughter.*

It was inſiſted likewiſe by the counſel for the plaintiff the heir at law, and only ſon of the teſtator, that the latter legacy to the child or children of Mrs. *Price* is equally contingent with the legacy to *Thomas Price*, and muſt wait till they arrive at their age of twenty-one, and therefore does not carry any intereſt in the mean time.

The council for the defendants *Mary Price* and *Pindock Price*, the brother and ſiſter of *Thomas Price*, inſiſted, that the teſtator, in caſe of *Thomas Price*'s death before 21, gave the *five hundred pounds* to the other child or children of his daughter equally arriving to ſuch age, and that *Mary Price* and *Pindock Price* are intitled thereto, though not born till after the teſtator's death; and that the words, *if Thomas Price lived to be twenty one*, muſt be taken in the ſame ſenſe as the words *ſo ſoon as he attained his age of* 21, would have been, and therefore not contingent as to the payment; and that as it is one entire ſentence, the latter part by relation will equally carry intereſt to the other child or children of Mrs. *Price*, as to *Thomas Price*.

LORD CHANCELLOR.

It is plain the grandchildren born after the teſtator's death are intitled, for as they were not *in eſſe* in his life-time, the teſtator muſt have had in his view future children of his daughter: but I am of opinion they are not intitled to intereſt, though I would help them if I poſſibly could.

A parent is bound by nature to ſupport a child; but this has not been extended to grandchildren, and therefore not intitled to intereſt.

If this legacy had been left upon no condition but to be paid to *Thomas Price* at his age of twenty-one, and not given over, then it would have been a legacy veſted, and tranſmiſſible; but ſtill no intereſt could have been demanded, unleſs it be in the caſe of a child, who had no other maintenance or proviſion, for a parent is bound by nature to ſupport a child; but this has not been carried ſo far as the caſe of grandchildren.

But here it is ſtill ſtronger, for this is not a veſted legacy; for in caſe *Thomas* died before twenty-one, it is given over.

If the child or children of *Mary Price* arrive at 21, then the 500*l.* was directed to be paid to them, and intereſt from the time it becomes payable.

The words, *equally arriving at the age of twenty-one*, muſt be conſtrued agreeable to the other words, and therefore it will ſtill remain a doubt, whether any thing veſts till twenty-one: but I ſhall not determine this now, and will only direct the five hundred pounds to be put out to intereſt, and to be paid in the mean time to the plaintiff; and if the child or children of Mrs. *Price* arrive at their ages of twenty-one, then the principal ſum of five hundred pounds to be paid to them, and intereſt from the time it becomes payable.

Caſe 230. *Thornhill* verſus *Evans*, *July* 2, 1742.

A mortgagee, where the mortgage was only 4 and ½ *per cent.* compelled the mortgagor to turn the intereſt into principal at 5 *per cent.* at the end of every ſix months,

A Bill was brought by the plaintiff as a mortgagor, to be relieved againſt the defendant the mortgagee, for taking the advantage of his neceſſities, and forcing him at the end of every ſix months, to turn the intereſt into principal at 5 *per cent.* whereas the original mortgage was only 4 and ½, and for inſiſting, at the time the mortgage was paid off, upon an advance of ſix months intereſt, over and above the intereſt which was due upon the mortgage, notwithſtanding the mortgagor had given the defendant ſix months notice of his paying off the mortgage.

and at the time the mortgage was paid off, inſiſted on an advance of ſix months intereſt, over and above the intereſt which was due. The bill was brought for relief againſt the mortgagee, and to ſet aſide the grant to the defendant of the place of ſteward to a manor of the plaintiff's as obtained by fraud. *Lord Hardwicke relieved the plaintiff* into, *both in reſpect to the tranſactions relating to the mortgage, and alſo in regard to the grant of the ſtewardſhip.*

The bill is likewiſe brought to ſet aſide a grant to the defendant of the place of ſteward to a private manor of the plaintiff's, as it was obtained by fraud and impoſition, the defendant making the plaintiff believe that the grant of the ſtewardſhip was ſo drawn, that he might revoke it at pleaſure, and at the ſame time the defendant had taken it to himſelf and his heirs.

LORD

LORD CHANCELLOR.

Where there is an act of extortion, this court will decree a refunding without inquiring into the particular circumſtances of impoſition.

I am ſurprized and ſorry that this affair is brought before the court, and am clearly of opinion that the plaintiff is intitled to be relieved upon the principal matters prayed by his bill.

The firſt relief prayed, is in reſpect of the computation of intereſt, by turning it into principal, and charging 5 *per cent.* intereſt upon the intereſt at the end of every ſix months.

Secondly, In reſpect to 119 *l.* 16 *s.* 3 *d.* advanced for the laſt ſix months intereſt over and above the common intereſt.

Thirdly, The fifty days intereſt after the notice expired for paying off the mortgage, which was entirely owing to the defendant's own delay.

As to the firſt; the excuſe for the defendant is, that if a mortgagor does not pay intereſt regularly, the mortgagee may upon agreement turn the intereſt into principal; but then it muſt be done fairly, and is generally upon the advance of freſh money, and even then it is reckoned a hardſhip upon a mortgagor, and an act of oppreſſion: nor is there any proof here of freſh money lent.

An agreement to turn intereſt upon a mortgage into principal, muſt be done fairly, and on the advance of freſh money.

But what weighs with me is the computation at the end of every ſix months, and the turning intereſt into principal, and making that intereſt carry 5 *per cent.* when the original mortgage carried but 4 and $\frac{1}{2}$, which is a very extraordinary proceeding, and therefore upon this part of the caſe the plaintiff is to be relieved: and I ſhall direct the Maſter to take an account only of what is due upon the 4000 *l.* at 4 and $\frac{1}{2}$ *per cent.* and the plaintiff to pay no more than 4 and $\frac{1}{2}$ for any freſh money that ſhall appear to be due to the defendant.

Lord *Hardwicke* directed the Maſter to take an account only of what is due on the original ſum at 4 and $\frac{1}{2}$ *per cent.* and the plaintiff to pay the ſame rate of intereſt for any freſh money that ſhall appear to be due.

Secondly, As to the 119 *l.* 16 *s.* 3 *d.* advanced for the laſt ſix months intereſt over and above the common intereſt.

This is a moſt extravagant affair; nor is there any colour for taking a double intereſt upon the laſt half year; the pretence indeed is, that the plaintiff by way of gratuity for ſervices formerly done agreed to give double intereſt for the laſt ſix months, whenever he paid off the mortgage.

This court will not ſuffer a council to maintain an action for fees, or if he happens to be a mortgagee, to inſiſt on more than legal intereſt, under pretence of a gratuity for buſineſs formerly done in the way of council.

Can it be thought that this court will ſuffer a gentleman of the bar, to maintain an action for fees, which is *quiddam honorarium*, or if he happens to be a mortgagee, to inſiſt upon more than the legal intereſt, under pretence of gratuity or fees for buſineſs formerly done in the way of a council? To admit ſuch a clandeſtine way of coming at fees, is of much worſe conſequence than the other.

A mortgagee may refuſe to part with the deeds till the money is paid, but ought not to deny an inſpection in his hands.

It has been ſaid, and truly ſaid, a mortgagee may refuſe to part with the deeds till his money is paid; but ſtill a fair mortgagee will not deny an inſpection of deeds in his hands, when he has notice to be paid off.

The conſequence then of this is, that the ſum of 119*l.* 16*s.* 3*d.* muſt be refunded, with the intereſt which has been received upon it.

Thirdly, In reſpect to the fifty days intereſt after the notice expired for paying off the mortgage.

Though intereſt is in arrear when the mortgage is paid, a mortgagee ſhall not have intereſt for that intereſt.

The principle which the defendant goes upon is, that if intereſt is in arrear when the mortgage is paid off, he ſhall have intereſt for that intereſt, which was never allowed of in a court of equity.

Fourthly, As to the grant of a ſtewardſhip in fee.

It is void *ipſo facto*, for it may poſſibly come to a woman, which is not to be ſuffered where it is a judicial office.

The queſtion here, whether it is an impoſition: in the firſt place it has not been proved the plaintiff ever looked upon the grant; and very liable to be impoſed upon, ſuppoſing he had read it, ſince he did not know what an inheritance was, notwithſtanding he ſaw the grant was to a man and his heirs.

Beſides, the defendant abuſed the truſt which this gentleman repoſed in him; for as he was his council, he ought to have told him the effect of theſe words.

The defendant having abuſed the truſt repoſed in him, and manifeſtly intending to get the eſtate into his own hands, the grant of the ſtewardſhip muſt be delivered up, and the plaintiff muſt have his coſts of this ſuit.

Another ſtrong ingredient in this caſe is, the defendant's manifeſt intention to get the eſtate into his own hands; and therefore taking it with the other circumſtances, this grant muſt be delivered up to the plaintiff; and he muſt likewiſe have his coſts to this time; and I reſerve the other coſts till it comes back upon the Maſter's report.

2

Anon.

Anon. July 2, 1742. Caſe 231.

LENGTH of time was inſiſted on by the defendant, as a bar to the redemption of a mortgage ſought by the plaintiff's bill, it being as long ago as the year 1713.

Length of time pleaded in bar to a redemption of a mortgage, being made in 1713. the mortgagor's ſolicitor appearing to have ſettled an account in 1730. in order to pay off the mortgage, Lord *Hardwicke* held that would ſave the right of redemption.

LORD CHANCELLOR.

I own I am not for encouraging redemption of mortgages of very long ſtanding, but then the court muſt not wink ſo hard as not to allow of it in any caſe.

Here there is a pretence of coverture, which is no excuſe, becauſe if a woman becomes afterwards diſcovert, the ſtatute of limitations will run from that time, and though ſhe ſhould marry again, it will run after the ſecond marriage.

Coverture is no excuſe for not redeeming a mortgage; for if a woman becomes afterwards diſcovert, the ſtatute of limitations will run from that time.

The next excuſe is that here was a tenancy by the curteſy, but there would be no bounds to a redemption if this was an excuſe, and no mortgagee could ever be quieted in the poſſeſſion: for it is of no conſequence to the mortgagee, who had the equity of redemption, if they do not make uſe of that right, they ſhall be barred.

Tenancy by the curteſy is no excuſe, for it is of no conſequence to a mortgagee, who has the equity of redemption; if they do not make uſe of their right, they ſhall be barred.

But though the mortgage was in 1713. in the preſent caſe, yet no longer ago than 1730. the clerk to the ſolicitor for the mortgagor had actually ſettled an account of what was due for principal and intereſt, in order to pay off the mortgage; and though no further proceedings been had, yet that ſhall ſave the right of redemption; but however, I will not over-rule the plea entirely, but reſerve it till the hearing.

Clarke verſus *Periam, July* 3, 1741. *upon a rehearing.* Caſe 232.

THIS was a bill brought by the plaintiff, to eſtabliſh a bond for ſecuring an annuity of ſixty pounds *per ann.* given her as *præmium pudicitiæ*; the defendant by a croſs-bill inſiſts the plaintiff was a lewd woman, and a common proſtitute, and for that reaſon

A bill brought to eſtabliſh a bond, for ſecuring an annuity of 60 *l. per ann.* given the plaintiff, as *præmium pudicitiæ*; a croſs bill praying the ſecurity may be delivered up, as the plaintiff was a common proſtitute. The defendant's council offered to prove the plaintiff guilty of lewdneſs with a particular perſon; it was objected, the charge in the croſs bill being only ſhe was a lewd woman, the defendant ought to confine herſelf to a general character, and not to particular inſtances. *Lord Hardwicke thought the objection of great conſequence to the practice of the court, and took time to conſider till the firſt day of rehearings after the term.*

was not intitled to have the annuity eſtabliſhed, and therefore prays that the ſecurity may be delivered up.

Mr. *Clarke* council for the plaintiff in the original cauſe,
Said the annuity is only ſixty pounds *per ann.* and not to take place till after the death of the obligor.

A material piece of evidence was offered now for the plaintiff, which was not at the former hearing, the regiſter of her baptiſm, which appeared to be in 1711, and therefore ſhe could be only 16 at the time of her acquaintance with *Periam*, in the year 1727. and he was then of full age, ſo that it cannot be conceived that ſhe was capable of impoſing upon him, and ſeducing him to the giving this bond; for the law preſumes infants not capable to govern and manage themſelves, much leſs of impoſing upon others, eſpecially on perſons of full age.

Ten witneſſes for Mrs. *Clark*, and only one of them a relation, ſwear poſitively, that ſhe had an unblemiſhed character, previous to her acquaintance with *Periam*.

There is no evidence of her returning to vicious courſes after *Periam* left her, which muſt have been the natural conſequence, if ſhe had been abandoned before, and therefore this is a ſtrong preſumption ſhe was not a lewd woman.

There are but four witneſſes for the defendant, who ſwear to particular inſtances of lewdneſs, and theſe not from their own knowledge, but that they were told ſo by perſons who had a criminal converſation with her.

The council for the defendant offered evidence to prove the plaintiff guilty of acts of lewdneſs with a particular perſon, one Mr. *Abingdon*, before ſhe was acquainted with *Periam*.

An objection was taken by the plaintiff's council, that the charge in the croſs bill is only that Mrs. *Clark* was a lewd woman of an infamous character, and that the bill does not require any anſwer to this, and therefore the defendant in the evidence ought to confine himſelf to a general character, and not to particular inſtances, according to the rule of law upon examining to characters; for the charge here is ſo looſe and general, that it was impoſſible for the plaintiff to know at what time or place, or with what perſon, they intended to charge her with acts of lewdneſs.

And that in order to let them into this evidence, they ought to have charged that ſhe was kept by the perſon, they pretend to have had criminal converſation with her.

The

The allegation is general, that ſhe is a lewd woman, but the evidence goes to particular inſtances of proſtituting her chaſtity.

Mr. *Murray* on the ſame ſide argued, that they ought to be confined to evidence as general as the allegation: in every caſe at law, where the character of a perſon is called in queſtion, there the examination muſt be general; and goes on good grounds, becauſe they will not ſuffer witneſſes to come upon ſurprize, with particular inſtances, which the party is not prepared to anſwer.

If they had examined to her being a lewd woman in general, or to her being generally of an infamous character, it would have been relevant to the iſſue.

The caſe of Lord and Lady *Donerail*, which has been mentioned by Mr. *Clark*, is not fully ſtated, becauſe taken only from the printed caſes.

By the bill, Lady *Donerail* charged that after her marriage ſhe behaved with the utmoſt duty and tenderneſs.

Lord *Donerail* in his anſwer ſays, ſhe did not behave with that duty and affection as became a virtuous woman, much leſs this defendant's wife.

Virtue, when applied to a wife, in all languages is emphatically applied to chaſtity.

The evidence in that caſe to ſupport the defendant's charge, was a particular inſtance of lewdneſs with Mr. *Barry*: the Lord Chancellor of *Ireland* was of opinion it ſhould be read; and upon the ſtrength of this evidence chiefly, diſmiſſed Lady *Donerail*'s bill; ſhe appealed to the houſe of Lords, and in *February* 1734-5. it was heard: and upon the dangerous conſequence of admitting ſuch evidence, on general charges to the character and reputation of women, the houſe of Lords would not permit it to be read.

It could not poſſibly be foreſeen what this witneſs would ſay, and therefore the plaintiff was not capable of croſs-examining him to this particular fact.

Mr. Attorney General inſiſted, in ſupport of the propriety of this evidence, that in the caſe of *Bennet* verſus *Vade*, *June* 28, 1742. though the allegations were general, and general weakneſs only charged upon Sir *John Lee*, yet the court admitted inſtances of particular weakneſs to be read, which is a parallel caſe with the preſent.

He

He ſaid in the caſe of Lord and Lady *Donerail*, the doubt in the houſe of Lords was, whether the word *virtuous*, in the defendant's charge, could let him into proof of her violating her chaſtity; and the Lords were of opinion, that as the very maintenance and ſupport of Lady *Donerail* depended upon the event of this cauſe, that they ought to be tender of giving too great a latitude to the word *virtuous*, or extend it to one virtue more than another, and therefore denied the evidence.

He cited *Sidney* verſus *Sidney*, which was firſt heard at the *Rolls*, where Sir *Joſeph Jekyll* allowed evidence to be read of the ſame kind with this; but *Mr. Attorney General* ſaid he was doubtful, whether Lord Chancellor *Talbot* on the appeal admitted it; to which the plaintiff's council made anſwer, that his Lordſhip refuſed to admit it. 3 *Wms.* 269. Mr. *Brown* of the ſame ſide,

It has been ſaid no evidence muſt be read in this court, unleſs the nature of the evidence itſelf is put in iſſue.

Where lewdneſs is charged upon a woman, is it neceſſary to ſet forth at what particular tavern, or with what particular gentleman, ſhe has been guilty of lewdneſs?

Beſides, this would be attended with ill conſequences, becauſe it would lay open the caſe too much, and put the adverſary party upon their guard, and give them an opportunity of ſquaring their own evidence, by the proofs of the other ſide,

In caſes of inſanity, the court never expect particular acts to be charged, and yet the evidence goes to particular inſtances.

Mr. *Weldon* of the ſame ſide, inſiſted, that the interrogatories were general, and that this evidence came out upon the general interrogatory of, Is ſhe? or is ſhe not a lewd woman, and of an infamous character?

LORD CHANCELLOR.

I do not remember that this objection was made at the former hearing; and as the chief ſtreſs of the cauſe depends upon it, it is become a queſtion of very great weight, and therefore I will put it off to the firſt day of rehearings after term, and will look in the mean time into the caſe of Lord and Lady *Donerail*, and *Sidney* and *Sidney*, and *Cox* and *Robinſon*, about a twelvemonth ago in *Lincolns-Inn Hall*; this queſtion beſides is of great conſequence to the rules and practice of the court, and therefore deſerves conſideration.

Clark verſus *Periam*, *July* 27, 1742. *Rehearing*. Caſe 233.

LORD CHANCELLOR.

THE queſtion, upon which this cauſe ſtood over, was, whether the depoſition of one *Rogers*, taken in behalf of the defendant in the original cauſe, ought to be read; it is an attempt to prove that Mrs. *Clark*, before the time of *Periam*'s giving the bond to her, was kept by a particular perſon one Mr. *Abingdon*, and had criminal converſation with him.

The objection is, that the particular facts to which *Rogers* is examined ſhould have been put in iſſue ſpecially, and that they are not ſufficiently ſo in this cauſe.

It is ſufficient to put in iſſue a general charge of lewdneſs, and under this you may give particular evidence, but then it muſt be pointed and applied to the general charge.

As to the nature of the ſuits, the original bill is brought to have ſatisfaction out of the perſonal eſtate of the late Mr. *Periam*, for the bond.

The croſs bill is brought by the widow of Mr. *Periam*, and is to be relieved againſt this bond, and to have it cancelled; and the equity is founded upon this, that it was given by Mr. *Periam* to Mrs. *Clark*, *ex turpi Cauſâ*, and that ſhe was a lewd woman of an infamous character, and therefore it is inſiſted the court ſhould relieve againſt it.

The council for the plaintiff in the original bill inſiſt, that under this allegation in the croſs bill, the plaintiff there is not intitled to examine to any thing but her character in general, becauſe it is impoſſible for Mrs. *Clark*, to be prepared, to give an anſwer to the particular facts charged; for though every body is ſuppoſed to be ready to ſupport a general character, yet not a particular fact.

But I am of opinion the preſent caſe differs from all thoſe caſes relating to examinations to general characters, both as to the reaſon of the thing, and as to the authorities.

In the firſt place with regard to authorities, there is one in point, *Whaley* verſus *Norton & al'*, 1 *Vern.* 483. I do not mention this caſe as an authority of judgment, but only to ſhew the intention of the court, and the bar at that time; for it was not put in iſſue there, that the defendant was a common ſtrumpet. *

* The bill was to be relieved againſt a bond to a woman whom the plaintiff kept, it not being charged or put in iſſue in the cauſe, that ſhe was a common ſtrumpet, the depoſitions to this fact though proved, not allowed to be read. 1 *Vern.* 483.

There have been two caſes ſince I ſat in this court; the firſt was *Atkins* verſus *Farr*, *February* 28, 1738. *vide T. Atk.* 287. The charge there was, that at and before the time of his becoming acquainted with her, ſhe was a woman of lewd fame and bad character, and an orange girl at the playhouſe.

The next was *Robinſon* verſus *Cox*, after *T. term* 1741. the charge there, that ſhe was a woman of lewd fame; and they entered into the moſt particular account and particular facts that could poſſibly be imagined, of drawers being ſent by gentlemen to bring her to particular taverns.

And yet the preſent objection was not then made in either of thoſe caſes, it being the common way of charging matters of this ſort; ſo that what is now diſputed, was thought to be the rule of evidence at that time.

That a wife *has miſbehaved herſelf*, does not imply ſhe is an adultreſs, and a depoſition in that caſe to prove her one, ought not to be read.

In the caſe of *Sidney* verſus *Sidney*, *February* 7, 1722. at the *Rolls*, a bill was brought for performance of articles entered into before marriage, by the wife againſt the huſband: Sir *Joſeph Jekyll* diſmiſſed the bill, and was of opinion that the depoſition in that caſe to prove her an adultreſs, ought not to be read, becauſe the anſwer of the huſband had not put the charge of adultery in iſſue, for the words were, *ſhe had miſbehaved herſelf*, which does not imply adultery, for you muſt certainly make a general charge of it.

Saying that a wife did not behave with that duty as became a virtuous woman, will not intitle the huſband to enter into proof of her committing adultery, unleſs there is an expreſs charge of this kind, for the virtue of a woman does not conſiſt merely in her chaſtity.

The caſe which is principally relied upon for the plaintiff in the original cauſe, is, Lord and Lady *Donerail* 1735.

The bill was brought by her for ſeparate maintenance; the queſtion aroſe upon this; Lady *Donerail* had charged by way of merit, that ſhe had behaved with the utmoſt duty and reſpect.

My Lord *Donerail* in bar to the equity inſiſted on by the bill, ſays in his anſwer, *ſhe did not behave with that duty and affection as became a virtuous woman, much leſs this defendant's wife.* In order to ſupport this ſuggeſtion, he entered into particular facts of her adultery with one *Barry*, and in the Chancery in *Ireland* the depoſitions were read; but upon an appeal to the houſe of Lords here, they were not admitted.

I was not preſent in the houſe of Lords at the hearing of that cauſe, and therefore do not know the particular reaſons; but a very ſtrong one appears upon the pleadings themſelves, which diſtinguiſh it from the preſent caſe, and brings it to that of *Sidney* verſus *Sidney*, becauſe there is no expreſs charge of adultery in Lord *Donerail's* anſwer.

The

The virtue of a woman does not conſiſt merely in her chaſtity, for ſhe may be guilty of acts of cruelty; and indeed it appeared in this very cauſe that ſhe had not only uſed her huſband with inhumanity, but beat him; a woman too may be addicted to gaming, and other extravagancies, which is not a virtuous behaviour.

In the preſent caſe the plaintiff herſelf has laid a foundation, by ſuggeſting that ſhe was a kept miſtreſs.

Theſe are all the authorities: from thence may be gathered the uniform ſenſe in thoſe determinations, that it was ſufficient to put in iſſue a general charge of lewdneſs, and that under this you may give particular evidence; and I think I have heard it laid down ſo by Sir *Joſeph Jekyll*; but then your particular evidence muſt be pointed, and applied to the general charge.

If you was to alledge in the bill, that the woman was kept by particular gentlemen, or had criminal converſation with particular perſons, the character of ſtrangers might ſuffer, and bills would be ſtuffed with indecent matter and private ſcandal.

Improper to charge in a bill, a woman had criminal converſation with particular perſons, as it would affect the character of ſtrangers, and fill it with private ſcandal.

Secondly, As to the reaſon of the thing.

The caſes urged by the plaintiff's council in the original cauſe relating to criminal proſecutions, muſt be allowed to be law; for in examining to characters you can only enter into general facts; but if there is a criminal proſecution, and the priſoner, in order to ſtrengthen the evidence for his character, enters into particular facts to ſupport it; this is called a challenge to the proſecutor, and then he may likewiſe examine to particular facts.

Where in a criminal proſecution, the priſoner to ſtrengthen his character enters into particular facts to ſupport it, the proſecutor may likewiſe examine to particular facts.

But in criminal proſecutions it comes in only collaterally and incidentally, and is not the particular thing to be tried; and when that is the caſe, they are not ſuppoſed to be prepared with evidence.

But compare this with caſes where the character is the particular iſſue to be tried: ſuppoſe in the caſe of an indictment for keeping a common bawdy-houſe, without charging any particular fact, though the charge is general, yet at the trial you may give in evidence particular facts, and the particular time of doing them; the ſame rule as to keeping a common gaming-houſe.

In an indictment for keeping a common bawdy-houſe, or gaming-houſe, though the charge is general, yet you may give particular facts in evidence.

This

In an iſſue on *non compos mentis*, you may give particular acts of madneſs in evidence, and not general only, that he is inſane.

This is the practice in all caſes where the general behaviour, or quality, or circumſtance of the mind, is the thing in iſſue; as for inſtance in *non compos mentis*, it is the experience of every day, that you give particular acts of madneſs in evidence, and not general only, that he is inſane; ſo where you charge that a man is addicted to drinking, and liable to be impoſed upon, you are not confined in general to his being a drunkard, but particular inſtances are allowed to be given.

In an indictment *of barretry*, the defendant is intitled *to a copy of the articles*, which are to be inſiſted on againſt him at the trial.

Indeed there is one, the caſe of barretry, which is contrary, where in an indictment for this offence, the defendant ought to have *a copy of the articles* to be inſiſted on againſt him at the trial, before-hand, that he may have an opportunity of preparing a defence; but that is a particular caſe, and differs from all others; for the drawing the line between purſuing him as a barretor, and following the courſe of his profeſſion as an attorney, is a very difficult thing, becauſe it is a crime of which an attorney for the moſt part only can be guilty.

Where the general life or converſation is in iſſue, the perſon muſt be prepared to invalidate that evidence, otherwiſe where it comes in *collaterally*.

Where-ever the general life or converſation is put in iſſue, it is notice to the perſon who is charged, that ſhe ſhould be prepared to take off the weight of that evidence; but where it comes in collaterally, you ſhall be confined to general evidence.

This ſeems to me to be the diſtinction, and the grounds of it; and if I was of a different opinion, I ſhould overturn the conſtant courſe of this court, and make the greateſt confuſion.

Lord Chancellor upon the merits of the cauſe propoſed, that the bond ſhould be delivered up to be cancelled, and that there ſhould be no coſts on either ſide, upon which it ſtood over for the plaintiff's counſel to recommend it to their client to acquieſce under this propoſal.

The next day, by the conſent of the parties in both cauſes, Lord *Hardwicke* ordered that a perpetual injunction be awarded to ſtay the proceedings at law of the plaintiff, in the original cauſe on the bond in queſtion.

Merſon

Merſon verſus *Blackmore*, *July* 12, 1742. *at the Rolls.* Caſe 234.

THE queſtion aroſe upon the will of one *John Moore*.

" All his lands, tenements and meſſuages whatſoever, after " debts and legacies paid, and funeral expences are diſcharged, the " teſtator gives to his brother-in-law *James Merſon* the plaintiff."

A teſtator gives to *James Merſon* all his lands, tenements and meſſuages whatſoever, after debts and legacies paid, and funeral expences are diſcharged: the debts being charged only contingently on the real, if the perſonal eſtate ſhould be deficient, the Maſter of the Rolls held the plaintiff has only an eſtate for life.

The queſtion, whether this is a deviſe in fee to the plaintiff, or only an eſtate for life.

Brown for the plaintiff cited the caſe of *Freake* verſus *Lee*, 2 *Lev.* 249. and Sir *Th. Jones* 113.

The will ſets out too with general words, As to all my worldly goods whatſoever, I intend to diſpoſe of as follows; which ſhews the teſtator's intention to diſpoſe of the whole. The legacies too are appointed to be paid in two months, which amount to more than the annual value of the eſtate deviſed, and conſequently muſt be a deviſe in fee, or otherwiſe the plaintiff would be a loſer inſtead of receiving any benefit from this legacy.

Mr. *Harvey*, for the defendant the heir at law, cited 1 *Cro.* 330. *Dickens* verſus *Marſhall*, mentioned by Lord Ch. Juſt. *Holt* in *Cole* verſus *Rollinſon*, *Salk.* 234.

Maſter of the Rolls. Where a groſs ſum is to be paid out of the lands, to be ſure, it gives a fee to the deviſee of thoſe lands.

But here the debts are not at all events charged upon the real eſtate, but only contingently, if the perſonal eſtate ſhould be deficient.

And therefore does not come up to the caſes cited of a groſs ſum to be paid out of land, and conſequently gives no more than an eſtate for life to the plaintiff the deviſee.

But at the inſtance of the plaintiff's counſel reſerved this point till it comes back upon the Maſter's report.

Caſe 235. *Pope* verſus *Curl*, *June* 17, 1741.

The defendant, on his anſwer being put in, moved to diſſolve an injunction againſt his vending a book of letters from *Swift*, *Pope*, and others.

A Motion was made on behalf of *Curl* the bookſeller, upon his having put in his anſwer to diſſolve an injunction, which Mr. *Pope* had obtained, againſt his vending a book intitled, *Letters from Swift, Pope, and others.*

LORD CHANCELLOR.

The firſt queſtion is, whether letters are within the grounds and intention of the ſtatute made in the 8th year of Queen *Anne*, *c.* 19. intitled, An act for the encouragement of learning, by veſting the copies of printed books in the authors or purchaſers of ſuch copies.

A collection of letters, as well as other books, is within the intention of the 8th of Queen *Anne*, the act for the encouragement of learning.

I think it would be extremely miſchievous, to make a diſtinction between a book of letters, which comes out into the world, either by the permiſſion of the writer, or the receiver of them, and any other learned work.

The ſame objection would hold againſt ſermons, which the author may never intend ſhould be publiſhed, but are collected from looſe papers, and brought out after his death.

Another objection has been made by the defendant's council, that where a man writes a letter, it is in the nature of a gift to the receiver.

The receiver of a letter has at moſt a joint property with the writer, and the poſſeſſion does not give him a licence to publiſh.

But I am of opinion that it is only a ſpecial property in the receiver, poſſibly the property of the paper may belong to him; but this does not give a licence to any perſon whatſoever to publiſh them to the world, for at moſt the receiver has only a joint property with the writer.

The ſecond queſtion is, whether a book originally printed in *Ireland*, is lawful prize to the bookſellers here.

Reprinting a book in *England*, which originally was pirated and printed in *Ireland*, will not be ſuffered, being a mere evaſion of *the act*.

If I ſhould be of that opinion, it would have very pernicious conſequences, for then a bookſeller who has got a printed copy of a book, has nothing elſe to do but ſend it over to *Ireland* to be printed, and then by pretending to reprint it only in *England*, will by this means intirely evade the act of parliament.

It has been inſiſted on by the defendant's council, that this is a ſort of work which does not come within the meaning of the act of Parliament, becauſe it contains only letters on familiar ſubjects,

and

and inquiries after the health of friends, and cannot properly be called a learned work.

It is certain that no works have done more ſervice to mankind, than thoſe which have appeared in this ſhape, upon familiar ſubjects, and which perhaps were never intended to be publiſhed; and it is this makes them ſo valuable; for I muſt confeſs for my own part, that letters which are very elaborately written, and originally intended for the preſs, are generally the moſt inſignificant, and very little worth any perſon's reading.

No works have done more ſervice to mankind than thoſe upon familiar ſubjects, and which never were intended to be publiſhed.

The injunction was continued by *Lord Chancellor* only as to thoſe letters, which are under Mr. *Pope*'s name in the book, and which are written *by him*, and not as to thoſe which are written *to him*.

The injunction continued as to letters written by Mr. *Pope*, not as to thoſe written to him.

Guillam verſus *Holland et e contra*, *October* 14, 1741. *in the paper of exceptions.*

Caſe 236.

WHERE, ſaid *Lord Chancellor*, *a portion is* charged upon land, and the will does not mention intereſt, the court will not give any more than 4 *per cent.* though the legal intereſt is 5 *per cent.* this is a rule which has been laid down of late years, and has been extended likewiſe to caſes, where legacies and portions are charged upon perſonal eſtates.

It is the rule of this court to allow no more than 4 *per cent.* where the will does not mention intereſt on portions charged upon land, and has alſo been extended to the caſes of legacies and portions charged upon perſonal eſtate.

Booth verſus *Booth*, *July* 14, 1742.

Caſe 237.

A Bill was brought by the plaintiff againſt the defendant for an account of the rents and profits of an eſtate during the time he was guardian to the plaintiff's brother, and for an injunction to ſtay the defendant's proceedings upon an ejectment for the poſſeſſion of the eſtate which is mortgaged to him; becauſe he is proceeding in this court to foreclоſe the equity of redemption.

LORD CHANCELLOR.

Though the defendant is foreclоſing the equity of redemption here, yet he is not precluded from bringing an ejectment at law at the ſame time, unleſs there is ſomething very particular to take it out of the common caſe.

A mortgagee is not precluded from bringing an ejectment at law at the ſame time he has a bill of foreclоſure depending here.

The

The only material queſtion is, whether there are any grounds for me to preſume the mortgage is ſatisfied: As to the perſonal eſtate, it is moſt clear that the plaintiff's brother was an incumbered man, and that he made an aſſignment of it to a neighbour before his death.

Then how can I infer neceſſarily from this, that the mortgage is ſatisfied: eſpecially when two witneſſes ſwear for the defendant, that upon his quitting and delivering up the poſſeſſion of the mortgaged premiſſes, he did it upon theſe expreſs terms, provided the intereſt due on the mortgage ſhould be paid.

But however it is not quite ſo clear as the common caſe, being entangled with an account of the perſonal eſtate, and therefore if the plaintiff will agree to give ſecurity to redeem, I will direct an injunction to ſtay proceedings upon the ejectment, which may be better for all parties, as it will keep the poſſeſſion in ſuſpence till the account is determined.

Caſe 238. *Smith* verſus *Newport and the Earl of Bradford, July* 14, 1742. *before the Maſter of the Rolls.*

The Earl of *Bradford*, by his will gave all his eſtate to truſtees, in truſt for the defendant Mr. *Newport* and the heirs of his body, and to pay ſuch ſums out of the rents and profits for his maintenance, as Lord *Bradford* ſhould by any writing appoint. By a codicil, he directs the truſtees, during Mr. *Newport*'s minority, to pay the rents to the plaintiff, ſo much as ſhe pleaſes to be applied for his maintenance, and the reſidue to her own uſe; by another codicil directs the truſtees ſhall not ſettle the eſtate on Mr. *Newport* and the heirs of his body till 26. and till then ſuch maintenance as the truſtees and the plaintiff ſhall think fit. Mrs. *Smith* inſiſted ſhe was intitled to receive the rents and profits till Mr. *Newport* attained the age of 26. but the Maſter of the Rolls was of opinion they veſted in Mr. *Newport* at 21. and the time of receiving prolonged only till 26. and decreed the truſtees ſhould account for the rents, *&c.* from his age of 21 to 26. to the committee of his eſtate, Mr. *Newport* being found a lunatick.

THE only material queſtion in this cauſe is, to whom the rents and profits of the late Earl of *Bradford*'s eſtate ſhall go from the defendant *Newport*'s age of 21 till his age of 26.

The plaintiff Mrs. *Smith* and the defendant Mr. *Newport* found their claim upon the will and codicils of the Earl of *Bradford.*

The Earl of *Bradford* upon neither, but merely as heir at law to his brother the late Earl.

The late Earl by his will dated the 8th of *May* 1730. "gives all "his eſtate to truſtees and their heirs, in Truſt by ſale or mortgage "to pay all his debts and legacies, and chargeable as aforeſaid, de- "viſed that the ſaid truſtees ſhould ſtand ſeiſed of the real eſtate in "truſt for the only uſe of the defendant Mr. *Newport* and the heirs "of his body, and for default of ſuch iſſue, in truſt for ſuch per- "ſon and perſons, and for ſuch eſtate and eſtates, as the teſtator "ſhould by any deed or writing direct and appoint; and for want

" of ſuch direction, then to teſtator's own right heirs: and that the " truſtees ſhould out of the rents and profits of his real eſtate pay " ſuch ſums of money for the education of the defendant Mr. *New-* " *port* during his minority, as the teſtator ſhould by any deed or " writing direct and appoint."

" By his ſecond codicil the teſtator directs, that the truſtees ſhould " during the minority of Mr. *Newport*, till the time of his death, " in caſe he ſhould die before twenty-one, pay the rents of all " his eſtate to the plaintiff Mrs. *Smith*, ſo much thereof as ſhe ſhould " think proper to be applied for his maintenance, and the reſidue " to her own ſeparate uſe."

By his third codicil, reciting the will and former codicils, " he " expreſsly directs, that the truſtees ſhall not ſettle the eſtate on the " defendant Mr. *Newport* and the heirs of his body until he ſhall " attain 26 years, and until that age he ſhould have ſuch handſome " allowance for his maintenance as the plaintiff *Smith* and the truſ- " ſtees ſhould think fit.

The teſtator died the 25th of *December* 1734. the plaintiff brought her bill in 1735. for ſeveral purpoſes, and among the reſt to be let into the poſſeſſion of the ſeveral eſtates till the defendant Mr. *Newport* ſhould be intitled. It was decreed in 1739. that the plaintiff ſhould be paid the ſurplus rents and profits till the defendant Mr. *Newport* ſhould attain his age of 21. and upon his attaining that age, all parties were to be at liberty to apply for further directions touching the ſaid truſt eſtate. And on this day it came on before his Honour for further directions.

Maſter of the Rolls. * I ſhall firſt conſider the queſtion as it ſtands between the plaintiff and Mr. *Newport*.

* *William Forteſcue*, Eſq;

It is inſiſted by Mrs. *Smith*, that ſhe is intitled to the rents and profits of all the real eſtates deviſed under the will of the late Earl of *Bradford* till Mr. *Newport*'s age of 21. and that the teſtator having by his third codicil prolonged the time till his age of 26. it will follow as a natural conſequence that the teſtator intended ſhe ſhould receive the rents and profits till that time.

I may here obſeve, firſt, that the plaintiff is not intitled merely as the defendant Mr. *Newport* is a minor, nor is the direction that the rents and profits ſhould be paid to her during his minority ſufficient to intitle her, but the words *till he arrives at his age of* 21.

The teſtator's intention in extending it to Mr. *Newport*'s age of 26. ſeems to me to be, to prevent him from alienating at 21. and therefore it does not neceſſarily follow, that by prolonging the time

he has given the rents and profits to the plaintiff till the defendant Mr. *Newport* attains his age of 26. for it might be intended too, to prevent any extravagance he ſhould be guilty of at ſo young an age as 21. and it might be done too in order to lay up money from his age of 21 to 26. to pay off the incumbrances upon the eſtate. No neceſſary concluſion therefore can be drawn from it one way or another.

It is certain the intention of the teſtator was, that the plaintiff ſhould enjoy the rents and profits of all the eſtates till Mr. *Newport* attained his age of 21. but if he intended that ſhe ſhould likewiſe have the rents till he arrived at 26. he would have directed it over again in the ſame manner as he had done with regard to his age of 21. and the third codicil ſhall not be extended to make any alteration in the will further than the expreſs words will warrant.

Upon the whole of this point I am of opinion the plaintiff is not intitled to the rents from the defendant Mr. *Newport*'s age of 21. to his age of 26.

The ſecond queſtion is between the defendant Mr. *Newport* and the Earl of *Bradford*.

Whether the rents and profits are diſpoſed of by the teſtator at all between Mr. *Newport*'s age of 21 and his age of 26.

It is ſaid very truly, an heir at law ſhall not be diſinherited by implication only; and for this purpoſe were cited the caſes of *Stephens* verſus *Stephens*, *Caſes in the time of Lord Talbot* 228. and *Hopkins* verſus *Hopkins*, *Id.* 44.

With regard to this queſtion, it muſt be conſidered that the heir at law is diſinherited by the expreſs words of the will, for the whole eſtate is given to truſtees and their heirs, in truſt for the defendant Mr. *Newport* in tail, and the plaintiff *Smith* in fee, ſo that the whole is diſpoſed of, the legal eſtate veſting in truſtees for the uſe of the defendant Mr. *Newport*, and in default of iſſue of him, to the plaintiff and her heirs; therefore the heir at law can have nothing, unleſs there is a revocation of what is before diſpoſed of.

Now the third codicil does not revoke the eſtate-tail given to the defendant Mr. *Newport*, but only prolongs the time of his coming into poſſeſſion: Can this then amount to a revocation of the will as to the intermediate time; or does a direction that the rents and profits be not paid to Mr. *Newport* till his age of 26. prevent their going to the defendant Mr. *Newport?* I apprehend not at all: for though he is not to have the rents and profits till his age of 26. yet his intereſt in them is not taken away; and though they are not immediately to be paid, yet they veſt notwithſtanding.

Therefore I am of opinion that here is nothing undiſpoſed of under this will, but that the rents and profits veſt in the defendant Mr. *Newport* at 21. and the time of receiving only is prolonged till his age of 26 years.

For theſe reaſons I muſt decree the truſtees to account for the rents and profits during this intermediate time from his age of 21 to his age of 26. to the committee of the defendant *Newport*'s eſtate, he being found a lunatick.

Matthews verſus *Cartwright*, *July* 16, 1742. Caſe 239.

THE plaintiff had a note dated *March* 25, 1737. to this effect: Received of my brother Mr. *Thomas Matthews* 450 *l.* to be ſecured by mortgage on my *Stoke-Hall* eſtate.

Thomas Matthews gave the plaintiff at different times three notes, one for 450 *l.* another for 250 *l.* and the laſt for 150 *l.* and expreſſed in each to be ſecured by mortgage on my *Stoke-Hall* eſtate; the drawer of the notes had before mortgaged the ſame eſtate to the defendant; the plaintiff takes in a prior mortgage to protect the ſums lent upon the notes. *Lord Hardwicke held there was nothing to differ this caſe from the common one, and that the defendant ſhall be paid the money lent upon the notes in the firſt place, as well as the money due on the aſſignment of the prior mortgage.*

A 2d note dated *Auguſt* 19, 1737. in theſe words: Received 250 *l.* of my brother *Thomas Matthews*, to be ſecured by mortgage on my *Stoke-Hall* eſtate.

A 3d note for 150 *l.* in the ſame terms.

The drawer of the notes had made a mortgage before of this very eſtate to the defendant; the plaintiff afterwards brought in a prior mortgage, to protect the ſums lent upon the three notes againſt the ſecond mortgagee Mr. *Cartwright*.

The defendant inſiſts no money was ever advanced by the plaintiff as a conſideration for the three notes: the Chancellor offered to direct an iſſue to try the conſideration, upon peril of coſts againſt the defendant *Cartwright*, but he not caring to run the riſque, Lord *Hardwicke* ſaid, I am of opinion here is nothing in this caſe which is different from the common one of a firſt, ſecond and third mortgagee, where the laſt, after having notice of a ſecond mortgage, prior in time to his own, buys in the firſt incumbrance to protect himſelf; in that caſe the ſecond mortgagee ſhall not redeem without paying both firſt and third mortgage.

So in the preſent caſe the plaintiff, the note holder, upon his having notice of the ſecond mortgage to the defendant, and paying off the firſt incumbrance upon this eſtate, and taking an aſſignment of it, ſhall protect himſelf againſt the defendant's mortgage, and ſhall be paid in the firſt place the money lent upon the notes, as well as the money due to him upon the aſſignment of the firſt mortgage.

Shepherd

Caſe 240. *Shepherd* verſus *Titley*, *July* 17, 1742.

The court will not make an inconſiſtent decree in a ſecond cauſe between the ſame parties, on account of the confuſion it would create; but at the ſame time Lord *Hardwicke* declared, he would not upon an order in a former cauſe tie up the plaintiff, but will direct the cauſe to ſtand over, ſo as to give him an opportunity of laying the matter before the court on a bill of review, or otherwiſe, as he ſhall be adviſed.

MR. *Shepherd*, who had a mortgage for 4000*l.* upon Mr. *Jennings*'s eſtate in 1725. in compaſſion to the mortgagor in 1728. forgave him 800*l.* and three years afterwards Mr. *Shepherd* lent him 800*l.* again; during this intervening time Mr. *Titley* advanced the ſum of 2000*l.* to Mr. *Jennings*, for which he gave him a mortgage upon the ſame eſtate in the year 1728.

In 1729 Sir *Thomas Peyton* agreed to purchaſe of Mr. *Jennings* for the ſum of 1850*l.* fee-farm rents of 70*l.* *per ann.* iſſuing out of Sir *Thomas Peyton*'s eſtate, and payable to Mr. *Jennings*, imagining that he was at that time ſeiſed in fee, as he had covenanted with Sir *Thomas Peyton* that he had done no act to incumber; but Sir *Thomas Peyton* finding afterwards that Mr. *Jennings* had mortgaged the fee-farm rents to Mr. *Shepherd*, applied to him, who agreed that when he himſelf was paid his 4000*l.* and intereſt, that he would convey the fee-farm rents to Sir *Thomas Peyton*, who promiſed that if he was not diſturbed in the poſſeſſion of the fee-farm rents, he would not commence any ſuit againſt Mr. *Jennings*, and in this manner it has reſted ever ſince.

In a former cauſe in 1736. at the Rolls, his Honour decreed that the Maſter ſhould take an account of what was due upon the mortgage to Mr. *Shepherd* the preſent plaintiff, for principal and intereſt, and in the taking of that account the Maſter has allowed Mr. *Shepherd* no more for principal than 3200*l.*

Mr. *Shepherd* has now brought his bill againſt Mr. *Titley* to be paid the 4000*l.* and intereſt, or that Mr. *Titley* may ſtand foreclоſed.

LORD CHANCELLOR.

There is a good deal of difficulty on one ſide and on the other, and I am very much at a loſs what decree to make. The bill is now brought for a new purpoſe different from the former cauſe; and to be ſure a mortgagee may, after a decree for a redemption, bring a bill for a foreclоſure, unleſs it is done merely to accumulate the expence, and in that caſe the court will not give any countenance to it.

But I do not take this to be the principal end of the preſent bill; one intention of it is in order to make a freſh charge upon Mr. *Jennings*'s eſtate, being a ſum lent, as the plaintiff ſays, by him to the mortgagor upon a bond and judgment.

Another end of this bill is to take in Sir *Thomas Peyton*'s fee-farm rents, that they may contribute towards the ſatisfaction of the mortgage, and be brought in by way of aid, if the mortgage premiſſes ſhould be a failing fund.

Theſe are two material points, and indeed the nature of the tranſaction is very dark, and attended with particular circumſtances.

By the plaintiff's charge before the Maſter, the intereſt from 1728 to 1731, ceaſed upon 800*l.* on the mortgage for 4000*l.* but the mortgagor afterwards gives a bond and judgment for another ſum of 800*l.* advanced, and admitting this to be a new ſecurity, though I do not determine that point now, yet the judgment is a lien upon the eſtate, if Mr. *Shepherd* had no notice of Mr. *Titley*'s incumbrance; for then the equity of this court will certainly allow Mr. *Shepherd* to tack the judgment to the mortgage, and to be paid both in the firſt place before any meſne incumbrance can be admitted.

But the great obſtacle ariſes from the decree in the former cauſe, for the Maſter muſt ſettle the account under the direction of the court, and cannot take any notice of the new loan, but is confined merely to the plaintiff's mortgage.

Where there is an original cauſe, and a decree made in it, you cannot have afterwards an inconſiſtent decree, in a ſecond cauſe between the ſame parties, for that would create ſuch confuſion as is not to be endured by the rules of this court.

And therefore I am of opinion that I cannot vary the decree in the former cauſe; but then I will give the plaintiff Mr. *Shepherd* ſome opportunity of trying the validity of this new debt of 800*l.* for after this tranſaction of the 800*l.* it appears by a deed executed between the plaintiff, one *Davis*, and Mr. *Peyton*, that they admitted the plaintiff to be ſtill intitled to the 4000*l.* this being ſo, in whatever light the 800*l.* might appear, the parties did not think it worth their while to diſpute the validity of this demand.

Then it will come to this queſtion, whether the plaintiff may not be at liberty to rehear, or to bring a bill in the nature of a bill of review, in order that this matter may be inquired into fully.

And I think it would be hard merely upon an order in a former cauſe to tie up the plaintiff abſolutely, ſo as to prevent his laying this matter fairly before the court; therefore I direct the plaintiff to pay the coſts of the day, and the cauſe to ſtand over, that he may have an opportunity of proceeding by bill of review, or otherwiſe, as he ſhall be adviſed.

On the 18th of June 1743. there was a rehearing of the ſeveral cauſes, when Mr. *Shepherd*, Mr. *Titley* and Sir *Thomas*, were by bill and croſs bill before the court.

Shepherd inſiſted, that on advancing 800 *l.* again, the deed ought to ſtand, as it did before, a ſecurity for 4000 *l.* the parties intending it ſhould: and his council offered to read parol evidence to ſhew this intention; which was objected to as being within the ſtatute of frauds and perjuries. Lord *Hardwicke* ſaid, that the loan of the 800 *l.* cannot be conſidered as a continuance of the old mortgage in 1725. and in reſpect to an intervening incumbrance, is a new one, admitting *Shepherd* to have notice, and therefore would not allow the parol evidence.

It was inſiſted by Mr. *Shepherd*'s council, that he having the legal eſtate, and no notice of the intervening incumbrance, Mr. *Titley* is not intitled to redeem but upon payment of the 3200 *l.* and the 800 *l.*

The caſe relied upon for Mr. *Shepherd* was *the Dutcheſs of Marlborough* verſus *Brace*, 2 *Wms.* 491.

The mortgage deed being originally for 4000 *l.* it was inſiſted, on Mr. *Shepherd*'s advancing 800 *l.* again, the deed ought to ſtand, as it did before, a ſecurity for 4000 *l.* it being intended ſo by the parties; and the plaintiff's council offered to read parol evidence, to ſhew this intention. But the council for Mr. *Titley* objected to this evidence, as being within the ſtatute of frauds and perjuries; for there being a receipt on the back of the mortgage deed for 800 *l.* of courſe it appeared by the very deed itſelf, that in 1728. only 3200 *l.* principal remained; and therefore it would be a contradiction in terms to ſay, that 800 *l.* lent in 1731. is part of the mortgage in 1725. for lending a different ſum in 1731. was the ſame as if it had been a new mortgage; ſo that Mr. *Shepherd* can never charge the mortgagor, or any other perſon ſtanding in his place, with its being a part of the old mortgage, unleſs there was an agreement for that purpoſe produced in writing.

LORD CHANCELLOR.

Whether theſe depoſitions were read before, is of no ſignification, the whole being open, and is now as an original hearing; but I am of opinion, that the parol evidence offered by Mr. *Shepherd*'s council ought not to be read.

This was a mortgage for 4000 *l.* the legal eſtate was in Mr. *Shepherd*, the equity of redemption was in Mr. *Jennings*, and being ſo, the ſum of 800 *l.* appears to be paid off upon this mortgage by *Jennings*, upon *Shepherd*'s receipt, and who has likewiſe admitted the fact before the Maſter, and the circumſtance of the lending or relending was about three years after the 800 *l.* was diſcharged.

Suppoſing

Suppoſing it firſt as a new loan, it is impoſſible to charge the mortgaged eſtate with a further ſum without a written agreement, becauſe it is charging the equity of redemption with a ſum that is not in the deed.

But then the way, in which Mr. *Shepherd*'s council would take it, out of the common caſe, is, by ſhewing that it was agreed between the parties, that the eſtate ſhould be charged as it was originally with the 4000 *l.*

On the other hand conſider that the eſtate is diſcharged of the payment of 800 *l.* not by a ſolemn writing indeed, but by a receipt under the hand of Mr. *Shepherd.*

It has been ſaid, that the whole between Mr. *Shepherd* and Mr. *Jennings* is to be regarded but as one tranſaction, and that the advancing the 800 *l.* again is a ſetting up, or a continuance of the original ſum.

But this cannot be, for it is not part of the ſame tranſaction, for there is the diſtance of three years; and it is admitted here is a break, and intereſt does not go on for theſe three years.

Suppoſe there had been a puny incumbrance between the year 1728. and Mr. *Shepherd*'s relending the 800 *l.* and that he had notice of this puny incumbrance, could he have over-reached it? moſt certainly not.

This ſhews that the lending the 800 *l.* cannot be conſidered as a continuance of the old mortgage in 1725. but is to all intents and purpoſes a new one with regard to an intervening incumbrance within the three years, admitting Mr. *Shepherd* to have notice; and therefore I cannot allow this parol evidence.

Then the council for the plaintiff produced a bond and judgment to him for the 800 *l.* and inſiſted that he can tack the judgment to the mortgage, and ſo intitle himſelf to receive both ſums before Mr. *Titley* can be let in upon the eſtate: for as Mr. *Shepherd* the plaintiff has brought a bill to foreclose Mr. *Jennings* and Mr. *Titley*, Mr. *Titley* might have brought a croſs bill, and charged notice to Mr. *Shepherd*, and put this matter in iſſue; but as Mr. *Titley* has not done this, he cannot wreſt the legal eſtate out of Mr. *Shepherd*'s hands, unleſs he will pay off the judgment as well as the mortgage.

Mr. Solicitor General, council for the defendant Mr. *Titley*, made two points, and inſiſted in the firſt place, whether under all the circumſtances of this caſe Mr. *Shepherd* is to be allowed to tack the

bond and judgment for 800 *l.* in 1731. to his mortgage in 1725. againſt a puiſne incumbrance, Mr. *Titley* between the year 1725 and 1731. Mr. *Titley*'s mortgage being dated the 24th of *June* 1728.

The ground, he ſaid, the court goes upon, in taking a ſubſequent ſecurity to a former one, is, that the court will preſume the laſt money was lent upon the faith of the original ſecurity.

What ground is there to preſume that Mr. *Shepherd* lent this 800 *l.* upon the credit of the original mortgage; the contrary is rather to be preſumed, becauſe he might, if he pleaſed, have indorſed this further ſum on the mortgage deed, without the trouble of a warrant of attorney, and entring up judgment, which is a more round about way.

A ſettled rule, that the prior mortgagee may tack a judgment to his mortgage, though ſubſequent in time to a ſecond mortgagee, provided he has no notice of the ſecond.

Lord Chancellor interrupted him, and aſked if it was not a ſettled rule of this court, that the prior mortgagee may tack a judgment to his mortgage, though ſubſequent in time to a ſecond mortgagee, when he has no notice of the ſecond mortgage.

Mr. Solicitor General gave it up, and went to his ſecond point, between Mr. *Titley* and Sir *Thomas Peyton.*

The equity of redemption of Mr. *Jennings*'s whole eſtate is ſubject to Mr. *Titley*'s mortgage, and as that part of the eſtate mortgaged to Mr. *Shepherd* will, in conſequence of your Lordſhip's opinion, be but a ſcanty ſecurity to Mr. *Titley*, he has a right to come upon the fee-farm rents to make up his principal and intereſt, as they were included in Mr. *Shepherd*'s mortgage, whom Mr. *Titley* is at liberty to redeem, and therefore ſtands in all reſpects in the place of Mr. *Shepherd* with regard to Sir *Thomas Peyton*, as Mr. *Titley* is a prior incumbrance; and for this purpoſe cited *Bovey* verſus *Skipwith*, 1 *Ch. Ca.* 201.

Mr. Attorney General of council for Sir *Thomas Peyton.*

There is no foundation to alter the decree at the former hearing, nor is it open to the objection made by Mr. *Titley*'s council; for the bill having been diſmiſſed as againſt Sir *Thomas Peyton*, this cannot now be inſiſted on as an original objection, unleſs it was conſequential, and a hindrance of juſtice.

The decree there was general, to take an account of what was due to Mr. *Shepherd* for principal and intereſt, and the whole 4000 *l.* was then ſuppoſed to be due.

So that Mr. *Titley* was as much injured by the decree of diſmiſſion of his bill againſt Sir *Thomas Peyton* then as he is now, and therefore, as it does not alter the ſituation of things, this cannot be called a conſequential direction from that decree; nor can a ſingle reaſon be given why your Lordſhip ſhould retain Mr. *Titley*'s bill againſt Sir *Thomas Peyton* now, which might not have been equally given at the former hearing.

The fee-farm rents are not included in the mortgage to Mr. *Titley*: Will it be laid down then as a rule in this court, that an original mortgagee and mortgagor cannot ſell a part of the mortgaged eſtate to a third perſon, notwithſtanding an intervening incumbrance upon another part of the mortgagor's eſtate?

Mr. *Shepherd* in his agreement with Sir *Thomas Peyton*, conſented to take his principal and intereſt *firſt* out of the other part of the eſtate in mortgage to him, before he came upon the fee-farm rents, and therefore Mr. *Titley* can be in no better condition than Mr. *Shepherd* himſelf.

Sir *Thomas Peyton* has agreed that he will not proſecute Mr. *Jennings* for *his breach of covenant*, which is a valuable conſideration in point of law, and upon which Sir *Thomas Peyton* might found *an aſſumpſit*, for it might happen that by this forbearance his debt might be loſt.

Mr. Solicitor General in his reply inſiſted, that Mr. *Shepherd* has not abſolutely given up the fee-farm rents, but reſerves to himſelf a power of reſorting to them again, if the reſt of the mortgaged premiſſes ſhould not be ſufficient, and therefore Mr. *Shepherd* continues to all intents and purpoſes to have a mortgage ſtill upon the fee-farm rents.

That the court will not, in caſe of Mr. *Jennings* the mortgagor, who has defrauded all the reſt of the creditors, ſuffer ſuch an agreement to defeat the right of a third perſon.

Mr. *Shepherd*, in his anſwer to Mr. *Titley*'s bill, admits he had notice of Mr. *Titley*'s mortgage ſix months before he ſigned the articles between him and Sir *Thomas Peyton*, therefore Mr. *Shepherd* has not parted with any ſecurity at all, but has the whole original debt for his ſecurity ſtill.

To allow what is contended for on the other ſide, would be putting it in the power of a firſt creditor to direct the order of payment as to all the reſt.

The articles for the purchaſe of the fee-farm rents between Mr. *Shepherd* and Sir *Thomas Peyton*, were in *April* 1732, and Mr. *Titley*'s bill was brought the *June* immediately following.

LORD CHANCELLOR.

The queſtion now before the court is, Whether Mr. *Titley* has a right, as againſt Sir *Thomas Peyton*, to redeem Mr. *Shepherd*, and to have an aſſignment from him of his intire ſecurity, and by that means to compel Sir *Thomas Peyton* to redeem him as to the fee-farm rents.

Sir *T. P.*'s caſe not diſtinguiſhable from any other puny incumbrancer; for the rule is *prior in tempore, potius in jure.*

As to the merits, I do not know how I can diſtinguiſh the caſe of Sir *Thomas Peyton* from any other puny incumbrancer or purchaſor, where the rule of equity is, *prior in tempore, potius in jure.*

If, by the articles, Mr. *Shepherd* was to confine himſelf only to the other part of the mortgaged premiſſes, and had not reſerved a power of reſorting at all events to the fee-farm rents, if the reſt ſhould not be ſufficient, I ſhould then have thought Sir *Thomas Peyton* had a ſtrong caſe.

But as this caſe is circumſtanced, the queſtion will be, Who Mr. *Shepherd* is a truſtee for, as to the legal eſtate in the fee-farm rents, whether for Mr. *Titley*, or Sir *Thomas Peyton?*

It has been objected on behalf of Sir *Thomas Peyton*, that Mr. *Titley* is not right in point of form, and that he cannot by the rules of the court make this demand now, as it is ſo long ſince his bill was diſmiſſed againſt Sir *Thomas Peyton.*

Where there is a ſecond ſuit between the ſame parties, you may inſiſt on an acquieſcence under a decree in the firſt, unleſs the bill be diſmiſſed without any prejudice to the queſtion in that cauſe.

Let it ſtand over therefore to aſcertain this fact, whether, when the cauſe was heard at the *Rolls*, the point between Mr. *Titley* and Sir *Thomas Peyton* was litigated then; for if it was, Sir *Thomas Peyton* may inſiſt on the acquieſcence of Mr. *Titley* under that decree, otherwiſe if Mr. *Titley*'s bill was diſmiſſed *without any prejudice to this queſtion.*

Caſe 240. *Hall* verſus *Carter*, *July* 19, 1742.

JOHN *Carter* by his will, dated *Jan.* 25, 1685, "created a "term of 100 years in truſt out of the rents and profits of the "premiſſes, or by mortgage thereof, to raiſe portions of 100*l.* for "each of the daughters of his ſon *Thomas Carter*, payable at 18, "or

" or day of marriage; and moreover to pay to every ſuch daughter " or daughters the ſum of ſix pounds a year for their maintenance, " till their reſpective portions ſhall become due and payable; with " a proviſo that it ſhall be lawful for his ſon *Thomas Carter* to make " a jointure to ſuch woman as he ſhall marry, of *all* or any part " of the premiſſes limited to him: and in caſe of failure of iſſue " male of *Thomas*, the like limitation to his two other ſons *Corne-* " *lius* and *Henry*, with a proviſo, that in caſe ſuch perſon or per- " ſons who ſhall be next in remainder or reverſion expectant upon " the ſaid term of 100 years, ſhall and will pay unto ſuch daugh- " ter or daughters of the ſaid *Thomas Carter* or their guardian, or " to ſuch perſon lawfully authorized to receive the ſame, all and " every of their reſpective portions of 100*l.* a-piece, either before " or after the ſame are due and payable by the direction of this " my will; that then the ſaid term of 100 years ſhall from thence- " forth ceaſe, and determine for the benefit of ſuch perſon or per- " ſons, in remainder or reverſion as aforeſaid."

Thomas had two daughters, but no ſon, and left his widow *Ann Carter*, who had a jointure of the whole premiſſes deviſed under the will. *Cornelius Carter*, the ſecond ſon of *John*, is dead, but has left iſſue the defendant *Eſtcourt Carter*, who is tenant in tail under the will of *John Carter*.

The plaintiff *Grace Hall*, the daughter of *Thomas Carter*, who married in *April* 1724, 18 years ago, by her bill inſiſts, ſhe is intitled to her portion of 100*l.* and that it ought to be raiſed even in the life-time of *Ann Carter*, her father's widow.

But her council at the bar, thinking it too hard to maintain that the portion ſhould be raiſed upon the jointreſs, gave up that point, and inſiſted only that the truſtee may by mortgaging the reverſionary eſtate, expectant upon the death of the jointreſs, immediately raiſe the portions of 100*l.* and 100*l.* for the plaintiff *Grace*, and the defendant *Mary Paxton*.

Mr. *Brown*, for the plaintiff, cited *Butler* verſus *Duncomb*, 1 *P. Wms.* 448. and *Brown* verſus *Berkeley*, 2 *P. Wms.* 484. which went up afterwards to the Houſe of Lords.

Mr. Attorney General, for the defendant *Eſtcourt Carter*, the tenant in tail, inſiſted, that as the 6*l.* a year maintenance for the daughters, is to come out of the rents and profits, it muſt follow, that the groſs ſum of 100*l.* is to be poſtponed till the commencement of the term in poſſeſſion, and that this brings it within the reaſoning in the caſe of *Brome* verſus *Berkeley*: and that the truſtees here, as in that caſe having an election by ſale or mortgage, to raiſe

the portion, ſhews the intention of the teſtator, that they ſhould not exerciſe their election till the term commences in poſſeſſion.

LORD CHANCELLOR.

There have been a great many of theſe caſes, but for ſome years paſt I have heard nothing of them, which I hope is owing to the rule being well ſettled in this reſpect: and there have been likewiſe ſome caſes formerly, which by the ordinary underſtanding of mankind without doors, have been thought to go too far.

The court, in late caſes, have thought it hard to raiſe daughters portions in the father's life-time, and therefore refuſe to do it.

Therefore, in more modern caſes, the court has put a reſtriction, and thought it very hard in the life-time of the father to incumber his eſtate with raiſing daughters portions: and in this inſtance they ſtopped ſhort, and would not carry it ſo far, becauſe it encourages undutifulneſs, and occaſions improvident matches.

In late caſes, where the portion was large, the court have refuſed it, in favour of the remainder-man.

In caſes ſtill more modern, another reaſon has prevailed in favour of the remainder man, that he ſhould not be diſtreſſed by incumbring the reverſion too much, where the portion has been large. *Vide* the caſe of *Greaves* verſus *Mattiſon*, 2 *Jones* 201. and *Staniforth* and *Clerkſon* verſus *Staniforth*, 2 *Vern.* 460. taken notice of in *Corbet & Ux'* verſus *Magdwell*, 2 *Vern.* 640. by Lord *Cowper*, and ſince that ſeveral other determinations.

In the preſent caſe the demand is not in the life-time of the father, but long after his death, which happened in 1721.

The queſtion then is, Whether theſe portions ſhall be raiſed immediately upon the reverſion?

The portions cannot be raiſed in the life-time of the jointreſs, ſo as to affect her, for when *T. C.* executed the power, the eſtate roſe out of the will of *J. C.* and is precedent to the 200 years term.

As to the jointreſs, it is very clear that they cannot be ſo raiſed as to affect her; for if the jointure had been limited by the will it ſelf, there could have been no doubt; and it is certainly the ſame thing when it is done by a power; and when *Thomas Carter* executed it, the eſtate aroſe out of the will of *John Carter*, and conſequently is precedent to the 100 years term for raiſing portions.

The ſecond queſtion is, Whether the portions are raiſable out of this term, though a reverſionary one?

I am of opinion, theſe portions ought to be raiſed immediately, notwithſtanding the caſes cited; for this ſtands clear and diveſted of all the circumſtances mentioned in the others.

There may be inconveniences on both ſides, but on the ſide of the daughters a very great one, for they may wait till their portions are of no uſe to them, as has happened in one inſtance here;

here; for one of the daughters is dead, and her repreſentative comes only in her right.

In the caſe of *Corbet* verſus *Maidwell*, 2 *Vern.* 640. Lord *Cowper* admitted all the precedent caſes, and went upon the words of the ſettlement, *that in caſe the father ſhould die without iſſue male, and leave a daughter unmarried, or not provided for at his death, the truſtees were to raiſe* 2000*l. to be paid at* 18, *or marriage.* It was decreed not to be raiſed in the life of the father, it not veſting till his death.

In the caſe of *Butler* and *Duncomb*, the truſt of the term was expreſsly *from and after the commencement of the term*, and upon theſe ſingle words Lord *Macclesfield* founded his decree.

Conveyancers now are grown ſo cautious, as to inſert negative words in ſettlements, to prevent portions being raiſed in the life-time of the father and mother.

Conveyancers now inſert negative words, to prevent portions being raiſed in a father and mother's life-time.

The caſe principally relied on, upon the part of the defendant *Eſtcourt Carter*, is *Broome* verſus *Barkeley*.

There was a reverſionary term in that caſe, *in default of iſſue male of the marriage, on truſt to raiſe* 2500l. *for daughters, payable at* 21, *or marriage, and out of profits to pay* 100l. per ann. *for maintenance; the firſt payment of maintenance money to be made at ſuch of the ſaid half-yearly feaſts as ſhould next happen after the ſaid eſtate, ſo limited to the truſtees as aforeſaid, ſhould take effect in poſſeſſion: The power to raiſe the portions was out of the rents and profits, or by ſale, or by leaſing of the premiſſes, and maintenance to precede the portions. Lord Chancellor* King, *aſſiſted by the* Maſter of the Rolls, *was of opinion, that as maintenance was not to be raiſed till after the term takes effect in poſſeſſion*, a fortiori *the portions were not; and it would be abſurd to ſay, that the portion ſhall be raiſed firſt, and the maintenance money paid afterwards.*

The caſes are not at all alike, for there Mrs. *Broome*, the daughter, was not intitled to have any maintenance till the term took effect in poſſeſſion.

But in the preſent caſe it is far otherwiſe, for the maintenance is actually a charge upon the eſtate, and truſtees are to pay 6*l. per ann.* to each daughter, till their portions reſpectively become due and payable, and is not poſtponed till after the term comes into poſſeſſion; ſo that maintenance runs on till then; and though I do not know any inſtance where a ſale has been directed for maintenance

The maintenance here is a preſent charge upon the eſtate, and is not poſtponed till after the term comes into poſſeſſion, and no harm can ariſe from mortgaging the reverſion, as the arrears muſt be ſatisfied the moment the term comes into poſſeſſion.

out of rents and profits, becauſe it muſt be annual, which would create endleſs trouble, yet it is a charge upon the eſtate, and the arrear which is incurred muſt be paid off after it comes into poſſeſſion.

Then, where can be the objection of mortgaging the reverſion now; or what harm can it be to the reverſioner; becauſe the moment the term comes into poſſeſſion, the arrears muſt be ſatisfied?

A power in truſtees of raiſing portions by rents, or by mortgage, is no reaſon for poſtponing the raiſing, in order that they may make their election.

An objection has been made by Mr. *Murray*, that the portion being directed to be raiſed out of rents and profits, *or by mortgage*, therefore it ought to wait till the term comes into poſſeſſion, that truſtees may make their election.

This was the argument in *Broome* verſus *Berkeley*, but there are many caſes of ſettlements where this election is given to truſtees, and yet they ſhall not be allowed to poſtpone the raiſing, in order to make their election only.

I am not clear, whether it might not be raiſed by ſale, if it ſtood only upon the words *rents and profits*, which have been held to carry a fee.

The defendant cannot redeem the term, and exonerate the eſtate, without paying intereſt for the portions from the time they became due.

The next *objection* was, that if the court ſhould be of opinion the portion it ſelf ought to be raiſed, yet that it ſhall not carry intereſt; and in order to ſupport it, they have read the laſt proviſo in the will, which ſays, that the term of 100 years ſhall ceaſe, if ſuch perſon as ſhall be next in reverſion will pay the daughters portions either before or after the ſame are due: And from hence it is inferred that the defendant *Eſtcourt* may redeem the term, and exonerate the eſtate at any time without paying intereſt.

But I am of opinion that he cannot, but muſt pay the intereſt for the portions, from the time they became due; and that the intention of the teſtator was, that the daughters ſhould have maintenance till the portions became payable, and intereſt afterwards till they were raiſed.

Where there is a power of charging land with a groſs ſum, it imports intereſt of courſe.

Though intereſt is not mentioned, yet in the caſe of *Lord Kilmurry* and *Geery*, 2 *Salk.* 538. it was held, that where there is a power of charging land with a groſs ſum, it imports intereſt of courſe, and none would lend ſuch ſum if the law were otherwiſe: This very rule prevailed afterwards in the caſe of *Evelyn* verſus *Evelyn*, 2 *P. Wms.* 591.

I ſhall

I ſhall decree 18*l.* to the widow, eight pound to be paid her by the plaintiff *Grace*, as ſoon as her portion is raiſed, as a compenſation for the three years maintenance till *Grace* was married.

The truſtee to have coſts, but none between the other parties, and the portions to be raiſed by mortgaging the reverſion expectant upon the death of the jointreſs.

Chitty verſus *Selwin and Martyn, at the ſecond ſeal after* Trin. term, *July* 20, 1742.

Caſe 241.

THE plaintiff moved to ſtay the defendants from proceeding to a trial at law upon a policy of inſurance, and that a commiſſion may iſſue for the examination of witneſſes in the *Weſt Indies*, on a ſuggeſtion that the material facts for the plaintiff aroſe there.

A commiſſion prayed for examining witneſſes in the *Weſt Indies*, as the facts ariſe there, and to ſtay the defendants proceeding at law on a policy; and the injunction, as the voyage was at and from *Carthagena* to *Porto Bello*, and the facts muſt neceſſarily ariſe in the *Weſt Indies*.

LORD CHANCELLOR.

Where a ſhip is inſured at and from a place, and it arrives at that place, as long as the ſhip is preparing for the voyage, upon which it is inſured, the inſurer is liable; but if all thoughts of the voyage are laid aſide, and the ſhip lies there five, ſix or ſeven years, with the owner's privity, it ſhall never be ſaid that the inſurer is liable; for it would be very abſurd to make him ſuffer for the whim or caprice of the owner, who chuſes to let the ſhip lie and rot there.

Whilſt a ſhip is preparing for a voyage, upon which it is inſured, the inſurer is liable; but if the voyage is laid aſide, and the ſhip lies by for 5, 6 or 7 years, with the owner's privity, the inſurer is not liable.

As this was a voyage at and from *Carthagena* to *Porto Bello*, the facts which are in controverſy in this cauſe, muſt neceſſarily ariſe in the *Weſt Indies*, and therefore the injunction muſt be granted, to ſtay the defendants the inſured from proceeding at law till further order, that the plaintiff may have an opportunity by a commiſſion, to aſcertain the facts which he inſiſts on to be very material; that the ſhip lay above four years at *Carthagena*, before it was ſunk there by *Don Blaſs*; and that all thoughts of proceeding on its voyage to *Porto Bello* were laid aſide, there being no fair held, on account of the *Engliſh* fleet being in thoſe ſeas, under the command of Admiral *Vernon*, and likewiſe the ſucceſs he met with afterwards in his attack of that port.

I ſee no difference at all between this caſe and that of *Green* verſus *Suaſſo*, *December* 10, 1741; and therefore will make the ſame

ſame order here, as in that cauſe; an injunction was granted accordingly.

Caſe 242. *Yates* verſus *Hambly*, *July* 21, 1742.

Lord Hardwicke held, that the two houſes deviſed under the will were a redeemable intereſt, and that no bar ariſes from the length of time.

THOMAS *Talbot*, being ſeiſed in fee of ſeven meſſuages in St. *Thomas* Apoſtle, ſubject to a mortgage term of 500 years, which afterwards became veſted in *Edward Parker* deceaſed, who married *Alice*, *Thomas Talbot*'s daughter; and which, by indenture of the 30th of *Auguſt* 1695, was aſſigned to *Joſeph Blunt*, in truſt for *Edward Parker*, ſubject to redemption on *Thomas Talbot*, or his heirs, paying to *Edward Parker* 350*l*. *Did*, by his laſt will, dated 20th of *April* 1698, deviſe *two of the houſes* to his daughter *Mary*, afterwards the wife of *James Plummer*, and her heirs; and gave unto *Edward Parker* all the reſt of the meſſuages, to hold to him and his heirs, he paying all his debts, and appointed him ſole executor: Upon the teſtator's death, *Edward Parker* entred upon all the ſeven meſſuages: In 1699, *James Plummer*, and *Mary* his wife, exhibited their bill in this court againſt *Edward Parker* and others, to compel *Parker* to ſuffer the plaintiffs to enjoy the two meſſuages, according to the teſtator's will, or let them redeem the mortgage; but *Parker* dying ſoon afterward, having by his will appointed *Alice* his wife his executrix, who poſſeſſed the ſeven meſſuages, ſhe entred into a treaty with *James Plummer* and his wife for ending the ſuit; and it was agreed, that *Alice Parker* and the other daughters, and co-heirs of *Edward Parker*, ſhould, in conſideration of 500*l*. and 10 guineas, releaſe and convey to *James Plummer* and his wife, all their right in the ſeven meſſuages: *Plummer* and his wife having borrowed 50*l*. of *William Hambly* deceaſed, by leaſe and releaſe, dated the 1ſt and 2d of *January* 1699, and a fine, did convey the two houſes deviſed to them to *William Hambly*, and his heirs, *until he ſhould have received by the rents and profits thereof the* 50l. *with intereſt*; *and after payment by ſuch rent of the* 50 l. then to the uſe of *James Plummer* for life, remainder to *Mary* his wife for life, remainder to the heirs of *James Plummer*, on the body of *Mary*, remainder to the right heirs of *James Plummer*: *James Plummer* having informed *William Hambly* of the agreement for the purchaſe of the intereſt of *Alice Parker*, and the co-heirs of *Edward Parker*, for 500*l*. and 10 guineas, and deſired him to advance theſe ſums for the benefit of *Plummer* and his wife, he did advance the money, to be applied accordingly; and it was thereupon agreed between *Hambly* and *Plummer*, that the mortgage ſhould be aſſigned to a perſon in truſt for *Hambly*, to prevent a merger of the term, and that the inheritance of the premiſſes ſhould be conveyed to the co-heirs of *Edward Parker*, to the uſe of *Hambly*, his heirs and aſſigns; but redeemable by *Plummer* and his heirs, on payment of principal and intereſt to *Hambly*: And the

purchaſe

purchaſe money of 500*l.* and 10 guineas having been paid to *Alice Parker, and the co-heirs of Edward*, by indentures of leaſe and releaſe of the 1ſt and 2d of *September* 1702, *Alice Parker, and the co-heirs of Edward*, aſſigned to *Peter Hambly* the ſeven meſſuages for the remainder of the term of 500 years, in truſt for *William Hambly*; and by leaſe and releaſe of the 27th and 28th of *September* 1702, *Alice Parker*, &c. conveyed the two meſſuages to *William Hambly* and is heirs, in truſt for *James Plummer* and his heirs, ſubject to the agreement between *Plummer* and *Hambly* of the 2d of *January* 1699.

James Plummer lived till 1710, and *Hambly* continued in poſſeſſion of the ſeven meſſuages till his death in 1717, without ever accounting for the rents thereof, and *James Plummer* dying without iſſue, five of the meſſuages, ſubject to the mortgage, deſcended to *Timothy Plummer*, the brother and heir at law of *James Plummer*, who became intitled to the remainder in fee of the other *two* of the ſeven meſſuages which had been deviſed to *Mary Plummer*, and of which the fine was levied in 1699.

Timothy Plummer, in his life-time, conveyed all the ſeven meſſuages, for a valuable conſideration, to the plaintiff, and *Timothy Plummer* dying ſoon after, the plaintiff obtained adminiſtration, and inſiſts he is become intitled to the equity of redemption, on payment of what remains due on the mortgages or ſecurities to *William Hambly* deceaſed.

William Hambly the defendant, the ſon and heir of *Peter Hambly*, and grandſon and heir of *William Hambly*, on his coming of age, had the poſſeſſion of the ſeven meſſuages delivered to him, and is now in the receipts of the rents thereof; and by his anſwer inſiſts, that his grandfather *William Hambly* entred on the ſeven meſſuages, above *thirty* years ago, and that *James Plummer* and his wife were well ſatisfied they had received more money from *William Hambly* than the premiſſes were worth, and never during their whole lives demanded any account of the rents and profits, and therefore, by virtue of the ſeveral deeds, the will of his grandfather, who has deviſed the meſſuages to the defendant for life, and his iſſue in tail, remainder to his right heirs, and the great length of poſſeſſion in the premiſſes, without any account demanded or given for the rents thereof, he inſiſts that he is abſolutely intitled in law to all the ſeven meſſuages, without rendring any account for the rents and profits thereof.

LORD CHANCELLOR.

The firſt queſtion is, Whether a mortgage of two of the ſeven houſes from Mr. *James Plummer* to Mr. *William Hambly*, is a redeemable intereſt or abſolute.

It is very clear that the wife of *Plummer* was entitled to thoſe houſes ſubject to a mortgage made by *Talbot* her father; and on the 2d of *Jan.* 1699, *Plummer* mortgages the ſame eſtate for 50 *l.* to ſecure this and all other ſums advanced by *Hambly*.

This upon the face of it is plainly a mortgage, and *Hambly*, and thoſe who claim under him, have been in poſſeſſion ever ſince.

Now *Plummer* and his repreſentatives are certainly entitled to redeem, had they come in a reaſonable time.

Therefore the queſtion will be, Whether it may be redeemed in 1740?

And I am of opinion, that the two houſes are ſtill a redeemable intereſt; and no bar ariſes from the length of time.

There is no doubt, but if this mortgage had been made in the common form, and ſubject to a forfeiture upon non-payment, the length of time would have been a bar, the courts of law and equity ſquaring their rules by the ſtatute of limitations.

But this is a conveyance of the inheritance for ſecuring the ſum of 50 *l.* or any other ſum advanced by *Hambly*, in truſt, that he ſhould continue in poſſeſſion till by perception of the rents and profits he ſhall be ſatisfied the principal and intereſt upon ſuch ſums as he hath already lent, or ſhall hereafter lend, and ſubject to this incumbrance to *James Plummer* for life, to his wife for life, and to the heirs of their two bodies; and in default of ſuch iſſue, to the right heirs of *James Plummer*.

The mortgagee here was only in the nature of a tenant by elegit, and as ſoon as his principal and intereſt was ſatisfied, the eſtate ceaſed in *William Hamly*;

Now there never could be a forfeiture under this deed, for the mortgagee was only in the nature of a tenant by elegit, and as ſoon as his principal and intereſt was ſatisfied, by being paid off, or by perception of rents and profits, the eſtate ceaſed in *Hambly*; and *Plummer* or his repreſentatives might have maintained an ejectment; nor would any bar have ariſen from a length of time, unleſs the ſtatute of limitation had run by the mortgagee's continuing in poſſeſſion twenty years after the money had been paid off.

and *Plummer*, or his repreſentatives might have maintained an ejectment; nor unleſs *Hambly* had continued in poſſeſſion 20 years after the money had been paid off, could the ſtatute of limitations have run.

The plaintiff has certainly a right to come into this court for an account of the profits received: as in an *elegit*, the conuſor has a right to come here to ſee if the conuſee upon the extended value has received a ſatisfaction for his whole debt, and if there is a ſurplus, to have it paid over to him.

The plaintiff may come here for an account of the profits received, as in an *elegit* the conuſor has a right to ſee if the conuſee, on the extended value, has received a ſatisfaction for his whole debt, and to have the ſurplus paid to him.

I do not ſee this caſe at all differs from a *Welſh* mortgage, though I do not ſay but there are circumſtances which may create a bar even in that caſe; but in common *Welſh* mortgages on tendring principal and intereſt, they may come into this court for a redemption at any time.

In common *Welſh* mortgages, on tendring principal and intereſt, the perſon intitled may come into this court for a redemption at any time.

The firſt objection was, that it is liable to all the miſchiefs in common caſes, and is a breach of the rule laid down in this court by way of analogy to the ſtatute of limitations.

But to this I anſwer, that in the preſent caſe here is nothing for the ſtatute of limitations to operate upon, for here is no forfeiture; indeed after the account is taken, if it ſhould appear that the mortgage was ſatisfied by perception of profits twenty years ago, and that the mortgagee has continued in poſſeſſion ever ſince, the ſtatute of limitations will run.

The ſecond objection was, It is very unreaſonable that a mortgagee ſhould be a perpetual bailiff to the mortgagor.

That will not hold here, for the mortgagee takes the eſtate ſubject to a perpetual account; and this court ought not to relieve him from his own contract and agreement.

Where a mortgagee takes an eſtate, ſubject to a perpetual account, he will not be relieved from his own contract.

Therefore I am of opinion the plaintiff is intitled to redeem upon the common terms of paying principal, intereſt and coſts, and to have an account of what has been received, and what remains due: and is not obliged to bring an ejectment for the poſſeſſion, but ſhall have a decree for it here, after the mortgage is reported to be ſatisfied.

The plaintiff intitled to redeem on the common terms, and not obliged to bring an ejectment for the poſſeſſion, but ſhall have a decree for it here.

It is like many caſes in this court, where, though the party has a double remedy, he ſhall not be put to that expence; as for inſtance, in a bill brought for a diſcovery of aſſets, after they are diſcovered, the plaintiff ſhall not be turned over to a ſuit of law, but ſhall be decreed ſatisfaction for his debt here.

After aſſets are diſcovered, by a bill brought here; the plaintiff ſhall not be turned over to law, but decreed a ſatisfaction here.

As

Lord *Hardwicke* held the defendant intitled to an abſolute eſtate in the five houſes, and diſmiſſed the bill with regard to any relief prayed as to them.

As to the five houſes, I am of opinion the defendant *William Hambly* is intitled to an abſolute eſtate, though it is an exceeding dark tranſaction; but yet it is not proper to direct an iſſue to try a truſt, nor do I remember any inſtance of it; for as it depends upon the ſtatute of frauds and perjuries, it is incumbent upon this court to determine it; and therefore the bill muſt be diſmiſſed as to any relief prayed with regard to five of the ſeven houſes in queſtion.

But I declare, according to the terms of the mortgage deed, the plaintiff is intitled to the redemption of *the remaining two houſes*, and direct the Maſter to take an account of the rents *of the two houſes* received by the defendant or *William Hambly the mortgagee*, and ſuch rents to be applied in paying the intereſt, and then in ſinking the principal, and upon the plaintiff's paying to the defendant what ſhall appear due to him for principal, intereſt and coſts, the defendant is to reconvey the ſaid mortgaged premiſſes to the plaintiff, and deliver poſſeſſion to him accordingly.

Caſe 243. *Smith* verſus *Wyat*, *July* 21, 1742.

Potatoes being ſown in great quantities in a common field, the rector brought his bill for them as a great tithe. *Lord Hardwicke held, potatoes being in their nature a ſmall tithe, the ſowing them in greater quantities makes no alteration.*

THE bill was brought by the rector of a pariſh in *Eſſex* for the tithes of potatoes ſown in great quantities in the common fields, and therefore claims it as a great tithe.

The defendant the vicar inſiſts, that notwithſtanding it is ſown in fields, it ſtill continues a ſmall tithe, and the quantity makes no difference.

Mr. *Clark* for the plaintiff cited *Hutton* 77. *Cro. Car.* 28. *Wharton* verſus *Liſle* in 4 *Mod.* 3 *Lev.* 365. and *Carth.* and *Deggs Parſ. Counſ.* 177. in order to ſhew that the quantity made a difference, and that when potatoes are ſown in gardens it is a ſmall tithe, but when in fields a large tithe.

The caſes cited by the defendant's council to prove it a vicarial tithe were *Parry* verſus *the Biſhop of London*, *Hil.* 1705. *Wallis* verſus *Pain et al'*, *February* 8, 1738. The *Attorney General* ſaid, it would be a great inconvenience to the people of *England* if the rule which they have laid down for the plaintiff ſhould be eſtabliſhed, that quantity will denominate it to be a great tithe.

LORD CHANCELLOR.

The queſtion is whether potatoes planted in fields are great, or ſmall tithes.

Potatoes in their nature are ſmall tithes; then the queſtion will be, whether they receive any alteration of their right by cultivating in greater or ſmaller quantities.

When the diſtinction of great and ſmall tithes was at firſt ſettled, probably it was upon this foundation, that the former yielded tithes in greater quantities, and the ſpecies of tithes which were called ſmall produced but in ſmall quantities.

The diſtinction between great and ſmall tithes might ariſe at firſt from the former producing greater, and the latter ſmaller quantities.

Though it might be arbitrary at firſt, yet it has grown into a rule, and fixed ſo for the ſake of certainty; nor is there any authority cited, where it is ſaid to be determined, that the rule of tithes ſhall depend upon the quantity, and not upon the nature.

In the caſe of *Udall* and *Tindall*, *Cro. Car.* 28. and in *Hutton* 78. it is ſo laid down indeed, but there was no judicial determination. And in *Wharton* verſus *Liſle*, 3 *Lev.* 365. and 12 *Mod.* 41. Ld. Ch. Juſt. *Holt* did hold that the tithes ſhould be determined whether great or ſmall from their quantity and not their nature, but the judgment was contrary.

Though Ld. Ch. Juſt. *Holt* in *Wharton* verſus *Liſle* held tithes ſhould be determined whether great or ſmall from their quantity, the judgment was contrary.

If this ſort of roots ſhould be called ſmall tithes when planted in gardens, and great when planted in fields, it would introduce the utmoſt confuſion, and muſt vary in every year in every pariſh.

If potatoes in gardens ſhould be called ſmall tithes and great in fields, it muſt vary every year in every pariſh.

If the quantity will turn ſmall tithes into great, why will it not turn great tithes into ſmall, when the quantity of great tithes is but ſmall.

An objection has been made, that if this rule ſhould hold it would put it in the power of the occupier to change the property.

To which I anſwer *ſo it will*, for tithes are a fluctuating uncertain inheritance, and depend upon the courſe of huſbandry; for a man may turn arable into paſture, and then the tithe being agiſtment, is become a ſmall tithe from a great one.

Where arable is turned into paſture, it is an agiſtment tithe, and become a ſmall one from a great one.

Therefore I think as there is no judicial determination againſt this, I am warranted in my opinion, that the tithe of potatoes is a ſmall tithe; and his Lordſhip decreed accordingly.

Caſe 274. *The Earl of Coventry* verſus *Coventry*, *July* 22, 1742.

THE queſtion in this cauſe aroſe upon the will of *Thomas* Lord *Coventry*, made in 1698. whether the teſtator by any words has diſpoſed of a manor called *Twigmore* to the plaintiff; for if he has not, the defendant inſiſts, he is intitled to it as heir at law.

Thomas late Earl of *Coventry* being in his life-time ſeiſed in fee of the manor of *Twigmore* in the county of *Lincoln*, " did by his will " deviſe his freehold manors of *Great* and *Little Milton* in the coun- " ty of *Oxford* to his wife *Elizabeth* for her life, remainder to truſtees " and their heirs, to the uſe of his firſt and other ſons in tail male, " remainder to his ſon *Thomas* Lord *Deerhurſt* for life, and to the " uſe of his firſt and other ſons in tail, remainder to teſtator's ſon " *Gilbert* for life, and to his iſſue male, remainder to teſtator's uncle " *Francis Coventry* for life, and his iſſue male, remainder to *Thomas* " *Coventry* for life and his iſſue male, remainder to *Henry Coventry*, " and his iſſue male, remainder to teſtator's right heirs. And he " thereby willed *that the manor or Lordſhip of* Twigmore *ſhould be* " *exchanged for the inheritance of the prebend manor of* Milton *in* Ox- " fordſhire, *which he held by leaſe, and that the ſame ſhould be done* " *by act of parliament*; *and that the inheritance of the ſaid prebend* " *manor after his death may be kept in his name and family*, he gives " to *Thomas Lord Deerhurſt* and *Gilbert Coventry*, and two others, " and to their heirs, the manor of *Twigmore* aforeſaid, and alſo the " manor of *Milton*, to hold to them, their heirs and aſſigns for ever, " to the uſes in this his will, and to hold the prebend manor of " *Milton*, unto the ſame truſtees, their executors, *&c.* for and du- " ring the term of years he had therein, and all his tenant right of, " in and to the ſame, to the end ſuch exchange might be made by " act of parliament as aforeſaid, as ſoon as may be after his deceaſe, " it being his will to be a benefactor to the church of *Lincoln*; ne- " vertheleſs it was his will that the truſtees ſhould permit his ſaid " wife *Elizabeth* to enjoy the manor of *Twigmore*, and prebend ma- " nor of *Milton*, and to receive the rents to her own uſe until ſuch " exchange could be made, and did alſo direct, that as ſoon as ſuch " exchange could be perfected, that the ſaid prebend manor of " *Milton* ſhould be ſettled upon his wife for life, and after to his iſſue " male on the body of the ſaid wife in ſpecial tail, with remainder " to the ſame perſons to whom he had limited *Great* and *Little* " *Milton*."

Thomas died ſoon after he made his will without iſſue male of his body by *Elizabeth* his then wife, and leaving iſſue by a former venter two ſons Lord *Deerhurſt* and *Gilbert*, both ſince dead without iſſue, and *Thomas Coventry* is alſo dead without iſſue male; *Elizabeth*

Counteſs of *Coventry* died in 1724. upon whoſe death the manor of *Great* and *Little Milton* veſted in the plaintiff for life, with remainders as before mentioned.

Gilbert Coventry ſurvived the other three truſtees, and left a daughter only, who married Sir *William Carew*, and by him had the defendant *Coventry Carew*, who is heir at law both of *Gilbert* the ſurviving truſtee, and likewiſe of *Thomas* the teſtator.

If no exchange can be made, the plaintiff inſiſts the manor of *Twigmore* ought to be ſettled upon him for life, with remainder as of *Great* and *Little Milton*, being the intention of the teſtator if exchange could not have been made, and that defendant ought to convey the manor of *Twigmore* to ſome new truſtee, till an act of parliament can be obtained.

The defendant Sir *William Carew* for himſelf, and as guardian for his ſon, ſays, that Lady *Ann Carew* his wife, daughter of *Gilbert Coventry*, dying ſeiſed in fee of the ſaid manor of *Twigmore*, and leaving *Coventry Carew* her ſon and heir by this defendant, he is intitled to hold and injoy this manor as tenant by the curteſy, and that *Coventry Carew* his ſon is intitled to the reverſion in fee as heir at law of the teſtator, and likewiſe of *Gilbert Coventry*.

The *Attorney General* for the plaintiff cited the caſe of *Noys* verſus *Mordaunt*, 2 *Vern.* 581. and the *Attorney General* verſus *Fiennes*, *February* 20, 1738.

For the defendant Mr. *Murray* cited the caſe of *Burgoyne* verſus *Benſon*, the 12th and 13th of *May* 1738. before Lord *Hardwicke* and *Bellaſis* verſus *Compton*, 2 *Vern.* 294.

LORD CHANCELLOR.

This comes before the court upon a bill brought by the preſent Lord *Coventry*, to have the benefit of an eſtate by way of truſt called *Twigmore* in *Lincolnſhire* for himſelf, and for thoſe who claim under the will of *Thomas* Lord *Coventry*.

By the will it appears the teſtator's intention was to ſecure eſtates in poſſeſſion and reverſion not only to his lineal, but the collateral branches of his family; for the introductory clauſe of his will ſhews plainly his intention to ſettle his whole eſtate.

The teſtator was ſeiſed in fee of two manors, one called *Great Milton*, and the other *Little Milton*, and likewiſe of a leaſehold eſtate called the prebend manor of *Milton* under the church of *Lincoln*, and of a freehold manor called *Twigmore* near the city of *Lincoln*.

He

He deviſes his manors of *Great Milton*, &c. to his wife *Elizabeth* for her life, remainder to truſtees and their heirs, to the uſe of his firſt and other ſons by *Elizabeth* in tail male, *&c. vide the will*; then takes up the conſideration of the prebend manor of *Milton*, and manor of *Twigmore*.

Thomas, the teſtator, died ſoon after.

The counteſs his ſecond wife became intitled to both theſe manors, till an exchange could be made; and during her life no exchange was ever made, nor ſince her death, and it is admitted the leaſehold eſtate is at an end, for it was never renewed.

Gilbert Coventry, ſecond ſon to the teſtator by the firſt venter, was the ſurviving truſtee of theſe manors: He died without iſſue male, and left one daughter, who was his heir, and married the defendant Sir *William Carew*; ſo that the defendant *Coventry Carew*, her ſon, is the heir at law of the ſurviving truſtee, and of *Thomas* Lord *Coventry* the teſtator.

The church of *Lincoln* refuſe to make the exchange; therefore the bill is brought for the making the exchange; and if the plaintiff is not intitled to that, he prays that he may at leaſt have the manor of *Twigmore*.

Againſt this latter relief, one general objection, made in behalf of *Coventry Carew*, that he is the heir at law of the teſtator, and the plaintiff who claims under the will ſtands in no other light before the court than as a volunteer; and therefore a court of equity ought not to interpoſe, but where the law has placed the eſtate, there it ought to remain.

But this objection will not hold here, for *Coventry Carew* muſt take as a deviſee, or not at all, for the teſtator did not leave any thing to deſcend but appointed truſtees of all his real eſtate.

And it is by mere accident it comes to *Coventry Carew* as heir at law to the ſurviving truſtee *Gilbert Coventry*, and therefore ſhall make no more alteration than if it had fallen to the repreſentative of any other truſtee.

When there is a limitation to a truſtee, though the legal eſtate veſts in him, yet it is incumbent upon this court to declare who ſhall have the beneficial intereſt, or otherwiſe truſtees would have the eſtate themſelves.

The firſt queſtion, What is the Intention of the teſtator, and the conſtruction of the will?

It

It appears to me, his intention was, that a new purchaſe ſhould be made of the prebend manor of *Milton*, for particular uſes, *viz.* a proviſion for his younger children, and afterwards that the inheritance ſhould go over in remainder to *Thomas* Lord *Deerhurſt*, &c. in order to keep the prebend manor of *Milton* in his name and family: This was his original and primary view.

A ſecondary view was, to benefit the church of *Lincoln*, by giving them an eſtate near *Lincoln*, and an eſtate of inheritance in poſſeſſion, in lieu of the prebend manor of *Milton*, provided an act of parliament could be procured.

The ſecond queſtion is, What would have been the effect of the exchange, had it been compleated?

As to this, I am of opinion, the plaintiff, and thoſe who claim under him, would not have taken by deviſe, but by virtue of the exchange from the prebend manor of *Milton*.

Suppoſe the exchange had been defeated by an eviction of the prebend manor, the perſon who had loſt the manor of *Milton* muſt have *Twigmore* back again, and not the heir at law: And the truſtees would certainly have been truſtees for the *ceſtuy que truſt* of the prebend manor of *Milton*.

In exchanges it is not clear, on an alienation by one party, and an eviction, whether the heir or the alienee ſhould enter.

It is not clear in the law of exchanges, if there is an alienation by one of the parties, and there is an eviction, whether the heir at law or the alienee ſhould enter; therefore this eſtate muſt be taken to be ſubject to the ſame truſts as the eſtate in exchange would have been.

The third queſtion is, What is the equity that reſults, now the exchange is not made, or perhaps never will, which the teſtator ſeems not to have had in his contemplation.

Where money is given to be laid out in lands, and when bought, to be ſettled on ſuch and ſuch perſons, on a bill brought here, the courſe is to direct a purchaſe, and the profits of the money to go as the land it ſelf, till purchaſed.

The equity is very plain; where a ſum of money is given by the will of a teſtator to be laid out in the purchaſe of lands, or of lands in a particular county, and after they are bought, to be ſettled upon ſuch and ſuch perſons: If a bill is brought here, the conſtant ordinary courſe is to direct a purchaſe, and the produce of the money to go as the land it ſelf till purchaſed.

Suppoſe a direction by will, to purchaſe an eſtate, which is afterwards ſwallowed up by an inundation, the money ſo deviſed ſhall not go to an executor, but as the rents would have done when the land was purchaſed.

This comes very near the preſent caſe; I would put theſe caſes: Suppoſe there was a direction by a will to purchaſe a particular

eſtate, which is ſwallowed up by an inundation, as happened in *Eſſex*; or ſuppoſe the will was to purchaſe an eſtate in ſuch a county, and it cannot be procured, what is the conſequence; ſhall the money ſo deviſed to be laid out go to the executor? No ſurely; but it ſhall go in ſuch manner as the rents and profits would do when the land is purchaſed: Now I do not ſee any difference between directing an eſtate to be given in exchange, and directing his manor of *Twigmore* to be ſold and turned into money, and applied for that purpoſe.

Twigmore is deviſed to truſtees for the uſes, *&c. vide the will:* Now the court muſt make ſuch conſtruction as will in the firſt place effectuate the purchaſe.

Another objection has been made, that the profits from and after the death, till the exchange ſhould be made, is an intereſt indiſpoſed of, and was compared to Lord *Weymouth*'s caſe.

But I think it is not at all like that caſe, for there the profits were totally undiſpoſed of; here the whole fee is given to truſtees, to the uſe of particular perſons, and for particular purpoſes.

It is carried too far, when it is ſaid, no exchange can ever be made, for there is no time fixed for it, and therefore there may come a prebendary at *Lincoln* who may conſent to the exchange.

Another objection was made, that ſuppoſing the leaſehold eſtate in the prebend manor had been kept full, and to this time, the plaintiff could not have taken both the eſtates.

This objection ſeems very ſpecious at firſt, but will not weigh in the preſent caſe; for I own I am not ſatisfied, whether the plaintiff would not have been intitled to both.

Next, as to the caſes.

What I ground myſelf upon is, conſidering this in the light of a purchaſe, which diſtinguiſhes it from all the caſes, and brings it to a common equity.

The caſe of *Burgoyn* verſus *Benſon*, relied on chiefly for the defendant, is attended with ſuch variety of circumſtances that it can never be a preſident for this or any other.

Upon the whole, I am of opinion, that the plaintiff is intitled to the manor of *Twigmore*, and muſt decree the poſſeſſion accordingly.

Howard

Howard verſus *Hopkyns*, *July* 21, 1742. Caſe 245.

THE plaintiff has brought this bill for a ſpecifick performance of an agreement.

A proviſo in articles for the purchaſe of an eſtate, that if either ſhould break the agreement, he ſhould pay 100 *l.* to the other; the defendant on being offered two years purchaſe more, accepted it, notwithſtanding his agreement. *Lord Hardwicke decreed a ſpecific performance of the articles.*

The plaintiff and defendant executed articles for the purchaſe of an eſtate; there was a proviſo in it, that if either ſide ſhould break the agreement, he ſhould pay 100*l.* to the other: The defendant afterwards met with a third perſon, who offered him two years purchaſe more than the plaintiff, upon which he immediately accepted of it, notwithſtanding his agreement with the plaintiff.

It was inſiſted by the defendant, that the plaintiff had been a tenant himſelf for ſeveral years of this very eſtate, and that he depreciated the value of it, and made a falſe repreſentation in order to keep off others, and to ſecure it to himſelf, which is a fraud in the plaintiff, and therefore the defendant ought to be relieved from this bargain.

It was inſiſted likewiſe, that it was the intention of the plaintiff and defendant, that upon either paying 100*l.* the agreement ſhould be abſolutely void.

LORD CHANCELLOR.

As to the defence of the ſtipulated ſum, I cannot take this, to let off either party when they pleaſe, but is no more than the common caſe of a penalty, for it might be inſerted by the plaintiff in order to be paid for his trouble of viewing and meaſuring the eſtate, taking plans, *&c.* ſuppoſing the defendant ſhould not be able to make out a title.

The offering to pay the ſtipulated ſum will not vacate the agreement, for it is no more than the common caſe of a penalty.

In all caſes where penalties are inſerted in caſe of a non-performance, this has never been held to releaſe the parties from their agreement, but they muſt perform it notwithſtanding.

A penalty has never been held to releaſe parties from their agreement, for though incurred, they muſt perform it notwithſtanding.

Indeed, if there had been evidence, which had proved a miſrepreſentation of the farm by the plaintiff to a gentleman who had a deſire of purchaſing it, that would have been a reaſon for ſetting aſide the agreement, and would have rebutted the equity the plaintiff has of a ſpecific performance of the agreement.

But

But the proof does not come up to this, nor is the perſon, who is pretended to have dropped the purchaſe of the eſtate merely upon the falſe ſuggeſtions and miſrepreſentations of the plaintiff, examined as to this fact, and therefore I muſt decree a ſpecific performance of theſe articles.

As to the increaſe of purchaſe money given by the defendant *Norwood* to the defendant *Hopkyns*, which muſt now be refunded to the defendant *Norwood*, he can receive no more from the plaintiff than the ſum agreed to by the articles, but I cannot make any decree as between co-defendants, unleſs I have their conſent, and therefore ſhall leave this matter open.

Caſe 246. *Ulrich* verſus *Litchfield*, *July* 23, 1742.

M. P. gave her real and perſonal eſtate to the plaintiffs, equally between them; and on the death of one of them, the whole eſtate to *James Ulrich* in tail; and for want of ſuch iſſue, to *Richard Ulrich* in fee, with a few pecuniary legacies, and charged her real eſtate with the payment, if the perſonal eſtate ſhould not be ſufficient; *and by her will declared ſhe gave all the reſt and reſidue of her perſonal eſtate to her uncle* Leonard Collard's *three daughters.*

The council for the reſiduary legatee offering to read the parol evidence of the attorney who drew the will, that he had expreſs directions to give the perſonal eſtate to the three daughters of *Leonard Collard*: *Lord Hardwicke ſaid, this was not a caſe where parol evidence can be read, though there were ſome things here which might make a judge wiſh to admit it.*

A Queſtion aroſe in this cauſe upon the will of *Mary Paravacini.*

" She bequeathed her real and perſonal eſtate to the plaintiffs " *Elizabeth Travers* and *James Ulrich*, equally between them for " life; and upon the death of *Elizabeth Travers*, ſhe gave the whole " eſtate to *James Ulrich*, in tail general, and for want of ſuch iſſue, " to *Richard Ulrich* in fee, with a few pecuniary legacies, and " charged her real eſtate with payment of theſe legacies, if her " perſonal eſtate ſhould not be ſufficient; and by her will declared " *ſhe gave all the reſt and reſidue of her perſonal eſtate to her uncle* " Leonard Collard's *three daughters*; and particularly gave to Mrs. " *Suſanna Litchfield* 10*l.* and made her executrix."

Mr. *Wilbraham*, for the reſiduary legatees, inſiſted, that *reſt and reſidue* of her perſonal eſtate, muſt mean the reſidue after the particular legacies are paid off; and could not refer to the beginning of the will, becauſe there a fee is deviſed, and conſequently the teſtatrix has diſpoſed of the whole: That parol evidence in this caſe may be admitted of the attorney who drew this will; that he had expreſs directions to give the perſonal eſtate to the three daughters of *Leonard Collard*, that to be ſure, things which are quite contrary to the will, ſhall not be proved by parol evidence, but that it may be allowed to explain words in a will, eſpecially in this caſe, where it appears to be merely a blunder in the drawer: He

cited the caſe of *Pendleton* verſus *Grant*, *Eq. Caſ. Abr.* 231. and *Hodgſon* verſus *Hodgſon*, 2 *Vern.* 593.

In the preſent caſe, he ſaid, it does not intrench upon any of the rules, with regard to parol evidence, but only clears up who was intended to have the perſonal eſtate, where the whole is deviſed to two different perſons; and that it ſeems clearly to be a blunder in the drawer of the will, becauſe the deviſe in the firſt part of it is proper only in the diſpoſing of real eſtate.

LORD CHANCELLOR.

Where there is a deviſe of an eſtate to one perſon at the beginning of the will, and a deviſe of the ſame eſtate to another at the end of it, there have been determinations that they ſhall take as jointenants.

It has been held, where there has been a deviſe of an eſtate to *A.* at the beginning, and to *B.* at the end of a will, they ſhall take as jointenants.

The conſideration before me is as to the perſonal eſtate.

There are two queſtions:

Firſt, Whether I ought to admit parol evidence to explain the intention of the teſtator.

And as to this, I am of opinion, it is not a caſe in which parol evidence can be read, and would be of dangerous conſequence; it is true, there are ſome things here which would make a judge wiſh to admit it; but I muſt not follow my inclinations only, for I do not know, that upon the conſtruction of a will, courts of law, or equity, admit parol evidence, except in two caſes: Firſt, to aſcertain the perſon, where there are two of the ſame name, or elſe where there has been a miſtake in a chriſtian or ſurname, and this upon an abſolute neceſſity, as in Lord *Cheyney*'s caſe, where there were two ſons of the name of *John*, 5 *Co.* 68. and if the court had not let in ſuch evidence, it would have made the will void, notwithſtanding, there was ſuch a perſon as *John*, &c. and the doubt was only which of them was meant, and notwithſtanding too the heir at law was clearly diſinherited.

Courts of law and equity admit parol evidence in two caſes only, to aſcertain the perſon, where there are two of the ſame name, or where there has been a miſtake in a chriſtian or ſurname, and in reſulting truſts relating to perſonal eſtate; as where an executor has a ſmall legacy, and the next of kin claim the reſidue, there parol proof is admitted to aſcertain who was to have it.

The ſecond caſe is, with regard to reſulting truſts relating to perſonal eſtate; where a man makes a will, and appoints an executor, with a ſmall legacy, and the next of kin claim the reſidue.

In order to rebut the reſulting truſt for the next of kin, in the caſe of *Littlebury* verſus *Buckley*, *Eq. Caſ. Abr.* 245. and the *Counteſs* verſus *the Earl of Gainſborough*, 230. Parol proof was admitted to aſcertain the perſon who was to have the reſidue.

It is very true, cafes may be cited where Lord *Cowper* has admitted fuch evidence; for he went upon this ground, that it was by way of aſſiſting his judgment, in caſes extremely dark and doubtful.

Lord *Hardwicke* not ſatisfied with Lord *Cowper*'s rule of admitting parol evidence in doubtful wills.

I have the greateſt deference for his judgment, but muſt own I was never ſatisfied with this rule of Lord *Cowper*'s, of admitting parol evidence in doubtful wills: beſides, he went further in the great caſe of *Strode* verſus *Ruſſell*, 2 *Vern.* 621. in which there was an appeal to the houſe of Lords; Mr. Juſtice *Tracy*, who aſſiſted Lord *Cowper* in that cauſe, was at firſt of the ſame opinion with him, but upon conſidering it more, diſavowed his firſt opinion, and was clear that it could not be admitted; and this alteration in his judgment was mentioned in the houſe of Lords.

Mr. Juſtice *Tracy*, who aſſiſted Lord *Cowper* in *Strode* verſus *Ruſſell*, was at firſt of the ſame opinion with him, but on conſideration, clear the evidence could not be admitted; and his alteration of judgment had weight in the houſe of Lords.

In *Selwin* verſus *Brown*, Lord *Hardwicke* ſaid he was for admitting it. Lord *Talbot*, who had a remorſe of judgment at the ſame time, rejected it; but the houſe of Lords refuſed it, and affirmed the decree.

In the caſe of *Selwin* verſus *Brown*, *Caſes in the time of Lord Talbot* 240. I was of opinion that it ought to have been admitted; and even Lord *Talbot*, when he had heard the cauſe, had a remorſe of judgment at the ſame time he rejected the parol evidence; but the houſe of Lords refuſed it as of moſt miſchievous conſequence, and affirmed the decree.

Item, *I give to John*—— 10 *l. and ſeveral legacies to others, and then diſpoſes of all the reſt and reſidue.*

Here is undoubtedly a contradiction and repugnancy in the words; for in the firſt place ſhe has given all her perſonal eſtate to the plaintiff, and yet legacies come afterwards, and a deviſe of the reſidue.

What then muſt be the conſtruction.

Where the ſame thing is given in a will to two different perſons, Lord *Coke* ſaid the latter words ſhall revoke the former; but in *Plowden*, in the caſe of *Paramore* and *Yardley*, it was held they ſhall take as jointenants; but Lord *Hardwicke* ſaid he rather inclined to Lord *Coke*'s opinion.

As to the general queſtion, where the ſame thing is deſcribed, generally, and given to two different perſons in the former and latter part of a will, Lord *Coke* was of opinion, the latter words ſhall revoke the former; but in *Plowden*, in the caſe of *Paramore* and *Yardley*, it is ſaid, they ſhall take as jointenants: I own the reaſoning in *Plowden* is not convincing to me, but rather incline to Lord *Coke*'s, though the latter caſes have taken it otherwiſe.

But no certain rule is to be laid down as to conſtruction of deviſes; and ſo ſays *Swinburne* in the 7th *part*, *chap.* 21. but they muſt depend upon their particular circumſtances.

In

In the caſe of a ſimple legacy, if a man makes a will, and gives a horſe to *A.* in the firſt part, and in the latter end of it gives the ſame horſe to *B.* it is a revocation of the former legacy, and therefore *Swinburne* is miſtaken in point of law.

Where a man gives a horſe to *A.* in the firſt part, and in the latter end the ſame horſe to *B.* it is a revocation, and *Swinburne* is miſtaken in point of law, in ſaying they ſhall take as jointenants.

Upon the whole of what *Swinburne* ſays, the reſult is this, That if the ſame thing be given to two perſons, they ſhall take as joint-tenants, unleſs there is ſomething to indicate and prove the intention of the teſtator to revoke and vary the deviſe.

Now try the preſent caſe by this rule, and ſee if it does not come exactly within it.

The teſtatrix by giving legacies after the deviſe of all the perſonal eſtate, has varied the will *pro tanto.*

It is truly ſaid that a man may give the whole in a former part, and qualify it afterwards, and ſtill the firſt legatee is intitled in part.

The teſtatrix's charging the real eſtate with the legacies, if the perſonal is not ſufficient, ſhews her intention in one event totally to revoke the deviſe of the perſonal; and there being an alteration of her intention before ſhe finiſhes her will, the conſtruction is, ſhe has altered her intention throughout, and the plaintiff is not intitled to any part of the perſonal eſtate, but the reſidue belongs to the three daughters of Mr. *Leonard Collard*; and Lord *Hardwicke* decre edaccordingly.

But here, in caſe the whole perſonal eſtate ſhould not be ſufficient to pay the legacies, ſhe charges the real eſtate with them, upon a ſuppoſition that the other might not be ſufficient, and therefore is a plain indication of her intention in one event totally to revoke the deviſe of the perſonal eſtate.

Then it muſt be admitted that here is an alteration of her intention, as to this deviſe before ſhe finiſhes her will.

Afterwards ſhe ſays, *I give all the reſt and reſidue of my perſonal eſtate to my uncle* Leonard Collard's *three daughters.*

What is the conſtruction then? Why that the teſtator has made an alteration in her intention throughout.

Mr. *Brown* would endeavour to find out a reſt or reſidue, notwithſtanding all the perſonal eſtate is given away to the plaintiff; and that is ſuppoſing the plaintiff had died in the life-time of the teſtatrix, then it would have ſunk into the reſidue as a lapſed legacy, and the three daughters of the uncle would have been intitled under the deviſe of the reſt and reſidue.

But this will not hold; for when a perſon makes a will, and gives particular legacies, it is not ſuppoſed to be in the view of the teſtator that legatees will die in his life-time, nor does he provide for

for that accident; and this is the reaſon it is called a lapſed legacy, becauſe the teſtator had it not in view at the time of the will.

Fane verſus *Fane*, 1 *Vern.* 30. is ſtrong to this point.

Upon the whole, I am of opinion the plaintiff is not intitled to any part of the perſonal eſtate.

Caſe 247. *Saltern* verſus *Saltern*, *July* 24, 1742.

Where there is a deviſe of a leaſe for years to a man, and if he die without iſſue remainder over, the whole intereſt veſts in the firſt taker; otherwiſe if a leaſe for lives, for if the firſt taker makes no uſe of his power, on his death it veſts in the remainder-man, who takes as a ſpecial occupant.

THE words of the will upon which the queſtion aroſe were, "I give unto my grandſon alſo a leaſe that I did take, being "part of the lands called *Barton*, unto *John Saltern* and his heirs, "but if he ſhall happen to die without heirs of his body, then he "deviſes it over."

It was ſaid by council, that a deviſe to a man generally and for life of a chattel intereſt, and if he die without iſſue, or if he die without heirs of his body, remainder over, that it ſhall be conſtrued in this court to mean a dying without iſſue at the time of his death.

LORD CHANCELLOR.

I know of no ſuch rule; for in thoſe caſes where the court has reſtrained it to a dying without iſſue at the time of the death of the firſt taker, it has ariſen from ſome other words, which ſhew the intention of the teſtator to confine it to ſuch a dying without iſſue.

Where there is a deviſe of a leaſe for years to a man, and if he die without iſſue remainder over; there is no doubt but the whole intereſt veſts in the firſt taker; otherwiſe if it had been a leaſe for lives, for there the firſt taker had a power over it only during his own life to have diſpoſed of it, but if he makes no uſe of that power, immediately upon his death it veſts in the remainder-man, who takes *as a ſpecial occupant*.

Caſe 248. *Hodgeworth* verſus *Crawley*, *July* 26, 1742.

A deviſe of an annuity *clear from A.* means free from taxes.

A Deviſe to truſtees of a ſum of money to be laid out in the purchaſe of an annuity *clear* for *A.*

LORD CHANCELLOR.

I muſt direct the truſtees to lay it out in the purchaſe of an annuity free from taxes, which is the proper meaning of the word *clear*.

Smith verſus *Fellows*, *July* 26, 1742. Caſe 249.

THE queſtion in the preſent caſe is, Whether a freeman of *London* (by aſſigning over ſome leaſehold houſes to truſtees for particular purpoſes, reſerving to himſelf an eſtate for life, where the truſt was not to commence till after his deceaſe) has not been guilty of a fraud upon the cuſtom of *London*.

A freeman of *London* aſſigned over leaſehold houſes to truſtees for particular purpoſes, reſerving to himſelf an eſtate for life, where the truſt was not to commence till after his deceaſe: *Lord Hardwicke held it to be a fraud on the cuſtom, and decreed it to be cancelled.*

The caſes cited to prove it a fraud were *City* verſus *City*, 2 *Lev.* 130. *Hall* verſus *Hall*, 2 *Vern.* 277. and *Turner* verſus *Jennings*, 2 *Vern.* 612. and *Cotterell* verſus *Cotterell*, at the *Rolls*, 1736.

LORD CHANCELLOR.

I am of opinion that this is a plain fraud upon the cuſtom, and therefore decree the deed of aſſignment to be cancelled, and the defendant to account for the leaſehold premiſſes, as part of the freeman's perſonal eſtate; and the Maſter likewiſe to take an account of what rents and profits have accrued upon the ſaid leaſehold houſes, ſince the freeman's death, and to pay his debts in a courſe of adminiſtration, and out of the clear ſurplus, to allow the widow's chamber in the firſt place, then the reſidue to be divided into three parts; the firſt to go as the widow's ſhare, the ſecond as the orphanage, and the third as the dead man's part.

Legard verſus *Sheffield and others*, *July* 27, 1742. Caſe 250.

LORD CHANCELLOR.

THE plaintiff, an infant, has not replied to Lord *Mountjoy*'s anſwer, who, by his pedigree, makes himſelf to be one of the heirs at law to the Duke of *Buckinghamſhire*; and if the plaintiff had been of age, it would have been an admiſſion of the facts in the anſwer; but an infant can admit nothing, and therefore his not replying does not affect him; and for this reaſon; you muſt read the evidence of the pedigree, that I may judge whether it is clearly made out this defendant is an heir at law.

If a plaintiff, who is of age, does not reply, it is an admiſſion of the facts in the anſwer; but an infant can admit nothing and therefore his not replying does not affect him.

Caſe 251. *The Attorney General at the relation of Clarke and others* verſus *Montgomery*, *July* 28, 1742.

LORD CHANCELLOR.

The court lays more weight on a trial at bar from the ſolemnity of it, and length of examination.

WHERE there are two trials, and the laſt was at the bar, this court has ſuffered the laſt to prevail; and to lay down a rule that there muſt be three, will be attended with great expence; what turns in favour of the laſt trial, is the ſolemnity and length of examination, and the reaſon for directing a trial at bar is in order to that.

The laſt verdict here was on further evidence, which makes this a ſtronger caſe than the common one, where there are two trials on the ſame evidence, and therefore I ſhall not grant a new trial on that ground.

An original motion muſt be made for a new trial, and the court will not anſwer a petition for it, where the cauſe comes on upon the equity reſerved.

I do declare, that for the future, I will not anſwer a petition for a new trial, where the caſe comes on upon the equity reſerved, for I do expect an original motion to be made for that purpoſe, otherwiſe it is tending to great delay.

There were ſeveral proceedings in favour of the will, which make it reaſonable to hear what the judges ſay to the verdict.

Let it ſtand over to the firſt day of rehearing in the next term, for that purpoſe.

Caſe 252. *Montgomery* verſus *Clark and others*, *November* 25, 1742.

Lord *Hardwicke* thought it an abſurdity, that a will ſet aſide at law for the inſanity of the teſtator, may ſtill be litigated on account of perſonal eſtate in the eccleſiaſtical court, and expreſſed a wiſh the legiſlature would find a remedy for it.

A Motion was made on behalf of the plaintiff, as heir at law, and next of kin to *Elias Turner*, whoſe will has been ſet aſide for inſanity; that Mr. *Clark*, one of the truſtees, and executors of the will, may pay into the bank what money he has already received from the teſtator's perſonal aſſets, and that he may be reſtrained from getting in any more for the future.

Mr. *Clark*'s council inſiſted, that notwithſtanding there is a verdict at law againſt the will, it affects the teſtator's real eſtate only; and that he, as executor, is ſtill at liberty to ſupport the will in the eccleſiaſtical court, and therefore intitled to gather in the aſſets of his teſtator to defend the validity of the will.

LORD

LORD CHANCELLOR.

I have often thought it a very great abſurdity, that a will which conſiſts both of real and perſonal eſtate, notwithſtanding it has been ſet aſide at law for the inſanity of the teſtator, ſhall ſtill be litigated upon paper depoſitions only in the eccleſiaſtical court, becauſe they have a juriſdiction on account of the perſonal eſtate diſpoſed of by it.

I wiſh gentlemen of abilities would take this inconvenience and abſurdity into their conſideration, and find out a proper remedy by the aſſiſtance of the legiſlature.

But, as the law ſtands at preſent, it is not in the power of this court to interpoſe, ſo as to ſtop the proceedings in the eccleſiaſtical court.

The teſtator has left a very large perſonal eſtate, but has not truſted Mr. *Clark* alone, for he has appointed three more truſtees, who have a joint power, ſo that no one of them can act ſeparately.

And therefore, to anſwer the end of the motion, this method muſt be taken.

I will direct Mr. *Clark*, who has received 1000 *l.* of the teſtator's money to pay it into the bank, not to the account of the truſtees, but in the name of the accomptant general; and that there ſhall be a receiver appointed of the whole eſtate, who ſhall pay in what he receives from time to time, into the bank, with the accomptant general's privity, whilſt the validity of the will is conteſting in the eccleſiaſtical court.

The defendant ordered to pay in 1000 l. he has collected of the teſtator's money, into the bank, in the name of the Accomptant general;

and his Lordſhip appointed a receiver of the whole eſtate, to pay in, from time to time, what he receives whilſt the will is conteſting in the eccleſiaſtical court.

Clerk and others verſus *Miller*, at the Rolls, *July* 28, 1742. Caſe 253.

A Feme covert having a ſeparate eſtate, ſets workmen to work in her huſband's houſe, without his directions, and promiſe to pay them; there are other creditors on the ſame foot.

A feme covert who had a ſeparate eſtate employ's workmen in her huſband's houſe, without his directions, and promiſes to pay them; *the Maſter of the Rolls* doubted, whether a parol promiſe can ſubject lands, but ſhe ſubmitting to pay, he decreed accordingly.

The bill was brought by creditors againſt the repreſentatives of the huſband, and the widow, to have the ſeparate eſtate of *Mary Miller*,

Miller, and alſo the aſſets of the huſband applied towards ſatiſfaction of their debts.

Maſter of the Rolls: I doubt, whether upon the bare promiſe only, that is but parol, her lands can be ſubjected, which is what is prayed by the bill; but ſhe ſubmitting by her anſwer to pay, thought this a good reaſon for decreeing accordingly.

Caſe 254. *Cartwright* verſus *Pultney*, *July* 29, 1742.

LORD CHANCELLOR.

On a bill for a partition between two jointenants, the plaintiff muſt ſhew a title in himſelf, and not alledge generally, that he is in poſſeſſion of a moiety.

WHERE a bill is brought in this court to have a partition between two jointenants, or tenants in common, the plaintiff muſt ſhew a title in himſelf to a moiety, and not alledge generally that he is in poſſeſſion of a moiety, and this is ſtricter than a partition at law, where ſeiſin is ſufficient; the ſtatute of 8 & 9 *W.* 3. *c.* 31. was made for that reaſon.

Here the reaſon is, becauſe conveyances are directed, and not a partition only, which makes it diſcretionary in this court, whether where a plaintiff has a legal title, they will grant a partition or not, and where there are ſuſpicious circumſtances in the plaintiff's title, the court will leave him to law?

But this being founded on an equitable title, I muſt determine it, or otherwiſe it would be without remedy.

The plaintiff need not in his bill ſet forth a particular title, but a general ſeiſin in fee.

There was a decree at the *Rolls* for the Maſter to look into the caſe.

The Maſter's report ſtates the title, ſuſpicious circumſtances of forgery appeared in the plaintiff's deeds; which, though not forged by him, yet if forged, invalidate the plaintiff's title: An order was made to look into the deeds, upon which the plaintiff deſerted that title, and ſet up another, and prayed leave to bring a ſupplemental bill on that new title, and there are evidences of a forgery.

It was inſiſted on the plaintiff's part, there ought to be a trial at law.

But the defendant is not concerned to litigate this title as to any right of his own, only ſo far as to ſee that he has not a precarious partition, and a bad conveyance, and that in a caſe where it is diſ-

cretionary in the court to grant partition or not, and would put the defendant to a great expence.

The evidence here is all on one ſide againſt the deeds: But, on the contrary, the title is deſerted, and therefore it is not incumbent on the court, where deeds are ſo impeached, to grant a trial between parties concerned.

There have been caſes where the court has condemned deeds without a trial, for inſtance, *John Ward*'s caſe, who was directed to be proſecuted by the Attorney General, and this by order of the Houſe of Lords.

The title on the original bill muſt be laid out of the caſe, and diſmiſſed with coſts.

As to the title on the ſupplemental bill, the objection to it is, that it only ſhews an equitable title, not a legal one.

Where a fine and nonclaim is levied by one who got poſſeſſion under a forged deed, a court of equity would decree againſt the fine.

The court will decree againſt a fine levied under a forged deed.

But I muſt in this decree direct the plaintiff to procure a conveyance by his truſtees, and the Maſter to conſider who are ſuch.

Further objections have been made to the title: Circumſtances of fraud in the conveyances, want of conſideration, *&c.*

Theſe objections are not ſuch as concern the defendant in reſpect to the partition, for if the owners were in equity intitled to have a reconveyance on the fraud, yet the defendant not being privy, and the perſon being in poſſeſſion who had the legal title, and being party to the partition, the relief would not extend to that, if equally made, but the court would decree ſubject to the partition; if, indeed, it was defective in law, that would be an objection, but as they muſt come into equity, they muſt do equity to the defendant.

The laſt conſideration is, what I am to do? I am of opinion, that I may decree a partition on the ſupplemental bill, and the parties on both ſides are to procure the truſtees to convey; and the Maſter will conſider of that on framing the conveyances; and if any doubt ſhall ariſe, may come before the court on exceptions.

The plaintiff muſt pay the whole coſts of the firſt ſuit on the original bill; and I muſt reverſe the decree on the original cauſe with coſts; and on the ſupplemental bill make a new decree for partition, and reſerve the coſts,

Caſe 255. *Connor* verſus *The Earl of Bellamont*, *July* 31, 1742.

Where the debt was contracted in *England*, but the bond taken for it in *Ireland*, to be paid at a certain time, and at 7 *per cent.* it ſhall carry *Iriſh* intereſt.

THE queſtion was, Whether *Engliſh* or *Iriſh* intereſt ought to be allowed? In the preſent caſe the debt was contracted in *England*, but a bond taken for it in *Ireland*, to be paid at a certain time, and at 7 *per cent.*

LORD CHANCELLOR.

It is inſiſted the bond ought to carry *Engliſh* intereſt, an dif it had been a ſimple contract debt only, I ſhould have been of opinion it ought, and the variation of place would have made no difference.

But where the ſecurity is given upon an eſtate in *Ireland*, it muſt be conſidered as referable to the place where it is made, or who would lend money upon *Iriſh* ſecurity?

As to the caſes of Lord *Ranelaugh* verſus *Sir John Champante*, 2 *Vern.* 395. *and Prec. in Chan.* 128. cited by Mr. *Browne*; they are quite different from this, becauſe the bond for ſecuring the debt was executed here in *England.*

There might be many caſes cited; as for inſtance, the tranſactions among merchants with regard to the *reſpondentia bonds*, which carry 10 *per cent.* though entred into upon an agreement made in *England*; yet, as they relate to matters ariſing in the *Eaſt Indies*, they will not be deemed uſurious, but ſhall be binding upon the obligor.

If I was to lay down a rule, that where the contract is made in *England*, notwithſtanding the ſecurity is taken in *Ireland*, and the eſtate lies there, it ſhall be governed according to the rate of intereſt upon money in *England*, it would be attended with ill conſequences.

But here is a much ſtronger circumſtance in this caſe, for there was actually a fall of Timber upon an eſtate in *Ireland*, and a thouſand pound raiſed off *Iriſh* money to pay of the debt.

Therefore let the exception to the Maſter's allowing *Iriſh* intereſt, upon the bond, be over-ruled.

Staunton

Staunton verſus *Oldham July* 31, 1742. Caſe 256.

LORD CHANCELLOR.

THIS comes before me upon exceptions to a Maſter's report, to whom the cauſe was referred, upon *a decree to account.*

The court, where there is ſuch a decree, never ſuffer it to be ſigned and inrolled, becauſe it ties up their hands, if there ſhould have been any defect in the directions of the decree, from relieving in that particular, and defects are very frequent in caſes of this nature, and therefore the decrees are left open, in order to give parties an opportunity to rehear, where directions in a decree are imperfect.

The court never ſuffer a decree to account to be ſigned and inrolled, becauſe it ties up their hands from relieving, if there ſhould have been any defect in the directions of the decree.

Parteriche verſus *Powlet*, *Auguſt* 2, 1742. Caſe 257.

LORD CHANCELLOR.

WHERE a plaintiff is charged by an anſwer, he muſt diſcharge himſelf by proof, and cannot do it by reading the whole anſwer, as he may at law.

A charge by anſwer, muſt be diſcharged by proof.

An exception is taken to the Maſter's report, that he has charged the tenant for life without impeachment of waſte, with ſeveral ſums for the repairs of tenants houſes upon the eſtate.

A tenant for life though without impeachment of waſte, ſhall be obliged to keep tenants houſes in repair.

Lord Hardwicke over-ruled the exception, and ſaid, notwithſtanding tenant for life is without impeachment of waſte, he ſhall be obliged to keep tenants houſes in repair, unleſs the charge is exceſſive, and ſhall not ſuffer them to run to ruin.

A queſtion aroſe upon the ſpecial matter of the Maſter's report, whether parol evidence ſhould be admitted to explain a written agreement.

Not only contrary to the ſtatute of frauds, but to the common law before the ſtatute, to add any thing to an agreement in writing by parol evidence.

LORD CHANCELLOR.

Where a marriage agreement is compleat, and reduced into deeds and writings, to ſuperadd any thing afterwards is a very unfavourable caſe.

By the ſettlement the portion of the wife appears to be 5300 *l.* and at the ſame time ſhe gave a bond to the huſband's father in the penalty of 1400 *l.* for ſecuring 700 *l.* and ſigned by her, but at the

bottom the huſband in his own hand has written, *I own this to be my debt.*

Parol evidence has been read to explain this affair; but I am of opinion *that* evidence muſt be laid out of the caſe, and no advantage ought to be taken of it by either ſide.

As I am obliged to confine myſelf to the deeds, it appears to me to be an extortion in the father of the huſband, after every thing was agreed.

The wife ſigns the bond, and the huſband at the bottom writes, *I own this to be my debt*; what is the natural conſtruction? why that the wife became ſurety for her intended huſband to pay the father this ſum, moſt probably for a debt the ſon owed the father.

To add any thing to an agreement in writing by admitting parol evidence, which would affect land, is not only contrary to the ſtatute of frauds and perjuries, but to the rule of common law, before that ſtatute was in being; and therefore I ſhall direct that the wife's real eſtate ſhall not be charged with the payment of this bond.

A huſband has a mortgage upon his eſtate, the wife joins with him in charging her own, if ſhe ſurvives, her eſtate ſhall be looked on only as a pledge, and ſhe is intitled to be ſatisfied out of his eſtate, as ſtanding in the mortgagee's place.

The wife too in this caſe had a ſeparate eſtate by virtue of the marriage ſettlement; the huſband had an incumbrance upon his eſtate, the wife advanced money to pay it off, and the receipt from the mortgagee was delivered to her; the queſtion is, whether this was a bounty, or a loan only from the wife, for the receipt is not produced; if it is by way of loan, ſhe having a ſeparate eſtate, muſt be conſidered as a diſtinct perſon, and is equally intitled to ſtand in the place of the mortgagee as a ſtranger: and it is like this caſe; ſuppoſe a huſband has a mortgage upon his eſtate, and a wife joins with him in charging her own, if ſhe ſurvives him, though her eſtate is liable to the mortgagee, yet in this court her eſtate ſhall be looked upon only as a pledge, and ſhe is intitled to ſtand in the place of the mortgagee, and to be ſatisfied out of her huſband's eſtate.

It was referred back to the Maſter to review his report, and to inquire into the nature of the receipt, and to examine the banker who anſwered the wife's draught for this ſum of money.

Smith

Smith verſus *Haſkins Stiles Eyles*, *Auguſt* 3, 1742. Caſe 258.

A decree quod computet, makes no variation as to an executor, for before a final decree, he may confeſs a judgment, and it does not at all alter the nature of the demand.

SIR *John Smith* was concerned with the late Mr. *Haſkins Stiles* in the aulnage duty, under a leaſe from the Dutcheſs of *Lenox*, and the leſſees entered into articles mutually to indemnify one another: Sir *John Smith* has paid 2000 *l.* which was the fifth that Mr. *Haſkins Stiles* ought to have paid as his ſhare, for which he brought his bill againſt Mr. *Haſkins Stiles* in his life-time; and at the hearing of the cauſe there was a decree, that it ſhould be referred to a Maſter to ſee what was due to Sir *John Smith*; very ſoon after Mr. *Haſkins Stiles* died, and by his will appointed *Francis Haſkins Stiles Eyles* his executor, who, before the Maſter had reported the 2000 *l.* due to Sir *John Smith*, confeſſes a judgment to his father Sir *John Eyles* for 6000 *l.* the exception is now taken, to the Maſter's reporting this judgment to be of a prior nature to the plaintiff's demand of 2000 *l.* under the decree to account.

Mr. Attorney General for the exception, inſiſts, that though the decree does not aſcertain the *quantum* of the debt, yet it goes ſo far as to alter the nature of it, and to give it the ſanction of a court of equity.

Mr. *Murray* on the ſame ſide ſaid, the point is here determined in the decree, for the demand is liquidated, and the direction is to take the account only for the benefit of Mr. *Haſkins Stiles*, who is at liberty to diſcharge, but it now comes out that he was not able to ſet off a ſingle farthing; ſo that as there is no variation, but remains as it did when the decree was made, a liquidated ſum, it muſt have relation to the time of the decree, and therefore differs greatly from a common *decree quod computet*.

It is the adminiſtration of Mr. *Haſkins Stiles* who has confeſſed this judgment to his own father; and it would be very hard if he may thus poſtpone a creditor for a certain ſum, to a judgment given to ſo near a relation.

There is another circumſtance for Sir *John Smith*, that Sir *John Eyles*, the judgment creditor, had notice of the demand, and likewiſe of the decree, and therefore lent his money with his eyes open, and ought not to be preferred as he was no ſtranger to this tranſaction.

Mr. *Ord*, council on the other ſide, ſaid, that here is nothing in this decree, but common directions for the Maſter to ſee what is due from one party to the other; and it may come out that there is a balance due from the plaintiff to the defendant, and cannot be

called a final decree till the Maſter's report is confirmed: He inſiſted likewiſe that it is an account to be taken generally between the plaintiff and defendant, and not as Mr. *Murray* ſaid, for the defendant only, to account. In anſwer to the point of notice, he cited the caſe in *Salk.* 507. *Maſon* verſus *Williams.* *

LORD CHANCELLOR.

I thought this queſtion had been determined and ſettled; but ingenious men I find can take diſtinctions, where the thing itſelf will not admit of it.

The difference between a decree *quod computet*, and a final decree, was taken and ſettled in the caſe of *Morris* verſus *the Bank of England, Caſ. in the time of Lord Ch. Talbot* 217.

Decrees of this court are here put upon the ſame footing with judgments at law, though they have not obtained the ſame privilege *there.*

It is allowed that if *a decree* is obtained againſt a teſtator, or his executor, *quod computet*, it can by no means be put upon an equality with a judgment confeſſed after ſuch decree.

A decree quod computet always concludes in the ſame manner, and yet does not vary at all as to the executor, for before a final decree the executor may confeſs a judgment, and does not at all alter the nature of the demand, notwithſtanding the words are inſerted in the decree, *that each party do pay*; for theſe words are only a direction to the Maſter, to inſert what ſhall appear to be due upon the balance to either party; and when the order is made abſolute, the money is to be paid to the perſon reported to be intitled.

Theſe decrees have been truly compared to *interlocutory* judgments at law.

An action of covenant brought, and an interlocutory judgment *quod recuperet*, before final judgment, the teſtator dies, the executor confeſſes a judgment to a bond-creditor, he may plead it in bar to a *ſcire facias* on the action of covenant.

Suppoſe a man dies indebted by bond, and is likewiſe indebted upon covenant, and an action is brought upon the covenant, and an interlocutory judgment is *quod recuperet*, &c. and before the writ of inquiry of damages is executed, and final judgment entered up, the teſtator dies, and the executor confeſſes a judgment to the bond-creditor, he may plead it in bar to a *ſcire facias* upon the action of covenant.

* It was held by Lord Chancellor *Cowper*, that an executor may pay debts of a higher nature after a decree *quod computet*, but not after a final one, for ſuch a decree is in the nature of a judgment. *Maſon* verſus *Williams.*

So

So here in equity upon a *decree quod computet*, it does not paſs *in rem judicatam*, till the final decree.

A decree *quod computet* does not paſs *in rem judicatam*, till the final decree.

But here it is ſaid that there is a liquidated ſum, and nothing appears on the part of Mr. *Haſkins Stiles* by way of diſcharge on the Maſter's report.

But it will be very dangerous to admit of ſuch nice diſtinctions, for the points with regard to aſſets are numerous enough already, and I will not ſuffer them to be made upon the particular wording of this decree.

But even the fact here does not warrant the diſtinction; it was ſaid in the houſe of Lords, in the caſe of *Morris* verſus *the Bank of England*, that in *a decree quod computet*, it is impoſſible to pronounce who will be the debtor or creditor, and no ſtreſs is to be laid upon the words *that each party do pay* in the decree.

No ſtreſs to be laid on the words that each party do pay in a decree *quod computet*, for till the account taken, impoſſible to pronounce which will be the debtor or creditor.

The exception was over-ruled, and the judgment creditor was decreed to be ſatisfied out of the aſſets of Mr. *Haſkins Stiles*, preferable to the plaintiff Sir *John Smith*.

Baker verſus *Pritchard alias Hoſier*, *Auguſt* 4, 1742. Caſe 259.

THE defendant in this cauſe has demurred to the diſcovery, which is ſought by the bill, with relation to the perjury in a ſuit at law, charged to be committed by her procurement: And likewiſe to the diſcovery ſought touching the proceedings before the delegates: ſhe has alſo pleaded the common plea, of fine and non-claim in bar to the title ſet up by the plaintiff.

The defendant demurred to the diſcovery, ſought with relation to the perjury in a ſuit at law charged to be committed by her procurement, and likewiſe to the diſcovery ſought concerning the proceedings before the Delegates.

Lord *Hardwicke* held, that the ſentence in the Delegates cannot be read, as this is a demand for real eſtate, and they proceed there by different laws, and in matters too relative to the perſonal eſtate only, and allowed the demurrer as to this part.

The cauſes of demurrer are two: 1ſt, That what is prayed with regard to the perjury, would ſubject her to puniſhment; 2dly, That the proceedings in the court of delegates relate only to perſonal eſtate, and therefore ſhe is not obliged to ſet it forth, as this is a demand for real eſtate.

Mr. *Noel*, upon the point of the fine and non-claim, cited for the plaintiff *Allen* verſus *Sayer*, 2 *Vern.* 368.

Mr. *Murray* on the ſame ſide, laid it down, that the diſtinction here with regard to reading ſentences in the eccleſiaſtical court,

is this, that if the preciſe point is determined there, it may be read here; but if it was only a collateral thing, and not the direct point in the cauſe, which came before the eccleſiaſtical court, it cannot be read here.

He allowed the defendant was not obliged to ſet forth, that ſhe ſuborned the witneſſes at the trial at law, but ſhe may anſwer whether the verdict was not principally obtained upon the evidence of this perſon, who was perjured.

That the demurrer therefore covers too much, and if defective in part, it is bad for the whole, for a demurrer cannot be ſplit.

As to the fine and non-claim, he inſiſted there was no non-claim in the preſent caſe; for the fine was in 1733. the bill filed ſoon after, and the plea and anſwer did not come in till 1741. ſo that here was a proceeding all the time.

Another ground, he ſaid, for not allowing this fine was, that it is fraudulent, becauſe the defendant has changed the poſſeſſion by colluſion, with the tenants of the eſtate, who entered into an agreement to deliver the poſſeſſion, provided they may pay their rents into a third perſon's hands, until the event of the ſuit here was over.

Mr. *Brown* inſiſted for the defendant, that nothing was done from the year 1735. till 1741. ſo that here is a quiet poſſeſſion of ſix years at leaſt.

LORD CHANCELLOR.

Though a fine has been levied, yet if it is under circumſtances of fraud, the court ought to prevent the ſtealing away an eſtate in this manner.

Firſt, *as to the demurrer.*

I think it proper, becauſe it is plain all the matters referred to by the bill are relative to the proceedings in the eccleſiaſtical court.

As the demand in this court is for real eſtate, I think it would be of dangerous conſequence to admit the ſentence of the court of Delegates to be read here, who proceed by different laws, and in matters relative only to the perſonal eſtate.

If indeed in the life-time of Admiral *Hoſier*, there had been a proper ſuit inſtituted in the eccleſiaſtical court relating to the mar-

A ſuit in the eccleſiaſtical court, in Admiral *Hoſier*'s life-time, and a ſentence againſt it, would have bound every body, being concluſive, as it is the proper juriſdiction in caſes of this nature.

riage, and ſentence had been given againſt it, that would have bound every body, becauſe it is final and concluſive, as being the proper juriſdiction, and ſo in caſes of like the nature.

But here it was a mere collateral point, which came before the eccleſiaſtical court, for it was a queſtion relating to the adminiſtration, and the marriage was incidental only.

It is to be wiſhed indeed, that the proceedings in all caſes were uniform, but as the eccleſiaſtical court is the law of the land, it does ſometimes happen that they determine contrary upon the ſame facts, as in the caſe of *Mountague* and *Maxwell*. *

That the proceedings in all courts were uniform, is much to be wiſhed, but at preſent the eccleſiaſtical court frequently determines contrary upon the ſame facts.

The demurrer as to this part, therefore, muſt be allowed.

As to the other part, I do admit the defendant might demur, as to ſo much of the bill as aſks, whether ſhe procured the ſubornation of perjury; but then the queſtion will be, whether the defendant might not have divided it, and anſwered as to the evidence of *Phillips*'s influencing the verdict, and which was procured by her.

As a demurrer cannot be good for part, and bad for part, Lord *Hardwicke* allowed it likewiſe as to the diſcovery ſought in relation to the ſubornation of perjury.

It is truly obſerved that a demurrer cannot be good for part, and bad for part, and I think the queſtion, as to the influence of *Phillips*'s evidence is a part of the other queſtion, and that it is not diſtinct, but mutually relating one to the other, and therefore the demurrer is proper.

I am as fully of opinion the plea ought to be over-ruled.

The defendant pleaded likewiſe a fine and non-claim, in bar to the title ſet up by the plaintiff; Lord *Hardwicke* over-ruled it, becauſe the pendency of the ſuit here, as it was a proper matter of equity, has prevented the running of the fine.

As to the objection of referring to the former proceedings, though it may ſeem odd, it is not at all neceſſary to relate how the fine was levied, only that the perſon was ſeiſed, and that he levied a fine.

An objection has been made, that this is not a truſt eſtate from Admiral *Hoſier*, but a legal one from him to *Baker*, his heir at law, who deviſed it in truſt for the benefit of his children.

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* A perſon who proved a will in the ſpiritual court, by which he ſwore the teſtator was of ſound memory, afterwards controverted the ſame will at law, *as to the real eſtate*; upon which an iſſue was directed *compos* or *non compos*, and found *non compos*, *April* 1, 1717, before Lord *Cowper*. *Vide Vin. Abr.* title *Executors*, p. 65. ſect. 9.

Now I will not lay it down generally, that in the caſe of a truſt eſtate, a fine and nonclaim ſhall not prevail; for, ſuppoſe a fine is levied by a perſon in poſſeſſion, not affected by the truſt, there can be no doubt but the remainders would be barred by the fine, and it would be of dangerous conſequence to property if it was otherwiſe.

The plaintiff was an infant at the time of the fine levied; I will lay the truſt out of the caſe, and ſuppoſe it a legal eſtate, the infant might have a bill againſt the perſon in poſſeſſion for an account of the rents and profits, for the perſon in poſſeſſion is looked upon only as a guardian for the infant.

The bill preferred by the infant, when he came of age, is not at all more improper, than an entry at law or real action brought, to avoid the fine.

For otherwiſe it would trip up the juriſdiction of this court, if you will not allow, where it is a proper matter of equity, a bill to prevent the running of a fine.

But if this was not quite ſo ſtrong, the other objections are; and if I was to ſuffer the fine to be a bar, it is allowing the defendant to ſteal away the eſtate.

No exception can be taken to an anſwer whilſt a plea is depending, for that muſt firſt be removed out of the way.

It was neceſſary to ſupport this plea, to have ſet forth a full and ſufficient anſwer, for while a plea is depending, no exceptions can be taken to an anſwer, but the plea muſt firſt be removed out of the way, and that was the very reaſon the plaintiff lay by till the plea was determined, and accounts for the running of ſo much time.

Where tenants give a conditional poſſeſſion only, provided they may pay their rents to a third perſon, till a ſuit is determined, a fine levied under ſuch a poſſeſſion, will not be ſuffered to ſtand.

It is very probable that the application to the tenants was merely with a view to the ſcheme of the fine, but the poſſeſſion given by them to the defendant was not abſolute, but under terms amounting to a truſt, for it was conditional, provided they might pay their rents into a third perſon's hands, till the ſuit was determined.

Should ſuch a fine prevail, what is ſaid to be a ſolemn act, and an end to all controverſies, would ceaſe to be ſo, and introductory of numerous frauds. Even at law, fines will be ſet aſide for fraud, as in the caſe of a tenant for years.

Will a court of equity ſuffer a fine, levied by a perſon who has got ſuch a poſſeſſion, to ſtand? I am ſure, if I ſhould, a fine, which is ſaid to be a ſolemn act, and an end to all controverſies, would ceaſe to be ſo, and would be introductory of numerous frauds; even at law, fines will be ſet aſide for fraud, as in the caſe of a tenant for years, and this is a much ſtronger caſe, and therefore the plea muſt be over-ruled.

Whitchurch

Whitchurch verſus *Hide*, *Auguſt* 4, 1742. Caſe 260.

THIS was a bill brought founded on the right of the mayor, commonalty, &c. of the city of *London*, for ſupplying the borough of *Southwark*, and the adjacent places, with water; and by virtue of ſeveral mean aſſignments, the plaintiff is now in poſſeſſion of this right, excluſive of all others; and prays an injunction againſt the defendant, to reſtrain him from incroaching upon this right, by raiſing engines, laying pipes, and breaking up the ground, &c. and to have it eſtabliſhed in this court againſt the defendant and all others.

The plaintiff, through ſeveral mean aſſignments, being in poſſeſſion of a right originally in the city of *London*, of ſupplying *Southwark* with water, prays an injunction to reſtrain the defendant from incroaching on this right, by raiſing engines, laying pipes, &c. and to have it eſtabliſhed in this court: The defendant demurred to the bill, for that the plaintiff ought firſt to have eſtabliſhed his right at law. *Lord Hardwicke allowed the demurrer, as the chance there was of the plaintiff's right falling to the ground at law, was a ſtrong reaſon for it.*

The defendant demurs, and for cauſe of demurrer ſhews that the plaintiff ought firſt to have eſtabliſhed his right at law.

LORD CHANCELLOR.

This bill is brought upon an exceeding unfavourable caſe, for it is in ſome meaſure ſetting up a monopoly; and ſuch a kind of right as is claimed in no other part of this town, neither by the *York Buildings* company, or the *New River Head*, or even by the city of *London* it ſelf, in any part of it; nor can any perſon preſcribe to break up ſtreets without an act of parliament.

The ſupplying the borough of *Southwark* with water is of great conſequence to the publick.

Now, it is ſaid, a man may bring a bill, if he has a legal title, to eſtabliſh his right, without firſt trying it at law, as in general caſes of fiſheries in rivers, &c. where there is no general preſcription.

The council for the plaintiff have cited caſes of this kind, and there might have been many more mentioned; as for inſtance, in the caſes of new inventions upon the act, that fixes the ſole property of books in the authors, for it is under a common general right upon the ſtatute, ſo likewiſe under the act of parliament for veſting the ſole property in prints of new invention.

But I apprehend, when theſe acts were firſt paſſed, the court did not immediately grant an injunction, to reſtrain all other perſons till the letters patent had been firſt eſtabliſhed at law.

But

But, in the preſent caſe, it would run to a prodigious expence, to enter into a long examination, ariſing upon conſequential and collateral matter, when probably even the very foundation for the plaintiff's right may fail, which would make the expenſive proceedings here entirely fruitleſs, when one trial at law may poſſibly quiet the queſtion.

Where a perſon has a ſole excluſive right, which is infringed upon, if an action of treſpaſs will not lie, he may have an action of the caſe, for the law will not permit a man who has a right, to be without a remedy.

As to the objection that the plaintiff may have no remedy at law, there is but little weight in it; for if he has a ſole excluſive right, no doubt but he has a remedy; and if any perſon infringe that right, and he cannot bring a common action of treſpaſs, he may have an action of the caſe, for the law will not permit a man who has a right to be without a remedy.

As this is a caſe of great conſequence to the publick, I would allow the demurrer, even if there were no other reaſon; but the riſque the parties may run, in going into a very large expence, and long examination, here to no purpoſe, and the chance there is of the plaintiff's right falling to the ground at law, is a very ſtrong reaſon for it.

The caſes cited for the plaintiff were *Buſh* verſus *Weſtern*, *Prec. in Chan.* 530. *The Duke of Dorſet* verſus *Serjeant Girdler*, *id.* 531. *and the Mayor of York* verſus *Sir Lionel Pilkington*, *May* 5, 1707. *See* 1 *T. Atkyns* 282.

For the defendant, in ſupport of the demurrer, were cited, the caſes of *Powlet* verſus *Ingres*, 1 *Vern.* 308. *Reynolds* verſus *Hind*, *May* 5, 1729. *in the Exchequer.*

Caſe 261. *Chauncey* verſus *Tahourden*, *Auguſt*, 4, 1742.

An executor brings a bill for the diſcovery of the defendant's marriage, who demurs, for that if ſhe was to diſcover what is aſked, it would be a forfeiture of her legacy of 1500*l.* as it is given conditionally, if ſhe marries with the conſent of the truſtees under the will. *Lord Hardwick allowed the demurrer, as ſhe cannot anſwer to the marriage without ſhewing at the ſame time it was againſt conſent.*

THE bill was brought by the plaintiff, executor of a will, for a diſcovery of the defendant's marriage.

The defendant demurs, becauſe if ſhe was to diſcover what is required of her, it would be a forfeiture of her legacy, which is no leſs than 1500*l.* for it is given her conditionally, provided ſhe marries with the conſent of the truſtees under the will.

2

The

The council for the plaintiff inſiſted, that the defendant ought to diſcover, and compared it to a caſe before Lord Chancellor *Talbot*, where a huſband gave an eſtate to his wife by his will, whilſt ſhe continued a widow, with a limitation over to the plaintiff in the cauſe, in caſe of her ſecond marriage.

A huſband by will gave an eſtate to his wife, whilſt ſhe continued a widow, with a limitation over to another, in caſe of her ſecond marriage; the remainder man brought a bill for a diſcovery of the ſecond marriage, and ſhe demurred, as ſubjecting her to a forfeiture. *Lord Talbot over-ruled the demurrer, as it was not a condition, but a limitation over of an eſtate, and therefore could not properly be called a forfeiture.*

The remainder man brought a bill againſt the widow, for a diſcovery of her ſecond marriage, ſhe demurred, as it ſubjected her to a forfeiture, but he over-ruled the demurrer.

LORD CHANCELLOR.

In the firſt place, this is a harſh demand in a court of equity, for it muſt be admitted, that if a perſon incurs a forfeiture by diſcovering, he may demur.

On a bill to ſet aſide an uſurious contract, a defendant may demur to the diſcovery of what intereſt he agreed to take, for that he cannot ſet this forth, without diſcloſing the very intereſt he has taken.

I have known a bill brought here, and in the court of Exchequer, for diſcovery of waſte, and the demurrer allowed in both courts, becauſe the plaintiff had not waived the penalty.

In the caſe mentioned by Mr. *Clark* of an uſurious contract, it was a bill only to perpetuate teſtimony, and did not ſeek to diſcover from the defendant upon oath, whether the contract was uſurious.

The legacy is given here at the age of 21, or day of marriage, with the conſent of ſuch and ſuch perſons, but if ſhe marries without the conſent of thoſe perſons, it is given over.

Therefore this would tend to make her forfeit the legacy, if ſhe is to ſet forth whether ſhe was married before 21.

But in the caſe before Lord *Talbot* it was a limitation over of an eſtate, and not a condition, and therefore could not properly be called a forfeiture,

I would put this caſe, ſuppoſe a man ſhould bring a bill to ſet aſide an uſurious contract; and in the interrogatory part, ſhould aſk the defendant what intereſt he agreed to take; how can he ſet forth what intereſt he agreed to take, without diſcovering at the ſame time the very intereſt he has taken?

So, here when the bill aſks her to diſcover whether ſhe is not married, how can ſhe anſwer that, without ſhewing at the ſame time it was a marriage againſt the conſent of the truſtees, and by that means ſubject herſelf to a forfeiture, therefore the demurrer muſt be allowed.

Caſe 262. *Dineley* verſus *Dinely*, *Auguſt* 4, 1742.

A Demurrer will lie to a bill brought to diſcover whether there is ſuch a perſon, or where he is, in order only to make him a party.

THE bill was brought to eſtabliſh the will of Sir *John Dineley*, and ſeeks a diſcovery of the defendant, whether ſhe has any ſon now living by the late Sir *John Dineley*.

The defendant demurred, for that ſhe was a competent witneſs for him to examine at law.

LORD CHANCELLOR.

You cannot bring a bill here to diſcover, whether there is ſuch a perſon, or where he is, in order only to make him a party to a ſuit in this court, and therefore the demurrer muſt be allowed.

Caſe 263. *Liſſet* verſus *Reave*, *Auguſt* 4, 1742.

A bill brought by a principal, to diſcover what goods the defendant bought of his agent; he demurred, for that he is not obliged to ſet out what gain he has made by the retail; the demurrer over-ruled.

A Bill was brought by ſome *Leghorn* merchants againſt the defendant to diſcover what quantity of ſtraw hats he had bought of *Sedgewick* and *Bernard*, the plaintiff's agents, and how much money remains unpaid, that it may be paid to them, for fear their agents ſhould be inſolvent.

The defendant demurred to the diſcovery, for that he ought not to be obliged to ſet out what gain he has made by the retail of them.

LORD CHANCELLOR.

Where a principal tranſmits goods to an agent or factor, to be ſure he may maintain an action againſt the perſon who buys of that factor, for what remains due to his factor.

In the caſe of transferring ſtocks, it is very often done by brokers without the principal's being ſo much as mentioned, and yet he may maintain an action againſt the perſon to whom the ſtock was transferred.

Lord Hardwicke therefore held the demurrer in this caſe to be inſufficient, and ordered it to be over-ruled.

Lacon

Lacon verſus *Lacon*, *Auguſt* 6, 1742. Caſe 264.

THE plaintiff's teſtator, as was inſiſted by the bill, was employed by Sir *Edward Leighton* in his life-time as his attorney, and by Lady *Leighton* his executrix ſince, and ſeeks a diſcovery, whether there is not now in her hands bills of fees delivered by the plaintiff's father as an attorney both to Sir *John Leighton* and herſelf, and whether one of them did not promiſe to pay, and whether an original was not filed againſt her for the debt.

Though an original be filed at law, yet if there has been no proceeding upon it for ſix years, it will not prevent the ſtatute of limitations from running.

The defendant pleaded the ſtatute of limitations, that no action has accrued within ſix years before the filing of this bill, nor has ſhe within that time made any promiſe to pay, neither does ſhe know there is any original filed, but believes it to be a mere fiction.

Maſter of the Rolls, *William Forteſcue*, Eſq; The plea muſt be allowed, becauſe the affidavit of the original's being filed, is ſet out in general terms without mentioning in what court; and upon the former hearing *Lord Chancellor* was of the ſame opinion; and ſaid beſides, that ſuppoſing an original was filed at law, if there has been no proceeding upon it for ſix years, it will not prevent the ſtatute from running on the demand.

Lingood verſus *Croucher*, *Auguſt* 6, 1742. Caſe 265.

THE plaintiff and Mr. *Eade* had been partners in trade, but upon the diſſolution of the partnerſhip, ſome diſputes ariſing between them, a ſuit was carried on for ſome time in equity; but a propoſal being made to refer all matters in controverſy, it was agreed to, and the ſubmiſſion was made an order of this court; one condition in it was, that the parties ſhould be reſtrained from bringing a bill in equity againſt the arbitrators: they awarded 9150 *l.* to be due to Mr. *Eade* on the balance of accounts; upon which Mr. *Lingood* brought a bill againſt the arbitrators, *Croucher* being one, charging corruption and partiality, and praying that they may ſet forth the general accounts between the plaintiff and the defendant *Eade* relating to the partnerſhip.

Where the parties have agreed to make the ſubmiſſion to an award a rule of court, and to be reſtrained from bringing a bill in equity, the arbitrators, notwithſtanding the award may be defective in point of law, may plead it in bar to a bill here.

To ſo much and ſuch part of the bill as ſeeks a general account, *&c.* the defendants refuſed to diſcover, and pleaded the award in bar.

The bill further prayed a diſcovery from what account or accounts of the parties they founded their award.

To this part they likewiſe refuſed to diſcover, and pleaded the award itſelf in bar.

LORD CHANCELLOR.

Arbitrators may plead the award in bar to a bill charging partiality, but they muſt ſupport their plea by ſhewing themſelves impartial, or the court will give a party a remedy by making *them* pay *coſts*.

There are many inſtances in this court, where arbitrators to a bill charging corruption and partiality, may plead the award in bar to the diſcovery; but then it is incumbent upon them to ſupport their plea, by ſhewing themſelves incorrupt and impartial, or otherwiſe the court will give a party a remedy by making arbitrators pay coſts.

I remember an inſtance of this ſort in a famous caſe of *John Ward*, who being a party in a cauſe where one *John Warner* was an arbitrator, upon *Ward*'s coming into the room he ſaid, I *John Warner* will make you *John Ward* pay coſts.

Ward complained to the court of this partial behaviour in the arbitrators; and the court inverted *Warner*'s threats, for they made him pay *John Ward* coſts.

The great doubt with me is, as this award ſeems to be executory and not final, whether it is a good award at law; and if it is not good at law, then how can the arbitrators plead it in bar to the diſcovery prayed by the bill?

Where a ſubmiſſion to an award has been made a rule of court, it is a contempt of that court to diſpute the order, unleſs they can ſhew partiality, corruption or miſbehaviour in the arbitrators.

When the parties have ſubmitted to make the ſubmiſſion to the award a rule of court, it is a contempt of this court to diſpute the order, unleſs they can ſhew partiality, corruption or miſbehaviour in the arbitrators; and this will depend upon the denial of theſe facts in their anſwer; and if they do that ſufficiently, the plea ought to be allowed; but ſtill, if upon the hearing of the cauſe the evidence ſhould be ſtrong enough to convince the court that the arbitrators have been guilty of corruption, partiality or miſbehaviour, it will effectually open the plea: therefore I am of opinion notwithſtanding any defect in the award in point of law, yet upon the parties agreeing to make the ſubmiſſion a rule of court, and one condition in it being to be reſtrained from bringing a bill in equity againſt the arbitrators, the plea of the award by them ought to be allowed.

In the caſe of Mr. *Robins*, the council, who was appointed an arbitrator by this court, accepted of it upon a proviſo that the parties would enter into a rule not to bring a bill in equity, which was done accordingly; notwithſtanding this, the party againſt whom the award was made brought a bill againſt the arbitrator, and charged corruption and partiality; upon which Mr. *Robins* moved Lord Chancellor *King* that he might be ſtruck out from being a party to the cauſe: his Lordſhip granted the motion, and ſaid it would be a very great hardſhip upon arbitrators if they ſhould be harraſſed with ſuits, when they undertake ſuch an employment

without any gratification; and that allowing they are liable to ſuch a bill, would effectually diſcourage perſons of worth from accepting of being arbitrators; and therefore he ſtruck him out from being a party.

So in the caſe of the *Eaſt-India* company, where they agreed to wave the penalty, but inſiſted upon it afterwards; the bill was diſmiſſed as againſt the perſon who was liable to the penalty. *Vide the Eaſt-India Company* verſus *Sandys*, 1 *Vern.* 127.

Fitzgerald verſus *Burk*, *Auguſt* 7, 1742.

Caſe 266.

LORD CHANCELLOR.

I Have not known a plea drawn up in this manner; it is a plea of a mortgage for valuable conſideration without any notice of the plaintiff's right, and not in the common manner of pleading, for he begins with deducing the whole title from Mr. *Aylmore* and his wife through the ſeveral deraignments to himſelf.

Denying notice of the plaintiff's title, at the time of the execution of the deed, or payment of the conſideration money, is not ſufficient; you muſt ſwear you had no notice at or before the execution.

The plaintiff claims as heir at law; the defendant's manner of ſwearing he had no notice is too reſtrained, for he does not ſwear *at or before the execution* that he had no notice, but cautiouſly at the *time of the execution, or at the time he paid the conſideration money* he ſwears he had no notice. *The pleading was allowed.*

Burk verſus *Brown*, *Auguſt* 7, 1742.

Caſe 267.

LORD CHANCELLOR.

THERE are ſeveral points here that rarely come before a court of equity, but when they do I muſt judge of them ſtrictly, as in a court of law.

In the plea of an alien, you muſt aver the perſon was an alien, or otherwiſe it is no bar.

One of the plaintiff's demands relates to the real eſtate of the plaintiff's wife's father, deviſed by him to the mother.

An account is ſought by the bill of this eſtate.

A plea put in of a conveyance to the defendant by the mother, and alſo a plea of an alien; now, it muſt depend merely upon the diſability from the mother's being an alien, for the defendant has not made out the other part of the conveyance to himſelf; though if a voluntary ſettlement had been ſhewn from the mother, notwithſtanding her being an alien, I ſhould have thought it a bar to the

plaintiff's demand; but nothing is more frequent, than for parties to deſert the ſtrongeſt part of the caſe, and endeavour to cover it with a weaker.

Then it muſt depend ſingly upon the plea of her being an alien, and conſequently incapable of tranſmitting any deſcent of thoſe lands to her daughter.

As to the ſhewing the want of civil blood, I muſt lay this out of the caſe, becauſe the defendant has not averred in his plea that ſhe was an alien.

Then it reſts ſingly upon the plea of inquiſition on behalf of the crown, by which it is found ſhe was born at *Rotterdam*.

Now, as to that, to be ſure it is an unfavourable plea; for it is a very extraordinary thing, that the defendant ſhould have fought out for a diſability in his wife, and procured an inquiſition from the crown, if it had not been originally with a view of getting a grant of it to himſelf.

I muſt take it as ſtrictly as if he had pleaded to an action at law, and will make no preſumption in favour of ſuch a plea.

It ſets out pretty oddly, for the words are, "by means of the de- "viſe, this defendant, in the right of his wife, became ſeiſed of all "the real eſtate.

An alien may take by purchaſe, but then it is for the benefit of the crown.

An alien, to be ſure, is capable of taking by purchaſe; but by that is meant a conveyance at common law, or any other kind of purchaſe, but then it is for the benefit of the crown.

There is no inſtance, where it has been held, that a perſon by marrying an alien woman, is ſeiſed of the eſtate purchaſed by her.

I know of no inſtance where a woman alien is in poſſeſſion of an eſtate, but that it muſt be for the benefit of the crown; and I do not remember it has ever been held, that the huſband, by marrying her, can be ſaid to be ſeiſed of this eſtate.

In caſes of forfeiture to the crown, an eſcheator is a known officer, and commiſſions of this kind ſhould be either directed to him, or to a number of commiſſioners, of which there muſt be a *quorum*.

But here the direction is to the advocate general, and the cuſtom of directing to him at *Jamaica* is not ſet forth; and beſides, *Jamaica* is divided into different diſtricts, and it is not ſhewn here, that the commiſſion was directed to the particular diſtrict where the lands lay, and therefore as irregular as if the crown ſhould direct a

commiſſion to commiſſioners in *London*, to try whether lands lying in *Kent* or *Eſſex* are in the hands of an alien.

The commiſſion finds, indeed, that ſhe is an alien, but commiſſions of this kind are diſtinguiſhed from commiſſions of attainder, for that is only for the ſake of informing the crown; but a commiſſion to inquire whether the perſon is an alien, is to entitle, but no body is bound by it, for a man may traverſe it in the proper court of law, and is returnable in the Exchequer, where the party againſt whom it is found may diſpute the juſtneſs or validity of it: But as the defendant has not averred, whether the mother was an alien or not, it is ſtill open to be controverted by the daughter, and therefore as to that part of the plea, it is no bar.

The defendant's plea as to the perſonal eſtate is a ſtated account, and a conviction of manſlaughter.

A man who pleads a ſtated account, muſt ſhew it was in writing, and likewiſe the balance in writing, or at leaſt ſet forth what the balance was, neither of which is done in this caſe.

A plea of a ſtated account is bad, unleſs it ſhews the account was in writing, and what the balance was.

As to the plea of conviction, there is no colour to ſay, that this ſhall ſtand as a plea; for I cannot take things of this kind to a common intent, but muſt judge with equal ſtrictneſs, as if it was a plea at common law.

In a plea of conviction for capital offence, this court muſt judge with equal ſtrictneſs as if it was a plea at common law.

The defendant in his plea, ſays, that in *October* 1728, in *Galloway*, *A.* gave a mortal wound to *B.* of which he languiſhed and died, but does not ſay in what part *B.* received the wound: That it was tried at the aſſizes at *Galloway*, but does not ſay the perſons who tried it had a commiſſion of gaol-delivery, or that they were juſtices of *oyer* and *terminer*.

Saying that *A.* gave a mortal wound to *B.* of which he died, without mentioning in what part *B.* received the wound, is bad.

So ſaying that *A.* was tried at *Galloway* aſſizes, without ſaying the perſons who tried him had a commiſſion of gaol-delivery, is alſo bad.

Now this is not ſufficient, for in a plea you ought to ſet forth the juriſdiction, and that they had a right to try it, or it will not be ſtrong enough to forfeit perſonal eſtate.

As to the plea of not making the Attorney General a party, there can be nothing in it, for the reaſon I ſaid before, becauſe an inquiſition of attainder is only to inform, and does not intitle the crown to any right.

An inquiſition of attainder is only to inform, and does not intitle the crown to any right.

All the pleas muſt be over-ruled.

Jones

Caſe 268. *Jones* verſus *Coxeter*, *Auguſt* 12, 1742.

LORD CHANCELLOR.

Coſts in equity are diſcretionary, and given to the time of the decree; at law *unica directio fiat damnorum*, and wait till the final judgment.

THE giving of coſts in equity is intirely diſcretionary, and is not at all conformable to the rule at law, and in this court they give coſts to the time of the decree.

But at law *unica directio fiat damnorum*, and therefore they do not from time to time direct coſts, but wait till there is a final judgment.

Where the poverty of the plaintiff would not allow her to carry on the cauſe, Lord *Hardwicke* ordered the coſts to be taxed, and paid to her, to impower her to go on with the ſuit.

Here is a ſuggeſtion to the court, that the poverty of the perſon will not allow her to carry on the cauſe, unleſs the court will direct the defendant to pay ſomething to the plaintiff in the mean time.

Therefore, according to the prayer of the petition, let the Maſter tax the coſts decreed to be paid by the defendant to the plaintiff, and when it is ſo taxed, let them be paid to her, to impower her to go on with the cauſe.

Caſe 269. *The Charitable Corporation* verſus *Sir Robert Sutton and others*, *Auguſt* 13, 1742.

LORD CHANCELLOR.

The bill was brought to be relieved againſt the defendants as committee-men, or in other offices, and to have a ſatisfaction for a breach of truſt, fraud, and miſmanagement.

THE end of the plaintiff's bill is to be relieved againſt the defendants, who are fifty in number, and were either committee-men, or in other offices, and to have a ſatisfaction for a breach of truſt, fraud, and miſmanagement.

The corporation took its riſe from a charter of the crown.

The ſtock by the charter is not to be leſs than 20,000*l.* at a time, or more than 30,000*l.*

Several powers were granted for carrying on the affairs of the corporation, and ſeven perſons appointed under the name of committee-men.

The manner of lending upon pledges, *&c.* the charter inſtitutes ſeveral kinds of officers, particularly one, called the Warehouſe-keeper.

It

It reſtrains the company from banking, unleſs with notes payable on demand, and confined within the amount of the ſtock.

Theſe are the material powers.

The intention of it is extremely plain, to aſſiſt poor perſons with ſums of money by way of loan, to prevent their falling into the hands of pawn-brokers, *&c.*

In 1724, by the King's ſign manual, the ſtock was enlarged to 100,000*l.* in 1728, to 300,000*l.* and in 1730, to 600,000*l.*

I cannot help obſerving, as I go along, that this deviation from the original fund, was a handle for all the miſchiefs which happened afterwards.

One key of the warehouſe was to be in the cuſtody of *the warehouſe-keeper*, another *in the caſhier's poſſeſſion*, and a third in the *book-keeper's*, that each might be a check upon the others.

There was another officer, called *the ſurveyor of the warehouſe*, whoſe buſineſs it was to examine all the pledges taken in by *the warehouſe-keeper*.

If there was any defect of the goods in value, *the warehouſe-keeper* was to make it good out of his own eſtate.

It has happened that the moſt important of theſe rules was broke through by the court of committee.

The caſhier was ordered to deliver over the key of the warehouſe to *the accomptant*.

In 1726, *John Thompſon* was appointed *warehouſe-keeper*: He was ordered to deliver over to the meſſenger and common ſervants the key of the warehouſe.

In *September* 1726, *the ſurveyor of the warehouſe* was diſcharged, and there was never any appointed afterwards; ſo that all the checks upon *the warehouſe-keeper* were taken away.

Afterwards Mr. *Woolley* and Mr. *Warren* were appointed aſſiſtants to *the warehouſe-keeper*.

It does not appear to me, that theſe perſons were any check at all upon *the warehouſe-keeper*, for they gave no ſecurity to the cor-

poration, but are rather to be conſidered as his ſervant than the ſervants of the corporation.

So that, from this time, the whole power of pledging, &c. devolved upon theſe three perſons; and from hence the ſcene of iniquity began, the lending more money upon old pledges, without calling in the firſt ſum lent.

But the general and moſt deſtructive method was advancing money ſeveral times upon old pledges, which were not worth more than the firſt ſum lent, or elſe giving credit upon imaginary pledges.

The corporation lent out to *Thompſon* himſelf, upon theſe fictitious pledges, large ſums of money, notwithſtanding he had the whole management of theſe pledges, ſo that he might be ſaid to be both borrower and lender.

Woolley and *Warren* were permitted to act as brokers for the borrowers, and three parts in four of the loans were tranſacted in their names.

The court of committee took notice of this as an abuſe; and that they had printed advertiſements, giving directions to perſons to apply to them, in order to monopolize the whole brokerage, upon which the committee made an order, that all perſons might employ their own brokers; and yet, notwithſtanding this, the committee afterwards made *Woolley* and *Warren* aſſiſtants to the warehouſe-keeeper.

The loſs which enſued from this miſmanagement is prodigious, for the witneſſes have proved very clearly that the money lent was 385,000*l.* whereas the value of the goods pledged was not worth more than 35,000*l.* ſo that the loſs to the corporation is not leſs than 350,000.

The material conſideration for me is, from what cauſes, and from what perſons, this loſs may be ſaid to ariſe.

One ſet of perſons are clearly liable, thoſe who lent the money of the corporation upon fictitious pledges: There were a certain confederacy, or rather conſpiracy, who paſſed in the cauſe under the name of the partnerſhip of three, or the partnerſhip of four, or of five.

Lord Hardwicke then ſtated the evidence of *John Thompſon*, the warehouſe-keeper, who was examined for the plaintiffs.

It

It is proved by him, that there was a partnerſhip of five, under a pretence of carrying on a project of mines in *Scotland*; and that none of the committee knew how the account ofthe pledges ſtood, except this partnerſhip of five, four, and three.

The defendants have objected to his evidence, becauſe he was concerned principally in the fraud, and run away out of the kingdom in order to avoid juſtice; and beſides that, by an act of parliament made in the 6th year of *Geo.* 2. *ch.* 2. *Thompſon* is entitled to one fifth of what he ſhall diſcover of the company's effects.

It is very true, this is a legal objection, and though he is not a good witneſs with reſpect to the five partners, who have not examined him, yet he is certainly a good witneſs againſt ſuch of the defendants as have croſs examined him, and who have thought proper to read his depoſition.

The grounds upon which the plaintiffs found their relief againſt the committee-men are theſe:

1ſt, That they have been guilty of manifeſt breaches of truſt, or at leaſt of ſuch ſupine and groſs negligence of their duty, and ſo often repeated, that it will amount to a breach of truſt.

Theſe are great and important queſtions.

It will be proper to ſtate what are the actual breaches of truſt.

1ſt, Paſſing of notes, *&c.*

2dly, Signing notes for loans upon pledges, called renewed pledges, though they knew at the ſame time that the money originally lent was not paid.

3dly, Signing notes of *John Thompſon*, warehouſe-keeper.

4thly, Taking off all the checks upon him, *&c.*

5thly, Making ſeveral orders to put it in the power of *Thompſon*, *Warren*, and *Woolley*, to commit thoſe frauds.

As to the three firſt, they are actual breaches of truſt, and the committee-men are clearly guilty who have been concerned in them.

The *by-law* preſcribes, that when notes were to be iſſued by the caſhier, they ſhould be ſigned by one of the committee-men, and intended as a check upon the warehouſe-keeper and caſhier.

Now

Now, ſeveral notes have been iſſued without obſerving this rule, which is an expreſs contravention of the by-law.

A regiſtry of pledges was kept, in which an entry is made of the value of the goods pawned: After this was done, a new loan is made upon the ſame pledge, to the ſame perſon, and a reference to the old number in the regiſtry upon every new advance; ſo that it may be called *a pedigree of loans through twenty deſcents.*

Now it is not in the nature of the thing poſſible to ſuppoſe, that the ſame perſon wanting to reborrow could replace the firſt money lent; and therefore at the out-ſet was a plain and obvious fraud.

I ſhall therefore direct an inquiry into the value of the goods in general which have been pledged.

As to the third breach of truſt, the committee-men's behaviour, with regard to *Thompſon* their warehouſe-keeper.

It is ſuch a notorious fraud, or at leaſt groſs inattention, to ſuffer him, who was to ſet a value on all the pledges, to borrow money upon them himſelf; that, I ſhall direct thoſe who ſhall appear to be guilty of it to make good the loſs.

As to the fourth and fifth breach of truſt, the taking off all checks upon *Thompſon*, and making ſeveral orders to put it in the power of *Thompſon*, *Woolley* and *Warren*, to commit thoſe frauds.

They are not ſo clearly breaches of truſt, though at the ſame time they appear to me to have tended greatly to the loſs and prejudice of the corporation.

But whether they are criminal will be the queſtion? Now I think the perſons preſent are only liable who iſſued out the orders, which inveſted *Thompſon*, *Woolley*, and *Warren*, with ſuch powers.

But then another head of charge has been made, under the *craſſa negligentia*, which has been divided into theſe ſeveral branches:

1ſt, The committee-men's non-attendance upon their employment.

2dly, Their not obſerving the by-law of laying the balance of caſh regularly before them.

3dly, Not taking any notice of forfeited pledges.

4thly, Never once inſpecting the warehouſe to ſee what number of real pledges were there.

5thly, Putting the whole power into the hands of *Thompſon*, *Woolley* and *Warren*.

Now from all theſe an accumulated charge is made againſt the whole body of directors or committee-men.

Conſider firſt the foundation of this general charge.

I take the employment of a director to be of a mixed nature: it partakes of the nature of a publick office, as it ariſes from the charter of the crown.

The office of a director is of a mixed nature, publick as ariſing from the charter of the crown, but at the ſame time is not an employment that affects the publick government, for none of the directors of the great companies are required to qualify by taking the ſacrament.

But it cannot be ſaid to be an employment affecting the public government; and for this reaſon none of the directors of the great companies, the Bank, *South-Sea*, *&c.* are required to qualify themſelves by taking the ſacrament.

Therefore committee-men are moſt properly agents to thoſe who employ them in this truſt, and who empower them to direct and ſuperintend the affairs of the corporation.

Committee-men are properly agents to thoſe who employ them in the truſt, to ſuperintend the corporation affairs.

In this reſpect they may be guilty of acts of commiſſion or omiſſion, of malefeaſance or nonfeaſance. *Vide Domat's Civil Law* upon this head, 2. *B. Tit.* 3. *Sec.* 1 & 2.

Now where acts are executed within their authority, as repealing by-laws and making orders, in ſuch caſes though attended with bad conſequences, it will be very difficult to determine that theſe are breaches of truſt.

For it is by no means juſt in a judge, after bad conſequences have ariſen from ſuch executions of their power, to ſay that they foreſaw at the time what muſt neceſſarily happen; and therefore were guilty of a breach of truſt.

Next as to *malefeaſance and non-feaſance*.

To inſtance in non-attendance; if ſome perſons are guilty of groſs non-attendance, and leave the management intirely to others, they may be guilty by this means of the breaches of truſt that are committed by others.

A groſs non-attendance in a committee-man may make him guilty of the breaches of truſts committed by others.

A truſtee's ſaying, he had no benefit from the truſt, but merely honorary, is no excuſe for his want of diligence.

By accepting of a truſt of this ſort, a perſon is obliged to execute it with fidelity and reaſonable diligence; and it is no excuſe to ſay that they had no benefit from it, but that it was merely honorary; and therefore they are within the caſe of common truſtees. *Vide Coggs* verſus *Bernard*, 1 *Salk.* 26.

Another objection has been made, that the court can make no decree upon theſe perſons which will be juſt, for it is ſaid every man's non-attendance or omiſſion of his duty is his own default, and that each particular perſon muſt bear ſuch a proportion as is ſuitable to the loſs ariſing from his particular neglect, which makes it a caſe out of the power of this court.

Now if this doctrine ſhould prevail, it is indeed *laying the axe to the root of the tree.*

Where a ſupine negligence appeared in all the committee, by which a complicated loſs has happened, they are all guilty.

But if upon inquiry before the Maſter, there ſhould appear to be a ſupine negligence in all of them, by which a groſs complicated loſs happens, I will never determine that they are not all guilty.

A court of equity can lay hold of every breach of truſt, be it in a publick or a private capacity.

Nor will I ever determine that a court of equity cannot lay hold of every breach of truſt, let the perſon be guilty of it either in a private, or a public capacity.

There can be no injury but there muſt be a remedy, as the tribunals of this kingdom are wiſely formed both of courts of law and equity.

The tribunals of this kingdom are wiſely formed both of courts of law and equity, and ſo are the tribunals of moſt other nations; and for this reaſon there can be no injury but there muſt be a remedy in all or ſome of them; and therefore I will never determine that frauds of this kind are out of the reach of courts of law or equity, for an intolerable grievance would follow from ſuch a determination.

In the preſent caſe one thing is clear, that Sir *Archibald Grant*, *Robinſon*, *Thompſon*, *Burrows* and *Squire*, who were the five that were engaged in that confederacy, are certainly liable to make good the loſſes which the corporation have ſuſtained in the firſt place, and the committee-men who were not partners in this affair are liable in the ſecond place only.

Though the committee were not privy to the original fraud, yet they are guilty in the ſecond degree, by neglecting to uſe the power inveſted in them, to prevent theill conſequences ariſing from ſuch a confederacy.

Therefore in the preſent caſe, I am of opinion, if there is no evidence to charge the committee-men of being privy to the original deſign, yet they will be guilty in the ſecond degree, by conniving at

the

the affair, and not making uſe of the proper power inveſted in them by the charter, in order to prevent the ill conſequences ariſing from ſuch a confederacy.

I ſhall begin with ſuch of the defendants as ought to be diſmiſſed, againſt whom the bill cannot be ſupported, and then his Lordſhip named ſome few of them only.

I ſhall direct the Maſter to inquire who were *the committee-men* that ſigned notes to *Thomſon* the keeper of the warehouſe, for they muſt be reſponſible for the loſſes ariſing from thence, which muſt be made good by them or their repreſentatives.

I do likewiſe declare thoſe committee-men to be liable, who have iſſued notes upon loans called renewed pledges, without being ſigned, and the loſſes from it to be made good by them or their repreſentatives.

The Maſter muſt alſo ſtate the whole loſs the corporation has ſuſtained; and for the better diſcovery let all books and papers be produced by the ſeveral defendants upon oath, and let the plaintiffs by their proper officers produce books and papers on the oath of the ſaid officers.

The late Mr. *Ayſlabie* being a committee-man, let his repreſentative appear before the Maſter to be examined as to the hand his principal had in this affair, and to produce all papers in his cuſtody relating to it.

All other matters muſt ſtay until the cauſe comes back upon the Maſter's report.

Ex parte Ludlow, Auguſt 13, 1742. *in lunatick petitions.* Caſe 270.

A committee of a lunatick's real eſtate may cut down timber for repairs.

THE committees of the lunatick's eſtate, who are intitled to it themſelves after his death, did, upon repairs being wanting in the real eſtate for barns, *&c.* chuſe rather to lay out 25 *l.* in buying timber than take it off the eſtate, notwithſtanding there was timber upon it proper for this purpoſe.

LORD CHANCELLOR.

I am of opinion, that committees of the real eſtate of a lunatick may exerciſe the ſame power over it in regard to cutting timber for repairs, as any diſcreet perſon who was the abſolute owner of it might do: and therefore the committees of this eſtate muſt make

good this ſum of 25 *l.* to the perſonal eſtate, for they appear to me to have done *this* merely with regard to their own intereſt, as the reverſion of the real eſtate belongs to them.

Caſe 271. *Hedges* verſus *Cardonnel, in the paper of exceptions, October* 1742.

LORD CHANCELLOR.

A cuſtodium is the poſſeſſion of lands belonging to an outlaw, granted to the plaintiff by the court of Exchequer in *Ireland*:

A Cuſtodium is where a perſon in *Ireland* is ſued to an outlawry, and the plaintiff in the action, upon an application to the court of Exchequer there, has, by virtue of a *cuſtodium* iſſuing from thence, the poſſeſſion of the lands belonging to the outlaw.

Where the error in a maſter's report is owing to a party's not laying a material piece of evidence before him, the court will not direct him to review his report, but upon the exceptant's giving up his depoſit.

Where the party who takes the exception did not lay a material piece of evidence, which he had then in his power before the Maſter, to which the error in the Maſter's report is owing, the court will not direct the Maſter to review his report, upon any other terms than the exceptant's giving up his depoſit.

On an appeal from the *Rolls*, the appellant may be let into new evidence, which was not read there, provided he will give up his depoſit.

For it turns upon the ſame reaſoning as in the caſe of appeals from the *Rolls*, where, upon a petition, the perſon appealing may be let into new evidence, which was not read at the *Rolls*; but then as it was entirely his fault, that it was not read there, it will not be allowed him upon any other terms, than giving up his depoſit.

Caſe 272. *Humphrey* verſus *Morſe, October* 15, 1742.

An heir is intitled to his coſts, for it is the law which caſts the deſcent upon him; otherwiſe as to an executor, becauſe he may renounce.

A Bill was brought againſt the executor, and heir at law for an account of real and perſonal aſſets; and the doubt was, whether the heir at law ſhould be allowed his coſts.

LORD CHANCELLOR.

Executors ſhall not have coſts, becauſe they may renounce, but it is the law which caſts the deſcent upon the heir, and that differs his caſe from executors, and if he has accounted juſtly for ſuch money as is come to his hands, it certainly intitles him to his coſts; and therefore I ſhall direct accordingly.

Sir John Robinſon verſus *Cumming*, *October* 16, 1742. Caſe 273.

IT came before the Chancellor upon exceptions to a Maſter's report, who had allowed the defendant 120*l.* the value of preſents he had made formerly to the plaintiff's wife.

If a perſon who makes addreſſes on a view of marriage, and a reaſonable expectation of ſucceſs, gives preſents, and the lady deceives him afterwards, the preſents ought to be returned, or the value of them allowed.

But where made to introduce a perſon only to a woman's acquaintance, he is looked upon in the light of an adventurer; and if he loſes by the attempt, muſt take it for his pains, eſpecially where there is a diſproportion between the lady's fortune and his.

The caſe which the defendant makes is this, that he being a particular friend of Mr. *Sheffield*'s, the grandfather of Mrs. *Robinſon*, who was about ſixteen at the time of his death, had made her ſeveral valuable preſents; and that Mr. *Sheffield* by his will has expreſsly deviſed his whole eſtate to the defendant, in caſe he ſhould marry his grandaughter, which ſhews that he approved of the match, and had likewiſe made him executor.

The plaintiff inſiſts, that the defendant had inſinuated himſelf too much into the favour of this old man, and that the young lady had never given him the leaſt encouragement, as his circumſtances were by no means equal to hers, ſhe being a very great fortune, and he having only 100*l. per ann.* at moſt.

LORD CHANCELLOR.

I think, in caſes of this nature, theſe rules may be laid down, That if a perſon has made his addreſſes to a lady for ſome time, upon a view of marriage, and upon a reaſonable expectation of ſucceſs, makes preſents to a conſiderable value, and ſhe thinks proper to deceive him afterwards, it is very right that the preſents themſelves ſhould be returned or the value of them allowed to him: But, where preſents are made only to introduce a perſon to a woman's acquaintance, and by means thereof to gain her favour, I look upon ſuch perſon only in the light of an adventurer, eſpecially where there is a diſproportion between the lady's fortune and his, and therefore, like all other adventurers, if he will run riſques, and loſes by the attempt, he muſt take it for his pains: The defendant's caſe, upon all the circumſtances, being a good deal of this ſort, I am of opinion, the Maſter ought not to have allowed him the value of the preſents; and therefore the plaintiff is right in the exception.

There were other exceptions in the ſame cauſe.

At the time of the decree, the court directed, that Mr. *Cumming* ſhould be allowed, upon his oath, ſuch ſums as he had expended in a cauſe relating to Mr. *Sheffield*'s will.

An exception was taken to the affidavit, that it was too looſe, Mr. *Cumming* ſwearing only, that he had expended the ſeveral ſums contained in his account, to the beſt of his knowledge, remembrance, and belief; and that in ſeveral of the *items*, he does not mention the time it was paid, nor to whom, or for what the ſums were paid.

LORD CHANCELLOR.

When at law a perſon in an account is allowed ſums under 40*s.* on his oath, he muſt ſwear poſitively, and not to his belief only; the ſame directions as to this matter are given under a decree in this court, that he muſt peremptorily ſwear to the fact.

The exception muſt be allowed, becauſe where at law a perſon upon an account is allowed ſums under 40*s.* on his oath, it is not ſufficient that he ſwears to his belief only, but he muſt ſwear to the fact: So in directions under a decree, that the perſon upon an account ſhould be allowed ſuch ſums as he ſwears he has actually expended: It is not ſufficient, as in this caſe, that he believes he paid them, but he muſt peremptorily ſwear to the fact.

Though a Maſter, under ſuch direction as in this decree, has an implied power of ſettling the affidavit the perſon is to make, yet, to put it out of all doubt, I will ſpecify it now; and will alſo direct the Maſter to review his report, and to give Mr. *Cumming* an opportunity of clearing up the doubts that ariſe upon the account.

Another exception, that Mr *Cumming* in his account, ought to have made annual reſts; and that from time to time he ſhould have applied the aſſets as they came in, to pay off ſome part of the principal and intereſt due upon his own bond, and not charge a groſs ſum in one *item* for fifteen years intereſt.

LORD CHANCELLOR.

The court direct *annual reſts* in an account of the rents of real but not of perſonal eſtate.

In the common directions for taking an account of the rents and profits of real eſtate, the court have directed *annual reſts* to be made, but not in an account of perſonal.

A mortgagee by entring into poſſeſſion, by his own act makes himſelf accountable; and it is in this caſe, the direction of annual reſts is given.

For if a mortgagee enters into poſſeſſion of the eſtate, he does by his own act render himſelf accountable for what he receives, in diſcharge of his principal and intereſt, and it is in this caſe that the direction of annual reſts is made.

But if a mortgagor comes with only half the debt, and offers it to the mortgagee, he is not obliged to take it.

The preſent caſe of an executor is quite different, for it is not an office of his own ſeeking, but very proper that ſomebody, either as executor or adminiſtrator, ſhould collect in the aſſets, and if he happen to be a bond creditor himſelf, the court never direct, that if any ſums come into his hands, that he ſhould from time to time, by peacemeal, diſcharge the principal and intereſt of his bond; for he may firſt diſcharge all other demands againſt his teſtator's eſtate before his own; and unleſs it had appeared that a conſiderable ſum was left in his hands, ſufficient to pay off his bond intirely, over and above what was due upon other demands, there could be no ground for this exception; and therefore over-ruled it.

As to what Mr. Attorney General ſays, that upon a *plene adminiſtravit*, if it had appeared there was enough only to pay half the debt in the executor's hand, the jury muſt have found a verdict againſt him, it cannot be ſupported, for no court would have directed a jury to give ſuch a verdict, becauſe an executor, by an eſtabliſhed rule of law, may retain to pay his own debt, but is not obliged to take in part only.

An executor, by an eſtabliſhed rule of law, may retain to pay his own debt, but is not obliged to take in part, where there is not aſſets enough to pay the whole.

The defendant took an exception, that the maſter had not allowed him any intereſt on two years and a half arrears of an annuity, which he had purchaſed of the teſtator Mr. *Sheffield*.

It was a grant of an annuity by way of mortgage, and a power to the annuitant to enter, in caſe of arrears, and to hold till he was ſatisfied all arrears, and all his coſts and damages, but in this caſe the annuitant has not entered for default of payment.

LORD CHANCELLOR.

There is no inſtance where the court has ever allowed intereſt upon the arrears of ſuch an annuity; if, indeed, the annuitant had entered, and been in poſſeſſion of the eſtate, charged with it, the court would not have obliged him to have quitted the poſſeſſion, unleſs the grantor had agreed to allow him intereſt for the arrears of this annuity down to the day.

Where an annuitant has entered, and is in poſſeſſion of the eſtate charged with it, the court will not oblige him to quit the poſſeſſion, till the grantor allows him intereſt for the arrears of his annuity.

Ferrers verſus *Ferrers*, (*Vide Caſ. in the time of Ld. Ch. Talbot* 2.) was different from this, becauſe it was her jointure, and intereſt upon the arrears of the annuity was allowed her by way of maintenance, and as a compenſation for the debts, ſhe had contracted in the mean time; therefore this exception muſt be over-ruled.

Sergeſon

Caſe 274. *Sergeſon* verſus *Sealey*, *October* 25, 1742.

An inquiſition of lunacy is always admitted to be read, but is not concluſive evidence, for you may traverſe it.

MR. Attorney General objected to the reading an inquiſition of lunacy, becauſe it is offered as evidence to affect the right of a third perſon, and as it likewiſe had a retroſpect of eight years.

Lord Hardwicke over-ruled the objection, and ſaid, that inquiſitions of lunacy, and likewiſe other inquiſitions, as *poſt mortem*, *&c.* are always admitted to be read, but are not concluſive evidence, for you may traverſe them if you pleaſe.

By the inquiſition, the jury found Mr. *Samuel Pitts* a lunatick, without lucid intervalls, eight years back, ſo that it took in the time of the tranſaction with his ſon about laying out ſome part of his perſonal eſtate, in the purchaſe of real for the lunatick's benefit.

The two witneſſes to encounter the inquiſition, and to prove Mr. *Samuel Pitt*'s ſanity, (one of which was his apothecary) Swear, his underſtanding, at the time of this tranſaction, was ſomewhat impaired from his paralitick diſorder, but that it did not totally deprive him of it; and that his memory would ſerve him to give an anſwer to a ſhort queſtion, but not to one of any length.

Where, before an inquiſition of lunacy, a perſon who was found a lunatick, has made a purchaſe with the approbation of his only ſon, the court will not change the diſpoſition that has been made of this ſum of money, but the purchaſe will ſtand.

The principal point was, whether money belonging to a perſon, who is ſuppoſed to be a lunatick, and which has been laid out in land, does not *ſtill* belong to thoſe perſons who would have been intitled to the money at the time it was converted into real eſtate; and whether the property of a lunatick can be altered in any reſpect whatſoever; or whether this court can give it to a different repreſentative than the law would have done. *Vide Ridler* verſus *Ridler*, *Eq. Caſ. Ab.* 279.

LORD CHANCELLOR.

The general queſtion in this caſe is, Whether there is ſufficient ground in a court of equity to ſet aſide this purchaſe, which coſt 1021 *l.* and to conſider it as perſonal eſtate?

A lunatick is certainly capable of taking by way of grant, and therefore this eſtate has veſted in Mr. *Samuel Pitt*, and might deſcend from him.

I will conſider firſt, whether upon making this purchaſe in 1724, this gentleman was *non compos mentis*.

There

There is not at preſent before me, ſufficient evidence to ſatisfy me, that he was abſolutely *a lunatick, or non compos.*

As to the inquiſition, the jury have carried it too far, in finding him a lunatick, as his incapacity was owing to a diſtemper; they ſhould have found that he was not capable of managing his own affairs, and not properly that he was a lunatick.

When I admitted the inquiſition to be read, I ſaid it was not concluſive evidence; for it is not concluſive as to the point of time of taking the inquiſition, much leſs as to the retroſpect of eight years, for notwithſtanding ſuch inquiſition, there are numerous inſtances of a ſubſequent inquiry.

The evidence before me is, that he lived with his own family after he had the paralytick diſorder, as well as before, and that he was aſſiſted in the management of his affairs by his only ſon and his ſteward.

And at the very time the purchaſe was depending, the ſuppoſed lunatick himſelf rode out to inſpect the eſtate which was intended to be bought.

Now, can it be ſuppoſed, that the family would have made all this unneceſſary parade, if they had not thought Mr. *Pitt* capable of judging.

There are a great many inſtances of apoplexies turning to paralytick diſorders, which may at firſt affect only the members and organs of the body, and by degrees, as the weight of the diſtemper increaſes, may affect the memory and underſtanding.

In 1724, this purchaſe was made, and the inquiſition was not till 1726, two years after; and though the jury, out of a neceſſary caution, have found it with *a retroſpect* of eight years, in order to take in alienations; yet I ſhall not, for that reaſon only, direct a further inquiry.

The purchaſe appears to have been a reaſonable act, and no evidence to ſhew it otherwiſe, and yet it is ſaid, Mr. *Pitt* being a lunatick at the time, the court will not vary the property, and has been compared to the caſe of infants.

It is true, in the caſe of infants it is ſo; and upon application to the court to lay out part of their perſonal eſtate in land, it is always granted with a *ſalvo*, that if the infant dies before 21, or does not approve

Where there is an application to the court to lay out part of an infant's perſonal eſtate in land, if he dies before 21, or does not approve when he comes of age, the property will not alter.

approve of the purchaſe when he comes of age, that the property ſhall not alter.

But the caſe here is quite different, the perſon lives in his own family as he did before this paralytick diſorder, and alſo conſents to the purchaſe two years before any legal inquiſition into his capacity; and would it be right in the court to overturn acts that are done with the concurrence of the whole family, and in a reaſonable manner? If I did, I am ſure it would be attended with numerous inconveniences.

Here is in this caſe the ſtrongeſt circumſtance in the world; but one ſon, who muſt have been heir of the real eſtate, if not diſpoſed of otherwiſe, and intitled to the perſonal eſtate if his father, the ſuppoſed lunatick, died inteſtate.

The court have allowed part of a lunatick's perſonal eſtate to be laid out in repairs, and even upon improvements of his real eſtate.

Though it is very true, the court will not order the perſonal eſtate of a lunatick to be turned into real eſtate, yet there have been applications to this court to lay out part of his perſonal eſtate in repairs, or even upon improvements of his real eſtate, and the court have allowed it, if the next of kin at that time, who if he was dead would be intitled to his perſonal eſtate, do not ſhew any reaſon againſt it; and ſuch an order of the court has been even binding upon other perſons who were not conſenting to the order at the time it was made, but happened to be the next of kin at the lunatick's death.

Therefore, as this purchaſe was a reaſonable act, and done with the approbation of the only ſon, and as the court ought eſpecially to give the turn of the ſcale in favour of an heir, I am of opinion there are no grounds for the court to change the diſpoſition that has been made of this ſum of money, but the purchaſe muſt ſtand.

There was another point made in this cauſe.

A wife, in caſe ſhe ſurvived her huſband, and there were no younger children, had a power of diſpoſing of 4000*l.* by deed or will, executed in the preſence of three witneſſes, and this ſum was a charge on the real eſtate of the huſband.

William Pitt the ſon of *Samuel Pitt* married Mrs. *Speke*, and by the marriage articles it was covenanted that if there ſhould be one ſon only, and no younger children, and the wife ſhould ſurvive the huſband, that ſhe ſhould have the power of diſpoſing of 4000*l.* by deed or will executed in the preſence of three witneſſes to any perſon ſhe ſhould appoint, and this ſum was to be a charge upon the real eſtate of the huſband.

Before her ſecond marriage, ſhe, by articles executed in the preſence of two witneſſes only, appointed 2000*l.* out of the 4000*l.* to be for the uſe of her intended huſband; the remaining 2000*l.* ſhe diſpoſes of by will, but does not execute it in the preſence of three witneſſes. Lord *Hardwicke* held, that the articles were a good appointment of the 2000*l.* for the benefit of her ſecond huſband.

Mr.

Mr. *William Pitt* died, leaving only one ſon, *Samuel Pitt* the younger, who lived to be only nineteen, and dying before he came of age, his real eſtate deſcended upon Mrs. *Sergiſon*, the plaintiff's wife, who is great niece of *Samuel* the elder, and heir at law to him, and to *William Pitt* his ſon, and to the infant *Samuel* the younger, the grandſon of *Samuel* the elder.

After the death of Mr. *William Pitt*, Mr. *Speke* marries the widow, but, before her ſecond marriage, ſhe, by articles executed in the preſence of two witneſſes only, appoints the ſum of 2000*l.* out of the 4000*l.* to be for the uſe and benefit of her intended huſband, during the coverture, and after her death, to her ſon *Samuel Pitt*.

The other 2000*l.* ſhe makes a voluntary diſpoſition of by will, but did not execute it in the preſence of three witneſſes.

LORD CHANCELLOR.

The queſtion is, Whether the articles entered into upon Mrs. *Speke*'s marriage with Mr. *Speke* amounts to an appointment within the power?

I am of opinion, that it is a good appointment of 2000*l.* for the benefit of Mr. *Speke*; and notwithſtanding it is inſiſted that it is a defective appointment, becauſe there are only two witneſſes, yet this court will ſupply the defect, where it is executed for a valuable conſideration, much more where it is an execution of a truſt only: And though the appointment is inaccurately expreſſed, and in an informal manner, it ſhall ſtill amount to a grant of the 2000*l.* to Mr. *Speke*; and if it amounts to a grant, what is the effect? Why, that Mr. *Speke* ſhall have the whole uſe and benefit of it during the coverture; and falls exactly within the reaſon of Lady *Coventry*'s caſe; where a tenant for life, with a power to make a jointure, covenants, for a valuable conſideration, to execute his power, this court will ſupply a defective execution, or a non-execution againſt the remainder man.

Though the appointment here was inaccurately expreſſed, and in an informal manner, yet being executed for a valuable conſideration, this court will ſupply the defect.

The next queſtion is, as to the remaining 2000*l.*

This was not an appointment for a valuable conſideration, but only a voluntary diſpoſition, and therefore as the will under which the 2000*l.* is given was not executed in the preſence of three witneſſes, it has not purſued the power, and conſequently was a void appointment, ſo that this 2000*l.* ſunk in the infant's real eſtate.

The will under which the 2000*l.* is given, *being a voluntary diſpoſition*, as it has not purſued the power, by being executed in the preſence of three witneſſes, is a void appointment, and ſinks into the real eſtate.

There is another queſtion which relates to the intereſt of the 2000*l.* appointed to Mr. *Speke*, by the articles before his marriage.

And it is inſiſted, that, from the time of the articles executed, intereſt commenced, and that it ought to have been kept down by the infant during his life.

It is maintained upon theſe grounds: 1ſt, That the infant was only tenant in tail, remainder in fee, and that the remainder in fee never coming into poſſeſſion, he was liable to keep down the intereſt out of his perſonal eſtate; and 2dly, That the plaintiff cannot be charged with it, becauſe Mrs. *Sergiſon*, his wife, being heir at law of the infant's father, as well as of the infant himſelf, has no occaſion to claim through the infant at all, but may derive her title immediately from the father.

As to the firſt ground, to be ſure, there is that nicety in law between a remainder in fee in reverſion and in poſſeſſion; but to ſay in equity, that the infant ſhall be compelled to keep down intereſt upon his own eſtate, of which he was ſeiſed of the remainder in fee, out of his perſonal eſtate, is ſuch a nicety, that I cannot allow of by any means.

As to the ſecond ground, I am of opinion Mrs. *Sergiſon* is obliged to ſhew her couſinage, through the infant, though in the deſcent ſhe might derive the title from the father only.

I do not ſo much as remember an inſtance where even a tenant in tail has been obliged to keep down intereſt; but if he dies during his infancy, and the remainder in fee was limited to a ſtranger, it may poſſibly make ſome difference; but I will not determine now how the court would direct in that caſe.

In the preſent caſe, had there been an application to the court in the infant's life, by his guardian, the court would have directed the intereſt of this 2000*l.* to be kept down out of the rents and profits of his eſtate, and not out of his perſonal eſtate: Suppoſe an infant, tenant in tail, remainder in fee, had nothing to ſupport him but the rents and profits of real eſtate, and would ſtarve if they were to be applied to keep down intereſt, I ſhould not in that caſe have directed them to be ſo applied; but here there is a large perſonal eſtate, beſides the rents and profits of the real eſtate, which makes the difference.

Therefore there muſt be an account taken of the rents and profits of the real eſtate of the infant, deſcended upon Mrs. *Sergiſon*, the wife of the plaintiff, and ſo much of them applied as will pay off the

the intereſt due upon the 2000*l.* appointed to Mr. *Speke*, which muſt be at the rate of 4 *per cent.* and commence from one year after the execution of the articles of appointment to Mr. *Speke*.

Jewſon verſus *Moulſon, et e con. October* 27, 1742. Caſe 275.

THE queſtion, in both theſe cauſes ariſes from the will of *Joſeph Burr*, who, at the time of making it had five children: "He thereby directs two freehold houſes to be ſold; and his whole "eſtate to be turned into money; and after his debts and legacies "are paid, the reſidue of the money he gives to the plaintiff and "others, his executors, in truſt, for the benefit of his four ſons, "and his daughter *Jenny*, to be divided equally between them; and "if any or either of them die before the age of twenty-one, their "ſhare to go to the ſurvivor."

Harry Burr, one of the ſons, died after the father, and before twenty-one, and conſequently his ſhare went over to the ſurvivors.

In *Auguſt* 1739, Mr. *Vobe*, who kept a tavern, married the daughter, but made no proviſion for her by way of ſettlement.

In *March* 1739, Mr. *Vobe*, being juſtly indebted to the defendant *Moulſon*, a wine merchant, enters into a bond for the payment of it; and about three weeks after, makes an aſſignment to *Moulſon* of all the ſhare which in the right of his wife he was intitled unto, in her father's perſonal eſtate.

Afterwards he made a ſecond aſſignment of his wife's ſaid ſhare, to truſtees, for the benefit of all his creditors in general.

During all theſe tranſactions, *Jenny Vobe*, the wife of *Vobe*, and daughter of *Burr*, the teſtator, was under age.

The executors have done no act to ſettle or make any diviſion of the father's perſonal eſtate.

Mrs. *Vobe* has two children to maintain, as her huſband is a bankrupt.

Her ſhare under the will amounts to about 600*l.* and Mr. *Moulſon*'s debt to above 500*l.*

The queſtion is, Whether the wife, who is totally unprovided for, ſhall not have a maintenance ſecured to her out of her ſhare of her father's perſonal eſtate, before it is applied in payment of

Lord Hardwicke was of opinion, not to allow the defendant a creditor of Vobe's *to receive his wife's fortune, without making ſome proviſion for her; and recommended it to him to give her and her children ſome part of the principal of her fortune: on the 6th of* December 1742, *Lord Hardwicke decreed, in conſequence of an agreement between the parties, that a moiety of Mrs.* Vobe's *fortune ſhould be placed out for her ſeparate uſe during her life, and after her death, to be paid to her children, in equal ſhares*

the defendant Mr. *Moulſon*, and the reſt of the creditors of Mr. *Vobe* the huſband.

Mr. *Chute*, for the defendant Mr. *Moulſon*, cited *Tudor* verſus *Samyne*, 2 *Vern.* 270. Mr. *Brown*, of the ſame ſide, allowed it to be an eſtabliſhed rule of this court, that a huſband ſhall not meddle with the wife's fortune, unleſs he will, in the firſt place, make ſome proviſion for her; but the caſe of a creditor, he ſaid, was very different, who has paid a full conſideration for the aſſignment, and therefore it would be hard to make him ſtand in the place of the huſband.

He cited *Miles* verſus *Williams*, 1 *P. W.* 249. but relied chiefly on the caſe of *Bates* verſus *Dandy*, *July* 16, 1741. before *Lord Hardwicke*, *ſee p.* 207.

Mr. Attorney General, for the wife, ſubmitted two things.

Firſt, The general rule of a court of equity, that if a huſband is obliged to come here for a wife's fortune, he ſhall firſt make a proviſion for her, before he ſhall be allowed to meddle with it.

What, ſaid he, is the ground of this rule, but that it is natural juſtice and equity, the wife ſhould have ſome proviſion.

Secondly, This right runs along with the thing itſelf, and who ever comes in under the huſband, muſt take it only as he would have done; and the true reaſon for the court's interpoſition is, the wife's being unprovided for.

No harm or injuſtice is done, becauſe no body can take an aſſignment of the wife's fortune, but he muſt do it with his eyes open, and therefore it is his own fault, if he will lend upon ſuch a ſecurity.

There is beſides a ſtrong circumſtance in this caſe, for at the time the wife's ſhare was aſſigned, it was not a veſted intereſt, as ſhe could take only upon the contingency of her living to be twenty-one.

There is alſo a ſtrong argument to be drawn from the general inconvenience; for if the defendant Mr. *Moulſon* ſhould prevail, it would put it in the power of a huſband to evade the rule of the court; for by aſſigning the wife's effects, he gets her fortune in his power, which he could not have upon an application to Chancery, without making a proviſion for her firſt.

The Chancellor directed the cauſe to ſtand over, to look into the caſes; and on *October* the 29th, 1742. it came on again.

The Attorney General, for Mrs. *Vobe*, then cited the caſe of *Watſon* verſus *Maſcal*, *March* 15, 1732, before Sir *Joſeph Jekyll*, where he decreed a proviſion to a wife out of her fortune, againſt the aſſignees of a bankrupt. He likewiſe mentioned 1 *P. W.* 382. *Jacobſon & al'* verſus *Williams*, and 1 *P. W.* 735. *Richmond & Ux'* verſus *Talleur*. Mr. *Chute*, for the defendant Mr. *Moulſon*, cited 1 *P. W.* 458. *Boſvill* verſus *Brander*.

The cauſe ſtood over again till *November* 3, 1742. when the Chancellor gave judgment.

LORD CHANCELLOR.

Here are two bills brought:

The firſt, by the executors of Mr. *Burr*, to be diſcharged of their truſt, upon paying and aſſigning over *Jenny Vobe*'s ſhare of her father's perſonal eſtate, and that they may be indemnified in ſo doing.

The ſecond bill is brought by Mr. *Moulſon*, who claims a right to *Jenny Vobe*'s ſhare of *Burr*'s perſonal eſtate, under the aſſignment from her huſband.

As againſt the huſband, the equity is extremely plain, and likewiſe againſt the aſſignees, who claim under the ſecond aſſignment.

Therefore the principal queſtion in the cauſe ariſes out of the defence made by the wife of *Vobe*.

Two points have been inſiſted on for her.

Firſt, That the huſband cannot come into this court for the fortune of the wife, without making a proviſion for her in the firſt place.

Secondly, That there is an equity attached to the thing it ſelf, and therefore the aſſignee of the huſband takes it ſubject to the ſame equity; and from hence ariſes the greateſt doubt.

As to the *firſt*, It is an equity grounded upon natural juſtice, and is that kind of parental care which this court exerciſes for the bene- As a father would not have married his daughter without a proviſion, neither will this court, who ſtand in *loco parentis*, do it.

fit

fit of orphans; and as the father would not have married his daughter without inſiſting upon ſome proviſion, ſo this court, who ſtand in *loco parentis*, will not do it.

Where the eccleſiaſtical court have given their conſent the huſband ſhould have the wife's portion, this court has granted an injunction to ſtay the proceedings *there*.

This court will not ſuffer the huſband to take the wife's portion (though the eccleſiaſtical court, who have a concurrent jurisdiction with this, in regard to portions ariſing out of perſonal eſtate, have given their conſent the huſband ſhould have it,) until he has agreed to make a reaſonable proviſion for the wife; and in many inſtances have granted injunctions to ſtay the proceedings in the eccleſiaſtical court.

In *Tothill*'s Tranſactions in the high court of Chancery, in the caſe of *Tanfield* contra *Davenport*, 14 *Car.* 1. Lord Keeper *Coventry* takes notice of this rule, which ſhews it is not a doctrine newly taken up, as has been ſuppoſed.

Where there is a bond debt to the wife, *dum ſola*, and the husband recovers it at law, there is no inſtance of this court's granting an injunction, for the ſuit was proper at law.

But though this is ſo, yet if the huſband can come at the chattels of the wife, without the aid of this court, or of a court having a concurrent juriſdiction, I do not know any inſtance where this court has interfered; as if the wife's debtor will pay her debt to the huſband; ſo likewiſe where there is a bond debt to the wife, *dum ſola*, and the huſband recovers it at law, I do not know that this court have ever granted an injunction; for his ſuing at law was very proper, and therefore this court leaves it to its natural courſe, without meddling with a legal queſtion; though if a bill was brought in favour of a wife, for an injunction to ſtay execution upon the judgment at law, I do not know whether this court would not grant it; but, as that point is not now before me, I will not determine it.

Where a huſband makes a voluntary aſſignment of the wife's portion, the volunteer ſtands in his place only; the ſame equity in regard to executors, and the ſame as to aſſignees of bankrupts.

If one looks into the caſes upon this head, it is difficult to reconcile them, though, indeed, one thing is clear through them all; that if the huſband makes a voluntary aſſignment of the wife's portion, the volunteer muſt ſtand in the place of the huſband; there is the ſame equity too in regard to executors and adminiſtrators, and the ſame as to aſſignees of bankrupts, for it is the law that caſts it upon them, *vide* 2 *Vern.* 401. *Burnet* verſus *Kinaſton*, and 2 *Vern.* 564. *Taylor* verſus *Wheeler*, and *Jacobſon & al'* verſus *Williams*, 1 *P. W.* 382.

In equity, notwithſtanding a doubt of Lord *Cowper*'s, in the caſe of *Jacobſon* verſus *Williams*, it is now very well known, that *a poſſibility*, may be both releaſed and aſſigned.

There is a particular train in the report of the laſt caſe, and looks as if Lord *Cowper* reſted his opinion chiefly upon the commiſſioners of bankrupt's aſſigning a poſſibility, which he thought they could not do, but he was certainly wrong in point of law, for that not only the latter ſtatutes relating to bankrupts mention the word *poſſibility*, but alſo becauſe the 13 *Eliz. c.* 7. *ſect.* 2. impowers the commiſſioners to aſſign all that the bankrupt *might depart with*; and, beſides, the 21 *Jac.* 1. *c.* 19. enacts that the ſtatute relating

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to bankrupts ſhall be conſtrued in the moſt beneficial manner for creditors. *Vide Higden* verſus *Williamſon*, at the *Rolls*, *Mich.* 1731. and affirmed by Lord Chancellor *King*, in *Mich.* 1732 *: And in Equity it is very well known, that a poſſibility may be both releaſed and aſſigned.

The next caſe is *Watſon* verſus *Maſcal*, *March* 19, 1732. before Sir *Joſeph Jekyl*, who decreed exactly upon the ſame reaſoning as in the caſe of *Jacobſon* verſus *Williams*.

Yet, where the wife's truſt of a term has been aſſigned by the huſband for a valuable conſideration, there the determination has been contrary, and the rule has been, that the aſſignee ſhould not make a proviſion for the wife before he could be entitled. *Tudor* verſus *Samyne*, 2 *Vern.* 207.

Where the huſband aſſigns the wife's truſt of a term, for a valuable conſideration, the aſſignee need not make a proviſion for the wife, before he is intitled.

There was ſome diſpute at the bar, how *non allocatur* at the end of this caſe is to be applied, whether to the whole caſe, or the words immediately preceding; but, from what I have mentioned before out of *Tothill*, it is applicable only to the laſt preceding words.

The next caſe is *Walters* verſus *Saunders*, *Eq. Caſ. Abr.* 58.

The next is *Boſvil* verſus *Brander*, 1 *Wms.* 458.

The next is *Bates* verſus *Dandy*, *July* 16, 1741.

In theſe caſes you obſerve the particular contract of the huſband, for a valuable conſideration, has got the better of the wife's equity to have a proviſion.

The ground of Sir *Edward Turner*'s caſe, 1 *Vern.* 7. was this, that as the huſband, at law, could diſpoſe of a term for years, ſo may he diſpoſe of the truſt of a term, becauſe the ſame rule of property muſt prevail in equity as well as at law; but *vide* the caſe of *Pitt* verſus *Hunt*, 1 *Vern.* 18. where Lord Chancellor *Nottingham* expreſſed great ſurprize at this reſolution.

As at law, the huſband could diſpoſe of a term for years, ſo may he diſpoſe of the truſt of a term; for the ſame rule of property muſt prevail in equity as well as at law.

Now, I apply the reaſoning of theſe caſes to the preſent.

* 3 *P. Wms.* 132. In that caſe it was determined that a contingent intereſt or poſſibility in a bankrupt is aſſignable by the commiſſioners; thus a deviſe was to ſuch of the children of *A.* as ſhould be living at her death: *A.* had iſſue *B.* who becoming a bankrupt, gets his certificate allowed; after which *A.* dies; this contingent intereſt is liable to the bankruptcy, for as much as the ſon in the mother's life-time might have releaſed it.

As to the laſt of the aſſignments, it does not differ from the caſe of aſſignments of bankrupts, for it is the caſe of a failing man, and exactly under the ſame reaſoning as an aſſignment of a bankrupt's effects for his creditors in general; for here he aſſigns all his right, title, *&c.* and therefore is exactly upon the ſame footing.

As to the firſt aſſignment to the defendant Mr. *Moulſon*, to be ſure, that is different from the other, and likewiſe differs in ſeveral circumſtances from all the caſes cited.

In the firſt place, here is a mixed fund ariſing out of real as well as perſonal eſtate; for though the father, indeed, by his will, directs the eſtate to be ſold and turned into money, yet all the children together, when they came of age, might have ſaid to the truſtees of the will, let us take the real eſtate as it is, notwithſtanding the teſtator directs it to be ſold.

Beſides, the wife was an infant when ſhe married, and likewiſe during all theſe tranſactions, and conſequently a particular object of the care of this court.

This differs from the other caſes, for the huſband at once aſſigned all the fortune, and which he could not reduce into poſſeſſion without the aſſiſtance of this court.

Beſides too, this is not an aſſignment of a term for years, or a ſpecific thing, but an aſſignment at once of all her fortune, and which the huſband could not reduce into poſſeſſion, without the aſſiſtance of this court; neither has there been any diviſion in the world made, or even an account taken of the teſtator's eſtate, which could bind the parties.

The truſtees themſelves, though willing to have joined with the huſband, could not have bound the wife, as ſhe was an infant, and as there is likewiſe a clauſe of ſurvivorſhip in the will; and therefore there is no poſſibility of coming at the fortune, without the aid of this court.

For this reaſon the defendant Mr. *Moulſon* muſt be preſumed to have known all the circumſtances of this ſecurity, and what the rule of equity is in regard to proviſions to be made for a wife out of her fortune.

The material point was the aſſignment of the whole portion, and if ſuch a practice ſhould be allowed, it would defeat all the care of the court with regard to infants.

In the preſent caſe, I lay a very great weight upon its being an aſſignment of the whole portion, and if I ſhould allow this practice to prevail, it would trip up all the care and caution of this court with regard to infants; for a huſband then would have nothing to do but to take up money of a third perſon; and though neither he nor the lender know exactly at the time what the fortune is, yet he may aſſign it over, and ſo defeat the care of the court intirely.

Conſider

Conſider too, the particular circumſtances of this caſe; the huſband was in debt before he married; runs away with this young woman clandeſtinely, without the conſent of any of her relations, with a view, very poſſibly, to prevent his being arreſted.

To this it may be objected, that if I decree a proviſion for the wife, people will not venture to lend their money, which would be a great detriment to the public in general, and to trade in particular.

To which I anſwer, that though this court ſhould not ratify and legitimate ſuch aſſignments, yet there will be perſons enough found to riſque their money upon ſuch ſecurities.

Therefore, I am of opinion not to allow the creditor to receive the whole fortune of the wife, without making ſome proviſion for her; and I would recommend this method to the defendant Mr. *Moulſon*, that he ſhould come into terms to give the wife and children ſome part of the principal of her fortune, and then he will have an immediate benefit from the reſidue.

Lord Hardwicke ordered it to ſtand till the firſt day of cauſes after the term; and ſaid perhaps, before that time, the parties, when they ſee the inclinations of the court, will acquieſce; if they do not, they can have no benefit for a long time, as the intereſt of her fortune can be applied only to the ſeveral demands.

December the 6th 1742. The cauſe of *Jewſon* verſus *Moulſon*, ſtood again in the paper, when it appeared, that it was agreed between the parties, that the neat ſum, which ſhall remain after the deduction of coſts, ſhall be divided into equal moieties; and one moiety thereof was to be paid by *Jewſon* to *Moulſon*, towards ſatisfaction of his debt; and the remaining moiety was to be retained by *Jewſon*, to be diſpoſed of for the ſeparate uſe and proviſion of *Jenny Vobe*, and the children ſhe already hath, or may have, in ſuch manner as the court ſhall direct; and thereupon Lord *Hardwicke* ordered and decreed that the agreement be performed and gave full directions for placing out and ſecuring *Jenny Vobe*'s moiety for her ſeparate uſe, during her life, and after her death, for the payment of it to her children, in equal ſhares.

Webb

Caſe 276. *Webb* verſus *Claverden*, *October* 29, 1742.

A fraud in procuring a will cannot be determined here, but muſt be decided by a trial at law.

A Bill was brought by an heir at law, charging fraud and circumvention in the defendant, in obtaining the will, and inſanity in the teſtatrix.

LORD CHANCELLOR.

This court will not determine a fraud in procuring a will, without directing a trial at law, which was done accordingly.

Where an heir at law will bring a bill to ſet aſide a will for inſanity, inſtead of an ejectment, he ſhall pay coſts, if he fails.

I ſhall decree coſts againſt the plaintiff; for where an heir at law will bring a bill to ſet aſide a will for inſanity in the teſtator, when he might have proceeded at law by ejectment, this is ſuch a vexation, that if he fails in ſetting it aſide, he ſhall pay coſts, ſo far as relates to the controverting of the will.

Where an heir is brought before the court as a defendant, and iſſue is directed to try the fraud or inſanity of the teſtator, though he fails in overturning the will, the court will not give coſts againſt him.

But where an heir is brought before the court as a defendant, even though he ſhould inſiſt upon the will's being fraudulent, or the teſtator's being inſane, and an iſſue at law is directed to try the fraud or inſanity, yet this court will not give coſts againſt him, though he fails in the attempt of overturning the will, but very often allows the heir his coſts.

Caſe 277. *Galton* verſus *Hancock*, *October* 29, 1742.

H. being ſeiſed in fee of an eſtate, having borrowed money in 1724, gave a bond for it, and a mortgage on it for a ſecurity afterwards: In 1728, by will he deviſes the mortgaged eſtate, and a freehold, for three lives, to his wife; and appointed her ſole executrix. The queſtion was, if the perſonal eſtate is not ſufficient to pay the mortgage, whether the eſtate deſcended on the plaintiff ſhould not make up the deficiency, ſo that the eſtate decreed to the wife might not be affected whilſt there were real aſſets? Lord *Hardwicke* held, at the firſt hearing, the wife was not intitled to ſuch exoneration in a court of equity, but muſt take the eſtate with its burthen.

THE defendant's late huſband being ſeiſed in fee of an eſtate, and having borrowed a ſum of money, gave a bond for it, dated *May* 12, 1724, and a mortgage for the ſame ſum on the 13th of *June* following: On the 11th of *December* 1728, he made his will, and deviſed the eſtate in fee, which he had thus mortgaged, and alſo an eſtate for three lives, to the defendant his wife, and made her ſole executrix.

In 1734, he purchaſed one moiety of the reverſion in fee of the lifehold eſtate, and the other moiety in 1737, and died ſoon after, without making any alteration in his will.

The bill was brought by the heir at law, to have the deeds and writings of the lifehold eſtate, the reverſion in fee of which was purchaſed by the teſtator after making his will, and for an account of the perſonal eſtate.

The plaintiff inſiſts, that the eſtate deſcended is not liable to pay the mortgage, and endeavours to throw the burden upon the defendant, to be paid out of the perſonal aſſets; and if thoſe ſhould be deficient, out of the eſtate deviſed to the defendant.

The defendant inſiſts, that if the perſonal eſtate is not ſufficient to pay the mortgage, the eſtate deſcended upon the plaintiff ſhall make up the deficiency; and that the eſtate deviſed to her ſhall not be affected while the real aſſets are ſufficient.

Mr. *Chute*, for the defendant, cited *Heron* contra *Merick*, *Salk.* 416. *Carter* verſus *Barnardiſton*, 1 *P. Wms.* 505. and *King* verſus *King* and *Ennis*, 3 *P. Wms.* 358.

LORD CHANCELLOR.

This cauſe comes before the court in an odd manner, becauſe the mortgagee is no party, nor has he taken any remedy in law or equity.

The plaintiff however has a clear equity for the deeds and writings of the eſtate deſcended, and to have an account of the perſonal eſtate of the teſtator; and I own, I thought the other, at, firſt as clear a point in favour of the heir; but, however, as the defendant, the widow, is a ſufferer, contrary to the intention of her huſband, for he had no deſign of purchaſing the reverſion in fee of the lifehold eſtate, at the time he made his will, I was willing to hear what could be ſaid on her behalf.

Purchaſing the reverſion in fee after the will of the lifehold eſtate, was a revocation *pro tanto*, and deſcends upon the heir.

But it is ſo very clear, that the purchaſing the reverſion after making the will, is a revocation *pro tanto*, that it was very candidly given up at the bar.

From hence it ariſes that the eſtate, formerly lifehold, is deſcended upon the heir, and if deſcended, let it be by what means it will, whether by being omitted in a will, or revoked, it is the ſame thing; and will not alter the right between the parties.

This being ſo, it brings it to the main queſtion, whether, where a real eſtate is deviſed with an incumbrance, and another deſcended upon the heir, the deviſee is intitled to have her eſtate exonerated.

I am of opinion, the deviſee is not intitled to ſuch exoneration in a court of equity.

There is no precedent cited to me where it has been ſo determined, or where the very point has come directly before the court.

It has been inſiſted on, that the bond ought to be conſidered as a diſtinct debt, and the mortgage only as a collateral ſecurity, and therefore are two diſtinct tranſactions; and if ſo, the bond creditor is intitled to come upon the real aſſets.

I will not ſay whether this would not make ſome difference if it was the fact, but it appears to me that both bond and mortgage were to ſecure the ſame individual debt, and the bond was only given in the mean time, till the mortgage could be made.

It is likewiſe inſiſted on the part of the defendant, that the money borrowed is a debt that charges the heir, for the heir is bound by the bond, and the covenants in the mortgage.

The creditor may proceed againſt the heir if he pleaſes, for the law knows no diſtinction of the perſonal eſtate's being to be applied firſt.

It is very true that the perſonal eſtate ſhall be applied firſt, but at law there is no ſuch diſtinction, for the creditor may proceed againſt the heir if he pleaſes, and he has no way to help himſelf.

But it is a very different conſideration when the queſtion is between two real eſtates; and it would be hard to turn the burden off from a deviſee, and throw it upon an heir at law.

All the caſes prove an heir at law to be as much, if not more, a favourite in a court of equity than a deviſee, but none that a deviſee is more favoured.

The teſtator himſelf has laid a real burden upon the lands deviſed, and therefore different from the caſe of a general bond debt.

This is a caſe where the teſtator himſelf has laid a real burden upon the lands deviſed, and quite different from the caſe of a general bond debt, ſo that his mortgaging it is a material circumſtance. For how can a court of equity ſay that the teſtator did not intend it ſhould paſs *cum onere*, when there is ſo ſtrong a preſumption that he did?

It is truly ſaid at the bar, that there is no caſe exactly in point; but *Carter* verſus *Barnardiſton* comes neareſt to it.

In that caſe where there was a deviſe of the manor of *Dale* to one, and the manor of *Sale* to another; ſuppoſe the teſtator after he had thus deviſed theſe two manors, had thought proper to mortgage the manor of *Sale*, this deviſee might have uſed all theſe arguments which are now uſed to exonerate his eſtate, by calling upon the deviſee of the manor of *Dale* to bear his proportion of the mortgage.

It was very juſtly obſerved by Mr. *Brown*, that an heir at law, who has an eſtate deſcended upon him, is to be conſidered in the ſame light as if the eſtate had been actually given to him: And there is no colour to ſay (even laying aſide the expreſſion of an heir at law's being a favourite of this court) that a deviſee ſhall be preferred to him in equity.

His Lordſhip decreed the defendant *Hancock* to account for the perſonal eſtate of her teſtator, and that ſhe ſhould deliver up the deeds and writings relating to the eſtate deſcended upon the plaintiff, and that they ſhould be given in upon oath before a maſter, and lodged there as a ſecurity to the defendant for her dower upon this eſtate, until the plaintiff ſhall have aſſigned it.

There was a doubt formerly with regard to dower, but it has been ſettled ever ſince the caſe of *Lawrence* verſus *Lawrence*; *vide Eq. Caſ. Abr.* 218. in which though Lord *Somers* was of opinion, that where a huſband had given an eſtate to a wife larger than her dower, it ſhould go in ademption of the dower; yet the houſe of Lords on the 17th of *May* 1717. reverſed his decree, and held ſhe was intitled to both notwithſtanding.

Though a huſband deviſes an eſtate to a wife larger than her dower, ſhe is intitled to both notwithſtanding.

Galton verſus *Hancock*, *June* 11, 1743. *Rehearing*. Caſe 278.

MR. Solicitor General, * council for the defendant the deviſee.

* Mr. *Murray*.

The ſtatute of the 3 & 4 *Will. & Mar. ch.* 14. of fraudulent deviſes, ſhews that the heir and deviſee are not put upon the ſame footing: the deviſee cannot be ſued alone upon that ſtatute, for the heir muſt be joined with him: and as I am informed, the general practice upon judgments on this ſtatute is to inſert that the heir muſt make the firſt ſatisfaction, which is very particular, becauſe there are no direct words in the ſtatute to warrant it.

On the one hand it would be hard for an heir at law out of a ſmall pittance to pay a debt out of it in favour of a deviſee, and on the other hand, where the eſtate deſcended is large, it would be as hard to leave the burden on the ſpecific deviſee, when the mortgage almoſt exhauſts the eſtate: on account of theſe difficulties Lord *Hardwicke* adjourned the cauſe to ſearch for entries of judgments at law on the ſtatute of fraudulent deviſes, and for precedents in equity, where there are ſpecialty debts and mortgaged eſtates deviſed beſides.

The ſtatute has made no manner of alteration but barely between the creditor and the deviſee, and as to heir and deviſee the law is the ſame as before: for if *a bond creditor* exhauſts the perſonal aſſets, the legatee ſhall ſtand in his place, and come upon the real aſſets, for the heir is only intitled after all gifts are ſatisfied, ſo that a legatee is preferred to an heir at law: why then ſhould a legatee of a perſonal thing be in a better condition than a deviſee of a real thing?

thing? *Vide Hern* contra *Merick*, before Lord *Harcourt in Canc.* *Salk.* 416.

This being the ſettled rule, that the heir can take nothing but the ſurplus after all gifts are ſatisfied; conſider the principle on which it is founded, (for every rule is founded upon reaſon or maxims of law) *namely*, that if a teſtator can diſpoſe of the whole, *a fortiori* he may diſpoſe of a part.

A bond-creditor may certainly ſue the heir firſt if he pleaſes, without coming againſt the perſonal aſſets. *Kinaſton* verſus *Clark*, *October* 19, 1741.

Mr. *Chute* of the ſame ſide ſaid, it is the duty of an executor in the firſt place to diſcharge the mortgage, and if there are no perſonal aſſets, the heir muſt prevent the mortgagee from incumbring the ſpecific deviſee. *Clifton* verſus *Burt*, 1 *Wms.* 679.

Mr. Attorney General for the plaintiff.

Here is no creditor before the court, and therefore comes naked and ſimply on the proper equity between a deviſee and the heir at law.

The deviſed eſtate is liable in two capacities.

1ſt, As it is ſubject to the mortgage.

2dly, Under the ſtatute of fraudulent deviſes.

There are many caſes where the turn of the ſcale is given to an heir at law, for the ſake of the heir at law: But the gentlemen of the other ſide have not ſhewn that equity has taken the burden from the *hæres factus*, where the ſcale is equal, and thrown it upon the *hæres natus*.

They conſider it in too narrow a view, without reflecting how the will has given it, and the circumſtances.

If it appears that it was the teſtator's intention that the deviſee ſhould take it incumbered, there is an end of the queſtion.

It is impoſſible that the teſtator could intend ſhe ſhould take it diſincumbered, for he ſays, "After all my juſt debts are ſatisfied, "then I give to my wife this eſtate."

Which

Which ſhews ſhe was to pay the debts in the firſt place: afterwards by another independant clauſe he gives her all other his eſtates real and perſonal.

I have proved by the words, that it was the intent of the teſtator to give it ſubject to this burden, and the law charges it, as I ſaid before, in a double capacity; and therefore it would be abſurd to diſcharge it contrary to the intention, and contrary to the effect of the law. *Vide* the caſe of *Lord Warrington* verſus *Lee*, *Sel. Caſ. in Ch. in Lord King's time* 39.

He that knew he had given her all, ſubject to his debts, could not but know that this eſtate was equally ſubject, as the law had made it ſo.

The deviſee is ſubject here by the particular intention, the heir only by a remote operation of law.

The ſtatute of fraudulent deviſes is not applicable to the preſent caſe, becauſe the ſtatute has no lien upon debts ariſing from the contract of the parties, but upon general debts only of a teſtator.

Mr. Solicitor General in his reply ſaid, that clearly before the ſtatute the heir at law was liable in the firſt place to pay ſpecialty debts, and the deviſee was not to pay any part of that debt; and ſince the ſtatute the law is the ſame, for the ſtatute enters not into any other caſe of miſchief, but only provides that the creditor ſhall be paid at all events, and does not in the leaſt diſturb any right *the deviſee* might have before againſt the heir at law.

An heir can never have any contribution againſt the deviſee, becauſe he can have nothing from his anceſtor but what is left undiſpoſed of, nor is there any inſtance of an heir's bringing a bill againſt the deviſee for contribution. He cited *Harbert*'s caſe in 3 *Co.* 12. *b.* *

LORD CHANCELLOR.

This caſe has been more fully argued than it was before; but as council on both ſides have allowed there is no caſe exactly in point, for the arguments have been chiefly drawn from analogy to other caſes of marſhalling aſſets, I will not be over haſty in determining.

* It was reſolved, That in caſe of a common perſon the heir of a conuſor, or he againſt whom the judgment is given in debt ſhall be only charged, and ſhall not have contribution againſt the terre-tenant in ſome caſes; for if a man be ſeiſed of three acres of land, and acknowledges a recognizance or a ſtatute, *&c.* and enfeoffs *A.* of one acre, *B.* of another, and the third deſcends to the heir; in this caſe, if execution be ſued only againſt the heir, he ſhall not have contribution, for he comes to the land without conſideration, and the heir ſits in the ſeat of his anceſtor. *Harbert's* caſe.

Some perſons who have ſate in this court think it has gone too far in giving one voluntier a remedy by way of circuity againſt another.

Though both real and perſonal eſtate are liable to debts, yet the real aſſets are a favoured fund.

To be ſure, there is a good deal of weight in the conſequences of the other ſide; and therefore theſe things deſerve the conſideration of the court.

For though it ſeems hard, that where an heir at law has a ſmall pittance, the court ſhould make him pay a debt out of his fund, in favour of a deviſee of an eſtate, which was made ſubject to this debt, and a deviſee likewiſe of all the reſidue, both real and perſonal; yet, on the other hand, ſuppoſe an eſtate of 1000*l. per ann.* ſhould deſcend upon an heir at law, and the teſtator ſhould have deviſed another eſtate, ſubject to a mortgage which almoſt exhauſts the eſtate, would it not be as hard to leave the burden upon the ſpecific deviſee, where there are real aſſets ſufficient to diſcharge all the debts?

His Lordſhip adjourned it to *Michaelmas* term to look into the entries of judgments at law upon the ſtatute of fraudulent deviſes; and likewiſe for precedents of caſes in this court, where there are ſpecialty debts, and mortgaged eſtates deviſed beſides.

Caſe 279.

Galton verſus *Hancock*, *June*, 25, 1744.

Lord *Hardwicke* was of opinion, that the wife is intitled to have the mortgage upon the eſtate deviſed to her, exonerated out of the real aſſets deſcended upon the heir, and reverſed the former decree totally as to this point.

AFTER Lord *Hardwicke* had taken a twelvemonth's time to conſider of the caſe, he this day gave judgment in it as follows:

This cauſe came on laſt upon a petition of rehearing. *See the ſtate of the caſe before, page* 424.

At the firſt hearing, I determined againſt the defendant.

The principal queſtion is, Whether the defendant is intitled to have the mortgage upon the lands deviſed to her under the will of her huſband, exonerated out of the real aſſets deſcended upon the plaintiff, the heir of the teſtator?

This will depend upon two more particular queſtions.

Firſt, Whether there are any words in the will to throw this upon the heir at law?

Secondly, Whether according to, or in conſequence of thoſe rules, which have been eſtabliſhed in equity, the defendant ſhall prevail to have the mortgage on the eſtate deviſed to her, exonerated out of the real aſſets deſcended on the plaintiff?

The teſtator in his will ſets out with a deſire, that all his debts may be paid in the firſt place, and concludes with a general reſiduary deviſe to the defendant, whom he makes his executrix.

On the part of the plaintiff, it is inſiſted, that the introductory clauſe in the will is ſufficient to charge the defendant with the incumbrance upon the eſtate deviſed to her, and that ſhe ought to take it *cum onere*.

So, I think it would, with regard *to creditors*, but is by no means ſufficient to fix the *onus* or burden upon the legatee, or to make a variation with regard to the different funds, out of which the debts are to be paid, or to tranſpoſe the order in which the funds are to be applied for that purpoſe; for theſe clauſes in wills have received ſuch a conſtruction, merely for the aid and aſſiſtance of *creditors*, that they may not loſe their juſt debts.

Where a will ſets out with a deſire that the debts may be paid in the firſt place, the wife, with reſpect to creditors, muſt have taken the eſtate *cum onere* deviſed to her, but is not ſufficient to fix the burden upon the legatee, ſo as to make a variation with regard to the different funds out of which the debts are to be paid; or tranſpoſe the order in which they are to be applied for that purpoſe.

As to part of the real eſtates deviſed to the wife, the will is clearly revoked, and muſt be taken as if they had never been deviſed, I mean thoſe which were only *pur auter vie* at the making of the will, and the inheritance of them purchaſed in afterwards by the teſtator.

But it would ſound extremely harſh in a court of equity, if I ſhould ſtrain, to charge the deviſee with this debt, and by that means leſſen even the eſtate which remains to her under the will, when clearly the intention of the teſtator was to give her the whole, and totally to diſinherit his heir.

To leſſen the eſtate which remains to the wife under the will, where the intention of the teſtator was totally to diſinherit the heir, would ſound harſh in a court of equity.

The ſecond queſtion is a new one, and was never before brought in judgment, or *in ſpecie*.

I ſhall conſider it in two lights.

Firſt, How it would have ſtood, in caſe this had been a general debt by bond, or covenant, where the heir is bound, without any mortgage to ſecure it.

Secondly, Whether the mortgage in this caſe will make any difference.

There

There are two periods of time which will be material; how it would have been at common law before the ſtatute of fraudulent deviſes, and how ſince.

At common law, the deviſee was not liable to the demand, becauſe the diſcent was broke.

The rule of equity before the ſtatute did not differ from the rule of law, unleſs there were ſome particular circumſtances in the caſe.

This court had been often attempting, before the ſtatute, to make a deviſee liable to ſpecialty debts, but were not able to come at it, which was the occaſion of the ſtatute.

Before the ſtatute of fraudulent deviſes, an heir would have had the aid of the perſonal eſtate in eaſe of the real; but if no perſonal, not intitled to a contribution from the deviſee.

The heir, before the ſtatute, would have had the benefit of the perſonal eſtate in this court, in eaſe of the real; but if there was no perſonal, the heir could have had no relief, not ſo much as a contribution, from the deviſee.

The next queſtion is upon the operation of the ſtatute, abſtracted from the mortgage in this caſe.

The words of the ſtatute of the 3 & 4 *W. & M. cap.* 14. are theſe:

" Whereas it is not reaſonable or juſt, that by the practice or " contrivance of any debtors, their creditors ſhould be defrauded of " their juſt debts; and nevertheleſs it hath ſo often happened, that " where ſeveral perſons having, by bonds, or other ſpecialties, bound " themſelves and their heirs, and have afterwards died ſeiſed in fee- " ſimple, of and in manors, meſſuages, lands, *&c.* or had power, " or authority to diſpoſe of or charge the ſame by their wills or teſ- " taments, have, to the defrauding of ſuch their creditors, by their " laſt wills or teſtaments, deviſed the ſame, or diſpoſed thereof in " ſuch manner, as ſuch creditors have loſt their ſaid debts: For " remedying of which, Be it enacted, *&c.* That all wills and teſta- " ments, limitations, diſpoſitions or appointments, of or concern- " ing any manors, meſſuages, lands, tenements, or hereditaments, " or of any rent, profit, term or charge out of the ſame, whereof " any perſon or perſons, at the time of his, her, or their deceaſe, " ſhall be ſeiſed in fee ſimple, in poſſeſſion, reverſion, or remain- " der, or have power to diſpoſe of the ſame by his, her, or their " laſt wills or teſtaments, ſhall be deemed and taken (only as againſt " ſuch creditor or creditors as aforeſaid, his, her, and their heirs, " ſucceſſors, executors, adminiſtrators, and aſſigns, and every of " them) to be fraudulent, and clearly, abſolutely, and utterly void, " fruſtrate and of none effect, *&c.*"

By

By force of this ſtatute, the deviſee is made liable at law; and the action muſt be brought jointly againſt the heir and deviſee.

The action under the ſtatute muſt be brought *jointly* againſt the heir and deviſee.

Sect. 3. " And for the means that ſuch creditors may be enabled " to recover their ſaid debts, be it further enacted, That in the caſes " before mentioned, every ſuch creditor ſhall and may have and " maintain his, her, and their action and actions of debt, upon his, " her, and their ſaid bonds and ſpecialties againſt the *heir* and *heirs* " *at law* of ſuch *obligor or obligors*, and *ſuch deviſee* or *deviſees*, " *jointly*, by virtue of this act."

The next queſtion will he, What judgment is to be entered up in this caſe?

It has been inſiſted by the defendant's council that there ought to be two diſtinct judgments: *Firſt*, That the heir ſhould make ſatisfaction, and if he has not ſufficient aſſets, then, that the deviſee ſhould do it.

But there has been no precedent of any judgment in this action cited in ſupport of this; but then it was ſaid, this was the only reaſon why the ſtatute directs the heir and deviſee to be *joined* in the action, becauſe if the heir had not aſſets enough, then judgment might be entered againſt the deviſee.

But this is not concluſive, for I take the proviſion in the act to be introduced for the benefit of the creditors, merely without any regard either to the *heir* or *deviſee*, for *the enabling clauſe* intitles the creditor to a new formed writ, and to bring a new action; for otherwiſe there might have been a colluſion between the deviſee and heir at law, to play off the will, or not, juſt as it ſhould ſuit them beſt; therefore it was a neceſſary and wiſe proviſion of the act, to join *the heir and deviſee* in the action, to ſecure the creditor at all events.

The proviſion in the act was introduced for the benefit of the creditors, merely without any regard either to the heir or deviſee, or otherwiſe by colluſion they might have played off the will, or not, as ſuited them beſt.

I directed the ſolicitors on both ſides to ſearch for precedents of judgments at common law on this ſtatute, but they have not been able to find any; the reaſon muſt be, that the proceedings in this court are more expeditious, for they may have a ſale directed, as they have both heir and executor before the court.

The reaſon why there are no precedents to be found of judgments at common law, is, that the proceedings here are more expeditious; for as both heir and executor are before the court, the creditors may have a ſale.

There are three printed caſes on this action, one in *Clift's Entries* 243. and another in *Lilly's Entries* 145, which is a better book, the caſe of *Joſeph* verſus *the Duke and Dutcheſs of Hamilton*, in the Exchequer, but no plea or judgment are mentioned.

In the caſes on this action in *Clift's* and *Lilly's Entries*, the writ charges the heir in the *debet* and the *detinet*; and that the judgment muſt follow the writ and count is a known rule at law.

The third is in *Lilly's Entries* 529. 7 *Ann.* but there likewiſe is no plea or judgment, nor any entry of it in the office.

In all theſe precedents, the writ charges the heir in the *debet* and the *detinet*, and ſo it was in all actions againſt co-heirs.

According to the known rules of law, the judgment muſt follow the writ and count; therefore I conclude the judgment here muſt likewiſe be of both: *Vide* 3 *Co.* 13, 14. where the reaſon for a judgment againſt both the heirs is fully ſet forth.

There is another conſideration, which is, that from the nature and form of the judgment it ſelf, there cannot be two diſtinct judgments: *Vide Plowd.* 438. *Davy* verſus *Pepys*, where there is a precedent of a judgment at large againſt co-heirs.

The lands deſcended are to be delivered to the creditor upon *the execution*, at a certain annual value, until his debt is ſatisfied.

If ſo, when can the ſecond judgment take place? for you can never ſay, that this may not be ſatisfied out of the real aſſets of the heir, ſince the judgment is, the creditor to hold *quouſq; debitum ſatisfactum fuerit.*

In equity, to ſatisfy a ſpecialty debt, perſonal aſſets muſt be firſt applied, and if deficient, the real aſſets deſcended.

What is the rule in equity? Why, in caſe of a debt by ſpecialty, that the perſonal aſſets ſhall be firſt applied, and if deficient, the heir ſhall be charged for aſſets deſcended.

No caſe was cited at the bar; but there is one which has ſome reſemblance to it, *Gawler* verſus *Wade*, 1 *P. Wms.* 99. It is ſaid there, by Lord *Cowper*, it is the act of parliament makes this aſſets in the deviſee's hands, and *that* requiring the heir to be made a defendant, you muſt follow the remedy therein preſcribed; and this bill in equity is as an action at law; but his Lordſhip ſaid nothing as to a contribution between *the heir and deviſee.*

There are two caſes where this point has been determined, *Saville* verſus *Saville*, before Lord *King*, and Lord *Conway*'s caſe.

In *Pitt* verſus *Raymond*, the bill was to have ſatisfaction out of aſſets deſcended and deviſed; Lord *Talbot* directed, if the perſonal were not ſufficient, an account was to be taken of aſſets deſcended, and if that was deficient, then of the deviſed eſtate, which ſhews his opinion as to the order in which the aſſets were to be marſhalled.

I ſhall add another caſe, *Pitt* verſus *Raymond*, *January* 27, 1734, before Lord *Talbot*: "A new bill there was brought, after a long "courſe of proceeding, to have ſatisfaction out of aſſets both de- "ſcended and deviſed: his Lordſhip directed there, that if the per- "ſonal were not ſufficient, then, in the next place, an account "was to be taken of aſſets deſcended upon the heir at law; and if "that ſhould be deficient, then an account was to be taken of the

"deviſed

" deviſed eſtate, which ſhews his opinion as to the order in which " the aſſets were to be marſhalled."

I take it, that the notion of contribution in the caſe of *Gauler* verſus *Wade* is not well founded, for it is only ſtarted by council, but is not ſupported by any authority.

The ſtatute of fraudulent deviſes was made merely for the ſake of *creditors*, and not at all in favour of heirs at law.

The enacting clauſe makes wills void againſt *ſuch creditors*, but leaves the law as it was before with regard to *heirs*.

In this caſe, it would be contrary to the plain intention of the teſtator, to make the deviſee, the wife, liable to the debt, ſo that ſhe ſhould, in whole, or in part be defeated of her legacy.

The ſecond queſtion is, Whether there being a mortgage upon this eſtate deviſed to the defendant the wife, will make any alteration.

It muſt be admitted that this is a debt by ſpecialty, and that the land is only regarded as a pledge or ſecurity for the money in this court.

A mortgage is a debt by ſpecialty, and the land is only regarded as a pledge for the money.

The mortgagee may take his remedy, indeed, againſt the executor, or againſt the heir at his election; but it muſt likewiſe be admitted, this election of the mortgagee will not determine which fund ought properly to be charged, nor vary the right as to thoſe funds.

A mortgagee may take his remedy againſt the executor, or againſt the heir, but the election of the mortgagee does not vary the right as to the funds, or determine which ought properly to be charged.

This was determined *originally* in favour of the heir, for theſe reaſons, becauſe the heir is in the ſeat of the anceſtor, and, whilſt the ancient tenures ſubſiſted, was obliged to perform the ſervices.

The firſt executions were *fieri facias*, and *levari facias*, which affected chattels only, but did not take the land, *vide* 3 *Co.* 11. *b.* *William Harbert*'s caſe; and ſo tender were they anciently of landed eſtates, that even in the caſe of the crown, if the goods and chattels of the king's debtor be ſufficient, and ſo can be made appear to the ſheriff, whereupon he may levy the king's debt, then ought not the ſheriff to extend the lands and tenements of the debtor, or of his heir, 2 *Inſt.* 18, 19. And Lord *Coke*, in *Harbert*'s caſe, 12. *b.* gives the reaſon why the lands of the king's debtor were liable to the king's execution, becauſe *Theſaurus regis eſt pacis vinculum & bellorum nervi*, and therefore the law gives the king full remedy for it.

Anciently they were ſo tender of landed eſtates, that the ſheriff could not, even in caſes of the crown, extend the lands of the debtor, if his chattels were ſufficient, and ſo made appear to the ſheriff.

He might have added another reaſon why this judgment is in favour of the heir, becauſe otherwiſe it muſt have been againſt the perſon of the heir, and this is to diſcharge and exonerate his perſon.

Here it was that this court ſtepped in and founded an equity upon it, by directing the perſonal eſtate to be firſt applied in favour of an heir, and are not tied down to the rules of law, becauſe this court can bring both heir and executor before them at the ſame time.

Lord *Nottingham* firſt determined in favour of a *hæres factus*, that perſonal aſſets ſhould be applied in exoneration, but then he was a *hæres factus* of the whole real eſtate.

Corniſh verſus *Mew*, 1 *Ch. Caſ.* 271. is the laſt caſe where the court refuſed to do it in favour of a *hæres factus*; this was in the time of my Lord *Nottingham* indeed, but I believe determined by the *Maſter of the Rolls*, or ſome Judge ſitting for him, becauſe Lord *Nottingham* had determined it expreſſly contrary in a caſe before, which was the firſt caſe where a *hæres factus* had this determined in his favour, that perſonal aſſets ſhould be applied in exoneration. *Vide* 1 *Ch. Caſ.* 223. *Hayes* againſt *Hayes*. But this was in the caſe of a *hæres factus* of the whole real eſtate.

Pockley verſus *Pockley*, was the firſt inſtance, where it was determined in favour of a deviſee of part of the eſtate only; and Lord *Nottingham*'s opinion has been followed ever ſince.

The firſt caſe where it was determined in favour of a deviſee of part of the real eſtate only, was the caſe of *Popley* verſus *Popley*, as it is called in 2 *Ch. Caſ.* 84. but in 1 *Vern.* 36. *Pockley* verſus *Pockley*. I need not mention any more caſes, for the opinion of this great man (Lord *Nottingham*) hath been followed ever ſince.

The land is given to the wife, which much mean effectually, for if ſubject to the mortgage, it is an ineffectual deviſe.

By the will in the preſent caſe the land is given to the wife the deviſee, which muſt mean effectually; for if given ſubject to the mortgage, the whole benefit will be drawn from the deviſee, and rendered ineffectual.

Where ſpecialty creditors exhauſt the perſonal aſſets, ſimple contract creditors ſtand in his place, and may come upon the real.

Now if the deviſee is intitled to be exonerated; ſuppoſe there are ſimple contract creditors, and a ſpecialty creditor (as the mortgagee in this caſe is) exhauſts the perſonal aſſets, have not the ſimple contract creditors an equity to ſtand in his place, and to come upon the real aſſets, and is it not the conſtant courſe of this court?

It is agreeable likewiſe to the reaſon and equity of the ſtatute againſt fraudulent deviſes, which leaves it in full force againſt the heir at law.

In the laſt place I think this opinion will coincide intirely with the intention of the teſtator.

Here comes in the objection of the moſt weight on the part of the plaintiff, that this is plainly an eſtate deviſed with a *lien* upon it, which

which ſhews the teſtator meant ſhe ſhould take it *cum onere*, ſo that at leaſt it may be ſaid in favour of the plaintiff, there is intention againſt intention.

But if an inference ſhould be drawn from a teſtator's mortgaging particular lands, and deviſing them ſo mortgaged, that he intended theſe very lands ſhould be liable in the hands of the deviſee to this burden, that would equally hold againſt perſonal aſſets, being firſt applied; and it is the conſtant direction of this court, that the mortgaged eſtate ſhould be conſidered only as a pledge for money, but as to the proper application of the funds for payment of that debt, it is left juſt as it was before.

It is equal to the creditors to go firſt againſt the land deviſed, and if the court would in that caſe conſtrue it in favour of the deviſee againſt the heir at law, where by circuity the ſimple contract creditors ſtand in the place of the ſpecialty, then what reaſon can be aſſigned why the deviſee ſhould not have the benefit directly againſt the heir at law.

Clifton verſus *Burt*, 1 *P. Wms.* 678. one died indebted by bond, who by his will had given a legacy of 500 *l.* and deviſed his freehold lands to *B.* in fee, leaving a perſonal eſtate ſufficient only to pay the bond; the legatee ſhall not ſtand in the place of the bond creditor to charge the land, in regard the land is ſpecifically deviſed; otherwiſe if the land had deſcended to the heir.

This caſe proves that even general pecuniary legatees are to be preferred to an heir at law, much more a ſpecific deviſee of land, and this too is analagous to the rule of law; for every deviſee is in nature of a purchaſer, and ſo laid down in *Harbert's* caſe, 3 *Co.* 12. *b.* that the heir ſhall not have contribution againſt any purchaſer although *in rei veritate* the purchaſer came to the land without any valuable conſideration, for the conſideration of the purchaſe is not material in ſuch caſe.

General pecuniary legatees are to be preferred to an heir at law, *a fortiori* a ſpecifick legatee of land, for it is a rule of law, that every deviſee is in nature of a purchaſer.

In the ſearch I ordered to be made for precedents, there is but one caſe which is like it, and that indeed comes very near, *Serle* verſus *St. Eloy*, 2 *P. Wms.* 386. heard before Sir *Joſeph Jekyl*, *January* 25, 1727. One deviſes his lands in *D.* to *A.* (his couſin) an infant at her age of twenty-one, *ſubject to the incumbrances thereupon*, and the rents during her infancy to be paid to her father, and deviſes all his other lands to truſtees to pay his debts.

The infant the deviſee inſiſted, that the mortgage upon her eſtate ought to be diſcharged out of the perſonal eſtate, and if that was not ſufficient, then out of money ariſing by ſale of the truſt-eſtate.

One deviſes his lands in *D.* to *A.* his couſin, an infant, at 21, ſubject to the incumbrances therein, and all his other lands to truſtees to pay debts: Sir *Joſeph Jekyl* directed the mortgage on *A*'s eſtate to be paid off out of money ariſing by ſale of the truſt eſtate, though *A.* by bill had ſubmitted to diſcharge it. On appeal to Lord Chancellor *King* he affirmed the decree.

The defendant, the heir at law and reverſioner, inſiſted, that the mortgage was to be paid off out of the rents and profits of the eſtate deviſed to the plaintiff whilſt he was under age.

Sir *Joſeph Jekyl* was of opinion, that the debt by mortgage on the plaintiff's eſtate is part of thoſe debts which are to be paid off out of the money ariſing by ſale of the truſt-eſtate: and though the infant by her bill had ſubmitted to pay it off, yet he ſaid he muſt take care of the infant, and directed the bill to be amended.

This cauſe came on before Lord Chancellor *King*, on an appeal from the *Rolls* the 28th of *May* 1728. who after two days hearing affirmed the decree.

I have done with the caſes, and ſhall now take notice of the obſervations of the council on both ſides.

The firſt obſervation was on the part of the plaintiff.

That this doctrine would extend to level all deviſes; for according to this rule, if a teſtator ſhould have mortgages upon different eſtates for different ſums, and deviſes thoſe eſtates to ſeveral perſons, a deviſee of the eſtate which has the largeſt mortgage upon it, and leaſt in value, would be intitled to come upon the other deviſees for a contribution.

But this is not warranted by the caſe of *Carter* verſus *Bernardiſton*, 1 *P. Wms.* 505.

The election of the creditor to come for ſatisfaction either againſt the real or perſonal eſtate, will not determine what ſhall ultimately be the fund which ſhall be charged.

The other obſervation was on the part of the defendant, that if ſhe was not intitled to have the eſtate deſcended applied to diſcharge the mortgage, it would have this conſequence, that if the mortgagee ſhould bring his action againſt the heir, and recover, which he might certainly do, the heir would then be intitled in this court to have ſatisfaction againſt the land deviſed, as originally ſubject to the mortgage.

And this is rightly argued; for it is admitted that the election of the creditor will not determine what ſhall be ultimately the fund which ſhall be charged.

It would be a moſt abſurd conſequence, if the heir at law ſhould in this caſe draw away from the deviſee the benefit which the teſtator meant to give her by this deviſe, by making her bear the burden contrary to the teſtator's intention, and at the ſame time take beneficially himſelf, when the teſtator clearly intended to give away the whole from him.

Theſe

Theſe are the reaſons which induced me to alter my opinion, and I am not aſhamed of doing it; for I always thought it a much greater reproach to a judge to continue in his error, than to retract it.

It is a much greater reproach to a Judge to continue in his error than to retract it.

I might at firſt be influenced by the appearance of hardſhip in this caſe on the part of the heir.

But the rule of a court of equity in marſhalling of aſſets is of great conſequence to the practice of this court, and ought to countervail any arguments of hardſhip to particular perſons; beſides, upon mature deliberation, I do not think the caſe of the heir at law ſo hard as I did before, becauſe it was not the intention of the teſtator that the heir ſhould take any part of his eſtate; and it was a mere accident threw a part upon him, *videlicet*, the ignorance of the teſtator that it was neceſſary after purchaſing in the fee of theſe eſtates *pur auter vie*, to republiſh his will to make them paſs to the defendant the widow.

The rule in marſhalling of aſſets is of ſuch conſequence to the practice of this court, that it ought to countervail any arguments of hardſhip to particular perſons.

Upon giving this caſe all the conſideration that I am capable of, I think the former decree ought to be reverſed totally as to this point: and accordingly directed an account ſhould be taken of the real aſſets deſcended upon the heir, and applied to pay off and exonerate the mortgage upon the eſtate deviſed to the defendant.

Ryves verſus *Coleman*, *November* 3, 1742. *upon exceptions at Lincolns-Inn Hall.*

Caſe 280.

THE plaintiff brought a bill againſt the defendant, as adminiſtratrix of her huſband, for an account of his aſſets.

The court decreed an account againſt her, and reſerved all future directions till the cauſe came back upon the Maſter's report, but intereſt was not reſerved.

The court had decreed an account, againſt the defendant, of the aſſets of her huſband as his adminiſtratrix after his death; ſhe took all his goods and ſtock in trade, and carried on the ſame buſineſs; the Maſter reported 1400 *l.* due to the plaintiffs upon a balance of accounts, who inſiſted on intereſt for that ſum. *Lord Hardwicke held, that this being a demand on ſimple contract, and the adminiſtratrix not having yet ſold the goods, her only fund for raiſing money, ſhe ſhall not be charged with intereſt on the* 1400 *l.*

The defendant after the death of her huſband, took all his goods and ſtock in trade, according to the appraiſed value, and has carried on the ſame buſineſs, but has not ſold off all the goods.

The bill was brought in 1740. within 6 months after the huſband's death; the defendant put in her anſwer immediately, and the cauſe was heard in 1741. in leſs than two years from the filing of the bill, ſo that ſhe was guilty of no delay.

The

The Maſter reports 1400*l.* due to the plaintiffs upon a balance of accounts.

It came on now before Lord Chancellor for further directions; when the plaintiff's council inſiſted on intereſt for the ſum of 1400*l.* reported due, by the maſter to the plaintiff.

The defendant objected, firſt, that no intereſt was reſerved by the decree, and therefore, by the courſe of the court, it could not now be made a queſtion for judgment; and, ſecondly, if it had been reſerved, yet the defendant was not chargeable with intereſt in this caſe.

LORD CHANCELLOR.

Though there be no particular reſervation of intereſt by a decree, yet there is a diſcretionary power in this court to allow it, upon ſpecial circumſtances.

I am of opinion, that generally no intereſt can be allowed, where it is not ordered or reſerved by the decree; but notwithſtanding there is no particular reſervation of intereſt by a decree, yet there is a diſcretionary power in this court to allow intereſt upon ſpecial circumſtances; as where the demand in it's nature carries intereſt, as a bond, *&c.* or where it appears that the adminiſtrator has made intereſt of her inteſtate's effects, while the ſuit has been depending.

But nothing of that kind appears in this caſe; and the plaintiff's demand being only upon ſimple contract, and the defendant having no other means to raiſe the money but by ſale of the inteſtate's goods, which are not yet ſold, there is no pretence for charging her with intereſt upon the 1400*l.*

Caſe 281. *Stonehewer* verſus *Thompſon*, *November* 8, 1742.

G. H. in 1693, conſeſſed a judgment, but it was not to take place till after the death of a woman who lived till 1726; the eſtate ſubject to this judgment deſcended to *J. H.* who mortgaged it to the defendant; and in 1721, became a bankrupt, five years before the judgment was to take place. *Lord Hardwicke held, the repreſentative of the judgment creditor, and not the aſſignee under the commiſſion, is intitled to redeem the mortgage, and to have the eſtate of* G. H. *exonerated out of* J. H.*'s eſtate, if ſufficient.*

GEORGE Hitchcock, in 1693, confeſſed a judgment, and at the ſame time there was a defeaſance executed, by which the judgment was not to take place till after the death of a woman, who did not die till 1726; the eſtate, ſubject to this judgment, deſcended from the anceſtor to the heir *John Hitchcock*, who mortgages it to the defendant *Thompſon*, and likewiſe another eſtate of his own: The mortgagee had no notice of the judgment at the time: The heir becomes a bankrupt in 1721, five years before the woman died, on whoſe death the judgment was to take place: The defendant is appointed aſſignee.

The

The repreſentative of the judgment creditor has brought his bill to redeem the mortgage, upon payment of principal, intereſt, and coſts.

The queſtion is, as there was no actual elegit taken out by the judgment creditor before the commiſſion of bankruptcy iſſued, Whether the aſſignee under the commiſſion ſhall redeem the mortgage, or the judgment creditor?

Mr *Murray*, for the plaintiff, cited *Sir William Harbert*'s caſe, *Co.* 3. *Rep.* 12. *Sir William Jones* 88. *Dyer* 81. to ſhew that the heir is chargeable only as ter-tenant, and therefore the perſon who claims under the judgment, is not a creditor of the bankrupt.

LORD CHANCELLOR.

The judgment creditor is intitled to redeem the whole, for it muſt be intire, and to have the eſtate of *George Hitchcock* exonerated out of the eſtate of *John Hitchcock*, if *John*'s is ſufficient.

As to the point which has been laboured, in order to make this perſon come in as a creditor under the commiſſion of bankruptcy, there is nothing in it.

If it had been merely a bond creditor from the anceſtor, there might have been ſome colour to inſiſt upon this under the ſtatute of fraudulent deviſes, becauſe that act makes it a debt againſt the heir himſelf, as well as the anceſtor.

But it is intirely different here, as this is *a judgment* which is a lien upon the land, *a fortiori* a lien upon the lands in the hands of the aſſignee under the commiſſion, who ſtands only in the place of the bankrupt.

As it is the beſt way, I ſhall decree the eſtate to be ſold, and the plaintiff to be paid in the firſt place.

Sheppard verſus *Gibbons, et al'*, *November* 13, 1742. Caſe 282.

THE queſtion in this cauſe aroſe on the words of *John Bromwick*'s will, who being ſeiſed in fee of a freehold eſtate at *Perry Barr* and *Great Barr*, in *Staffordſhire*, *June* 9, 1711. made his will, "and thereby deviſed to *Thomas Lacy* and *Joſeph Gibbons*, "their heirs and aſſigns, the lands afore mentioned, *in truſt*, that "the ſaid *Lacy* and *Gibbons*, and the ſurvivor, and his heirs and aſ- "ſigns, ſhould permit his three ſiſters *Mary Rudge*, *Elizabeth Sayer*, "and *Ann Pace*, and their aſſigns, to hold and enjoy the ſaid pre- "miſſes, and to receive the rents thereof to their ſole and ſeparate "uſe,

Lord *Hardwicke* held, that the conſtruction in this will of the words, *as his ſiſters ſeverally* are, is, that the ſiſters ſhould take as tenants in common, and not as jointenants.

" uſe, as they ſhould appoint, notwithſtanding their coverture; to " the intent that the ſaid three huſbands might have nothing to do " with the ſaid premiſſes, or the rents thereof; and as his ſaid ſiſters " ſhould ſeverally die, he gave the premiſſes to their ſeveral heirs, " with a proviſo for the truſtees to demiſe and ſet the ſaid premiſſes " during his ſiſters lives, but to permit them and their heirs to re- " ceive the rents thereof; that in regard his perſonal eſtate would " not be ſufficient to pay his debts, legacies, and funeral charges, " therefore the teſtator directed that *Thomas Lacy*, and *Joſeph Gib-* " *bons*, and the ſurvivor of them, and the heirs of ſuch ſurvivor " ſhould ſell and diſpoſe of ſuch part of his ſaid meſſuage, lands, " and tenements, and of the freehold and inheritance thereof, by " ſale or mortgage, or by ſale of any timber growing thereon, as " they ſhould ſee occaſion, and with the money thereby ariſing, to " ſatisfy all and ſo much of his debts, *&c.* as his perſonal eſtate " ſhould not amount to pay."

He appoints his three ſiſters executors, and ſoon after died, leaving them together with the plaintiff, the ſon of *Eleanor Sheppard*, another of the teſtator's ſiſters, who died in his life-time, his co-heirs.

On the 23d of *January* 1713, *Mary Rudge* died, leaving iſſue the defendant *Rudge*, her only daughter and heir; *Ann Pace* is alſo ſince dead, and the defendant is her ſon and heir.

Elizabeth, the wife of the defendant *Sayer*, in her life-time, joined with her huſband in levying a fine, and the deed to lead the uſes has veſted a truſt eſtate in fee in the huſband, of her third part: She died without iſſue on the 7th of *Auguſt* 1737, leaving the defendants *Rudge* and *Pace*, and the *plaintiff*, as being the iſſue of her three ſiſters, her co-heirs at law.

The plaintiff has brought his bill againſt *Gibbons*, the heir of the ſurviving truſtee, to be let into poſſeſſion of a third of the teſtator's eſtate.

The firſt queſtion was, Whether the deviſe to *Lacy* and *Gibbons*, and their heirs, to hold to them, and their heirs, is a deviſe of a bare truſt to them in fee of the whole inheritance in the eſtate, or whether the uſe of the whole inheritance executed in the three ſiſters.

Or whether, ſecondly, the deviſe to the truſtees gave them a legal eſtate only for the lives of the three ſiſters, upon the truſts in the will, ſo that the remainder, limited to their reſpective heirs, muſt veſt in them as purchaſers.

Mr.

Mr. *Harvey*, for the plaintiff, in order to ſhew that the intention of the teſtator ſhall prevail over the law, cited *Boraſton's* caſe, 3 *Co.* 19. *a.* *Backhouſe* verſus *Wells*, *Hill.* 12 *Ann. B. R.* before Lord Chief Juſtice *Parker*, &c. *King* verſus *Melling*, 1 *Vent.* 225.

And to ſhew that the words heirs of the body, and heirs males, have been conſtrued words of purchaſe, or words of limitation, as they ſupport the intention of the teſtator; he cited *Papillon* verſus *Voyce*, 2 *P. W.* 471. *Liſle* verſus *Gray*, 2 *Jones* 214. 2 *Lev.* 223.

And that the doctrine in *Shelly's* caſe, 1 *Coke*, though it has prevailed in deeds, yet has not been extended to wills.

LORD CHANCELLOR.

This caſe is ſo very plain, that there is no occaſion for hearing the defendant's council.

If this is a contingent limitation for the ſiſters to take by purchaſe, they muſt either do it, on its being a contingent limitation of the truſt, or a contingent limitation of the legal eſtate.

It is true, the whole inheritance may be veſted in truſtees, and yet afterwards there may be a ſpringing uſe which ſhall defeat the firſt limitation of the legal eſtate, ſo that they can never unite to make one eſtate of inheritance, but ſhall continue ſeparate.

But, conſider this caſe; the firſt limitation was to truſtees and their heirs, and if you ſhould make this conſtruction, that the truſtees had only a contingent legal eſtate, defeaſible upon the death of either of the ſiſters, then what would become of the ſubſequent truſt in the ſame truſtees, for the payment of debts.

Therefore the whole legal eſtate muſt be conſidered as originally in the truſtees.

Then the queſtion will be, What kind of truſt this is?

There is no colour in the world to ſay that the teſtator created this truſt to put the inheritance out of the ſiſters, but his meaning was only to prevent the huſbands from intermeddling.

It is true, the word heirs may be made words of purchaſe, but then they muſt be very particular, *and as they ſhall ſeverally die, I give the premiſſes to their ſeveral heirs*, which are the words here, and have never been held to make the heirs purchaſers.

Suppoſe

A deviſe to *A.* for life, and to the heirs of his body, unites the two eſtates ſo, as to make the firſt taker tenant in tail.

Suppoſe a man ſhould deviſe to *A.* for life, and to the heirs of his body, would not the court unite the two eſtates, ſo as to make the firſt taker tenant in tail?

Then the plain meaning of the words, *as they ſeverally die*, &c. is that the ſiſters ſhould take as tenants in common, and not as joint-tenants.

Upon the whole, a clearer caſe could not come before the court; and therefore I muſt affirm the Maſter of the *Rolls*'s decree.

Caſe 283. *Miſs Lanoy* verſus *The Duke and Dutcheſs of Athol*, *November* 13, 1742.

LORD CHANCELLOR.

There being a borrowing and a lending in the caſe of a mortgage, the real eſtate is conſidered only as a pledge, and the perſonal liable in the firſt place; but this rule has never been carried ſo far, as to extend it to a proviſion in a ſettlement.

THIS cauſe comes after a great length of time, but that is no objection as the plaintiff was an infant, and is only now juſt of age.

Two things which have been mentioned, may be laid out of the caſe.

Firſt, That it appears there was ſome ſurpriſe upon the court.

Secondly, That things were not rightly ſtated.

I have read over the copy of the decree, and it does appear to me, that the material things were before the court.

And the ſame points were inſiſted on then as are now: And therefore I cannot impute any improper management to the cauſe, in order to prejudice the infant.

But, however, if the court ſhould have erred in their judgment, the plaintiff is intitled to have it ſet right.

The firſt objection to the decree is, that there is no direction given for the payment of the Dutcheſs of *Athol*'s arrears of 500*l.* *per ann.* nor the arrears of 80*l.* *per ann.* charged on the real eſtate, for the plaintiff's maintenance during her minority.

It appears that the real eſtate falls very ſhort of anſwering all the charges upon it; and therefore the plaintiff's council inſiſt, ſhe is intitled to have theſe deficiencies turned upon the perſonal and copy-hold eſtates belonging to the late Mr. *Lanoy* her father; becauſe

there is a covenant in the marriage ſettlement, that in caſe his wife ſhould ſurvive her huſband, then his heirs, executors, *&c.* ſhould pay the 500*l. per ann.* to his wife, clear of every thing except the land tax.

But though there is this covenant, it is truly ſaid by the defendant's council, that the perſonal aſſets are not the original fund charged, and in that reſpect differs from a mortgage, or any other incumbrance, for there being a borrowing and a lending in the caſe of a mortgage, the real eſtate is conſidered only as a pledge; and the perſonal eſtate, which is the natural fund, is liable in the firſt place; but this rule has never been carried ſo far as to extend it to a proviſion upon a ſettlement.

Then conſider this upon the firſt ſettlement, which was in conſideration of marriage, and is a good one, though the wife brought no fortune at the time: Mr. *Lanoy* creates a charge of 500*l. per ann.* upon his real eſtate, as a jointure for his wife, and ſubject thereto, to the heirs males of his body, and in default of ſuch iſſue, to his own right heirs.

Suppoſe a much ſtronger caſe than the preſent, that there had been a ſon, who would have taken *per formam doni* under the ſettlement; and yet would he have had the real eſtate diſincumbered out of the perſonal? There is no pretence to ſay he would; there never was, nor ever will be ſuch a decree; *a fortiori* the plaintiff is not intitled to it under the firſt ſettlement, as ſhe takes only as heir at law.

Conſider it next under the ſecond ſettlement; the huſband and wife levy a fine, and make a new ſettlement, the limitations of which were, to himſelf for life, and to his wife for life, then a term of 200 years to raiſe a portion of 6000*l.* for daughters, whether any ſons, or not, and ſubject thereto, to the heirs of the body of the huſband.

Under this ſettlement, what ground has the plaintiff to have the real eſtate diſincumbered out of the perſonal?

She does not, in the firſt place, take as a purchaſer, for it is a ſettlement after marriage: There is no limitation to the firſt, and every other ſon, no limitation to the heirs of their two bodies, but a general limitation to the heirs of his body.

Now, by virtue of this ſettlement, if Mr. *Lanoy* had ſurvived his wife, and married again, it would have gone to the eldeſt ſon of his ſecond wife, and not to the plaintiff.

But ſtill I am of opinion, there is an equity for the plaintiff, and that is in reſpect of the 6000*l.* portion.

By the firſt ſettlement, there is no proviſion by way of portion at all; then afterwards comes this great acceſſion of fortune to the wife, from her father Mr. *Frederick*.

Suppoſe Mr. *Lanoy* was intitled to this addition in his own right, or in the right of the wife only, he was either way juſtified in making the ſecond ſettlement.

Now the plaintiff is a daughter, and a child, and in this court conſidered in the nature of a creditor for the portion.

If that be ſo, What will be the effect of it in equity?

By the Maſter's ſtate of the account, there are great arrears of the 500*l.* *per ann.* jointure upon the wife, and likewiſe of the 80*l.* *per ann.* maintenance for the plaintiff, almoſt a deficiency of 4000*l.* which muſt run on as a burden upon the inheritance, and, as has been truly ſaid, it muſt exhauſt the inheritance, if the Dutcheſs of *Athol* ſhould live to be very old, which, in the courſe of nature, ſhe may do.

The Dutcheſs has two funds, real and perſonal eſtate, to anſwer her demands, the plaintiff has only one.

If a creditor has two funds, he ſhall take his ſatisfaction out of that upon which another creditor has no lien.

Is it not then the conſtant equity of this court, that if a creditor has two funds, he ſhall take his ſatisfaction out of that fund upon which another creditor has no lien.

A perſon who has two eſtates, mortgages both to *A.* and afterwards, one of them only to *B.* the firſt ſhall take his ſatisfaction out of that which is not in mortgage to the ſecond mortgagee, though the eſtates deſcend to two different perſons.

Suppoſe a perſon, who has two real eſtates, mortgages both to one perſon, and afterwards only one eſtate to a ſecond mortgagee, who had no notice of the firſt; the court, in order to relieve the ſecond mortgagee, have directed the firſt to take his ſatisfaction out of that eſtate only which is not in mortgage to the ſecond mortgagee, if that is ſufficient to ſatisfy the firſt mortgage, in order to make room for the ſecond mortgagee, even though the eſtates deſcended to two different perſons.

So far as will ſecure the plaintiff her 6000*l.* the court conſidered her as a creditor, and intitled to turn her mother on the copyhold and perſonal eſtates.

And therefore I am of opinion, that ſo far as will ſecure the plaintiff her 6000*l.* fortune, ſhe ought to be conſidered as a creditor, and intitled to turn the Dutcheſs upon the copyhold and perſonal eſtates.

There is a very ſtrong caſe of a portion, in the caſe of *Reeve* verſus *Reeve*, 1 *Vern.* 219. and 2 *Ventr.* 363. where the court proceeded upon the ſame foundation as I do now *.

The next conſideration is as to the 80*l.* yearly maintenance.

There is no ground, as it ſtands only upon the ſettlement, to ſay, it can be a charge upon the perſonal eſtate.

But then it may be likewiſe put upon the ſame foot as the portion; for, as to compelling the mother to maintain her daughter out of her own eſtate, it will be going too far, and therefore I ſhall lay that out of the caſe.

The utmoſt this court does, is in the caſe of an elder brother, where it directs the Maſter to make a larger proviſion for him, that he may be enabled to maintain his younger brothers, as he is the head of the family, and the houſekeeper.

The court, in the caſe of an elder brother, will direct the Maſter to make a larger proviſion for him, that he may be able, as the head of the family, to maintain the younger.

I think theſe are all the points, except the queſtion, which relates to the ſtock, and annuities ſtanding in the joint names of the huſband and wife at Mr. *Lanoy*'s death.

Mr. *Lanoy* married his lady at a time ſhe had no portion, and made a ſettlement upon her in conſideration of marriage only.

By the determination of the queſtion in *Frederick* verſus *Frederick*, 1 *P. W.* 710. the Dutcheſs of *Athol* became intitled to a fifth of a fifth of the father's cuſtomary eſtate, ſo that, by virtue of the decree, ſhe was let into a very great fortune, which was directed to be paid to her only, but the ſtock, notwithſtanding, was transferred to the huſband and wife; if nothing more had been done, the huſband to be ſure might have diſpoſed of it as he pleaſed; but if he made no alteration, ſhe would certainly have been intitled to it on the foot of the transfer.

But it does not reſt there, for the ſecond ſettlement was made afterwards, reciting, that Mr. *Lanoy*, in the right of his wife, being become intitled to exchequer annuities, and money to the value of

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* *A.* charges lands in *D.* with a portion for a daughter by a firſt venter, and then marries, and ſettles part of theſe lands for the jointure of a ſecond wife, who has no notice of the charge.

A. believing the portion would take place of the jointure, by will, gives other lands in lieu thereof.

The wife, by combination with the heir, refuſes to accept the deviſe. Decreed, the daughter ſhould hold the lands given under the will to the wife, till her portion was paid. *Reeve* verſus *Reeve*, 1 *Vern.* 219.

1600*l.*

1600*l.* the limitations under it are in ſtrict tail, and proviſions for daughters.

Mr. *Lanoy* dies in the life of the wife, leaving the ſtocks and annuities unaltered, which in law is conſidered as ſurviving to the wife.

But, by the plaintiff's council, it is inſiſted, that though in point of law it ſurvives, yet by the equity of this court, the huſband, in conſideration of the ſecond ſettlement, is become a purchaſer.

But, upon looking into the caſes, I own I cannot carry it ſo far, as to take it from the mother, and give it to the daughter, as the perſonal eſtate of the father.

The wife's portion has been decreed to the huſband, though he has not made a ſettlement adequate to it, where the ſettlement was before marriage; otherwiſe on a voluntary ſettlement after marriage.

I believe, where the ſettlement made by a huſband has not been adequate to the wife's fortune, this court has, notwithſtanding, decreed that he ſhall have her portion: But then all theſe caſes are upon ſettlements before marriage, and I cannot find it ſo determined where it is a voluntary ſettlement after marriage.

Then apply thoſe authorities to the preſent caſe.

The ſecond ſettlement was upon a very great acceſſion of fortune to the wife, after ſhe had been married ſome time, but is by no means adequate to the addition; for there is nothing new under this ſettlement, except the proviſion for the daughters fortune; for the jointure to the wife is the ſame, and is no greater upon the huſband's eſtate than before.

Now, the proviſion for the daughter has nothing to do with the general rule of a ſettlement equivalent to the fortune the father had with the mother.

What I go upon is this, that here was no contract on the part of the wife, ſhe was incapable of contracting her ſelf, neither had ſhe a father or guardian to contract for her.

If there had been any application to this court, with regard to the ſecond ſettlement in Mr. *Lanoy*'s life-time, they would have directed the Maſter to ſee if the huſband had made an adequate ſettlement; and the court would have aſked the wife, who was of age, by way of analogy to paſſing the fine, whether ſhe conſented her fortune ſhould be ſettled in this manner, and then the wife would have been bound by ſuch conſent and agreement.

But to ſay that ſhe is bound, without the intervention of this court, or without her own agreement, is carrying it too far.

* The caſe of *Adams* verſus *Cole*, before Lord *Talbot*, is indeed a very ſtrong one; but then it was a ſettlement made after, *upon an agreement before marriage*; and Lord *Talbot* laid the ſtreſs altogether upon it's being the expreſs agreement of the parties; and for that reaſon decreed for the repreſentative of the huſband againſt the repreſentative of the wife.

But in the preſent caſe the wife was incapable of contracting, being under coverture: and what makes it a great deal ſtronger, is, that it may be collected from the tranſactions themſelves, that it was the intention of the parties the Dutcheſs ſhould have this money: for Mr. *Lanoy* having the power over the property of the wife, was a very ſufficient conſideration for what he has done for the wife on the ſecond ſettlement. And yet he has ſuffered it to ſtand unaltered all his life-time, and even after his death, then why ſhould the court take it contrary to the intention of the teſtator from the mother, and give it to the daughter?

Therefore I muſt decree the Maſter to ſee what is due for the plaintiff's arrears of maintenance, and if mortgaging or ſelling the 200 years term ſhall not be ſufficient to ſatisfy the arrears and the 600 *l.* then the Maſter to take an account of the perſonal and copyhold eſtates of Mr. *Lanoy*, that the plaintiff may be ſatisfied there, if the real eſtate ſhould not be ſufficient.

Clayton verſus *Cookes*, *November* 15, 1742. Caſe 284.

A Bill brought by a lord of a manor againſt copyholders, to compel them to come, and be admitted tenants.

LORD CHANCELLOR.

A lord of a manor cannot bring a bill of this kind, but has his remedy at law by making proclamations ſo many court days, and if the copyholders do not come in, he may ſeize upon their lands, or if they ſhould be infants, a new act of parliament, 9 *Geo.* 1. *c.* 29. *ſec.* 1. has chalked out a method how he ſhall proceed.

After proclamations made, and ſo many court days, if the copyholders do not come in, the Lord may ſeize upon their lands.

* The huſband upon marriage (in conſideration of his wife's fortune computed at 500 *l.*) agrees to yearly payments to her ſeparate uſe, that ſhe may diſpoſe of 100 *l.* by will in his life-time; that if ſhe ſurvive he is to leave her 200 *l.* apparel, plate, &c. Part of her fortune was a bond of 200 *l.* The huſband dies, having made his will, and the plaintiff reſiduary legatee, but had not recovered this 200 *l.* due on the bond; then the wife dies: this bond ſhall go to the repreſentative of the huſband, he being a purchaſer of it by the ſettlement on her. *Adams* verſus *Cole*, *Caſ. in Eq. in the time of Lord Ch. Talbot* 168.

If indeed there had been any confuſion ariſing from copyhold lands being blended together, the lord might have brought a bill of diſcovery to aſcertain the lands.

But as it is not pretended in this caſe that there is any confuſion of lands, the bill muſt be diſmiſſed with coſts.

Caſe 285. *Knotsford* verſus *Gardiner*, *November* 17, 1742.

THE queſtion in this cauſe aroſe upon the following will:

J. C. ſeiſed of ſeveral freehold lands, and poſſeſſed of ſeveral leaſehold, deviſed to his wife for life all his eſtate in *London*, and after her death, he bequeathed the aforementioned eſtates to his daughter *A. C.* and her heirs, and to his wife gave all his goods, cattels and chattels, and made her ſole executrix: She married again, and had the plaintiff by her ſecond huſband, who inſiſted that by the deviſe to his mother of the reſidue, the leaſehold lands paſſed. *Lord Hardwike thinking it very material, whether all the freehold lands were compriſed in the teſtator's marriage ſettlement, directed a trial at law to aſcertain this fact.*

John Colcheſter ſeiſed in fee of ſeveral freehold lands, and poſſeſſed of ſeveral leaſehold lands in the ſame pariſh, deviſed in the following manner: "I give, deviſe and bequeath unto *Martha* "my wife for life, all my eſtates in *Longdon*, *&c.* and after her "deceaſe, I give, deviſe and bequeath the aforementioned eſtates "to my daughter *Ann Colcheſter* and her heirs for ever. *Item*, I "give and bequeath unto my wife all my goods, cattels and chat-"tels, and all other things not before bequeathed," and made his wife ſole executrix.

She ſometime after her huſband's death married again, and had the plaintiff by the ſecond huſband, who inſiſts that by the deviſe to the wife of the reſidue, the leaſehold lands paſſed to her, and claims as the executor of his mother, who was the executrix of *John Colcheſter* the teſtator; for he ſays, that as there are freehold and leaſehold both, that nothing but the freehold paſſed to the defendant, the daughter of the teſtator, being ſufficient to anſwer the word *eſtates* in the will.

Mr. *Murray* for the plaintiff cited the caſe of *Roſe* verſus *Bartlet*, *Cro. Car.* 293. *pl.* 3. *Hil.* 8 *Car. B. R.* to ſhew that if words are uſed applicable to both, it ſhall by way of eminence paſs only fee-ſimple lands.

That the word *eſtates* is plainly local, and does not mean the intereſt in the eſtate, becauſe it is in the plural number. 1 *Roll. Abr.* 613. *Piggot* and *Penrice*. *Caſ. in Eq. Abr.* 209. *Id.*

The limitations here are proper only to the deviſe of a freehold eſtate, and therefore the teſtator did not intend to paſs the leaſehold likewiſe.

The

The Attorney General for the defendant.

The wife of the teſtator had theſe very freehold lands ſettled upon her in marriage, and to the heirs of the body of the huſband, in 1696. and the teſtator has no other freehold but a little cottage of very ſmall value, ſo that if the conſtruction contended for by the plaintiff ſhould prevail, then the teſtator gives the defendant nothing but what ſhe was intitled to before.

The circumſtances of this caſe are material; it conſiſts but of one farm, and freehold and leaſehold lands are blended together in the hands of one tenant, ſo that they were not diſtinguiſhable.

Now it can never be imagined that the teſtator meant to mangle and tear the eſtate to pieces, in order to give it away from his own child.

LORD CHANCELLOR.

As the facts are not fully before me upon the evidence on either ſide, it muſt go to a trial at law.

It is very material whether all the freehold lands are comprized in the marriage ſettlement, becauſe if they are, the teſtator then has given the defendant nothing but what ſhe had before, if the conſtruction the plaintiff's council contend for ſhould prevail.

If there ſhould be only leaſehold eſtates in the pariſh, and the teſtator deviſes all his eſtates to *A.* there is no doubt but the leaſehold will paſs under this deviſe.

If a teſtator deviſes all his eſtates to *A.* and has only leaſehold, they will paſs.

But if there ſhould be both freehold and leaſehold, then it will be a conſiderable queſtion whether any more than the freehold paſſed, ſuppoſing there ſhould be no ſettlement of the freehold; for in the caſe of *Roſe* verſus *Bartlet* it was reſolved, that if a man hath lands in fee, and lands for years, and deviſeth all his lands and tenements, the fee-ſimple lands paſs only, and not the leaſe for years. And if a man hath a leaſe for years and no fee-ſimple, and deviſeth all his lands and tenements, the leaſe for years paſſeth, for otherwiſe the will would be merely void.

If a man hath lands in fee, and for years, and deviſeth all his lands, the fee-ſimple paſs only; and if he hath a leaſe for years and no fee-ſimple, the leaſe for years paſſeth, for otherwiſe the will would be void.

Though in the preſent caſe I have no doubt at all as to the intention of the teſtator, yet the rule of law would prevail.

Therefore let the bill be retained for a twelvemonth, and the parties proceed to a trial at law upon this iſſue, whether the teſtator had both freehold and leaſehold, and in the ſame pariſh.

A trial at law directed on this iſſue, whether the teſtator had both freehold and leaſehold, and in the ſame pariſh.

had at the making of his will both freehold and leaſehold, and in the ſame pariſh.

Caſe 286. *Oldham* verſus *Hughes*, *November* 20, 1742.

The wife of the defendant not capable of changing the nature of her eſtate by articles, becauſe under coverture, and unable to contract.

A Bill was brought in order to have twenty thouſand pounds in money, or twenty thouſand pounds *South-Sea* annuities, inveſted in land, purſuant to articles of agreement for that purpoſe. The *Maſter of the Rolls* decreed the annuities to be ſold and laid out in land, and the preſent caſe comes upon an appeal from that decree.

In *September* 1715. Mr. *Deacle* upon his marriage with Mrs. *Deacle* covenanted with truſtees that he, his heirs, executors or adminiſtrators, ſhould lay out twenty thouſand pounds in the purchaſe of land, and ſettle it to the following uſes, *viz.* to himſelf for life, then to the intent that his wife ſhould receive eight hundred pounds a year for her life, as her jointure, in lieu of dower, then to his firſt and other ſons in tail male, with remainder to his own right heirs. Mr. *Deacle* died in 1723. without having laid out the money in a purchaſe, or leaving any iſſue by his wife; his heirs at law were Mrs. *Bourne* his ſiſter, who was married to Mr. *Bourne* the defendant, and Mr. *Oldham* the plaintiff, who was his nephew by another ſiſter. Mr. *Deacle* was a freeman of *London*, and as he died without a child, his widow by the cuſtom became intitled to a moiety of his perſonal eſtate; and as to the other moiety, which was the dead man's ſhare, and diſtributable, the widow became intitled to one moiety of that, and Mr. *Bourne* and his wife and Mr. *Oldham* to the other moiety, as next of kin: however, upon Mr. *Deacle*'s death there was a diſpute between the widow and next of kin as to the right of adminiſtration; and upon an agreement it was granted to Mr. *Bourne* and his wife and Mr. *Oldham*, and articles of agreement upon that occaſion in 1724. were entered into between the next of kin and the widow, who were the only perſons intitled to the perſonal eſtate of Mr. *Deacle*; wherein it was covenanted and agreed that twenty thouſand pounds *South-Sea* annuities ſhould be transferred to truſtees, who ſhould ſell them, and lay out the money in land, and ſettle it to the ſame uſes as are in the former articles; with this contingent proviſo however, that if the widow died before the money was laid out in land, that it ſhould go to Mr. *Bourne* and his wife, and Mr. *Oldham*, their executors and adminiſtrators equally, according to their reſpective intereſts; and by theſe articles Mr. *Bourne* and Mr. *Oldham* covenanted for themſelves, their heirs, executors and adminiſtrators, that if the *South-Sea* annuities ſhould fall ſhort to anſwer Mrs. *Deacle*'s annuity of eight hundred pounds a year, that they would make it good; the annuities were aſſigned to truſtees, and one of them laid out 164 *l.* annihila-

annihilation money upon them, to make them up twenty thouſand pounds *South Sea* annuities: Mrs. *Bourne* died, whereby Mrs. *Oldham* became intitled, as heir, to all her real eſtate; but Mr. *Bourne*, her huſband, contended, that theſe ſubſequent articles, had turned the money, which was realized by the former articles, into perſonal eſtate again, whereupon he became intitled to his wife's ſhare, as her adminiſtrator.

LORD CHANCELLOR,

As to one moiety of theſe *South Sea* annuities, Mr. *Oldham*, the plaintiff, is intitled to it as co-heir to Mr. *Deacle*, ſubject only to Mrs. *Deacle*'s annuity; but upon the other moiety, which belonged to Mrs. *Bourne*, as the other co-heir, ariſes the preſent point, which is, whether it is to be conſidered as real or perſonal eſtate, if real, it belongs to Mr. *Oldham*, as her nephew, and heir at law; if perſonal, to Mr. *Bourne*, as her huſband.

If this queſtion was to be conſidered upon the articles in 1715, before Mr. *Deacle*'s marriage, there could be no diſpute but that it is to be taken as land; but a queſtion now will ariſe upon the foot of the agreement entered into in 1724; and, upon theſe articles it is inſiſted, that the nature of this eſtate is changed; and whether I take it as twenty thouſand pounds in money, or ſo much *South Sea* annuities, articled to be laid out in land, it is by them converted into perſonal eſtate, by the agreement of the parties; and there is no doubt, but if two perſons are intitled to money which is articled to be laid out in land, and conſidered as ſuch, they may agree before the inveſtiture of it, to take it as perſonal eſtate, and it ſhall go as ſuch to their repreſentatives, provided none of the parties were under any incapacity: But I am of opinion, that neither Mrs. *Bourne* was capable of changing the nature of this eſtate, becauſe of her being under coverture, and unable to contract, nor, ſuppoſing her able to contract, do the articles import any ſuch change.

As to Mrs. *Bourne*'s capacity, if this money is to be conſidered as real eſtate, ſhe is a feme covert, and cannot alter the nature of it barely by a contract or deed; for, to alter the property of it, or courſe of diſcent, this money muſt be inveſted in land, (and ſometimes ſham purchaſes have been made for that purpoſe) and ſhe may then levy a fine of the land, and give it to her huſband or any body elſe: There is a way alſo of doing this, without laying the money out in land, and there ſhe might have levied a fine of it, and given it to her huſband; or upon coming into court, and conſenting to take this money as perſonal eſtate, and being examined as to ſuch conſent, it binds the money articled to be laid out in land, as much as a fine at law would the land, and ſhe might diſpoſe of it to her huſband.

Before Mrs. *B.* could have altered the property, or courſe of deſcent, the money muſt have been inveſted in land, and

At law, *money* ſo articled to be laid out in land, is conſidered barely as money, till an actual inveſtiture, and equity alone views it in the light of real eſtate, and therefore this court can act upon it, as it's own creature, and do what a fine at common law can upon land.

land, and that is, by coming into this court, whereby the wife may conſent to take this money as perſonal eſtate, and upon her being preſent in court, and being examined (as a feme covert upon a fine is) as to ſuch conſent, it binds this money articled to be laid out in land, as much as a fine at law would the land, and ſhe may diſpoſe of it to he huſband, or any body elſe; and the reaſon of it is this, that at law, money ſo articled to be laid out in land, is conſidered barely as money, till an actual inveſtiture, and the equity of this court alone, views it in the light of a real eſtate; and therefore this court can act upon its own creature, and do what a fine at common law can upon land; and if the wife had craved aid of this court in the manner I have mentioned, ſhe might have changed the nature of this money which is realized, but ſhe cannot do it by deed.

Lord *Hardwicke* of opinion, the articles in 1724, do not import any variation of this eſtate, from real to perſonal, for it being agreed the 20,000*l.* ſhould be transferred to truſtees, to buy land, to be ſettled to the ſame uſes, as in the articles of 1715; there is no doubt but this money is to be conſidered as realized, and the articles have made no converſion of the eſtate from real to perſonal.

As to the articles in 1724, ſuppoſing the wife under no diſability, I am of opinion that they do not import any variation of this eſtate from real to perſonal; for it is there agreed, that the twenty thouſand pounds ſhall be transferred to truſtees, who are to ſell them, and buy land, to be ſettled to the ſame uſes as in the articles of 1715; ſo far this money is, no doubt, to be conſidered as realized; and though there is a *proviſo*, upon this contingency, *that if the widow dies before the money is inveſted in land*, that then it ſhall be divided, and go among the next of kin, their executors and adminiſtrators; yet, as that contingency has not happened, and the widow is now living, the original truſt is ſtill ſubſiſting, for the money to be conſidered as *realized*; that being ſo, I am of opinion, that the articles have made no converſion of the eſtate from real to perſonal, but it ſtill remains realized, whether it is twenty thouſand pounds in money, or ſo much *South Sea* annuities.

The whole produce of the 20,000*l. S. S.* annuities, is to be laid out, when ſold, in the purchaſe of land, and not 20,000*l.* in money only, as all the parties who had any intereſt in the perſonal eſtate of *D.* agreed they ſhould be transferred to truſtees, to ſell and lay out in land the money ariſing thereby.

Another queſtion has aroſe, that, ſuppoſing the fund is to be laid out in land, yet, whether the whole produce of twenty thouſand pounds *South Sea* annuities is to be laid out when ſold, or only the ſum of twenty thouſand pounds is to be taken out of the produce, and inveſted in a purchaſe: I am of opinion, the true meaning is, that the whole produce of twenty thouſand pounds *South Sea* annuities ought to be laid out in ſuch purchaſe; and the conſtruction Mr. *Hand*, the truſtee aims at, would not be anſwered, if only twenty thouſand pounds in money was to be laid out. Mr. *Hand* inſiſts, the twenty thouſand pounds *South Sea* annuities, was ſet apart only as a ſecurity for the *twenty thouſand pounds*, and when that ſum was raiſed, the reſidue was to be conſidered as part of the perſonal eſtate of Mr. *Bourn*. But it ought not to be conſidered ſo; for all the par-

ties

ties who had any intereſt in the perſonal eſtate of Mr. *Deacle*, agreeing that twenty thouſand pounds *South Sea* annuities ſhould be tranſferred to truſtees, upon truſt to ſell and lay out in land the money ariſing thereby, ſubject to the eight hundred pounds a year annuity, is a good agreement to bind the whole produce of the *South Sea* annuities; for it is an agreement of all the parties who were intitled, wherein each agrees to part with his ſhare, and in this they might have one view, to give better ſecurity to Mrs. *Deacle* as to her annuity, and another, to increaſe the intereſt of the heirs. But if only twenty thouſand pounds was to be laid out, and there ſhould be any ſurplus from the annuities, it will not go totally from Mr. *Bourne*, but it being part of the eſtate of Mr. *Deacle*, will be diſtributable, and Mr. *Bourne* will only have his wife's ſhare.

Beſides, this matter has reſted this eighteen years, and there being an agreement, by proper perſons, to ſwell the intereſt of the heir at law, it would be very hard to deprive him of it.

And if I ſhould agree with Mr. *Hand*, he could only inſiſt upon the value of the annuities at the time of the tranſaction in 1724, juſt after the fatal year 1720, when they were very little above par, ſo that Mrs. *Bourne*'s ſhare would be very trifling.

It has been inſiſted, that Mrs. *Bourne* could no more agree to turn money into land, than ſhe could land into money; but there I differ, becauſe, as to the ſhare of Mr. *Deacle*, the huſband, Mr. *Bourne* was intitled to that, in right of his wife, and had an abſolute dominion over it, and he was a party to the agreement; therefore the decree at the *Rolls* muſt be affirmed, and the articles muſt be executed according to the expreſs words, and the whole produce of the annuities laid out in land for that purpoſe.

Another queſtion is, as to one hundred and ſixty-four pounds, annihilation money laid out by one of the truſtees, and, to be ſure, he is to have an allowance for it, but out of what fund? It has been ſaid by the plaintiff, it ſhould come out of the eſtate of Mr. *Bourne*, or the whole perſonal eſtate of Mr. *Deacle*. On the part of Mr. *Bourne*, the defendant, it is inſiſted, that it ſhould come out of the annuity fund it ſelf: And to be ſure it muſt; for if Mr. *Oldham*, the plaintiff, inſiſts, that the annuities are to be veſted in land, inſtead of twenty thouſand pounds in money, he muſt abide by the conſequences of that fund, for if it ſhould be reduced, Mr. *Deacle*'s perſonal eſtate is not to make good the deficiency of it, for it is only bound to make good twenty thouſand pounds in money.

Another point is, as to the indemnity of Mr. *Bourne*, and Mr. *Oldham*, they having covenanted for themſelves and their reſpective heirs, executors and adminiſtrators, to make good Mr. *Deacle*'s annuity

nuity of eight hundred pounds, and by that means have bound their own eſtates at law. But they are only to be conſidered as *ſecurities* for Mr. *Deacle*, and are to be indemnified out of his eſtate. For this ariſes originally on Mr. *Deacle*'s covenant for himſelf, his heirs, executors and adminiſtrators, to ſettle on Mrs. *Deacle* that annuity; and though Mr. *Bourne* and Mr. *Oldham* are bound as to Mrs. *Hughes*, yet, as to one another, they are intitled to have an indemnity out of Mr. *Deacle*'s eſtate; and Mr. *Deacle* has a right to have ſome further fund ſet apart out of Mr. *Deacle*'s eſtate to ſupply this annuity, and *to indemnify the ſureties*; and as it depends on Mr. *Deacle*'s covenant, which is both for the heirs, and for the executors and adminiſtrators, it is a *perſonal debt*, and to be charged upon his perſonal eſtate in the firſt place, and the real eſtate is only chargeable on failure of the perſonal: Lord *Hardwicke* affirmed the decree.

Caſe 287. *Hencage* verſus *Hunloke*, *November* 22, 1742.

The plaintiff is intitled to the 1000*l.* and 300*l.* and the two freehold houſes, under a truſt in marriage articles; for an elder daughter, where there is a ſon, is accounted a younger child.

BY articles of the 2d of *Auguſt* 1728, upon the marriage of the plaintiff's father and mother, "it was agreed, that the grandfather of the plaintiff, on the mother's ſide, ſhould, before the 25th of *December* next, pay to the defendant, the truſtee, 1000*l.* and ſecure to him 300*l.* on bond, to be laid out in the purchaſe of *South Sea* annuities, in truſt to permit the plaintiff's father to receive the intereſt and dividends thereof during his life, and after his death, to permit the wife to receive the intereſt thereof for her life: and after the death of the ſurvivor, if they ſhould have a ſon, or one or more younger children, ſons or daughters; then upon farther truſt to pay the ſaid principal ſums to ſuch younger children, if but one, and if more than one, equally to be divided between them: And it was further covenanted, that the plaintiff's grandfather ſhould procure his ſiſter *Frances Flatman*, who was intereſted in two houſes in *Shoe Lane*, to convey all her intereſt therein to the uſe of her ſelf for life, to the plaintiff's mother for life, then to her younger child or children in tail general, remainder to the plaintiff's mother in fee."

Frances Flatman, by indenture of leaſe and releaſe, bearing date the ſame day with the articles, *viz.* the 2d of *Auguſt* 1728. ſettled the two houſes to the ſame uſes with the articles.

The father and mother are dead, and have left the plaintiff, their daughter and eldeſt child, and alſo a ſon.

She has brought a bill againſt the truſtees, to have a maintenance out of the 1000*l.* and 300*l.* and alſo out of the rents of the two freehold houſes, and to have both transferred to her when ſhe comes of age.

It

It was inſiſted for the defendant, the infant ſon, that as the plaintiff is the eldeſt child of the marriage, ſhe cannot take the 1000*l.* and 300*l.* as it is expreſſed to be a proviſion for younger children, or at leaſt not the two freehold houſes, for that the caſes have only gone as to terms for years, for raiſing portions, and not upon a legal limitation of a freehold eſtate.

LORD CHANCELLOR.

To be ſure, the preſent caſe differs, in one reſpect, from the caſes cited, becauſe I do not remember that this conſtruction has ever been made upon a legal limitation.

For, if an ejectment was to be brought, I doubt the plaintiff would find a great difficulty to make out a title under this limitation, ſhe being *the eldeſt*, would not at law be conſtrued a *younger child.*

In an ejectment the plaintiff could not have recovered; for, being the eldeſt, ſhe would not at law be conſtrued a younger child; but in this court, as the articles are executory, they muſt be carried into execution, agreeable to the intention of the parties.

But, in this court, as the articles are *executory*, they muſt be carried into execution, agreeable to the intention of the parties; for it is all one intire proviſion for the children, as well what is to be paid in money, as what is given by the houſes.

Now, younger child or children, in the indentures of leaſe and releaſe, muſt be conſtrued analogous, or in confirmity to the articles, *videlicet*, any child, excluſive of a ſon; and what governs my judgment is, that I muſt take the articles and the indenture as one and the ſame act, for they are both dated upon one and the ſame day; and I cannot make a different conſtruction of the deed from the articles; for the legal limitation is to provide for the younger children, or one younger child as much as the other, according to the plain intent of the grandfather, father, mother, and the aunt.

The articles, and the indenture of releaſe muſt be conſidered as one and the ſame act, being both dated on one and the ſame day, and a different conſtruction ought not to be put upon them.

The rule has been rightly laid down by the plaintiff's council, that according to all the late caſes, an elder daughter, where there is a ſon, is accounted a younger child.

And though the daughter might not have recovered at law, this court would have rectified the miſtake, as it hath done, where a term in a ſettlement, for raiſing portions for younger children, was placed after an eſtate-tail, which ſhould have been before, and this in two inſtances, one before Sir *Joſeph Jekyl*, in the caſe of *Uvedale* verſus *Halfpenny*, 2 *P. Wms.* 151.*

Where a term for raiſing portions is placed after an eſtate-tail, which ſhould have been before, this court will rectify the miſtake.

* In a marriage ſettlement, a term for years, for ſecuring younger childrens portions, was by miſtake made ſubſequent to the eſtate-tail limited to the ſons; Sir *Joſeph Jekyl* ſet it right according to the intention and agreement of the parties, *Halfpenny* verſus *Uvedale*.

Lord *Hardwicke* declared, that according to the true intent and meaning of the indenture of the ſecond of *Auguſt* 1728, the plaintiff is intitled to the two ſums of 1000*l.* and 300*l.* and to the *South-Sea* annuities purchaſed with the 1000*l.* and to the freehold houſes in *Shoe-Lane*, as a daughter of *Thomas Heneage* and *Anna Maria* his wife, the defendant *George Heneage* being the only ſon of the marriage, and ordered the Maſter to take an account of the dividends of the *South-Sea* annuities, and of the rents of the two houſes received by the defendants, and to allow the clear produce thereof for the plaintiff's maintenance for the times paſt, and till ſhe attains twenty-one; and if the 300*l.* or any part, can be recovered, he directed it to be placed out in the purchaſe of *South-Sea* annuities in truſt for the plaintiff; and alſo decreed that the plaintiff ſhould hold the two houſes to her and the heirs of her body, till twenty-one; and afterwards that the defendant *George Heneage* do convey them to the plaintiff in tail general, with remainder to *George* in fee, unleſs within ſix months after his attaining his age of twenty-one, or being ſerved with a *ſubpœna* for that purpoſe, he ſhall ſhew unto this court good cauſe to the contrary.

Caſe 288. * *Lady Dorothy Saville, and Lady Mary Saville, by their Guardian, and alſo the Executrixes of Lady Eſſex Saville deceaſed, by Bill of Revivor* —— } Plaintiffs.

Sir George Saville and others, May 24, 1720. —— —— —— } Defendants.

Mr. Juſtice *Tracy* held, that the lands of which Marquiſs *William* was ſeiſed in fee, and deviſed to his daughters in tail, were not ſuch an eſtate of inheritance, as will be a ſatisfaction of the portions for his daughters by the ſecond wife, becauſe they claim theſe lands by purchaſe and the proviſo in the marriage ſettlement reſtrains the ſatisfaction, to lands coming to the daughters by diſcent from their father.

THE queſtions in the cauſe aroſe upon this caſe.

" By conveyance, dated the 19th and 20th of *February* 1694, " made upon the intended ſecond marriage of *William* Lord *Eland*, " eldeſt ſon of *George* Marquis of *Halifax*, with Lady *Mary Finch*; " after the uſual limitations, there was a term created of 500 years, " charged upon all the manors and lands in *Nottinghamſhire* and " *Yorkſhire*, comprized in the marriage ſettlement, and the truſt of " it was declared to be, that in caſe there ſhould be a failure of iſſue

* The nearneſs of relation between the late Mr. Juſtice *Tracy* and me, and the great reverence and eſteem in which his name is ſtill held by the profeſſion of the law, I make no doubt will ſufficiently plead my excuſe for giving this caſe to the publick, in which he has ſo greatly diſtinguiſhed himſelf, in the opinion he communicated by letter to Lord *Macclesfield*, being diſabled, through illneſs, to attend in court, eſpecially as I cannot find it is reported in any book whatever.

" male

" male of the ſecond marriage, and there ſhould be one or more " daughter or daughters, that the truſtees ſhould by ſale or mort- " gage of the premiſſes, for and during the term after the com- " mencement thereof, raiſe, *if but one daughter* 20,000l. *if two or* " *more* 25,000l. *equally to be divided, and to be paid to them when* " *they reſpectively attain their age of ſixteen, or days of marriage,* " *which ſhould firſt happen:* And in caſe any of the daughters ſhould " die before the portions become payable, to go to the ſurvivors, " and to be paid to them at ſuch time as the original portions; if " but one daughter, ſhe to have 300*l. per ann.* till 12 years of age, " and afterwards 500*l. per ann.* for maintenance till her portion " become payable; if more daughters, 200*l. per ann.* a-piece, till " 12, and afterwards 300*l. per ann.* maintenance, to be paid at " *Michaelmas* or *Lady-Day*, which ſhould firſt happen after the " commencement of the ſaid term; *provided, or in caſe lands or te-* " *nements of an eſtate of inheritance ſhall deſcend to the ſaid daughters* " *from Lord* Eland, *of as great value to be ſold, as the portions hereby* " *for them intended, then the* 500 *years term ſhall ceaſe and be void,* " *for the benefit of the perſon who ſhall be next in reverſion or re-* " *mainder of the ſaid manors,* &c."

" The marriage took effect, and Marquis *George*, by conveyance " dated the 1ſt and 2d of *March* 1694, reciting the deed of *Fe-* " *bruary* 1694, and the ſeveral eſtates therein limited; and that the " reverſion and inheritance of the premiſſes, from and after the de- " termination of the ſaid eſtates, was limited to him and his heirs, " did, in conſideration of his name and family, and to ſupport the " ſame, in caſe neither he nor his ſon Lord *Eland* ſhould leave any " iſſue male, ſettle the ſaid premiſſes upon *George*, now Sir *George* " *Saville*, Baronet, for 99 years, if he lived ſo long, without im- " peachment of waſte, and to his firſt and other ſons in tail male, " with ſeveral remainders to other perſons, with the like limi- " tations."

Marquis *George* being likewiſe ſeiſed in fee of ſeveral other manors and lands in other counties, and having the reverſion in fee of divers manors, *&c.* expectant upon the deceaſe of the now Marchioneſs Dowager of *Hallifax*, and likewiſe the reverſion and inheritance in fee-ſimple, of and in ſeveral fee-farm rents, expectant upon the deceaſe of *Catharine* Queen Dowager, made his will *March* 17, 1691, and thereby " gave his houſe at *Acton* in *Mid-* " *dleſex*, to his wife for life, and after her deceaſe, to Lord *Eland* " and his heirs;" and then deviſes as follows: " As to all my lands " not comprehended in the ſettlement made upon my ſon's mar- " riage, I give them to my ſon Lord *Eland*, and to the heirs of his " body, and for want of ſuch iſſue, to my daughter *Stanhope*; and " made Lord *Eland* ſole executor.

Marquis

Marquis *George* died without any other iſſue male than Lord *Eland*, who proved the will; and he being ſeiſed under the will as aforementioned, by leaſe and releaſe, on the 17th and 18th of *May* 1695, " declared the uſes of an intended recovery of ſeveral manors, " lands, *&c.* in the counties of *Northampton*, *Derby*, *York*, *Notting-* " *ham*, *Middleſex*, and *Surry*, to be to him and his heirs;" and afterwards, by leaſe and releaſe, dated the 5th and 6th of *July* 1695, " Marquis *William* did ſettle the ſame manors, *&c.* to the uſe of " himſelf for life, and after his deceaſe to the uſe of ſuch perſon, " and for ſuch eſtate, as he by any writing, ſigned in the preſence " of three or more witneſſes, or by his laſt will, ſigned in like " manner, ſhould declare, limit and appoint; and in default of " ſuch declaration, limitation and appointment, then, after his " death, to his firſt and other ſons in tail male, and in default of " ſuch iſſue, to all and every his daughters, and the heirs of their " body iſſuing, and in default of ſuch iſſue, to the uſe of the ſaid " *Lady Stanhope*, and the heirs of her body, and in default of " ſuch iſſue, to the right heirs of Marquis *George* for ever."

Marquis *William*, by a codicil to his will, dated the 20th of *Auguſt* 1700, ſigned in the preſence of three witneſſes, therein reciting the deed of recovery, *&c.* " deviſed all his ſaid manors, *&c.* " to his executors for 500 years upon truſt by ſale or mortgage to " raiſe (in caſe he had no ſon) the ſum of 5000*l.* a-piece, addi- " tional portions for each of his daughters, to be paid to them at " ſixteen, or marriage, and ſubject to the ſaid term, he deviſed all " the ſaid manors, lands, *&c.* to his firſt and other ſons in tail " male; and in default of ſuch iſſue, to remain and be to ſuch uſe, " and for ſuch eſtate, as are thereof declared in and by the ſaid " indentures of leaſe and releaſe of the 5th and 6th of *July* " 1695."

On *May* the 31ſt 1700. Marquis *William* died without any iſſue male; but by his firſt Lady had iſſue *Lady Ann Bruce*, and by his ſecond, three daughters, *Lady Eſſex*, *Lady Dorothy*, and *Lady Mary Saville*, two born in his life, and the other ſince his deceaſe.

George Saville, now Sir *George*, after Marquis *William*'s deceaſe, entered upon the lands in *Nottinghamſhire* and *Yorkſhire*, conveyed to him by the deed of *March* 1694. ſubject to the ſeveral charges as aforeſaid, and received the rents thereof due at *Michaelmas* 1700. and has ever ſince paid the maintenance of Marquis *William*'s three daughters till the *Lady-day* next before they reſpectively arrived at their ages of 16 years, which they have all ſince attained unto.

This

This cauſe underwent great debate, Lord *Macclesfield* being aſſiſted by Lord Chief Juſtice *Pratt*, the Maſter of the Rolls, * Sir *Joſeph Jekyll*. Lord Chief Juſtice *King*, and Mr. Juſtice *Tracy*, who all except the laſt delivered their opinions in court *May* 24, 1720. but he being ill, wrote the following letter to Lord *Macclesfield* the night before.

May 23, 1720.

My Lord,

" Not being able by reaſon of my indiſpoſition to appear in " court to-morrow to deliver my opinion in the cauſe of *Saville* " verſus *Saville*, (which I was prepared to do) I have in obedience " to your Lordſhip's commands ſent your Lordſhip my opinion in " writing upon the ſeveral points that were debated by council at " the bar, and I thought it not proper to take notice of any other.

Firſt point. Whether lands of which Marquis *William* was ſeiſed in fee, and deviſed to his daughters in tail, the remainder to the Lady *Stanhope*, *&c.* are ſuch an eſtate of inheritance as ſhall (in proportion to their value) be a diſcharge or ſatisfaction of the portions for his daughters by his ſecond wife, within the meaning of the proviſo in his ſecond marriage ſettlement.

" I am clearly of opinion they are not, becauſe the daughters " claim thoſe lands by purchaſe; and I think the proviſo plainly " reſtrains the ſatisfaction to lands coming to the daughters by de- " ſcent from their father."

Second point. Whether the Lands deſcending to the ſaid daughters from their father, and which ought to go in ſatisfaction of their portions, ought to be valued as at the time of the deſcent, or when their portions became due.

" I am of opinion that the valuations ought to be made ac- " cording to the values and circumſtances of the lands at the time " of the deſcent: for the proviſo is expreſs, That if lands of as " great value as the portions deſcend, the term of 500 years is to " ceaſe. And till the valuations made, it cannot be known whether " the lands are a full or only a partial ſatisfaction."

The valuation of the lands deſcending to the daughters from their father, muſt be made according to the value of the lands at the time of the deſcent; for till the valuation made, it cannot be known whether they are a full or a partial ſatisfaction.

Third point. Whether lands deſcended from Marquis *William* to his daughters by his ſecond wife in tail, are ſuch an eſtate of inheritance deſcended from him as is within the meaning of the ſaid proviſo.

The lands deſcended from Marquis *William* to his daughter in tail, are not ſuch an eſtate of inheritance as is within the meaning of the proviſo, for ſuch an inheritance was intended as is of certain value, an eſtate of inheritance in fee-ſimple.

" I am of opinion they are not, eſpecially being attended with " the circumſtances that appear in this caſe.

" Firſt, From the uncertainty there muſt be in the valuations: " for the valuations being to be made at the time of the deſcent, " when Lady *Eſſex* (the eldeſt of the three daughters) was but " two years old, and the youngeſt not born, how could the contin- " gencies of their dying without iſſue before they or their iſſue at- " tained the age of 21. to ſuffer recoveries, be valid? It is impoſſi- " ble there ſhould be any certain meaſure or rule for ſuch a valua- " tion: and it is hard to think, it could ever be intended that por- " tions (which are ſo much money certain) ſhould receive a ſatiſ- " faction by values to be made merely at random, and by fancy: " and therefore it is more reaſonable to think, that ſuch an eſtate of " inheritance was intended as is of a certain value, and that is an " eſtate of inheritance in fee-ſimple.

" But Secondly, I conceive the objection againſt a ſatisfaction of " the portions by the deſcent of an eſtate-tail is more ſtrong by the " circumſtance of the remainder's being in Lady *Stanhope*, and " Marquis *William*'s having a daughter (the Lady *Bruce*) by his " firſt wife.

" For ſuch an eſtate might deſcend to the daughters by the " ſecond wife to the full value of 25000 *l.* and ſo the term of 500 " years would ceaſe, and the portions be diſcharged, and yet the " three daughters by the ſecond wife might not have near the value " of the portions deſigned them by the ſettlement.

" For by the expreſs proviſion of the ſettlement, if one of the " three daughters died before her portion become payable, her " portion is limited over to her two ſurviving ſiſters; but in that " caſe her ſhare in the eſtate would have gone equally to my Lady " *Bruce*.

" And Thirdly, If two of the three daughters had died before " their portions became due, the loſs to the ſurvivor had been ſtill " greater.

" And therefore the words (an eſtate of inheritance) being of " an ambiguous ſenſe, and importing likewiſe (if not more ſtrong- " ly) an eſtate in fee-ſimple; and when ſuch an eſtate is properly " an equivalent, as it is an abſolute eſtate in the land, as there is an " abſolute intereſt in the portions, and as it would deſcend as the " portions would have gone;

" Surely by all rules of conſtruction, the words ought to be " taken in that ſenſe which is conſiſtent with the whole deſign of

" the ſettlement, and not in that which would defeat it in ſo ma-
" terial a part, as the benefit of ſurvivorſhip amongſt the three
" daughters.

Fourth point, Whether the reverſions in tail expectant upon the deaths of Lady Dowager *Hallifax*, and the late Queen Dowager, are ſuch eſtates of inheritance deſcended from Marquis *William* to his daughters by his ſecond wife, as are within the intent and meaning of the proviſo.

The reverſions in tail, expectant on the deaths of Lady Dowager *Hallifax* and the late Queen Dowager, are not ſuch eſtates of inheritance deſcended from Marquis *William* as are within the intent of the proviſo.

" Having delivered my opinion before upon the deſcent of an
" eſtate-tail in poſſeſſion, it follows I can be under no doubt as to
" thoſe reverſions, becauſe the reaſons I have offered before hold
" more ſtrongly againſt them: and I have no occaſion to mention
" the further objections that were made againſt them.

" As to a reverſion in fee which was mentioned at the bar, upon
" the argument of the other points, I do not find there is any ſuch
" eſtate in the caſe, and therefore I ſhall give no opinion in it.

Fifth point, The only remaining one, I think, that was debated at the bar, was, whether Sir *George Saville* ſhall account for the rents and profits of his eſtates, and for the value of the timber cut down and ſold by him, to the end that they may be applied towards raiſing the daughters portions.

" I am of opinion he ſhall not.

The courſe of the court with regard to a tenant for life is, that he ſhall keep down the intereſt by rents and profits, but portions or principal money on any other incumbrance, ſhall be borne by the whole eſtate; and therefore Sir *George Saville* ſhall not account for the rents or the value of the timber cut down, in order they may be applied towards raiſing the daughters portions.

" It was ſaid at the bar (and not denied I think by the other
" ſide), that the conſtant courſe of the court in the like caſes has
" been, that the tenant for life ſhall keep down the intereſt by the
" rents and profits, but that the portions, or the principal money
" due upon any other incumbrance, ſhall be borne by the whole
" eſtate.

" And this ſeems reaſonable, eſpecially in this caſe: for with re-
" ſpect to the daughters, they have nothing more to deſire but to
" be ſecure of their portions, and that they are beyond all doubt,
" by a ſale or mortgage of part of the great eſtate that is charged
" with them.

" And with reſpect to thoſe in remainder, when Marquis *George*
" preferred Sir *George Saville* to be the firſt who ſhould enjoy his
" paternal eſtate, to ſupport his name, and the honour of his
" family, he could never intend to diſtreſs Sir *George*, and put him
" into a ſtarving condition for the ſake of thoſe in remainder, who
" were more remote in his conſideration.

" And

" And as for the timber, Sir *George* had by his ſettlement a " power to cut what he pleaſed as a part of the profits of his " eſtate, and as thoſe in remainder could not have come by their " bill in this court, and have ſtopped him from cutting down the " timber, or have prayed now that the portions ſhould be raiſed " out of it, if it had been ſtanding; neither I think ought they to " have any benefit by it, now it is actually cut down and ſold.

My Lord,

" If I had delivered my opinion in court, I ſhould have enlarged " and inforced the reaſons I have here given, ſeveral ways: But I " ſhould rather have contracted them upon this occaſion, if I had " had more time and leſs pain; but indeed I received your Lord- " ſhip's commands ſo late this evening, that I could not ſo much " as get this haſty writing fairly tranſcribed, and therefore I hope " it will be excuſed. I am

Your Lordſhip's moſt obedient,

And humble Servant,

Robert Tracy

Lord Chief Juſtice *Pratt*, Sir *Joſeph Jekyll*, and Lord Chief Juſtice *King*, delivered their opinion in court, which agreed with Mr. Juſtice *Tracy*'s, and Lord *Macclesfield* concurring, gave judgment accordingly.

On the 24th of *May* 1720. the two Chief Juſtices and the Maſter of the Rolls delivered their opinion in court, which agreed with Mr. Juſtice *Tracy*'s in every reſpect, and Lord *Macclesfield* concurring with them, gave judgment upon the ſeveral points, in the manner they have been already ſtated.

Firſt, That a valuation ought to be put upon the lands deſcended to the plaintiffs, the daughters of Marquis *William* (as an equivalent for the 25000 *l.*) as the ſame were worth to be ſold at the time of ſuch deſcent, and from that time the truſt term of 500 years ought to ceaſe: but if the value of the deſcended lands be not equal to the portions intended to be raiſed, then the term to continue in truſt to raiſe the reſidue.

Secondly, That whatever lands the daughters *take by the will* of their father, they take not by deſcent, but as purchaſers, and ſuch lands can be no part of the equivalent.

Thirdly, That *the eſtate-tail* deſcended to the three daughters and Lady *Bruce*, as heirs of the body of their father, remainder to Lady *Stanhope*, either in poſſeſſion or expectant on the deaths of the late Queen Dowager and the Lady Marchioneſs Dowager, is no ſatisfaction of the portion, or any part thereof: *But if any eſtate in fee-ſimple deſcended to them from their father in poſſeſſion, or reverſion expectant on any term for years, that ought to go towards their ſatisfaction.*

Fourthly, That what the defendant Sir *George Saville* hath raiſed by timber or other profits of the truſt-eſtate ought not to be accounted for, nor applied towards the diſcharge of the plaintiffs portions, for the eſtate is no more than a ſecurity for the 25000 *l.* with intereſt till the ſame ſhall be paid, and that Sir *George Saville* is in the nature of a mortgagor in poſſeſſion, and the eſtate being more than of value ſufficient to anſwer the ſaid portions and intereſt, he is not ſubject to account or to refund the money raiſed by him for the timber ſold, or other profits by him made.

Saunders verſus *Drake*, *November* 27, 1742. Caſe 289.

THE queſtion in this cauſe aroſe upon the will of one Mr. *Wilſon*, who at the time of making it, and for ſeveral years before, lived in *Jamaica*.

A teſtator who lived in *Jamaica* gives legacies to be paid in ſterling money in the firſt place, and the two legacies immediately following generally without ſaying in ſterling money, and at the end of his will ſeveral more to be paid in ſterling money. Lord *Hardwicke* held that the plaintiff muſt take his legacy in *Jamaica* money, for his expreſſing himſelf differently, ſhewed a different intention.

The teſtator by his will gives legacies to be paid in *ſterling* money in the firſt place, and the two legacies immediately following theſe (one of which is the plaintiff's) he gives generally, without ſaying to be paid in *ſterling* money: then he deviſes his real eſtate, and gives ſome ſpecific legacies; and laſtly, ſeveral more legacies to be paid in *ſterling* money.

The plaintiff has brought his bill for his legacy of 300 *l.* and inſiſts the defendant, who is the executor, but no ways intereſted, ſhould pay him in *ſterling* money.

Mr. Attorney General for the plaintiff argued, that putting theſe general legacies cloſe to *the ſterling*, they ſhall have the ſame conſtruction by appoſition: and as the teſtator has money both in *Jamaica* and *England*, why ſhould not the plaintiff's legacy be paid in *ſterling* money, eſpecially as it is given to a perſon in *England*.

The council of the other ſide inſiſted, that in *Jamaica*, where money is mentioned generally, it is always underſtood to be the current money of *Jamaica*.

LORD CHANCELLOR.

It is impoſſible for me to tell what was the teſtator's intention; but I muſt make a conſtruction from the words.

The general rule that has been laid down on the part of the defendant is true; for if a bond be given at *Dublin*, or a note at *Jamaica*, it muſt be paid in the current money.

A bond given at *Dublin*, or a note in *Jamaica*, muſt be paid in the current money; the ſame with regard to a will.

So if in either place there is a ſum of money left by will, it ſhall be paid to the legatee in current money.

Then the queſtion will be, if there is any thing in the preſent caſe to take it out of the general rule.

The legatees living in *England* makes no diſtinction, for the reſidence of the perſon deviſing muſt decide it.

If the teſtator had given all his legacies generally, undoubtedly they muſt have been paid in *Jamaica* money, nor would the legatees living in *England* have made any diſtinction, for *the reſidence of the perſon deviſing* muſt decide it.

Every thing in this will ſhews it muſt mean *Jamaica* money; for if all the legacies given generally would confine it to *Jamaica* money, *a fortiori*, if the teſtator gives ſome *ſterling*, and others generally, the latter muſt be paid out of *Jamaica* money, for his expreſſing himſelf differently ſhews a different intention.

It is ſaid on the part of the plaintiff, that his legacy immediately following the *ſterling* legacies, it muſt be taken as a continuation of the ſame intention.

And there might have been ſomething in this argument, if there had not been in the latter end of the will other *ſterling* legacies, which takes away the force of this argument intirely.

Though the effects are partly in *Jamaica*, and partly in *England*, yet as this is a deviſe of a compounded reſidue, without ſeparating the funds, no argument can be drawn from it in favour of the plaintiff.

There has been an endeavour likewiſe to raiſe an argument for the plaintiff, from the teſtator's effects being partly in *Jamaica*, and partly in *England*.

And to be ſure, if the teſtator had ſeparated his funds in *Jamaica* and *England*, and had charged his legacies which he has given generally upon the *Engliſh* money, it would have been an argument of conſiderable weight.

But as it is a deviſe of a compounded reſidue, and he directs his debts to be paid generally out of the whole perſonal eſtate without ſeparating the funds, this argument falls to the ground; and therefore upon the whole the plaintiff muſt take his legacy in *Jamaica* money.

Fleetwood

Fleetwood verſus *Janſen and Mennill*, *November* 29, Caſe 290.
1742.

LORD CHANCELLOR.

A Motion is made on behalf of the plaintiff for further time to redeem the mortgage, which was originally given to Mr. *Delmee*, and by him aſſigned to the defendants.

A motion for further time to redeem a mortgage, and that it ſhould ſtand as a ſecurity only for what was *bonâ fide* advanced, but forfeited as to what was won at play: Lord *Hardwicke* ſaid, as Mr. *Fleetwood*, in a former cauſe, where he might have done it, did not inſiſt on a redemption, the foreclоſures could not regularly be kept open, but on the whole circumſtances allowed three months.

And it was inſiſted by the plaintiff's council, that the mortgages which *Janſen* and *Mennill* have upon his eſtate, ought to ſtand only as a ſecurity for ſo much as has been *bonâ fide* advanced, and ſhall be forfeited as to what was won at play.

To be ſure, the inforcing the gaming act is not merely confined to the intereſt of private perſons, but is of great conſequence to the publick, and ſo I have always thought it when I ſat in the other court.

The inforcing the gaming act is of great conſequence to the publick, and not confined to the intereſt of private perſons.

And, as in other crimes, accomplices are always encouraged, ſo more eſpecially ought they to be in theſe caſes, for notwithſtanding among *Gameſters* themſelves, they call it *honour* and *debts of honour*, I think it *falſe honour*, and that a perſon who lays open and diſcovers theſe practices, has done a meritorious action.

Though gameſters call them *debts of honour*, yet this court thinks it falſe honour, and that the perſon who informs, has done a meritorious act.

But though it may be the rule, yet the circumſtances of this caſe are particular, and will not fall within all the general rules.

The defendants, with Mr. *Delmee*'s and their own mortgage, have at leaſt 69,000*l.* upon the plaintiff's eſtate.

And upon a valuation of the mortgaged premiſſes, which is ſtretched to the very utmoſt, it does not amount to more than 80,000*l.* and when it comes to be ſold, it is not very probable that any purchaſer will give more than 70,000*l.* with ſuch a large incumbrance upon it.

The mortgage aſſigned by Mr. *Delmee*, to *Janſen* and *Mennill*, is 46,000*l.* and allowed by the plaintiff to be a fair mortgage.

And if *Janſen* and *Mennill* had not taken this mortgage of Mr. *Delmee*, he would undoubtedly have been intitled to have foreclоſed them both: And as *Fleetwood* (in the old cauſe between Mr. *Delmee*, plaintiff, upon a bill of foreclоſure, *Janſen*, *Mennill*, and *Fleetwood*, defendants) never inſiſted upon a redemption at the hearing, nor even before a Maſter; conſider, whether it would not introduce a dangerous precedent in this court, to admit him to redeem now, after he has acquieſced under the foreclоſure in the former cauſe; and whether it is not better that a private perſon ſhould ſuffer an inconvenience, rather than a general one ſhould ariſe to the publick.

Upon a *ſcire facias* taken out on a judgment, a defendant ſhall inſiſt only on what he might have done at the hearing of the original cauſe.

What is the rule at law upon a *ſcire facias* taken out on a judgment? Why, that a defendant ſhall not inſiſt upon any thing but what might have been inſiſted on at the hearing of the original cauſe.

The rule in equity is the ſame, with this difference only, that if any thing new has happened ſince the hearing, defendant may avail himſelf of it.

So is the rule in equity, with this variation, that if any thing *new* has happened ſince the hearing, the defendant may take advantage of it.

This is the caſe upon the old bill.

Then what is the equity upon the new? Why, that the whole money ſecured upon Mr. *Fleetwood*'s eſtate (except Mr. *Delmee*'s mortgage) is forfeited to the heir at law of *Fleetwood*, as being won at play by virtue of the gaming act; and that the heir at law has aſſigned over the whole benefit to a truſtee, in truſt for Mr. *Fleetwood*, who now brings his bill, and inſiſts upon being let into a redemption, on paying the defendants only what ſhall appear to be juſtly and *bona fide* lent.

But I am of opinion, that, regularly, I cannot keep open this foreclоſure, neither will it be any great benefit to the plaintiff to do it, becauſe he will have the advantage of any equity at the hearing, which may ariſe from his bill, notwithſtanding the foreclоſure.

However, upon the whole circumſtances of the caſe, I will allow the plaintiff three months more to get the money for redeeming Mr. *Delmee*'s mortgage, and that to be peremptory.

December

First ſeal after Michaelmas term, December 3, 1742. Caſe 291.

A Motion againſt the Printer of the *Champion*, and the Printer of the *St. James's Evening Poſt*; that the former, who is already in the *Fleet*, may be committed cloſe priſoner; and that the other, who is at large, may be committed to the *Fleet*, for publiſhing a libel againſt Mr. *Hall* and Mr. *Garden*, (executors of *John Roach*, Eſq; late major of the garriſon of *Fort St. George*, in the *Eaſt Indies*); and for reflecting likewiſe upon Governor *Mackray*, Governor *Pitt*, and others, taxing them with turning affidavit men, *&c.* in the cauſe now depending in this court, between Mrs. *Roach* and the executors: And inſiſting that the publiſhing ſuch a paper is a high contempt of this court, for which they ought to be committed.

Incumbent on courts of juſtice to preſerve their proceedings from being miſrepreſented; and the minds of the publick ſhould not be prejudiced before a cauſe is heard.

LORD CHANCELLOR.

Nothing is more incumbent upon courts of juſtice, than to preſerve their proceedings from being miſrepreſented; nor is there any thing of more pernicious conſequence, than to prejudice the minds of the publick againſt perſons concerned as parties in cauſes, before the cauſe is finally heard.

It has always been my opinion, as well as the opinion of thoſe who have ſat here before me, that ſuch a proceeding ought to be diſcountenanced.

But, to be ſure, Mr. Solicitor General has put it upon the right footing, that notwithſtanding this ſhould be a libel, yet, unleſs it is a contempt of the court, I have no cognizance of it: For whether it is a libel againſt the publick or private perſons, the only method is to proceed at law.

Whether a libel be publick, or private, the only method is to proceed at law; and this court has no cognizance, unleſs it is a contempt, by being an abuſe of their proceedings.

The defendant's council have endeavoured two things: 1ſt, To ſhew this paper does not contain defamatory matter. 2dly, If it does, yet there is no abuſe upon the proceedings of this court, and therefore there is no room for me to interpoſe.

Now, take the whole together, though the letter is artfully penned, there can remain no doubt, in every common reader at a coffee-houſe, but this is a defamatory libel.

For after he has laid down the plan of the paper in this manner:

" *It has been obſerved long ago, that the Roman Catholicks are* " *very zealous for the propagation of their religion, and that they ſtick*

" *at nothing, though ever ſo ſcandalous, to compaſs their ends: We* " *have had lately a moſt ſhocking inſtance of it.*"

Printing initial letters will not protect a libeller.

Then it goes on, and treats of perſons, ſome at *Paris* and others at *London*; and it is very plain, that it is relative to the executors of Major *Roach* parties in this cauſe, notwithſtanding there are only initial letters of their names, and places of abode, in the manner following: " *He has appointed (meaning Major Roach) T———* " *H———l, of G—— O——d S——t, and F———G——n of* " *the T———e, his E———rs.*

All the libellers of the kingdom know now, that printing initial letters will not ſerve their turn, for that objection has been long got over.

The bill in chancery, mentioned in the laſt paragraph of the firſt column, can be applicable only to this cauſe; for the words are, " *She (meaning Mrs. Roach) came back to London, and filed a* " *bill in chancery againſt the two E——rs, in order to call them to* " *an account.*"

It is plain therefore who is meant; and as a jury, if this fact was before them, could make no doubt, ſo, as I am a judge of facts, as well as law, I can make none.

I might mention ſeveral ſtrong caſes, where even feigned names have been conſtrued a libel upon thoſe perſons who were really meant to be libelled.

I ſhall take notice but of one, and that is the caſe of Mrs. *Dodd*, who printed a letter abuſing the late King, under the name of *Merriweis Sophy* of *Perſia*; it was tried before a jury of gentlemen of great honour, who were ſo well ſatisfied of the real meaning, that, notwithſtanding the whole was concealed under fictitious names, they found the publiſher guilty.

Next, as to the expreſſion in the paper, that " *There were, even* " *here in* England, *ſome gentlemen of note and character, who did* " *not ſcruple to turn affidavit men.*" Mr. Solicitor General has inſiſted, this may be taken in a good ſenſe, as well as a bad one, becauſe a man who ſwears true, is as much an affidavit man, as if he ſwears falſe, and the court ſhould take it *in mitiori ſenſu.*

I will not take upon me to ſay, whether upon an action at law, this could be ſupported as libellous upon the ſtrict rules.

But, I believe, there is no body who is converſant in the proceedings of this court, but muſt know, that this expreſſion means perſons who are ready, upon all occaſions, to make affidavits, without regarding whether they have any conuſance of the facts.

Calling a perſon an affidavit man is libellous, for it means a man who is ready to ſwear on all occaſions, without any conuſance of the fact.

Upon the whole, as to the libellous part, if ſo far there ſhould remain any doubt, whether the executors are meant, it is clear, beyond all contradiction, upon the laſt paragraph, in which are theſe words, " *This caſe ought to be a warning to all fathers, to take care* " *with whom they truſt their children, and their fortunes, leſt their* " *own characters, their widows, and their children, be aſperſed, and* " *their fortunes ſquandered away in law ſuits.*

And likewiſe, though not in ſo ſtrong a degree, the words, *turned affidavit men*, is a libel againſt thoſe gentlemen who have made them.

It is inſiſted, that the following words, (" *This cauſe, which has* " *been long depending, in chancery here, was at laſt determined, on* " Wedneſday *the 3d Inſtant, by the Right Honourable the Lord High* " *Chancellor. A great many perſons, who, as well as I, were con-* " *cerned for Mrs.* Roach, *and, impatient to know the iſſue of that* " *affair, went that day to* Lincolns-Inn Hall, *and we were every one* " *of us extremely pleaſed when we heard that moſt upright magiſtrate's* " *decree, by which the Maſter's report was confirmed, and the Right* " *Honourable the Lord* Barrimore *appointed guardian,*") are not a contempt of this court, becauſe here is no miſrepreſentation of facts, and the court ſpoke of with great reſpect.

And indeed, it is very true, but then this is colourable only, and ſuch colours ſhall never impoſe upon the court.

There are three different ſorts of contempt.

Three kinds of contempts, ſcandalizing the court; abuſing parties; and prejudicing mankind before a cauſe is heard.

One kind of contempt is, ſcandalizing the court it ſelf.

There may be likewiſe a contempt of this court, in abuſing parties who are concerned in cauſes here.

There may be alſo a contempt of this court, in prejudicing mankind againſt perſons, before the cauſe is heard.

There cannot be any thing of greater conſequence, than to keep the ſtreams of juſtice clear and pure, that parties may proceed with ſafety both to themſelves and their characters.

The

The printer of the *Glouceſter Journal*, calling his advertiſement *A Hue and Cry after a Commiſſion of Charitable Uſes*, was held to be a libel, and the court committed him.

The caſe of *Rakes*, the Printer of the *Glouceſter Journal*, who publiſhed a libel, in one of the *Journals*, againſt the commiſſioners of charitable uſes at *Burford*, calling his advertiſement *A hue and Cry after a Commiſſion of Charitable Uſes*, was of the ſame kind as this, and the court in that caſe committed him.

Printing a brief before the cauſe comes on is a contempt, as it is prejudicing the world with regard to the merits.

There are ſeveral other caſes of this kind; one ſtrong inſtance, where there was nothing reflecting upon the court, in the caſe of Captain *Perry*, who printed his brief before the cauſe came on; the offence did not conſiſt in the printing, for any man may give a printed brief, as well as a written one to council; but the contempt of this court, was prejudicing the world with regard to the merits of the cauſe, before it was heard.

Upon the whole, there is no doubt, but this is a contempt of the court.

With regard to Mrs. *Read*, the publiſher of the *St. James's Evening Poſt*, by way of alleviation, it is ſaid, that ſhe did not know the nature of the paper; and that printing papers and pamphlets is a trade, and what ſhe gets her livelyhood by.

If a printer prints any thing that is libellous, it is no excuſe to ſay that he had no knowledge of the contents.

But, though it is true, this is a trade, yet they muſt take care to do it with prudence and caution; for if they print any thing that is libellous, it is no excuſe to ſay, that the printer had no knowledge of the contents, and was intirely ignorant of its being libellous; and ſo is the rule at law, and I will always adhere to the ſtrict rules of law in theſe caſes.

Therefore Mrs. *Read* muſt be committed to the *Fleet*, according to the common order of the court upon contempts.

But as to Mr. *Huggonſon*, who is already a priſoner in the *Fleet*, I do not think this any motive for compaſſion; becauſe theſe perſons generally take the advantage of their being priſoners, to print any libellous or defamatory matter which is brought to them, without ſcruple or heſitation.

It is a mitigation of the printer's offence, if he will diſcover the perſon who brought the paper to him.

If theſe printers had diſcloſed the name of the perſon who brought this paper to them, there might have been ſomething ſaid in mitigation of their offence; but as they think proper to conceal it, I muſt order Mrs. *Read* to be committed to the *Fleet*, and *Huggonſon* to be taken into cloſe cuſtody of the warden of the *Fleet*.

Green, an infant verſus *Ekins, Burnaby and Elizabeth his wife, and others, December* 6, 1742. Caſe 292.

A Bill was brought by the plaintiff, who is the eldeſt ſon of the defendant *Burnaby*, by *Elizabeth* his wife, who was the only daughter of Mr. *Green*, deceaſed, by his firſt wife, to have the truſts of the will of Mr. *Green*, his grandfather, performed, and to have marriage articles, made before the marriage of his father and mother, carried into execution, for his benefit, upon the following caſe.

Mr. *Green*, who was a brewer, had iſſue by his firſt wife, the defendant *Elizabeth*, who, in his life-time, had privately, and without his conſent, married Mr. *Burnaby*; and by his ſecond wife had iſſue another daughter, named *Frances*, who, at the time of making this will, and at his death, was an infant; and having a very conſiderable real eſtate, and a very large perſonal eſtate, deviſed ſeveral particular legacies to his wife, and to Mrs. *Burnaby*, and his daughter *Frances*; and gave directions to have his trade carried on after his death, for the benefit of thoſe who ſhould be intitled to the reſidue of his eſtate: And all the reſidue of his perſonal eſtate, he deviſed to any ſon, he ſhould have by his wife, at his age of twenty-one; and if no ſon, then to his daughter *Frances*, to be paid to her at her age of twenty-one, or marriage: But if it ſhould happen, that his daughter *Frances* ſhould depart this life before twenty-one, or marriage, and he ſhould have no other daughter born of his ſecond wife, who ſhould attain twenty-one, or marriage, then, and in ſuch caſe, if his daughter *Elizabeth Burnaby* ſhould have iſſue of her body one or more ſon or ſons, he gave and bequeathed the reſidue of his perſonal eſtate to ſuch ſon of his ſaid daughter as ſhould firſt attain the age of twenty-one; but if his daughter ſhould have no ſuch ſon or ſons, or having ſuch ſon or ſons, none ſhould attain the age of twenty-one, then, and in ſuch caſe, he gave and bequeathed the reſidue of his perſonal eſtate to *William Eakins Pier*, a defendant in this cauſe, ſubject to the payment of 4000*l.* to the daughter of his daughter *Burnaby*, in manner therein mentioned.

The queſtion was, whether the intereſt of the reſidue of *G.*'s perſonal eſtate, from the death of *Frances* his daughter, to the time it will veſt in the plaintiff his grandſon, muſt be accumulated, or whether it is an intereſt undiſpoſed of, and goes to the next of kin of the teſtator. *Lord Hardwicke was of opinion, that the intereſt muſt accumulate, and is a part of the reſidue, till the deviſe to the ſon of Mr.* Burnaby *veſts.*

Mr. *Green*, ſoon after making this will, died, and within half a year after his death, *Frances*, his daughter, died an infant, and the plaintiff being intitled, when of age, to the reſidue of this eſtate, brought his bill: And, upon this part of the caſe, the only queſtion was, whether the intereſt of the reſidue of this perſonal eſtate, from the death of *Frances*, the daughter, to the time it will veſt in the plaintiff, or any other ſon of Mrs. *Burnaby*, muſt be accumulated, and wait on the contingency; or whether (as the defendants con-

tend) it is an intereſt undiſpoſed of, and goes to the next of kin of Mr. *Green*, the teſtator.

Elizabeth Burnaby, by an agreement made on her father and mother's marriage, was intitled to 6000*l.* Mr. *Burnaby*, juſt before his marriage, ſigned a paper, whereby he agreed, that every thing which ſhould come to *Elizabeth*, by her father's death, ſhould go to them for their reſpective lives, and after the death of the ſurvivor, to the heirs of the body of *Elizabeth* by him begotten: As this was a limitation to the heirs of the wife, it veſted in her only, and the huſband conſenting, he decreed the 6000*l.* to be ſettled on her younger children.

As to the marriage articles, the caſe was, Mrs. *Elizabeth Burnaby* was under an agreement in writing, made on her father and mother's marriage, intitled to the ſum of 6000*l.* and had alſo expectancies on the death of her father; and Mr. *Burnaby*'s marriage with her being private, he, juſt before the marriage, drew up, and ſigned, a very ſhort paper, by way of articles, whereby it was agreed, that every thing which ſhould come to Mrs. *Burnaby*, by her father's death, or otherwiſe, ſhould go to them for their reſpective lives, and after the death of the ſurvivor, to the heirs of the body of Mrs. *Burnaby*, by him begotten.

For the eldeſt ſon, the plaintiff, it was inſiſted, that theſe articles ought to be executed for his benefit, and a ſettlement made on the eldeſt, and other ſons, as in all caſes of this kind had been done: But the eldeſt ſon being, under the grandfather's will, intitled to a very great eſtate, and the younger children of Mr. *Burnaby* having a very ſmall, or no proviſion, it was inſiſted, that the court, in this caſe, would ſo conſtrue the articles, that the whole ſhould go to them, or that a proviſion, at leaſt, ſhould be made for them out of this fund.

As to the point of the reſidue, Mr. Solicitor General inſiſted, that the word *reſidue* carried only that which would be ſo at the time when the will took effect, the death of the teſtator: For if the teſtator's daughter had then been of age, an immediate diviſion might have been made of it, and the remainder men can take no more under this deſcription than ſhe would have done; that if this was land, it is clear, that till the contingency happened, the eſtate would deſcend to the heir, and he would have the intermediate profits; ſo where a particular fund is given on a future contingency, the legatee cannot have it till that happens, and till then it is undiſpoſed of, and the next of kin muſt take it *ex proviſione legis:* For this purpoſe he cited the caſe of *Chapman* verſus *Bliſſet*, before Lord *Talbot*. *Caſes in his time* 145.

Where the teſtator deviſes the reſidue *per verba de præſenti*, no future intereſt, which accrues after the will takes place, can be part of it, and whether it veſts then, or on a contingency, is not material, for that is ſtill the thing given.

This reſidue, and the profits of it, are diſtinct intereſts, and for this purpoſe, he cited *Nicholls* verſus *Oſborn*, 2 *P. Will.* 419. If a particular legacy is given on a contingency, no intereſt is due, but the intereſt ſhall ſink into the reſiduum till that happens; and ſo held

held in the caſe of *Houghton* verſus *Harriſon*, before your Lordſhip, about a year ago, (*vide ante* 329.) This holds where a legacy is veſted *& ſolvendum in futuro*, except only in the caſe of legacies to children, where it is allowed for maintenance, for it has not been extended to grandchildren.

A reſidue is no other than a particular legacy of the ſeveral things which the teſtator dies poſſeſſed of undiſpoſed, and is the ſame as if particularly mentioned, and enumerated; therefore this muſt follow the rule of other legacies; one legatee of this ſame reſidue can take no more by that deſcription than another, yet, if conſtrued otherwiſe, as the contingencies on which they take ariſe at different times, what they take will be different.

If it is undiſpoſed, it was contended, that this being the intereſt from the death of *Frances*, it muſt be diſtributed to thoſe who were the next of kin of the teſtator at her death, and ſo her next of kin be excluded from any ſhare, becauſe it was a contingency to ariſe on her death.

LORD CHANCELLOR.

This laſt point ought clearly to be over-ruled, for in all diſtributions, the time of the death veſts the intereſt, though the equitable inteſtacy happens by contingency after; *Edwards* and *Freeman*, *Eq. Caſ. Abr.* 249. has been cited, as a caſe in point, to prove this; and *Studholm* verſus *Hodgſon*, before Lord *Talbot*, *July* 17, 1734, 3 *P. Wms.* 300. was cited as in point, that the intereſt ſhould accumulate as part of the reſidue.

During the life of *Frances* the daughter, the profits veſted in her, becauſe the reſidue did ſo; as it was a legacy payable at a future time, and deveſted on the contingency, and ſhe being a daughter, and this her portion, he decreed them to her repreſentatives.

As to the reſt of the profits which have and will accrue till the deviſe to the ſon of Mr. *Burnaby* veſts, I am of opinion, that the intereſt and profits muſt be conſidered as a part of the reſidue, and muſt accumulate.

A man may die partly teſtate, and partly inteſtate in this court, though not at law: But there is a great difference between a particular diſtinct part of the perſonal eſtate, and the whole reſidue of it, for when the whole is given, it is a contradiction in terms to ſay any part of that eſtate is undiſpoſed.

Though not at law, yet in this court a man may die partly teſtate, and partly inteſtate; but when a whole reſidue is given, it is a contradiction to ſay any part of that eſtate is undiſpoſed.

For

If a perſonal eſtate is increaſed by any event after the teſtator's death, it is part of the reſidue, and will paſs as ſuch, and ſo will the intereſt of that reſidue, for that intereſt is aſſets, and a part of the eſtate.

For whatever is claimed, is claimed as a part of his eſtate, and yet the whole reſidue of that eſtate is given away: The reſidue of a perſonal eſtate is nothing fixed, but a fluctuating intereſt, and if the perſonal eſtate is increaſed by any event after the death of the teſtator, it is part of the reſidue, and will paſs as ſuch; why then not the intereſt of that reſidue, for that intereſt is aſſets, and part of the eſtate; for if legacies are given, payable at a future time, and at the death of the teſtator the aſſets are deficient, but by profits in the mean time accruing, is become after ſufficient, all the legacies will be paid, for thoſe profits are part of the perſonal eſtate, and, if ſo, are part of the reſidue in this caſe. The only plauſible argument, *e contra*, is that which is drawn from real eſtates.

But there are many material differences between the profits of a real, and perſonal eſtate.

For in the caſe of real eſtates the thing it ſelf is not diſpoſed of, but deſcends in the mean time, and the heir has therefore a chattel intereſt till the contingency happens, and carries the profits with it.

A material difference between the profits of a real and perſonal eſtate; rents never can become part of the perſonal eſtate; but the profits of the perſonal eſtate, are the eſtate it ſelf. In the caſe of real eſtates, the thing it ſelf is not diſpoſed of, but deſcends till the contingency happens; perſonal eſtate neither deſcends nor goes to the next of kin, but is veſted in the executor.

But perſonal eſtate does not deſcend, or go to the next of kin, but is veſted in the executor, and this is a queſtion only relating to the truſt of it, where the intent of the teſtator muſt prevail. Another difference between them is, that in the one caſe the rents never could become part of the perſonal eſtate, but the profits of the perſonal eſtate are the eſtate itſelf. The teſtator has conſidered this as his perſonal eſtate after his death, by giving directions how to carry on the trade, *&c.* and the caſe of *Studholm* and *Hodgſon* is in point; And therefore I do accordingly decree the profits to accumulate.

As to the queſtion relating to the 6000*l.* on Mr. *Burnaby*'s marriage articles;

I think that is a point of more difficulty, for the eldeſt ſon has a very great proviſion, and the younger children have none.

The Rule of this court, where articles of this kind are made relating to real eſtates, has been to decree a ſtrict ſettlement.

This is a ſum of money not articled to be laid out in land, thoſe rules therefore do not extend to this caſe, for ſuch a ſettlement cannot be made, it muſt therefore be ſettled as perſonal eſtate.

To ſettle this as land, is giving the eldeſt ſon a greater intereſt in it than he would have if it was land; for in real eſtate, he would only have a contingency, with remainder over; here it would veſt abſolutely in him.

It would therefore be drawing a rule in this caſe by analogy from real eſtates, to defeat the intent of the parties.

By the legal conſtruction of theſe articles, this money is veſted in Mrs. *Burnaby* abſolutely.

And if that is the legal conſtruction, I cannot make any other to anſwer the intent; why ſhould I, if the huſband and wife will conſent to have this ſettled on the younger children?

The only objection is, that by holding this to be an abſolute intereſt in the wife, you veſt it in the huſband.

But this is not ſo here, for the limitation is to the heirs of the wife, and therefore veſts in her only, and not in him.

I may compare it to the caſe where by ſettlement of lands the wife has an eſtate *ex proviſione viri*, the court have refuſed to interpoſe to ſettle this eſtate otherwiſe, becauſe the intent will prevail ſince ſhe cannot alien by the ſtatute of the 11*th* of *Hen.* 7.

Where by ſettlement the wife has an eſtate *ex proviſione viri*, the court has refuſed to interpoſe to ſettle the eſtate otherwiſe.

Therefore Mr. and Mrs. *Burnaby* conſenting, the Chancellor decreed this to be ſettled on the younger children.

Stileman verſus *Aſhdown & al'*, *December* 8, 1742. Caſe 293.

THE bill was brought by an executor to have ſatisfaction out of the eſtate of the defendant's late father upon a judgment given by him to the plaintiff's teſtator, for 120 *l.* The defendant, the eldeſt ſon of the conuſor of the judgment, protects himſelf under a ſettlement made after the marriage of his father and mother in *May* 1694. in which the father was tenant for life, the mother tenant for life, and the defendant firſt tenant in tail.

A creditor, on the circumſtances of this caſe, decreed to be let in upon the eſtates jointly purchaſed by the father and his ſons, and a moiety of each directed to be ſold, and the money ariſing therefrom to be applied to the ſatisfaction of his judgment.

In 1700. the father made a ſmall purchaſe jointly with the defendant of 4 *l. per ann.* to them and their heirs.

In 1708. he made another joint purchaſe with his youngeſt ſon of 5 *l. per ann.* for 105 *l.* and ſettled it by way of proviſion for younger children, and paid the purchaſe money for both eſtates, and continued in poſſeſſion till his death, which happened in 1735.

The ſons afterwards entered upon theſe ſmall eſtates.

The plaintiff inſiſts that all the eſtates are ſubject to his judgment for 120 *l.* and that the ſettlement in 1694. was after marriage, and therefore voluntary.

The plaintiff having a right *primâ facie*, Lord *Hardwicke* put it upon Mr. Attorney General to begin as council for the defendant.

Who inſiſted that the father was not indebted at the time of the ſettlement, that it was made in conſideration of a marriage portion of two hundred and fifty pounds, and executed 37 years before the judgment, which was not confeſſed till 1721. and made too in purſuance of an agreement before the marriage.

But if the proof ſhould fail us here, the portion of the wife at leaſt will help us; and it is incumbent upon the plaintiff to ſhew that it was not paid at the time the deed bears date.

For though there is no receipt for the two hundred and fifty pounds indorſed upon the deed, yet it is no objection, becauſe at that time receipts upon the back were not ſo frequent as they are now.

Beſides, this court will not give a judgment creditor a better right than he has at law, and therefore he ought to have his remedy there.

The father and the ſons were joint purchaſers of the ſeveral eſtates in 1700 and 1708. and therefore the ſons were no truſtees for the father, as they were capable of taking the whole by ſurvivorſhip, and upon the death of the father all his right ceaſed, and the whole veſted in the ſons.

Mr. *Floyer* of the ſame ſide inſiſted, that in caſes of voluntary ſettlements, whether the court will deem them fraudulent or not, depends upon the circumſtances of the perſon at the time; here the father executed it for the benefit of younger children: He cited the caſe of *Duranda* verſus *Cooke*, before Lord Chancellor *King*, and *Sagittary* verſus *Hide*, 2 *Vern.* 44.

Several depoſitions were read to prove the father of the defendants in good circumſtances in 1694. in 1700. and in 1708. the times when the marriage ſettlement and the joint purchaſes were made.

Mr. *Brown* for the plaintiff,

Said it was highly improbable that the father's only view in the purchaſes ſhould be a proviſion for the children.

Becauſe with regard to the eldeſt ſon, the whole eſtate under the ſettlement in 1694. was ſecured to him, ſo that he was fully provided for: And therefore with reſpect to the plaintiff he can be conſidered in no other light than a ſtranger would be, who had joined in a purchaſe, with the father of the defendant.

This

This is taken on the footing of a jointenancy, and therefore is improper as a proviſion for a child, becauſe the father might have ſold a moiety, or if the ſon had married and even had children, and yet had died before the father, the other moiety would have ſurvived to the father.

All theſe circumſtances ſhew that it was merely a purchaſe for the benefit of the father, without any view to the advancement of the children, and it would be of dangerous conſequence to ſuffer a father by purchaſing in jointenancy with a ſon, to prevent creditors from being ſatisfied out of ſuch eſtates, upon the ſon's ſetting up a right of ſurvivorſhip, which did not accrue till ſome years after the debt exiſted.

There is one great difficulty he ſaid upon the plaintiff in this caſe, and that is to prove what the circumſtances of the defendant's father were twenty years before the judgment, for people who have been in good circumſtances, are credited a long time after they are in a a failing way, and therefore it is very difficult to point out the preciſe time when the father declined in his circumſtances.

As there is no other eſtate belonging to the father, and the whole is covered by joint purchaſes, the plaintiff muſt loſe his debt, unleſs theſe eſtates are liable.

LORD CHANCELLOR.

As to ſome things this caſe is extremely clear.

Firſt, as to the ſettlement in 1694. though made after marriage, yet being in conſideration of a portion which for any thing that appears was paid at the time, I am of opinion it cannot be impeached by ſubſequent creditors.

The ſettlement in 1694. being in conſideration of a portion paid at the time, though made after marriage, cannot be impeached by ſubſequent creditors.

The ſecond queſtion is as to the joint purchaſes, the firſt was made by the father and his eldeſt ſon on the 11*th* of *September* 1700, and the conſideration money is admitted to have been paid by the father.

The ſecond purchaſe was in 1708. and made by the father and *William Aſhdown* the youngeſt ſon, and the whole purchaſe money was advanced by the father.

It has been inſiſted on the part of the defendants, that theſe two purchaſes are to be conſidered, with reſpect to a moiety and on account of the ſurvivorſhip, as an advancement of the ſons, and conſequently they are intitled to retain the eſtate, and not liable to the plaintiff's judgment.

Now

Though the father pays the whole conſideration, yet, if the purchaſe is made in the name of a younger ſon, the heir cannot maintain it is a truſt for the father.

Now as to that, the general rule has been admitted, and has been long the doctrine of this court, that notwithſtanding the father pays the whole money, yet if the purchaſe is made in the name of a younger ſon, the heir of the father ſhall not inſiſt it is a truſt for the father.

But the preſent caſe differs from this rule, or any other that I remember.

In the judgment of Lord *Hardwicke*, the caſes have gone full far enough in favour of advancements.

And if I can find any material difference, I ſhall in my own judgment be inclinable to relieve the creditor, for though it may be proper *ſtare deciſis*, yet I have thought the caſes have gone full far enough in favour of advancements, and that I ought not to carry it further.

The reaſon why a purchaſe in the ſon's name, though the poſſeſſion continued in the father, has been held an advancement of the ſon, is, becauſe the father was his natural guardian during his minority.

It muſt be admitted that in ſome of the caſes which have been before the court, the father has continued in Poſſeſſion where the purchaſe has been made ſingly in the name of the ſon, and yet held an advancement of the ſon, and for this reaſon, becauſe the father is the natural guardian of the ſons during their minority.

A purchaſe in the names of father and ſon, *as joint-tenants*, is no advancement of the ſon, as it does not anſwer the purpoſe, for till a diviſion, the father has the poſſeſſion of the whole, and even after it a moiety, beſides the chance of the other moiety by ſurvivorſhip.

Here the purchaſe is in the names of father and ſon as jointenants, now this does not anſwer the purpoſe of an advancement, for it intitles the father to the poſſeſſion of the whole till a diviſion, and to a moiety abſolutely, even after a diviſion, beſides the father's taking a chance to himſelf of being a ſurvivor of the other moiety: nay, if the ſon had died during his minority, the father would have been intitled to the whole by virtue of the ſurvivorſhip, and the ſon could not have prevented it by ſeverance, he being an infant.

Where a father in a purchaſe takes an eſtate in it to himſelf for life, with remainder to his ſon in fee, as the father has the profits for life, the eſtate is liable to the creditor.

Suppoſe a ſtronger caſe, that the father had taken an eſtate in the purchaſe to himſelf for life, with remainder to his ſon in fee, ſhould this prevail againſt the creditor? no, certainly, for the plaintiff's father having the profits for life, and the ſon only a remainder, the eſtate would have been liable.

A material conſideration for the plaintiff is, that the father might have other reaſons for purchaſing in joint-tenancy, namely, to prevent dower upon the eſtate, and other charges, *&c.*

Then conſider how it ſtands in reſpect of the creditor; a father here was in poſſeſſion of the whole eſtate, and muſt neceſſarily appear to be the viſible owner of it, and the creditor too would have had a right by virtue of an *Elegit* to have laid hold of a moiety, ſo that it differs extremely from all the other caſes.

Here the father was in poſſeſſion of the whole eſtate, and neceſſarily appeared the viſible owner, ſo that the creditor by an *elegit* might have laid hold of a moiety, which differs it from all the other caſes.

Now it is very proper that this court ſhould let itſelf looſe as far as poſſible, in order to relieve a creditor, and ought to be governed by particular circumſtances of caſes.

And what can be more favourable for the plaintiff, than that every foot of the eſtate is covered by theſe purchaſes; and unleſs I let him in upon theſe eſtates, the plaintiff has no poſſibility of being paid.

It is not neceſſary that a man ſhould actually be indebted at the time he enters into a voluntary ſettlement to make it fraudulent; for if a man does it with a view to his being indebted at a future time, it is equally fraudulent, and ought to be ſet aſide; and therefore I ſhall decree the creditor in this caſe to be let in upon the eſtates jointly purchaſed by the father and ſon.

Not neceſſary a man ſhould be actually indebted at the time he enters into a voluntary ſettlement to make it fraudulent; for if he does it with a view to his being indebted at a future time, it is equally ſo, and ought to be ſet aſide.

I think, taking it all together, the preſent caſe comes very near the caſe of *Chriſt's Hoſpital* verſus *Budgin et Ux'*, 2 *Vern.* 683. *

Lord *Hardwicke* ordered and decreed that the eſtate of the defendant's father which was in mortgage, and a moiety of the premiſſes purchaſed in 1700. and alſo a moiety of the premiſſes purchaſed in 1708. be ſold, and the money ariſing by ſale of the mortgaged premiſſes be applied firſt in payment of the mortgage, and in the next place towards ſatisfaction of what ſhall be found due to the plaintiffs for principal and intereſt on their judgment and coſts thereon, and in this court; and if that is not ſufficient, then the money ariſing on the ſale of the two moieties ſhall be applied towards ſatisfaction of what ſhall be remaining due to them; and his Lordſhip decreed that the ſurplus of the money ariſing by the ſale of the premiſſes purchaſed in 1700 ſhould be paid to the defendant *John Aſhdowne*, and the ſurplus of the money ariſing by ſale of the premiſſes purchaſed in 1708 ſhould be paid to the defendant *William Aſhdowne*.

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* There a huſband lent out money in the names of himſelf and his wife upon mortgages and bonds, and dies.

Lord Keeper *Harcourt* looked upon the wife to be in nature of a joint purchaſer; and decreed ſhe was intitled to the mortgages and bonds againſt the heirs at law, *but admitted in caſe of creditors it might be fraudulent.*

Caſe 294. *Seymour* verſus *Bennet*, *Abbot and others*, *December* 15, 1742.

The principal regiſters in the prerogative office diſagreeing about the appointment of a clerk, the deputy nominated *Abbot*, who for a twelvemonth officiated, and received the fees, amounting to 500*l.* Lord *Hardwicke held, as he was the* officer de facto, *he had a right to the ſtated fees, and to retain them without account; and diſmiſſed the bill as againſt him with coſts.*

THE two principal regiſters in the prerogative office of *Canterbury*, diſagreeing about the appointment of a clerk in this office; the deputy regiſter took upon him to nominate the defendant *Abbot*, who for a twelve-month officiated, and conſtantly received the fees, amounting to 500*l.* in the whole.

The plaintiff, who is one of the regiſters, inſiſts, that *Abbot* ought to be allowed only a ſmall ſalary, as an under officer, and that he is liable to account to him, and the other principal regiſter, for the whole profits.

LORD CHANCELLOR.

There is no foundation at all for this bill; for to be ſure, Mr. *Abbot*, as he is appointed to officiate in this place, is the *officer de facto*, and of conſequence intitled to receive the ſtated fees, and to retain them, without account; nor is there any other perſon who can maintain an action for them beſides himſelf; and therefore the bill muſt be diſmiſſed, as againſt him, with coſts.

The next queſtion is, in whom the right of nomination of the office of clerk to the regiſter belongs, whether it is the right of the ſurviving grantees, under the grant of the late archbiſhop? And I am of opinion it is in the ſurviving grantees.

Not only the pecuniary profits are declared by the grant to go to the *ceſtuy que truſts*, but it is alſo declared, that they ſhall have the nomination of the deputy, but to be approved of by the archbiſhop, and his ſucceſſors.

This office has been compared to the caſe of an advowſon, but that is only a bare preſentation, where the biſhop has a right to preſent on lapſe, and has nothing more to do but to ſee it filled with a proper perſon.

But the caſe of an office is extremely different, becauſe of the labour and ſkill required, and the perſon being puniſhable if he does any thing fraudulent in the exerciſe of it, or is guilty of any acts of extortion.

Upon

Upon the whole, Mr. *Seymour* and Mr. *Bennet* have the ſole right of nominating the clerk; but if they cannot agree about the nomination, the court cannot help it.

The right of nomination of a clerk to the regiſter, is in the ſurviving grantees, in the grant of the late archbiſhop Doctor *Wake*.

It is like the caſe of a preſentation; if there are ſeveral *ceſtuy que truſts*, and they do not all agree, there can be no nomination; or, as in the caſe of jointenants and tenants in common, while they have a joint intereſt, and before ſeverance, they muſt all agree, or no act can be done.

Where there are ſeveral *ceſtuy que truſts* of preſentation, and they do not all agree, there can be no nomination. So in the caſe of jointenants before ſeverance, they muſt all agree, or no act can be done.

But then I may do here as in a partition caſe, where there are parceners of an advowſon, who cannot agree in one perſon, the court will direct the parceners to draw lots, who ſhall have the firſt preſentation.

Where there are parceners in an advowſon, who cannot agree in one perſon, the court will direct them to draw lots who ſhall have the *firſt* preſentation.

So here I will do the ſame, and direct the plaintiff *Seymour*, and the defendant *Bennet*, to draw lots, who ſhall nominate firſt a clerk, to fill up the vacancy, which is made by the death of Mr. *Spurvill*.

Lord *Hardwicke* directed the two regiſters to draw lots, who ſhall firſt nominate a clerk, to fill up a late vacancy.

Lord Tenham verſus *Herbert*, *December* 17, 1742. Caſe 295.

THE plaintiff brought his bill, in order to eſtabliſh a right to an oyſter fiſhery, and to be quieted in the poſſeſſion of it, againſt the defendant *Herbert*, who claims the piece of ground where this fiſhery is, as belonging to his manor.

The defendant demurred to the plaintiff's bill, brought to eſtabliſh a right to an oyſter fiſhery, and to be quieted in the poſſeſſion of it, as being a matter properly triable at law. *Lord Hardwicke declared, that where the right of a fiſhery is in diſpute only between two Lords of manors, they can neither come here, till it is firſt tried at law, and therefore allowed the demurrer.*

The defendant demurred to this bill, as it is a matter properly triable at law.

LORD CHANCELLOR.

Undoubtedly there are ſome caſes, in which a man may, by a bill of this kind, come into this court firſt; and there are others where he ought firſt to eſtabliſh his right at law.

Where a man ſets up an excluſive right, and the perſons who controvert it are numerous, and he cannot by one action at law quiet that right, he may come here *firſt*, which is called *a bill of peace*, and the court will direct an iſſue to determine the right, as between Lords of manors and their tenants, or tenants of one manor and another.

It is certain, where a man ſets up a general excluſive right, and where the perſons who controvert it with him are very numerous, and he cannot, by one or two actions at law, quiet that right, he may come into this court firſt, which is called *a bill of peace*, and the court will direct an iſſue to determine the right, as in diſputes between Lords of manors and their tenants, and between tenants of one manor and another; for in theſe caſes there would be no end of bringing actions of treſpaſs, ſince each action would determine only the particular right in queſtion between the plaintiff and defendant.

As to the caſe of the corporation of *York*, and Sir *Lionel Pilkington*, the plaintiffs there were in poſſeſſion of the right of fiſhing upon the river *Ouze*, for nine miles together, and had conſtantly exerciſed that right; and as this large juriſdiction entangled them with different Lords of manors, it would have been endleſs for the corporation to have brought actions at law.

But where a queſtion, about a right of fiſhery, is only between two Lords of manors, neither of them can come into this court till the right is firſt tried at law.

Lord *Tenham* does not charge in this caſe any poſſeſſion for the laſt 38 years, ſo that this is in the nature of an ejectment bill; the plaintiff ſays, that this piece of ground *aquâ cooperta* belongs to him; Mr. *Herbert* inſiſts, it belongs to him; ſo that this may very properly be determined at law, as it is a mere ſingle queſtion, to try the right between two perſons; and it is not like the caſe of the corporation of *York*, who muſt have gone all round the compaſs to have come at their right at law.

Therefore the demurrer muſt be allowed.

Caſe 296. *Blanchard* verſus *Hill*, *December* 18, 1742, *Laſt ſeal after Michaelmas term.*

The plaintiff moved for an injunction to reſtrain the defendant from uſing the *Mogul* ſtamp on his cards, ſuggeſting the ſole right to be in the plaintiff, having appropriated the ſtamp to himſelf, conformable to the charter granted to the card-makers company by King *Charles* the Firſt. *Lord Hardwicke denied the injunction, and ſaid, he knew no inſtance of reſtraining one trader from making uſe of the ſame mark with another.*

A Motion was made, on behalf of the plaintiff, for an injunction, to reſtrain the defendant from making uſe of the Great *Mogul* as a ſtamp upon his cards, to the prejudice of the plaintiff, upon a ſuggeſtion, that the plaintiff had the ſole right to this ſtamp, having appropriated it to himſelf, conformable to the charter granted to the card-makers company, by King *Charles* the Firſt.

LORD

LORD CHANCELLOR.

I think the intention of the charter is illegal, though, indeed, all the clauſes that eſtabliſh the corporation, and give them power to make by-laws, are legal.

In the firſt place, the motion is to reſtrain the defendant from making cards with the ſame mark, which the plaintiff has appropriated to himſelf.

And, in this reſpect, there is no foundation for this court to grant ſuch an injunction.

Every particular trader has ſome particular mark or ſtamp; but I do not know any inſtance of granting an injunction here, to reſtrain one trader from uſing the ſame mark with another; and I think it would be of miſchievous conſequence to do it.

Mr. Attorney General has mentioned a caſe, where an action at law was brought by a cloth-worker, againſt another of the ſame trade, for uſing the ſame mark, and a judgment was given that the action would lie. *Popb.* 151.

A cloth-worker may maintain an action againſt another of the ſame trade, for uſing his mark, where it is done with a fraudulent deſign to put off bad cloths, or to draw away cuſtomers.

But it was not the ſingle act of making uſe of the mark that was ſufficient to maintain the action, but doing it with a fraudulent deſign, to put off bad cloths by this means, or to draw away cuſtomers from the other clothier: And there is no difference between a tradeſman's putting up the ſame ſign, and making uſe of the ſame mark, with another of the ſame trade.

In the caſe of monopolies, the rule the court has governed itſelf by, is, whether there is any act of parliament under which this reſtriction is founded.

This court will never eſtabliſh a right claimed under a charter, unleſs there has been an action to try the right at law.

But the court will never eſtabliſh a right of this kind, claimed under a charter only from the crown, unleſs there has been an action to try the right at law.

The court would not do it, even in the caſe of the ſole printing of bibles and common prayer books, till a trial was firſt had.

If the injunction is to be obtained, it muſt be upon the charter of the crown.

But then it muſt be conſidered upon the intention of the charter, what was the end of directing the marks there.

This was one of the monopolies ſo frequent in *James* the Firſt's time, and continued through all his reign, but did not laſt long in his ſucceſſors:

I take this to be one of thoſe monopolies which were ſo frequent in King *James* the Firſt's time, and continued through all his reign, but did not laſt long in his ſucceſſors: I obſerve too, the application for this very charter was in King *James* the Firſt's time, though not compleated till the beginning of King *Charles* the Firſt's reign.

In the firſt place, the deſign of granting this charter, was to raiſe a ſum of money for the crown.

Here is a clauſe likewiſe for prohibiting the importation of cards from foreign parts: Could ſuch a clauſe be ſupported now? Impoſſible! As it is intirely illegal.

There is another clauſe that confines the making of cards to *London*, and ten miles about it, which is a plain monopoly, and directly againſt law.

The duty here, is two ſhillings a groſs upon cards; and the receiver entitled to one half of the duty, under the charter.

There is an authority to the card-makers, to ſeal their own cards; and every particular maker ſhall have his own ſtamp or mark, ſo that the receiver of the duty may know who is the maker of the cards.

The deſign of this was, that it might be plain to the receiver, who the cards belonged to, and that the receiver might be enabled yearly to make up his account relating to the duty.

Now as this was illegal, the payment of this duty has been diſcontinued long ſince.

This, then appears to have been the primary end of theſe marks.

There is another clauſe in the charter, that in order every card-maker may know his cards, from another card-maker, each trader ſhall lodge his mark or ſtamp with the receiver, *to prevent any fraud upon our loving ſubjects.*

This is a colourable end, but if any weight was to be laid upon theſe colourable recitals, it would be eſtabliſhing every other monopoly.

For all the world knows, that there is a pompous recital in every monopoly, of the great benefit to trade, accruing from ſuch charters of reſtriction.

There

There is another thing obſervable too, that it is impoſſible to carry this clauſe into execution; for the duty being illegal, and ſunk, the receiver ſunk with it, ſo that there is no perſon to receive the ſtamps or marks.

An objection has been made, that the defendant in uſing this mark, prejudices the plaintiff by taking away his cuſtomers.

But there is no more weight in this, than there would be in an objection to one innkeeper, ſetting up the ſame ſign with another.

The objection of the defendant's taking away the plaintiff's cuſtomers by uſing the ſame mark, is of no more weight than to one innkeeper's ſetting up the ſame ſign with another.

There is a fact ſet out by the defendant in his anſwer, which is not at all denied by the plaintiff, that the card-makers uſe quite different marks from what they did formerly; which ſhews this charter is grown obſolete, or otherwiſe all card-makers if they obſerved the charter, would adhere to that ſort of ſtamps which are directed under it.

Upon the whole, there are no grounds in this caſe to grant an injunction againſt the defendant, till the hearing of the cauſe.

Bennet verſus *Lee*, *December* 20, 1742. Caſe 297.

A Petition had been preſented on behalf of *Francis Lee*, heir at law to Sir *Francis Lee*, grandfather of Sir *John Lee*, for a bill of review upon a ſuggeſtion of new evidence diſcovered ſince the decree, in the former cauſe, and which was not in his power at the time of the decree, and this was ſupported by affidavits.

Lord *Hardwicke* doubted whether an infant can, before he comes of age, put in a new anſwer, ſo as to rehear the cauſe over again; for if there ſhould be a decree againſt him on the ſecond hearing, he may with as much reaſon put in a third anſwer, which would occaſion infinite vexation.

The material evidence that is inſiſted upon is a deed of ſettlement in 1684. made by the father of Sir *John Lee*, in which all the uſes under that ſettlement are ſpent, and the reverſion in fee is deſcended upon *Francis Lee* and his brother *Richard Lee*, who is an infant, in gavelkind.

It was argued on the part of *Richard Lee* that he, being an infant, cannot be precluded by the decree, from varying his defence in the former cauſe even before he comes of age.

LORD CHANCELLOR.

The doubt with me is, whether an infant can, before he comes of age, put in a new anſwer, ſo as to rehear the cauſe all over again; for if there ſhould be a decree againſt him upon the ſecond hearing, he may with as much reaſon put in a third anſwer, and make the proceedings endleſs, and by this means leave it in the power of a guardian

guardian to put in a new anſwer for him every year, during his minority, and occaſion infinite vexation. *

On the ſide of the plaintiff *Bennet* they ſet up three recoveries in 1703. 1718. and 1736. which, if they take in the *Kentiſh* eſtate claimed by the defendants, is a compleat bar to the petition.

Some objections being made to the validity of theſe recoveries, the cauſe was ordered to ſtand over, that the petitioners may have time to look into them.

Caſe 298. *Baker* verſus *Hart*, *December* 22, 1742.

The parties intereſted in an order for the appointment of a receiver, take upon them to print it with a recital of the material facts in the cauſe relevant to the order, and diſperſe it among the tenants: ſome other parties inſiſted this was a contempt of the court. Lord *Hardwicke* held it to be no contempt, but ſaid at the ſame time he did not approve of ſuch a practice.

THERE was an order made juſt before the laſt long vacation, for the appointing a receiver of the rents of an eſtate in the iſland of *Sheppey*, belonging to the late admiral *Hoſier*.

It being neceſſary for the Maſter to inquire into the circumſtances of the perſon, propoſed for a receiver, and likewiſe of his ſureties, it was impoſſible to complete it before the long vacation, ſo that the parties intereſted in this affair were apprehenſive that the tenants would pay their rent into an improper hand, and therefore upon conſultation with the Maſter how they might prevent this inconvenience, he adviſed them to print the order with the recitals of the moſt material facts in the cauſe, relevant to the order, and to diſperſe it among the tenants, which was done accordingly.

Some other parties in the cauſe apply now by petition to the court, inſiſting that the printing this order was a contempt of this court, and eſpecially the recital part of it, which as it is ſingle and detached from the reſt of the cauſe, may look in the eye of the world, as a reflection upon the perſons named in them.

LORD CHANCELLOR.

I am very far from approving of the method which has been taken of printing this order, but will always diſcountenance ſuch practice whenever I meet with it.

As to this particular caſe, it is not at all like the caſe of *Huggonſon*, the printer of the *Champion*, becauſe there he did not *verbatim* print the proceedings in the cauſe, between the executors of major *Roach*

* *N. B.* In the caſe of *Richmond & Ux'* verſus *Tayleur*, 1 *P. Wms.* 735. it was held that an infant aggrieved by a decree is not bound to ſtay till he is of age, but may apply as ſoon as he thinks fit to reverſe it: and may do this either by bill of review, rehearing, or original bill, alledging ſpecially the errors in the former decree.

and his widow, but by way of narrative took upon him to abuſe ſome perſons, who had made affidavits in the cauſe, and likewiſe the executors, and therefore extremely different from the preſent caſe; for here does not appear the leaſt intention of reflecting upon the perſons named in the printed order, but done merely by the advice of the Maſter, to prevent the tenants from paying the rent improperly, and to impound it in their hands, till there ſhould be a perſon appointed by the Maſter to receive it.

I could wiſh that the orders of this court, were framed with the ſame ſimplicity, as orders made by the courts of common law; and to be ſure in a great many inſtances they might; but in ſome ſpecial orders, the recitals of the principal facts which induced the court to make theſe orders, are neceſſarily inſerted, and as the drawing orders in Chancery have been for a long time practiſed in this manner, I will not take upon me to alter the courſe of them.

As the manner of drawing orders here is of long ſtanding, Lord *Hardwicke* ſaid he would not alter the courſe of them, but wiſhed they were framed with the ſame ſimplicity as orders made by the courts of common law.

As to the complaint itſelf in the preſent caſe, I am of opinion upon the particular circumſtances, and plain intention in doing it, that though it is not a practiſe I approve of, yet it was innocently done, and conſequently was no contempt of this court; and as to this part of the petition his Lordſhip ordered the ſame to de diſmiſſed.

Davy verſus *Barber*, *January* 15, 1742. Caſe 299.

SIR *George Carey* and Mr. *William Carey* had ſeveral eſtates in the weſt of *England*, which were very much incumbered; on the death of Sir *George*, his eſtate deſcended to *William*: *William* died, and Mr. *Barber* married his heir at law, who by that means became intitled to both theſe eſtates, and had likewiſe a conſiderable mortgage upon them which was prior to any of the incumbrances.

Where a purchaſer has an advantage by the dropping in of lives, the court will direct an inquiry, what intereſt was proper to be paid by him on that account.

In 1727. three bills were brought by Mr. *Davy* and others, who were creditors of Sir *George* and of *William* againſt *Barber*, in order to have a ſatisfaction out of theſe eſtates.

Under a decree for ſale of theſe eſtates, Mr. *Phillips* bid 8020*l.* and in 1730. was confirmed the beſt purchaſer at that ſum.

Mr. *Phillips* was deſirous of being let into poſſeſſion in purſuance of his purchaſe, but Mr. *Barber* has continued in poſſeſſion to this time as mortgagee, and it was but lately that his mortgage was ſatisfied.

By reaſon of this delay ſeveral lifehold eſtates are dropped in, and by that means the eſtates which Mr. *Phillips* bought are now worth 2000*l.* more than they were at the time he was confirmed the beſt purchaſer.

Mr. *Phillips* petitions to be let into poſſeſſion, and Mr. *Barber* and the creditors pray that the bidding may be opened.

Mr. *Phillips* and Mr. *Barber* came to an agreement in court, that Mr. *Phillips* ſhould pay Mr. *Barber* 1300*l.* more than the purchaſe money, and in conſideration thereof Mr. *Phillips* ſhould be let into poſſeſſion.

LORD CHANCELLOR.

I am of opinion that the proper direction will be, that the 1300*l.* be added to the ſum of 8126*l.* which Mr. *Phillips* in the name of Mr. *Hamlyn* had before bid for the eſtates in queſtion, and that Mr. *Barber*'s mortgage be paid in the firſt place, and thereupon he muſt aſſign his mortgage to truſtees, to be approved of by the Maſter, in truſt to attend the inheritance purchaſed by Mr. *Hamlyn*; that ſuch deeds as relate to other eſtates as well as the purchaſed eſtates ought to be lodged in the hands of the Maſter for the benefit of all parties, ſubject to further order, and Mr. *Hamlyn* to be at liberty to take copies of them, and the reſidue of the money to be placed out in the bank to the credit of the accountant general, and thereupon Mr. *Hamlyn* to be let into poſſeſſion.

The dropping in of lives on eſtates in the weſt of *England*, is conſidered not as accidental, but as annual profits.

In the weſt of *England* eſtates are conſtantly let out upon lives, and ſmall conventionary rents reſerved, but the chief profits ariſe from the dropping in of lives, which is not conſidered as accidental, but as part of the annual profits of the eſtate.

From 1730. when the report was abſolutely confirmed, neither Mr. *Hamlyn* nor Mr. *Phillips* have been let into poſſeſſion, but have been obſtructed by Mr. *Barber*, who ſeems to have had ſome grounds for it on account of a large mortgage on theſe eſtates prior to any body, and it was but reaſonable that he ſhould be ſatisfied; however, the eſtate is worth a great deal more by the dropping in of lives than it was at the time the Maſter's report was confirmed.

The queſtion then is, who is to have this advantage, or what recompence is to be made for it?

If the purchaſer under a private contract pay the purchaſe money at the time fixed, he will be chargeable with intereſt; as he muſt bear any loſs, ſo likewiſe will he be intitled to any profits that ariſe from the eſtate.

Now as to that, when purchaſes of this nature are made under private contracts between particular perſons, there is no great difficulty in the matter, for then a time is generally fixed for payment of the purchaſe money, and if the purchaſer does not pay the money, then he will be chargeable with intereſt; and as he muſt bear any loſs which happens in the eſtate, ſo likewiſe will he be intitled to any profits which ariſe from it; beſides it is in the breaſt of the court whether they will decree the contract to be ſpecifically carried

into

into execution, when any extraordinary advantage ariſes by an accident of this nature: and in other kinds of caſes the court has conſidered biddings a good deal under their diſcretion, ſo that if they think proper they may leave the party to his remedy at law.

But the preſent caſe is of a different nature, being a bidding under a decree of this court, and upon which this court muſt finally make a determination.

The purchaſer here has plainly a conſiderable advantage by the dropping in of lives, and had it not been for the agreement now made between Mr. *Barber* and Mr. *Hamlyn*, I ſhould have inclined to direct an inquiry what intereſt was proper to be paid by the purchaſer; for if the court was not to give ſuch direction, there would be a manifeſt injuſtice.

But in conſideration of Mr. *Hamlyn*'s agreeing in court to pay 1300*l.* more, I do think he is intitled to the advantage ariſing from the dropping in of lives.

Spinks verſus *Robins and Cope*; and by a croſs bill *Robins* verſus *Spinks, Trent and others*, *January* 27, 1742.

Caſe 300.

THE original bill was brought by the plaintiff as a reſiduary legatee of the late Mr. *Spinks* to have it placed out for his benefit by the defendants the executors of the will, and was merely of courſe; but the material queſtion aroſe on the croſs bill and upon this caſe.

S. by a codicil without any date gives 1000*l.* apiece to *Mary* and *Sarah Robins*, and if either die before their legacies are paid, the whole to the ſurvivor; each of the legacies directed to remain in the executor's hands till legatees attain 21. *S.* afterwards enters into two bonds, one to *Mary*, and another to *Sarah*, reciting he was deſirous to provide for their maintenance; each of the bonds were in the penalty of 4000 *l.* for ſecuring 2000 *l.* provided they marry in his life-time with his conſent, or in caſe they ſurvive him. As the principal ſums given by the bonds are upon two contingencies, they ought not to be conſidered as a ſatisfaction of the legacies under the codicil.

Mr. *Spinks* the teſtator by a codicil without any date gives 1000*l.* apiece to the plaintiffs *Mary* and *Sarah Robins*, (the daughters of Mrs. *Robins* a widow, with whom he lived for ſeveral years till the time of his death) and if either of them ſhould die before their legacies were paid, then he gave the whole to the ſurvivor, and directed that each of the ſaid two legacies ſhould remain in the hands of his executors, till they attained the age of 21.

He afterwards enters into two bonds, one to *Mary* and the other to *Sarah Robins*, reciting that for divers good cauſes and conſiderations he is deſirous to make a proviſion for and towards their maintenance.

Each

Each of the bonds were in the penalty of 4000*l.* for ſecuring 2000*l.* apiece to them, provided they ſhould marry in his life-time, with his conſent, or in caſe they ſhould ſurvive him.

Mr. Attorney General, council for the defendants, in the croſs cauſe inſiſted, that the bonds are to be conſidered as given in ſatisfaction of the legacies under the codicil.

A legacy to a daughter under the will of her father, held to be ſatisfied by his giving her a marriage portion afterwards.

And for this purpoſe, cited *Tapper* verſus *Chalcroft*, 11 *Feb.* 1739. *before Lord Hardwicke*; where it was held, that a legacy to a daughter, under the will of her father, was ſatisfied by his giving her a marriage portion afterwards: He cited likewiſe *Hartop* verſus *Whitmore*, 1 *P. Wms.* 681. and *Jenkins* verſus *Powell*, 2 *Vern.* 115. *Webb* and *Webb*, *Ventr.* 347.

Mr. *Chute*, for the plaintiffs the *Robins's*, cited *Atkinſon* verſus *Webb*, 2 *Vern.* 478. and inſiſted that the words for and towards the maintenance in the bond, *ex vi termini* imply, that it is not the whole he intended to give them, and therefore the 1000*l.* under the codicil may be conſidered as an additional portion.

LORD CHANCELLOR.

The general rule which has been laid down in the caſes is, where the portion has been actually paid.

But I do not remember any caſe that comes up to the preſent, where the principal ſum is given upon two contingencies, one of marrying with conſent in his life-time, and the other in caſe they ſhould ſurvive him, ſo that it might never take effect, for they might marry without his conſent, or die before twenty-one.

The caſes that have been cited to me have been of portions from parents to children, there the preſumption is, that the parent is paying the debt of nature.

I will not ſay, but there may have been caſes alſo between collateral relations, as between uncle and niece, ſtanding in *loco parentis:* but I do not remember in any caſe between ſtrangers, where a man firſt gives a legacy by will, and afterward in his life time, a different ſum to the ſame perſon by bond, that the one has been held to be in ſatisfaction of the other; for to extinguiſh a legacy by ſuch a conſtruction, would be a very extraordinary ſtretch of this court.

The words by which the legacies are given in this will are not at all in the terms of *a portion*, neither is the word *portion* ſo much as mentioned.

What weighs with me very ſtrongly is, that the money given by the bond, is upon a contingency, and therefore abſolutely uncertain, whether one ſhilling of the principal ſum will become due or not.

Now, in the conſtruction upon double portions, it has always been of weight, that they were both certain.

Formerly, the circumſtance of time when the portion was to be paid, had ſome weight in determinations, but latterly, it has been laid out of the caſe.

Here, it would be extremely unjuſt; for if either of theſe gentlewomen had married in the life-time of Mr. *Spinks*, without conſent, it would have been a forfeiture of the bond.

Mr. Attorney General ſays, that it was contingent, but when the event takes place, it is certain.

Now, a caſe may be put, which will clear the preſent caſe from Mr. Attorney's objection.

For, ſuppoſe a man gives a legacy to another, to whom he is indebted, this is a ſatisfaction, if it is equal, or exceeds the debt: But where a legacy is given upon a contingency, it has never been held to be a ſatisfaction; for in theſe caſes, it muſt be ſo at the time, and not uncertain whether the legacy will take effect or no.

A legacy left to a creditor is a ſatisfaction, if it is equal, or exceeds the debt; otherwiſe, if given upon a contingency.

This caſe is within the ſame reaſoning, and ought to be determined accordingly.

Lord *Hardwicke* declared, therefore, that the 2000*l.* and intereſt at the rate of 4 *per cent.* due upon the bond entered into by the teſtator to *Mary Robins*, now married to *Robert Trent*; and alſo the legacy of 1000*l.* given by the codicil of Mr. *Spinks* to *Mary Robins*, with the intereſt thereof, are ſubject to the truſts in the articles entered into by *Mary Robins* with *Robert Trent*, and decreed that the articles be performed; and that what ſhall be found due for the intereſt of the two ſums of 1000*l.* and 2000*l.* *before the marriage*, be paid to *Robert Trent*, the huſband; and what ſhall be found due for the arrears and growing payments of the intereſt of *the* 1000*l.* from the time of the marriage, be paid to *Mary*, the wife, for her ſeparate uſe, according to the articles; and that what ſhall be found due for the arrears and growing payments of the intereſt of the 2000*l.* from the time of the marriage, until a ſettlement ſhall be made, be alſo paid to *Mary*, for her ſeparate uſe.

Caſe 301. *Mellor* verſus *Lees*, *February* 5, 1742. *Rehearings.*

THIS caſe came before the Chancellor upon an appeal from the *Rolls.*

The plaintiff's grandfather, in 1689, mortgaged the eſtate in queſtion, to the *Whiteheads*, they afterwards mortgaged it to *Cartwright* and *Heywood*, and their heirs, for 200 *l.* who, to ſecure the intereſt, leaſed the eſtate to the plaintiff's father, in *June* 1689, and to his aſſigns, for 5000 years, at 12 *l.* a year rent for the three firſt years, and 10 *l.* a year rent for the remainder of the the term; and if at three years end, the 200 *l.* was paid, and intereſt, then the premiſſes were to be reconveyed: Receipts given, ſometimes for intereſt, and ſometimes for a rent-charge, the laſt in 1730. the 200 *l.* lent was charity-money, directed to be laid out in the purchaſe of lands in fee, and the rents to be applied for clothing 24 needy houſe-keepers. In 1738, the plaintiff gave notice he would pay in the money, but the defendant refuſed to take it, and inſiſted it was an abſolute purchaſe, *and ſo decreed by the* Maſter of the Rolls; *and on appeal,* Lord Hardwicke *being of the ſame opinion, affirmed the decree.*

A mortgage was made of an eſtate by the plaintiff's grandfather, *Thomas Mellor*, in 1689, to *John* and *James Whitehead*, the *Whiteheads* afterwards, on the 5th of *June* 1689, mortgaged the ſame eſtate to *Cartwright* and *John Heywood*, and their heirs, for ſecuring 200 *l.* to which *Thomas* and his ſon *John Mellor* were parties; and *Cartwright* and *Heywood*, in order to ſecure to themſelves the intereſt, made a leaſe to the plaintiff's father, *John Mellor*, dated the 12th of *June* 1689. and to his aſſigns, for 5000 years, at the rent of twelve pounds a year, for the three firſt years, and ten pounds a year for the remainder of the term; and if in the ſpace of three years, the 200 *l.* was paid, and the intereſt, then the premiſſes were to be re-conveyed.

Receipts have been given ſince, ſometimes for intereſt, and ſometimes for a rent-charge; the laſt receipt was in 1730.

The 200 *l.* lent, was money left under one *Sutton*'s will in 1687, and directed to be laid out in the purchaſe of lands in fee in *Lancaſhire*, or *Cheſhire*, and the rents of it, when purchaſed, to be applied towards clothing 24 aged and needy houſe-keepers.

The plaintiff, the 20th of *January* 1738, gave notice that he would pay in the money, but the defendant, a new truſtee of the charity, refuſed to take it, and inſiſted upon it as an abſolute purchaſe; and was ſo decreed by the *Maſter of the Rolls*, *William Forteſcue*, Eſquire.

The eſtate, at the time of the mortgage, was worth 500 *l.* only, but would ſell now for 900 *l.*

LORD CHANCELLOR.

To be ſure, the rules of this court relating to mortgages ought to be adhered to, that borrowers of money may not be oppreſſed.

There are two general queſtions in the preſent caſe.

Firſt; As to the contract, Whether it is a tranſaction that is in its nature a mortgage, or a defeaſible purchaſe, and ſubject to a repurchaſe?

Secondly, If originally intended as a mortgage, Whether length of time will not be a bar to redeeming?

As to the *firſt*, There is a difference between ſuch an agreement as this, which relates to a rent-charge iſſuing out of land, and an agreement which relates to the land it ſelf.

So likewiſe the caſe of creating a rent-charge out of lands, and mortgaging a rent-charge, is of different conſiderations.

Where a man takes a mortgage, it is not barely adequate to the payment of the intereſt, or even to a perpetual payment of the intereſt, but generally the eſtate is double the value of the principal money lent.

If, indeed, any fetters had been laid upon redeeming the mortgaged eſtate, by ſome original agreement, either in the mortgage deed, or a ſeparate deed, it would not avail, where it is done with a deſign to wreſt the eſtate fraudulently out of the hands of the mortgagor.

Where a mortgagee by agreement, either in the mortgage deed, or a ſeparate one, fetters the redemption, with a fraudulent deſign to get the eſtate, it will not avail.

But where is the fraud, or the inconvenience, in the preſent caſe? The land it ſelf is not parted with, but it is merely ſelling a rent-charge, ſtrictly adequate to the conſideration given, the 200*l.* and inſtead of having a chance for the whole eſtate, the lender of the money is contented to buy the intereſt for ever, by way of rent-charge.

I have ſaid thus much in general; and now I come to the particular circumſtances in this caſe.

From the agreement, and from the articles themſelves in 1689, it appears plainly to be the intention of the parties, that after the end of the three years the intereſt ſhould be changed into a rent-charge, and be irredeemable.

The objection is, that the court will not permit a clauſe in the ſame deed, or in another, which ſhall fetter the redemption; and the obſervation is very right, when applied to the caſe of a common mortgage.

But

But what has been ſaid by the defendants council, with regard to the charity, is very material, (not that I will lay down a general rule, with regard to all charity money lent on mortgage) for here a ſum of 200*l.* is left by one *Sutton*, which is not to be laid out at intereſt, but to be inveſted in land in fee-ſimple, ſo that the truſtees of this charity, being under an inability of treating in the common way, have put it in this method, and it is the will it ſelf that has laid a foundation for tranſacting it in this manner, and has delivered the defendants from the ſuggeſtion of oppreſſion and impoſition.

In common mortgages, the want of a covenant for repayment of the mortgage money is no bar to a redemption.

It is material, in the preſent caſe, that here is no covenant in the deed, for the repayment of the mortgage money, which ſhews a plain intention of purchaſing a rent-charge.

In general, indeed, this is no rule againſt redemptions in common and ordinary caſes, though there is no ſuch covenant; but here it is explanatory of the whole ſcheme, and intention of the parties.

The agreement is to take a rent-charge, at the rate only of 5 *per cent.* which was extremely fair, conſidering the intereſt of money kept up long after at 6 *per cent.*

Floyer and *Lavington*, 1 *P. Wms.* 261. is the only caſe that comes near the preſent. *Bonham* verſus *Newcomb*, 2 *Vent.* 364. went upon a different reaſon, and is an exception out of the general rule *.

I do not ſingly found my opinion upon the nature of the contract in the principal caſe, but on the great length of time, for this bill is brought at the diſtance of 48 years.

Where a mortgagee has been in perception of the rents and profits for a conſiderable time, the court will not decree a redemption, as it would be making him a bailiff to the mortgagor.

And though it is very true, that the court will not ſuffer a common and plain mortgage to be redeemed, where the mortgagee has been in perception of the rents and profits for a conſiderable time, becauſe it would be making the mortgagee a bailiff to the mortgagor, and ſubject to an account; yet, in this caſe of a rent-charge, there would be no ſuch inconvenience, for the perſon might eaſily account.

* One for 800*l.* conſideration, grants a rent-charge of 48*l.* a year, in fee, upon condition, that if the grantor, during his life, ſhall give notice, and pay in the 800*l.* by inſtalments, *viz.* 100*l.* at the end of every ſix months, and ſhall do this during his own life-time, then the grant to be void; the mortgage was made about ſixty years ſince, when the legal intereſt of money was 8 *per cent*': Lord Chancellor *Cowper* was of opinion, the rent-charge was not redeemable, and decreed the bill for a redemption ſhould be diſmiſſed. *Floyer* verſus *Lavington*, 1 *P. Wms.* 268.

But conſider how much the value of money is altered ſince 1689, and likewiſe the value of the rent-charge.

For if the purchaſer was to reconvey his rent-charge now in 1742, he could not poſſibly purchaſe another with the 200*l.* that would produce more than 7*l.* a year; therefore, if the perſon who had a right to redeem had come ſooner, ſomething more might have been ſaid.

There is ſtill another reaſon, that it would make property precarious; for if after the three years it became an abſolute eſtate, then it is a freehold, and would be conveyed as ſuch; if conſidered as a redeemable intereſt, then it is only perſonal eſtate; this would create great confuſion, and render it very difficult for perſons either to diſpoſe of their property, or to ſettle what kind of conveyance is proper.

Therefore, this bill has been properly diſmiſſed at the *Rolls*, not ſo much upon general rules, as upon the particular circumſtances of the caſe, and upon the likeneſs there is between this and the caſe of *Floyer* verſus *Lavington*.

His Lordſhip affirmed the decree, but gave no coſts of either ſide.

Attorney General verſus *Sawtell*, *February* 8, 1742. Caſe 302.

Sir *J. T.* deviſed copyhold lands in charity, that he had before ſurrendered to the uſe of his will, which conſiſted of eleven ſheets, the two firſt of which he ſigned, and died before he ſigned the reſt, nor were there any witneſſes. *Lord Hardwicke held it to be a good appointment of the copyhold eſtate for the charity, under the ſtat. of* 43 Eliz.

THE queſtion was, Whether copyhold lands ſurrendered by Sir *John Taſh*, to the uſe of his will, and deviſed by him in charity, would paſs, as the teſtator had not ſigned the laſt ſheet, nor was there any witneſs to it.

A Scrivener had orders to ingroſs it, but the teſtator being *in extremis*, the rough draught, conſiſting of eleven ſheets, was brought to him, and he ſigned only the two firſt, but died before he could ſign the reſt.

It was proved in the cauſe, that the teſtator aſked, before he ſigned the will, whether it was according to his directions, and the Scrivener aſſured him it was.

In ſupport of the will, was cited *Wagſtaff* verſus *Wagſtaff*, 2 *P. Wms.* 258.

The Chancellor, though the will was not ſigned in the laſt ſheet, and without witneſſes, held it to be a good appointment of the copyhold eſtate for the charity, according to the ſtatute of 43 *Eliz. c.* 4. *of Charitable Uſes.*

Caſe 303. *Dr. Trebec* verſus *Keith, February* 12, 1742.

Lord *Hardwicke* overruled all the exceptions, upon a motion to quaſh the writ of *ſignificavit*, and held there was ſufficient to warrant the court to iſſue the *excommunicato capiendo.*

MR. *Keith*, miniſter of *May-fair* chapel, which was chapel of eaſe to Saint *George*'s pariſh, *Hanover-Square*, of which the plaintiff is the rector, being cited into the biſhop of *London*'s court, for officiating as a clergyman of the church of *England*, without being licenſed by the biſhop, and having been denounced excommunicate forty days, for contumacy and contempt of the eccleſiaſtical laws; upon the biſhop's certificate into Chancery of this fact, the writ of *ſignificavit* iſſued; and at a former ſeal it was moved to quaſh the writ, upon the following exceptions.

Firſt, That the particular cauſe of the excommunication is not ſet forth.

Secondly, No particulars are mentioned in what manner *Keith* officiated, or performed divine ſervice.

Thirdly, That it is not ſaid, that he has performed divine ſervice ſince the monition.

Fourthly, it is not ſaid, that at the time of the excommunication, he officiated within the dioceſe of *London.*

Fifthly, It is not ſaid, by what perſon, or in what manner the excommunication was pronounced.

Sixthly, That it does not appear when the excommunication was pronounced.

Laſt exception was, That Mr *Keith* is within the toleration act.

The defendant having obtained an order *niſi*, the plaintiff's council this day ſhewed cauſe, why the writ ſhould not be quaſhed.

In ſupport of it was cited, *The King* verſus *Bunard*, 1 *P. Wms.* 435.

And for the exceptions, *The King* verſus *Fowler*, *Salk.* 293. and *The Queen* verſus *Hill*, *Salk.* 294. and 8 *Co.* 68. *John Trollop's caſe.*

LORD

LORD CHANCELLOR.

This is a caſe of as great conſequence to the good government and diſcipline of the church as can poſſibly happen.

I can take notice of nothing but what appears upon THE SIGNIFICAVIT; and the queſtion before me is, Whether there is ſufficient to warrant the court to iſſue the writ of *excommunicato capiendo*.

Now, if this gentleman is out of the juriſdiction, he is not without remedy, for he may go to a court of common law after ſentence, as well as before.

The firſt, and material exception, is, That the particular cauſe of the excommunication ought to be ſet fort.

It is not neceſſary for the eccleſiaſtical court to ſhew they have rightly proceeded, for if they have not, you have a remedy by appealing to a higher eccleſiaſtical juriſdiction.

Here is certainly a deſcription of the principal cauſe, and if ſome of the matters mentioned are within the juriſdiction, it is ſufficient.

It is not like the caſe of the *King* and *Fowler*, which was held uncertain, as it was in the disjunctive, *Tythes or other eccleſiaſtical dues*, ſo that it might be eccleſiaſtical dues only; if it had been tithes and other eccleſiaſtical dues, it would have been well enough.

As to preaching, there is no pretence for his doing it without licence from the biſhop; the ſame as to the adminiſtring of the ſacrament, and celebration of marriage; for the canons of 1603, confirmed by act of parliament, are expreſs as to that matter.

Here the ground of the contumacy is deſcribed ſpecially, which is more than is neceſſary, for where the cauſe is ſufficient, it may be ſet forth generally.

The ſecond exception, That it is not mentioned in what manner *Keith* officiated, or performed divine ſervice, and therefore it might be in his own houſe, or a private chapel.

But the word *officiating* ought not to be ſo conſtrued; for reading prayers, or a ſermon, in a private family, is not performing divine ſervice.

Divine ſervice is the expreſſion made uſe of in ſeveral acts of parliament, particularly in the act of uniformity, 13 & 14 *Car.* 2. *cap.* 4. *ſect.* 27. relating to the ſervice in *Welſh*: In ſeveral other acts of parliaments, that direct the reading of proclamations, the order is, that it be read after divine ſervice.

The word *officiate* relates to his office as a preſbyter, which muſt mean his doing it in a publick manner.

It is not indeed neceſſary for a miniſter to have a licence from the biſhop of the dioceſe for every particular caſe, but yet the biſhop may ſuſpend him wholly where he is irregular, till he ſubmits to perform his duty properly: And it is not here a deſcription of the cauſe, but of the contempt only, for which he has excommunicated him.

The fourth exception, That it is not ſaid, at the time of the excommunication, he officiated within the dioceſe of *London*, and therefore has been cited out of the dioceſe, contrary to the ſtatute of 23 *H.* 8. *c.* 9.

It is not averred, indeed, that he was reſident in the dioceſe at the time of the excommunication pronounced, but being ſaid in the libel to be within the dioceſe, I will not preſume he was not commorant when the monition iſſued; and to this point, the caſe in 1 *P. Wms.* 435. was properly cited.

There is another anſwer to this objection; that a man may be reſident in one dioceſe, and come into another and commit the offence charged upon him in the *ſignificavit*, and this, for the purpoſe of being cited, is a reſidence ſufficient, and he may be proſecuted in the dioceſe where he committed the offence, and unleſs he was ſo conſidered, there would be no remedy. *Vide Doctor Blackmore's caſe, in Hard. Rep.* 421. *Pl.* 8. *Trin.* 17 *Car.* 2.

The fifth exception, That he is not ſaid to be a perſon in holy orders who pronounced the ſentence of excommunication.

The averment in the *ſignificavit* is ſufficient, for the words are, a perſon lawfully authorized, which take in the capacity of the perſon doing it.

Sixth exception, That it does not appear when the excommunication was pronounced.

Now, the *ſignificavit* only avers, that he continued contumacious, but the *terminus a quo*, and the *terminus ad quem*, is never ſet forth.

The

The laſt exception was, that Mr. *Keith* is within the toleration act, the *1ſt* of *W. & M. cap.* 18.

The act of toleration was made to protect perſons of tender conſciences, and to exempt them from penalties; but to extend it to clergymen of the church of *England*, who act contrary to the rules and diſcipline of the church, would introduce the utmoſt confuſion.

Lord Chancellor declared, that all the exceptions muſt be overruled.

Lingood verſus *Eade*, *January* 15, 1742. *Pleas and demurrers.* Caſe 304.

THE plaintiff preferred his petition on the 26*th* of *March* laſt, to ſet aſide the award in the matter between him and *Eade*, which was diſmiſſed, but without prejudice to his bringing a bill for the like purpoſe; he brought a bill accordingly againſt the arbitrators and *Eade*, and prays by it that he may have an inſpection of all the accounts, from which the arbitrators framed their award, and that it may be ſet aſide, and that the defendant *Eade* may account generally for all tranſactions during his partnerſhip with the plaintiff.

A plea to a bill brought to ſet aſide an award, and for a general account, *Lord Hardwicke* allowed it as againſt the general account, but held that the plaintiff was not precluded at the hearing from objecting to the award for fraud or partiality in the arbitrators.

The defendant *Eade* pleads, that in former cauſes between him and the plaintiff in this court, an order was made the eighteenth of *November* 1740. at the requeſt, and by the conſent of the parties, that all matters in difference between them relating to their joint dealings, or otherwiſe, ſhould be referred to *Charlton*, *&c.* and the award to be made on the *1ſt* of *May* then next; and by a ſubſequent order of court, with the conſent of the plaintiff's counſel, the time for making the award was enlarged till the firſt of *November*, and by a third order till the firſt of *February*; that the arbitrators met 45 times and upwards, (the plaintiff and defendant being preſent at the greateſt part of the meetings) and having fully heard and examined the plaintiff and the defendant and their ſeveral witneſſes, made their award within the time limited; *and among other things declared that they had taken an account of the outſtanding debts due to, or owing by or from the complainant, and the defendant, or either of them, on account of their joint dealings, and they awarded that each ſhould pay and diſcharge one equal moiety of the ſeveral debts therein mentioned, (that is to ſay) to Samuel Torin* 92*l.* 10*s.* 9*d. to Slingſby Bethel* 82*l.* 18*s.* 2*d. and to John Hide* 15*l. which the ſaid arbitrators found to be then remaining due from the complainant or defendant, or one of them, on their joint accounts, be the ſame more or leſs than as abovementioned.*

" That the arbitrators have ſet forth, in a ſchedule to their award, " an account of ſundry debts and effects owing to the partnerſhip, " amounting to 5094*l.* 14*s.* 2*d.* which debts and ſecurities they " awarded to belong in moieties to the plaintiff and the defendant; " and for the better getting in the ſame, the arbitrators did thereby " recommend it to the defendant and the complainant to conſent " that an order might be made by this court, for the appointing " a proper perſon converſant in mercantile affairs, to collect in the " ſame for their joint uſe, and in caſe either of the parties ſhould " refuſe to conſent thereto, the arbitrators did make it their humble " requeſt, to this court, to order the ſame, as the moſt probable " means to prevent future ligitations between the ſaid parties.

" That the arbitrators did award and declare, that excluſive of " the above matters, there was then due from the plaintiff to the " defendant 9194*l.* 19*s.* 6*d.* on a juſt ballance, which they awarded " to be paid by the plaintiff to the defendant by inſtalments of 2000*l.* " on each payment, with intereſt at 4 *per cent.* from the ſecond of " the ſame *February*.

" That laſtly they did award, that upon payment of the ſaid " 9194*l.* 19*s.* 6*d.* by the plaintiff, his executors, *&c.* to this defen- " dant, his executors, *&c.* they the ſaid plaintiff and this defendant, " their reſpective executors and adminiſtrators, ſhould mutually exe- " cute and deliver to each other reſpectively, a good and ſufficient " releaſe and diſcharge (the form whereof to be previouſly ſettled " by one of the Maſters of this court, in caſe this court ſhould be " pleaſed to give directions for the ſettling thereof), whereby the " ſaid parties ſhould reſpectively releaſe to each other, all matters " in difference between them, relating to their joint dealings, *&c.*

" The defendant for plea further ſaith, that all the ſaid particulars " ſo awarded are fair and juſt; all which matters and things the " defendant pleads in bar to the plaintiff's bill, and ſubmits to the " court whether he is obliged to make any further or other an- " ſwer.

Mr. *Murray*, council for the plaintiff, confined himſelf to the objections againſt the award, becauſe he ſaid the plea of the award muſt fall to the ground, if the award itſelf is not good.

An award muſt be the judgment of the arbitrators, and final; and it has been held to be a bad award, where the arbitrators direct that coſts ſhould be paid according to taxation.

The firſt objection he took was, that here the arbitrators award, that the debts due from the partnerſhip ſhould be paid in moieties, by *Lingood* and *Eade*, and then mentions only three debts, ſo that in this reſpect it is not final.

The ſecond objection, that the arbitrators recommending it to the parties, to conſent that an order might be made by this court, for the appointing a proper perſon to receive in the debts due to the partnerſhip, is deputing a third perſon to do an act, which ought to have been done by themſelves, and therefore is not properly their own judgment.

The third objection, that the arbitrators ought to have ſettled the releaſe themſelves, and not have left it to be done by a Maſter under the order, and directions of this court; and cited 1 *Salk.* 71. *Glover* verſus *Barrie.*

That upon the whole it was not a compleat award, and therefore the plaintiff ſhould be admitted to go on with his bill for an account, notwithſtanding the award.

Mr. Attorney General, council for the defendant *Eade*, in anſwer to the 2d objection, with regard to the receiver, *ſaid*, the arbitrators could not do otherwiſe, as it was uncertain what would be got in, and therefore they could not award the exact ſum to each of the parties, but to be divided when received.

Lord Chancellor then put this caſe to Mr. Attorney General (which came before him, when he was Chief Juſtice); Arbitrators had awarded that each of the parties ſhould give ſecurity to perform the award, but left it to a third perſon to ſettle the ſecurities, and for this reaſon held to be a void award; compare now this caſe with the preſent, where the arbitrators have referred it to a third perſon to get in the debts due to the partnerſhip.

To this Mr. Attorney General ſaid, the award is final as to the property, but the means of aſcertaining that property is only recommended to be left to a perſon appointed by the court; in the caſe mentioned by your Lordſhip, the arbitrators actually transferred to a third perſon, a power which belonged ſolely to themſelves.

As to the objection that the award is bad, becauſe the form of the releaſe is left to a maſter; as long as the ſubſtantial part, the awarding a releaſe of all demands is provided for by the arbitrators; the bare leaving it to a maſter to ſettle the form of the releaſe, can never vitiate the award.

Mr. *Murray* the Solicitor General ſaid in reply, The arbitrators here have awarded things out of the ſubmiſſion, that affects the juſtice of the caſe between the parties, which vitiates the whole award, and conſequently is no bar to the account.

LORD

LORD CHANCELLOR.

Though the bill is brought for two purpoſes, yet one is conſequential to the other.

Firſt, to ſet aſide the award.

Secondly, for a general account.

Improper to come into this court to ſet an award aſide merely for an objection in point of form.

The prayer of the bill to ſet aſide the award muſt be founded upon the fraud, corruption, or miſbehaviour of the arbitrators; for it would be improper to come into this court to ſet it aſide merely for an objection in point of form.

The other part of the bill is the original right he had before the award.

I muſt conſider the plea as it is pleaded to the latter part of the bill, the general account.

For to be ſure, the plaintiff is intitled to an account, unleſs the award is a bar, and therefore the court muſt enter into all the legal objections againſt the award, which a court of law would have done, as it is inſiſted on by the plea to prevent the general account.

Courts of law formerly uſed too much nicety in determining awards.

I own I have been a good deal doubtful as to the nicety that courts of law have uſed, in determining awards; for they have formerly gone ſo far, as to make it almoſt impoſſible for arbitrators to do what is the main intention of the ſubmiſſion, the putting an end to differences between parties.

Though arbitrators refer coſts to be taxed; yet it will not vitiate the award at law.

But now courts of law themſelves, have in ſome meaſure departed from very ſtrict rules, as where arbitrators refer coſts to be taxed, the judges have compared awards to judgments at law, which though they muſt have certainty, yet the officers tax coſts, and therefore where arbitrators give ſuch directions it ſhall not vitiate the award; though in the old caſes it has been held, that arbitrators could not in any inſtance delegate their power.

If courts of equity were to take greater latitude in determining awards than courts of law, it would introduce confuſion and uncertainty; better therefore to adhere to one rule.

It may poſſibly be worth while for me to conſider, as courts of law themſelves have relaxed from their rigour and nicety in determining awards, whether courts of equity may not ſtill take greater latitude: but I am unwilling to do this, becauſe it would introduce confuſion and uncertainty, and make awards a mixed caſe, partly determined by arbitrators, and partly by the authority of this court; and therefore I chuſe rather to confine myſelf to one rule.

As to the firſt objection, with regard to debts due from the partnerſhip, I will not lay any weight upon it, for as courts of law have ſaid, they will never make a preſumption to overturn an award; ſo neither will I in this caſe preſume that there are any other debts due from the partnerſhip, than what are mentioned by the arbitrators themſelves.

As courts of law have ſaid, they will never make a preſumption to overturn an award; ſo neither will a court of equity.

As to the ſecond objection, with regard to the receiver, which is recommended by the arbitrators, I own I have great doubts; but as the juſtice between the parties is the material thing, and the award being good to a common intent, anſwers the purpoſe of parties in ſubmitting to a reference, I am of opinion it is ſufficient, for in caſes of this ſort, in mercantile affairs, which cannot admit of certainty, it would be too nice to defeat awards upon objections of this kind.

Where an award is good to a common intent, and anſwers the purpoſe of parties in ſubmitting to a reference, the court will not ſet it aſide upon trivial objections.

It has been ſaid by the plaintiff's council, that the arbitrators recommending it to the parties to conſent that an order might be made by this court, for the appointing a receiver, *&c.* and in caſe of the parties refuſal to conſent thereto, the requeſting the court to order the ſame, is a delegation of their power, which arbitrators cannot do.

If arbitrators delegate their power, the award is totally void.

And to be ſure, if they have delegated their power, the award is void for the whole.

But Mr. Attorney General ſays, what the arbitrators have done in this reſpect, is at moſt but ſurpluſage.

Yet if it affected the juſtice of the things ſubmitted, it would not be ſurpluſage.

But this ſeems to me to be only a recommendation of the arbitrators to the parties, which is not tying them down to ſubmit that a perſon ſhould be ſo appointed, but leaves them at large; and if the parties do not approve of this ſcheme, why then it is ſurpluſage only, and not a delegation of their power.

The queſtion is, whether the arbitrators awarding that the debts due to the partnerſhip, when received, ſhall he divided in moieties between the parties, is ſufficient; and I am of opinion it is, for the arbitrators had no controul over the debtors themſelves, who might pay, if they pleaſed, the whole to one of the partners.

To lay it down for a rule that arbitrators muſt chalk out particularly the method in which the award is to be carried into execution, would be too nice, and overturn a great number of awards: for if this doctrine was to prevail, ſuppoſe one of the parties ſhould releaſe a debt due to the partnerſhip, it would be a breach of the award,

Arbitrators need not point out particularly the method in which the award is to be carried into execution.

for *qui dirimit medium dirimit finem*, and the other party could have no remedy, but either to bring an action or a bill for carrying the award into execution, which would make it endleſs, and no award could ever be effectual to finiſh diſputes between parties.

I cannot think of any other method the arbitrators could have purſued; for though it has been ſaid at the bar, that they might have directed the parties to give ſuch perſon as the arbitrators ſhould appoint a letter of attorney to get in the debts, yet this would not have been adviſable, becauſe if the perſon ſo deputed had proved inſolvent, it would have been doubtful whether the arbitrators themſelves might not have been liable.

Where arbitrators have awarded releaſes, the leaving it to the court to give directions to a Maſter to ſettle the form does not vitiate an award.

The laſt objection is the arbitrators leaving it to a Maſter to ſettle the form of the releaſe.

Now the general rule in regard to making awards is this, that arbitrators ſhould award each party to give a releaſe, and if they do not, it is at the peril of the parties.

Here it is, in the firſt place, fully and compleatly deſcribed in the award, what the parties ſhould do in point of giving releaſes, and then follows the reference to the Maſter to ſettle the form.

If the award had ſaid, that the releaſe ſhould be ſettled by the court firſt, and then the arbitrators would conſider whether they ſhould order a releaſe between the parties, this would have been very different, and I ſhould have inclined to think it a delegation of their power, and the award conſequently void.

But here they have awarded releaſes, and only leave it to the court, if they think proper, to give directions to a Maſter to ſettle the form; and it would be very extraordinary when, I think, the arbitrators have done all that is neceſſary, and there is no occaſion for the court to interfere; yet becauſe they have ſaid, we leave it to the court, therefore I muſt interpoſe merely for the ſake of making that a bad award, which without my interpoſition would be a good one.

Upon the whole, I am of opinion the award is good to a common intent, and the plea conſequently muſt be allowed againſt the general account; but the plaintiff is not precluded at the hearing of the cauſe from objecting to the award for fraud or partiality in the arbitrators.

Anon.

Anon. February 18, 1742. *firſt ſeal after Hil. term.* Caſe 305.

AN attachment iſſued againſt a perſon out of this court, and the ſheriff had the body in cuſtody, and took a bail-bond for his appearance, which he delivered to the plaintiff, who moved at a former ſeal, that the ſheriff might bring in the body; and the court made a rule upon him to ſhew cauſe why he did not bring in the body.

Where an attachment has iſſued againſt a perſon, and the ſheriff takes a bail-bond for his appearance, and delivers it to the plaintiff, the court will diſcharge a rule made upon the ſheriff to ſhew cauſe why he does not bring in the body; for the plaintiff is not without remedy, as he may move on a *cepi corpus* returned for a meſſenger to the county where the perſon lives.

The council for the ſheriff ſhewed for cauſe, that he had delivered over the bail-bond to the plaintiff, and had not the cuſtody of the body now.

Lord Hardwicke allowed the cauſe ſhewn by the ſheriff, and diſcharged the rule; for the plaintiff is not without remedy, as he may have a meſſenger into the county where the perſon lives, which is now a motion of courſe upon a *cepi corpus* returned, though formerly the court allowed meſſengers to thoſe particular juriſdictions only where the ſheriff had the amercements themſelves; but the rule now is to ſend a meſſenger into every county generally without any reſtriction.

Francis Emes, adminiſtrator of his wife Elizabeth Emes, Caſe 306.
plaintiff, Thomas Hancock defendant. Between the ſeals after Hil. term 1742.

THOMAS *Hancock,* grandfather to *Elizabeth* the plaintiff's late wife and to the defendant, on the ſecond of *June* 1729. made his will ("reciting that he had ſurrendered all his copyhold lands "to the uſe of his will) and did thereby give and deviſe the ſaid "lands to his wife *Elizabeth* and her aſſigns for life, and after her "deceaſe to his ſon *Stephen*, till his grandſon the defendant *Thomas* "attained the age of twenty-three, and no longer, and ſo ſoon as "his grandſon attained that age, then he gives it to his ſaid grandſon,

T. H. deviſes copyhold lands he had ſurrendered to the uſe of his will, to his wife for life, and after her deceaſe to his ſon *Stephen*, till the defendant his grandſon attained the age of 23. and as ſoon as he attained that age gives it to him and his heirs, on condition that he pays to *Elizabeth Hancock* within two years after he attains 23. and in default of payment of the 60*l.* then the teſtator gave *Elizabeth Hancock* a power to enter and receive the rents till the 60*l.* was paid.

The teſtator died ſoon after, making his will; *Elizabeth Hancock* married the plaintiff, and lived till the defendant attained his age of 23. but died within the two years after he attained that age. Lord *Hardwicke* decreed the 60*l.* to be raiſed out of the copyhold lands, and to be paid to the plaintiff.

his

" his heirs and aſſigns for ever, *on this condition that the ſaid grand-*
" *ſon, his heirs or aſſigns, ſhould pay or cauſe to be paid unto his grand-*
" *daughter Elizabeth Hancock the ſum of ſixty pounds within two years*
" *after his ſaid grandſon attained his age of twenty-three, and if his*
" *ſaid grandſon ſhould happen to die without iſſue of his body, then he*
" *gave and deviſed the ſame to his ſon Stephen Hancock and his heirs,*
" *on condition of paying the ſum of one hundred pounds to Elizabeth*
" *Hancock within one year after his ſon Stephen Hancock enjoys the*
" *ſaid premiſſes by virtue of this laſt deviſe*; and his will further was,
" that if his ſaid grandſon or ſon ſhould make default in payment
" of the ſaid ſum of ſixty pounds, *then it ſhould be lawful for his*
" *ſaid grandaughter Elizabeth Hancock, her executors and admini-*
" *ſtrators*, to enter into the ſaid premiſſes, and the rents thereof to
" receive and take till the ſixty pounds ſhould be paid.

The teſtator died ſoon after making his will, and his ſon *Stephen proved* it: *Elizabeth Hancock* married the plaintiff, and lived till after the defendant her brother attained his age of twenty-three, but died before the two years were expired after his attaining that age.

It was inſiſted by Mr. *Wilbraham* and Mr. *Capper*, counſel for the plaintiff, that the ſixty pounds was a veſted legacy, and tranſmiſſible to *Elizabeth*'s repreſentative.

The caſe of *Lowther* verſus *Condon*, 6 *June* 1741. upon a rehearing before Lord *Hardwicke* was principally relied upon for the plaintiff.

Mr. *Brown* for the defendant inſiſted that the 60*l.* ſhould ſink into the inheritance, as the time of payment was not come.

He cited *Carter* verſus *Bletſoe*, 2 *V.* 617. *Tournay* verſus *Tournay*, *Prec. in Chancery* 290. and *Hall* verſus *Terry*, *Nov.* 8, 1738. before Lord *Hardwicke*. *Vide* 1 *Tracy Atkyns* 502.

LORD CHANCELLOR.

All theſe caſes depend upon circumſtances; the preſent is a particular kind of caſe, and differs from all the others.

The court has often in theſe caſes laid a good deal of weight upon a child's dying before marriage, and before the portion is wanted, but here *Elizabeth Hancock* was married ſome years before ſhe died.

What is the operation and effect of the deviſe in point of law? I take it to be a conditional limitation, and therefore whetever right *Elizabeth* gained thereby is a legal eſtate.

She need not have reſorted here, on the common ſuggeſtion, that as none but an heir at law can take advantage of a condition broken, that ſhe is without remedy at law; for, upon default of payment, it is ſpecially provided for by the will, that ſhe, her executors and adminiſtrators, ſhall have a power of entering and holding till ſatisfied: Becauſe *Elizabeth* died within the two years, is it either a breach of the condition, or an excuſe for not paying the ſixty pounds?

It is ſaid the condition is become impoſſible; but I am of opinion it is not; for in point of law the condition ſubſiſts, notwithſtanding ſhe died within the two years: Suppoſe a bond given to *A.* payable at a future time, without naming his executors, adminiſtrators or aſſigns, why, if *A.* dies before that time, his executors, though not named, would be intitled to ſue upon the bond.

A bond given to *A.* payable at a future time, without naming his executors, if *A.* dies before that time, the executors will be intitled to ſue upon the bond.

If the huſband then, as adminiſtrator in this caſe, could recover it, even at law, has it been ever held, that becauſe he has a legal remedy, therefore equity will not give it him, but ought to adhere to its ſtrict rules, and leave him to law; conſider what confuſion this would make; for even after the adminiſtrator has recovered a judgment at law, the defendant would have a right to come into this court, upon payment of the ſixty pounds for a redemption, and this would occaſion a circuity, and two ſuits inſtead of one, an inconvenience which this court always avoids.

The teſtator's appointing two years after his grandſon attained twenty-three, for raiſing the ſixty pounds, ſeems to be done merely *for the convenience of the eſtate.*

The caſe of *Tournay* verſus *Tournay* comes the neareſt to this; but there the child for whom the proviſion was made died very young, at five or ſix years of age, ſo that the portion not being wanted, the court exerciſed a diſcretionary power, and would not raiſe it.

Here is a further circumſtance, for the will ſays, *if my ſaid grandſon ſhould die*, &c. *Vide The words of the will.*

Suppoſe *Thomas Hancock* had died within the two years (for if he had died after, *Elizabeth* would have been entitled only to the ſixty pounds) and the money had not been paid, and he had left a ſon, and the ſon had likewiſe died within the two years, and then *Elizabeth* had died before the year was out, which the teſtator had allowed to *Stephen Hancock* for payment of the 100*l.* would not the plaintiff, as repreſentative of *Elizabeth*, been intitled to the 100*l*? Moſt certainly he would; and the caſe of *King* verſus *Withers*, *Caſes in Lord Talbot's Time* 117. is for this purpoſe directly in point; and

from hence may be argued, that the intention of the teſtator was, that his grandaughter *Elizabeth* ſhould have one or the other.

Upon the whole, I ſee no equity at all for taking the portion from *Elizabeth*, or ſending her repreſentative to law, and therefore I ſhall decree the ſixty pounds to be raiſed out of the copyhold land, and paid to the plaintiff accordingly.

Caſe 307. *Darwent* verſus *Walton*, *February* 22, 1742.

Where one partner is out of the kingdom, the partner before the court ſhall pay the whole of a joint demand.

THE queſtion was, if a bill is brought againſt one partner for a joint demand, and the other is not amenable to the court, being out of the kingdom; whether the partner before the court ſhall pay the whole, or one moiety of the debt.

LORD CHANCELLOR.

Upon conſidering this caſe, I am of opinion, that the partner before the court ought to pay the whole.

Where a defendant cannot be made to appear, it amounts to the ſame thing as if proceſs had been taken out for want of an appearance, and carried on to a ſequeſtration.

This is analogous to the proceedings in courts of law, and likewiſe in this court; for where a defendant is out of the reach of the court, and cannot be made to appear, it amounts to the ſame thing as if the plaintiff had taken out proceſs for want of an appearance, and carried it through the whole line of proceſs to a ſequeſtration.

In this caſe it is in vain to take out proceſs, becauſe the joint debtor is out of the kingdom.

In equity you may take exceptions for want of parties, at the hearing of the cauſe, or demur, but you cannot plead it in abatement at law, after you have gone upon the merits.

An exception for want of parties here, is in the ſame nature with a plea in abatement at law, but if you go upon the merits there, you can never take it up again: Now, in equity, you may take exceptions at the hearing of the cauſe, or you may demur for want of parties.

33 — At law, where one of the creditors will not join in the action, he is ſummoned and ſevered, and the other has judgment *quod ſequatur ſolum*.

In the firſt place, what is the method of proceeding at law, in caſe of a joint demand, if one of the creditors will not join in the action, he is ſummoned and ſevered; if he will not proceed jointly after ſummons and ſeverance, then the other creditor has judgment *quod ſequatur ſolum*.

On the other hand, if there are two joint debtors, the creditor muſt bring his action againſt both; but if one only appears, and the creditor carries it on through the whole line of proceſs to an outlawry, againſt the perſon not appearing, then he may proceed ſolely againſt the other, and ſhall have judgment for his whole debt againſt the perſon appearing, and judgment only by default againſt the perſon who does not appear, which is all that he can do with regard to the latter; for, as to his goods, they are forfeited to the crown upon the outlawry.

Where an action is brought againſt two joint debtors, and one only appears, the creditor may have judgment for his whole debt againſt the perſon appearing, and by default, againſt the perſon who does not appear.

The proceedings upon the act for making proceſs in courts of equity effectual againſt perſons who refuſe to appear, 5 *G.* 2. *c.* 25. *ſ.* 1. are as follows, "Upon the defendant's not appearing, the "court may order the bill to be taken *pro confeſſo*, and make ſuch "decree as ſhall be thought juſt, and may thereupon iſſue proceſs "to compel the performance by an immediate ſequeſtration, or "by cauſing the poſſeſſion of the eſtate or effects, demanded by "the bill, to be delivered to the plaintiff, or otherwiſe, as the "nature of the caſe ſhall require."

Before the act, you might carry it on through the whole line of proceſs againſt a defendant, who did not appear to the ſequeſtration, and no further; but you might, notwithſtanding, ſet down the cauſe againſt the other defendant, and have a decree for the whole.

If you could do this before the act of parliament, where a perſon was in the kingdom, but obſtinately refuſed to appear, much more ought the court to make a decree againſt one partner, where the other is out of the kingdom, that an account ſhould be taken, and that the whole which appears to be due to the plaintiff ſhould be paid by the defendant, the partner who is brought to a hearing; and his Lordſhip ordered it accordingly.

Fitzer verſus *Fitzer and Stephens*, *February* 22, 1742. Caſe 308.

LORD *Rivers* by his will gave an annuity of 50*l.* a year, during life, to *Catherine Adair*, now *Fitzer*, the plaintiff in this cauſe, payable quarterly, and, by a codicil, directed that all his lands ſhould be charged with the payment of it.

Lord *Rivers* by will gave an annuity of 50*l.* to the plaintiff, who afterwards,

in 1726, married the defendant *Fitzer*; in 1728 they agreed to part; by a deed of ſeparation, the huſband covenanted to allow her 14*l.* *per ann.* out of his own eſtate, and 24*l.* more, to be paid quarterly, out of the annuity of 50*l.* and 12*l.* a year to his daughter, by the plaintiff, for her maintenance, to be paid quarterly.

The bill is brought againſt the huſband, and *Stephens*, a creditor of his, ſince the execution of the deed of ſeparate maintenance, to have the truſts of that deed performed. *Lord Hardwicke decreed according to the prayer of the bill as againſt the huſband; and as to Stephens, that he ſhould not releaſe his claim upon the annuity, till the plaintiff had paid him his debt.*

In

In 1726. ſhe married the defendant *Fitzer*, and in 1738. they agreed to part, and by a deed of ſeparation the huſband covenanted to allow her a ſeparate maintenance of 14*l.* *per ann.* out of his own eſtate, and 24*l.* more to be paid quarterly to her out of the annuity of 50*l.* and 12*l.* a year to his daughter by the plaintiff, to be paid quarterly, to ſuch perſon as ſhould maintain the daughter.

The bill was brought by the wife and daughter againſt the huſband, and againſt *Stephens*, who is a creditor of the huſband's, ſince the execution of the deed of ſeparate maintenance, and to whom all his eſtate real and perſonal has been aſſigned, purſuant to the directions of the inſolvent debtors act, 2 *Geo.* 2. *c.* 22. to have the truſt of the deed performed.

It was inſiſted by the defendant *Stephens*'s council, that this was a voluntary deed, being made after marriage, and with regard to creditors is fraudulent and of no conſideration, and clearly within the *St. of* 13 *Eliz. c.* 5. *Twyne*'s caſe, 3 *Co.* 81. and *Eq. Caſ. Abr.* 148. were cited to ſhew that natural love and affection is no conſideration.

For the plaintiff it was inſiſted that the 13 *Eliz.* ſays only that it ſhall be a good conſideration, and not a full and adequate conſideration: and that this conveyance if for a good, though not an adequate one, has taken it out of the ſtatute. *Vide Jones* verſus *Marſh, Caſ. in Ch. in Ld. Talbot's time* 64. was cited.

They argued likewiſe from the inconvenience that would ariſe if ſuch a conſtruction ſhould prevail, as is contended for by the creditor's council, becauſe it would be almoſt impoſſible to make a ſettlement of ſeparate maintenance, that would be of any force, which though they are not deſirable, yet are too often neceſſary things, for the huſband by contracting debts afterwards would have it in his power to defraud the wife, and deprive her of any maintenance.

The true conſtruction, they ſaid, upon the ſtatute was, that where a deed is merely voluntary, and intended as a fraud, that it ſhould be conſidered as fraudulent againſt creditors, but where there is ſome conſideration, though not a full one, that it ſhould be otherwiſe.

The creditor had him in execution only for 50*l.* and 12 years afterwards the huſband took the advantage of the inſolvent debtors act.

LORD CHANCELLOR.

Have you any inſtance of it's being held in this court, that a conveyance from a huſband to a wife without any pecuniary conſideration moving from the wife, has been held to be good againſt creditors?

Mr.

Mr. Attorney General, council for the plaintiff, ſaid, that indeed natural love and affection alone would not be a conſideration; but here there is a very good one, the maintenance of the wife and daughter; for ſuppoſe the wife had inſtituted a ſuit in the ſpiritual court for alimony, and the huſband by way of defence had inſiſted there upon his deed of ſeparate maintenance, they would have conſidered it as a proviſion in that court, and given ſentence againſt the ſuit, which ſhews that the eccleſiaſtical court do not hold it to be voluntary, but binding upon the parties.

LORD CHANCELLOR.

The queſtion is with regard to the deed of ſeparation in 1738. and the truſts declared in it, whether they are fraudulent within the 13 *Eliz.* againſt the defendant *Stephens* the creditor.

It is certain that every conveyance of the huſband that is voluntary, and for his own benefit, is fraudulent againſt creditors.

Every voluntary conveyance of the huſband is not fraudulent againſt creditors.

Conſider then whether this truſt deed is not ſo.

The plaintiff before marriage was intitled to a rent-charge of 50*l.* a year for her life from Lord *Rivers*'s eſtate, ſhe marries the defendant *Fitzer*, and for ſome time afterwards they lived together as man and wife, and though the huſband by law is bound to maintain his wife and child, yet ſtill the funds out of which the maintenance is to ariſe are liable to his creditors.

Though a huſband by law is bound to maintain his wife and child, yet the funds out of which the maintenance is to ariſe, are liable to his creditors.

This being ſo, he conveys the annuity to truſtees to ſecure the payment of 24*l. per ann.* to the wife, and 12*l.* to the daughter.

It has been inſiſted on the part of the plaintiff, here is a ſufficient *valuable* conſideration, though it was admitted on all hands that natural affection alone is not one; but I by no means allow this is a conſideration, for if it was, a huſband and wife need only agree to put ſome part of *his* eſtate out of his power, by veſting it in truſtees for her ſeparate uſe in order to defraud the creditors.

The caſe in the ſpiritual court put by the Attorney General is upon the miſbehaviour of the huſband, and is the determination of a court of juſtice, who have juriſdiction in theſe caſes: beſides, their decrees for alimony and maintenance are only againſt the perſon of the huſband, and do not affect any part of the eſtate, ſo as to take it from the huſband's creditors.

The decrees in the ſpiritual court for alimony and maintenance are only againſt the perſon of the huſband, but affect not the huſband's eſtate ſo as to take it from his creditors.

A proviſo in the deed of ſeparate maintenance, that if the wife contracts debts whereby the huſband is chargeable, then the deed is to be void; ſo that notwithſtanding this deed ſhe may at any time

diſavow it, and take up goods according to her rank, for here is no covenant on the part of the truſtees to indemnify the huſband, but reſts barely upon the agreement.

It has been argued for the plaintiff, that the huſband is delivered from the burden of maintaining his wife and daughter.

But here is no covenant from the truſtees or relations of the wife, that the huſband ſhall not be obliged to allow her a greater maintenance, or that the huſband ſhall be diſcharged from ſuch maintenance.

It is ſtill ſtronger with regard to the daughter, for ſhe was an infant at the time the deed was executed, and could not be bound by it; and beſides the father by nature is obliged to maintain her; ſo that the parties are not bound at all.

Then conſider it as an aſſignment which the huſband himſelf may make uſe of to fence againſt creditors, and conſequently it is fraudulent.

This caſe ſtands quite abſtracted and naked from any caſes, where there may be a covenant by relations of the wife to indemnify the huſband againſt debts of the wife; but I will not now determine what the conſtruction of even ſuch a deed would be, with regard to a huſband's creditors.

Conſiderations are not to be weighed in too nice ſcales.

This is not like the caſe of *Jones* verſus *Marſh*, for there 100*l.* was paid by the wife's relations, and I am not to weigh conſiderations in too nice ſcales.

The next thing which has been inſiſted on for the plaintiffs, is, that ſuppoſing no ſuch deed had been executed, as it was a rent-charge of the wife's before marriage, and the huſband had become a bankrupt, the court would not have decreed it to the aſſignees during the life of the huſband, unleſs they had firſt agreed to ſecure ſome proviſion for the wife.

The huſband during the coverture had a legal remedy by diſtreſs for the arrears of the annuity, without being firſt obliged to make a proviſion for his wife.

This is the caſe of a freehold of a wife, and deviſed to her for life, and during the coverture the huſband might have a legal remedy by diſtreſs for the arrears: but he could not have conveyed it away to her prejudice, for if ſhe had ſurvived, ſhe would have been intitled to the rent-charge again.

Would the court, where this is the caſe, have hindered the huſband of his legal remedy by diſtreſs, till he had firſt made ſome proviſion for his wife: I apprehend by no means, any more than they would do it where a man marries a woman ſeiſed of lands in fee.

And

And even in the caſes of aſſignments of bankrupts eſtates, or in the late caſe of *Jewſon* verſus *Moulſon, & è con': Oct.* 27, 1742. *vide ante* 417. the court have not determined that creditors are not intitled to the intereſt the huſband has in the wife's *choſe in action* during his life, but have recommended it to them to allow a groſs ſum to the wife by way of proviſion, and to take the reſt to themſelves to prevent a greater trouble.

Creditors in bankrupt caſes are intitled to the intereſt the huſband has in the wife's *choſe in action* during his life.

His Lordſhip decreed that upon the plaintiff Mrs. *Fitzer*'s paying the defendant *Stephens* the remainder of his debt, that *Stephens* ſhould releaſe all his right to the annuity to the truſtee of the deed of ſeparate maintenance.

He decreed likewiſe the truſts of the deed to be performed, as againſt the defendant *Fitzer* the huſband.

Coſts were given to *the creditor* only.

Poore verſus *Clark, February* 22, 1742.

Caſe 309.

A Bill was brought by a leſſee for 21 years, under the Dean and Chapter of *Wincheſter*, againſt a Lord of a manor, and the tenant of a particular houſe, that it might be pulled down, as it obſtructed the plaintiff's way to his fields, and to be quieted in the poſſeſſion of the way for the future.

Where you draw the juriſdiction out of a court of law, you muſt have all the parties before the court, who are neceſſary to make the determination compleat, and to quiet the queſtion.

The defendant's council objected for want of parties, becauſe the Dean and Chapter of *Wincheſter*, who are the owners of the inheritance, are not brought before the court.

LORD CHANCELLOR.

If the relief can be only temporary, it muſt be left to law; for in caſes of this kind the court will not interfere unleſs they can make a laſting and permanent decree, that ſhall for ever quiet and ſettle the right, and will not decree it for a particular term only.

The plaintiff here might as well have been a tenant for one year as twenty-one, or even a tenant at will.

If the queſtion was concerning a right of common, though a leaſeholder might eſtabliſh it at law, yet if he brings a bill here to eſtabliſh ſuch right, was it ever done without having the owner of the inheritance before the court; the ſame rule holds upon a bill brought by a leſſee for tithes, or for eſtabliſhing a modus; ſo is the practice of the Exchequer, for the general rule is, that if you draw the juriſdiction out of a court of law, you muſt have all perſons

parties

parties before this court, who will be neceſſary to make the determination compleat, and to quiet the queſtion.

The caſe of *Buſh* verſus *Weſtern*, *Prec. in Ch.* 530. is different from the preſent, becauſe the defendant there reſted entirely upon a forfeited mortgage, and did not ſet forth who the owner of the inheritance was, or pray that he might be made a party; upon the whole, this is a good objection for want of parties.

A decree againſt the lord of a manor will not bind copyholders in fee, or freeholders for life, who were no parties to it.

As to the objection of not making the reſt of the freeholders and leſſees of the manor parties, if they do not think proper to diſpute the plaintiff's right, the plaintiff is not obliged to bring them before the court; but if they ſhould not ſubmit to the right he claims of the way, a decree againſt the lord of a manor will not bind copyholders in fee, or freeholders for life, but they may controvert the right notwithſtanding.

Caſe 310. *Shudal* verſus *Jekyll*, *February* 25, 1742.

THE bill was brought againſt the executors of Sir *Joſeph Jekyll* for a legacy of 1000*l.*

A legacy of 1000*l.* given under the will of *J.* to the plaintiff, not ſatisfied by the 500*l.* given upon the marriage in the teſtator's life-time.

Sir *Joſeph*'s will was dated the 4*th* of *May* 1738. ſoon afterwards Mr. *Shudal* the plaintiff's late huſband made his addreſſes to her, and ſome time in *July* following applied to Sir *Joſeph*, who was her uncle, for his approbation, who being ſatisfied with the match, ſaid he would give him 500*l.* but as it was not convenient to let him have the money, he would draw a note payable to him on the 25*th* of *March* 1739. and lodge it in Mr. *Hill*'s hands, to be delivered to Mr. *Shudall* after the marriage was had, (which he did accordingly) and alſo ſaid that he would leave ſomething to his niece by his will, but that he would not be put under any obligation of doing it.

Upon the 19*th* of *Auguſt* 1738. Sir *Joſeph* died without revoking his will, and the very next day the plaintiff and Mr. *Shudal* were married.

The queſtion is, whether the legacy of 1000*l.* given to the plaintiff under the will is ſatisfied, by the 500*l.* given upon the marriage in the teſtator's life-time.

Mr. Solicitor General for the plaintiff.

Argued that this caſe is not within the general rule of preſumptive ſatisfaction, for when it has been ſo conſtrued, it is where the bequeſt under the will is expreſſly given to a daughter for a portion; and cited *Harton* verſus *Whitmore*, 1 *P. W.* 681.

Here the legacy of 1000*l.* is given generally to the plaintiff, who is the teſtator's grand niece: there's no ground to imagine that becauſe the teſtator gave 500*l.* in his life-time to the huſband, he intended it ſhould go in part ſatisfaction of the plaintiff's legacy. *Vide Spinks* verſus *Cope*, *Jan.* 27, 1742. beſides, the note given to the huſband was by no means for her benefit, for it might have gone to his executors, nor was there any ſettlement made by the huſband in conſideration of the ſum ſo advanced, and he is now dead inſolvent.

Mr. Attorney General for the defendant the executor ſaid, that as the teſtator was conſulted on the match, and not her own father, Sir *Joſeph* ſtands in *Loco Parentis*, and conſequently from the nature of the caſe it was intended as a portion.

A ſtrong circumſtance to ſhew his intention with regard to the plaintiff, is, that notwithſtanding the teſtator had given to another niece *Margaret Hill*, a legacy of 1000*l.* yet upon advancing to her afterwards 500*l.* upon her marriage, he told his ſecretary Mr. *Mortimer*, that now ſhe ſhould have but 500*l.* under the will: and though it does not appear that he expreſſed himſelf in the ſame manner upon the marriage of Mrs. *Shudal*, yet it is moſt natural to ſuppoſe that his intention was the ſame.

The Chancellor made two queſtions in this caſe.

Firſt, Whether there is a preſumption of ſatisfaction, or an ademption of the legacy, by what Sir *Joſeph Jekyll* did afterwards in his life-time.

Secondly, If there is not a general preſumption, then whether there is any thing in the cauſe which amounts to a proof that he intended it as a ſatisfaction.

This muſt depend upon the note, and the evidence.

Sir *Joſeph* by his will has given to the plaintiff by the name of *Elizabeth Parſons*, and to *Ann Parſons* her ſiſter, a general legacy of 1000*l.* apiece.

About ten weeks after Mr. *Shudal* acquaints Sir *Joſeph Jekyll* with his intention of marrying the plaintiff, who approved of the match, and immediately drew a note for 500*l.* payable to *Shudal* the 25*th* of *March* next.

After this converſation, and the giving of the note, it appears to have been the intention of the parties to have married in a fortnight or three weeks at fartheſt.

The queſtion is, if there is any preſumption to be drawn from hence.

I am of opinion that if the caſe reſted here, it would not create a preſumption of ſatisfaction either of the whole 1000 *l.* or part of it.

Where a father gives a legacy *generally* under a will to a daughter, he muſt be underſtood to mean it as a portion, and if he afterwards gives her a ſum on marriage, it is an ademption of the legacy.

The general run of caſes is upon a father's making proviſion by way of portion for a daughter in his life-time: this is truly ſaid to be a debt of nature from a parent to a child, and though he gives a legacy generally under a will, yet he muſt be underſtood to mean it as a portion; and therefore if he gives a ſum afterwards to her upon her marriage, it is for the ſame end, and conſequently an ademption of the legacy.

Double portions are what this court ſtrongly leans againſt, and whether the portion given in the life-time be leſs or not, is no ways material. Where an orphan is under the care of a collateral relation, and he by will gives her a legacy, which is expreſſed to be for her portion, and afterwards provides for her in his life-time; Lord *Hardwicke* inclined to think this would be an ademption.

This court to be ſure leans ſtrongly againſt double portions, or double proviſions, and whether the portion given in the life-time is leſs, or not, is no ways material; but all theſe caſes differ extremely from a bounty given by a remote relation, though I will not ſay but there may be caſes between collateral relations which would be conſidered as an ademption; for ſuppoſe a child to be an orphan without father or mother, under the care of a collateral relation, who by his will gives her a legacy, and expreſſes it to be for her portion, and afterwards makes a proviſion for her in his life-time, I ſhould be inclined to think this an ademption.

But in the preſent caſe, the plaintiff's father is living, and a collateral relation only, *her great uncle*, gives her a general legacy: now I do not know any caſe where ſuch a relation's giving a general legacy, and afterwards advancing the ſame perſon in his life-time has been held to be a ſatisfaction, and therefore differs from the caſes of fathers, or grandfathers, ſtanding in *loco parentis*.

The chief ſtrength of this caſe depends upon the ſecond queſtion, whether from the proofs which have been read it appears, that the teſtator intended it as a ſatisfaction.

In the caſes of ſatisfaction of legacies parol declarations have always been admitted.

I am of opinion that the evidence does import quite the contrary, and parol declarations have been conſtantly admitted in all theſe caſes.

Sir *Joſeph Jekyll*'s ſaying to *Shudal* that he would leave the plaintiff ſomething, but that he would not lay himſelf under an obligation to do it, for ſhe muſt take her chance, imports, that he intended to give her a legacy by the will.

But

But how is it poſſible for a court of juſtice to ſettle what was the *quantum* the teſtator intended; and can I imply that he intended to leave her no more than 500*l.*

Suppoſe, even in the caſe of a father, he had given 500*l.* to a daughter, or to the huſband, as a portion, and had ſaid, at the ſame time, I will leave her ſomething by my will, but will not lay myſelf under any obligation, and you muſt take the chance; a court of equity would not have held this to be an ademption of the legacy under the will.

Suppoſe a father gives a daughter 500*l.* as a portion, in marriage, and ſays, I will leave her ſomething by my will, but will not oblige myſelf to do it, this would not be an ademption.

But it is ſaid, the conſtruction in this caſe muſt be by way of analogy to what Sir *Joſeph Jekyll* has done with regard to another great niece, Mrs. *Margaret Hill.*

But though he has altered his will, as to one perſon, I can never take it to be an evidence of his intention to alter the legacy of another perſon; and therefore, the inference to be drawn from hence, makes rather for than againſt the plaintiff.

The altering a will as to one niece, can never be taken as an evidence of the teſtator's intention, to alter the legacy as to another.

As, therefore, I am of opinion, that even a father giving his daughter a portion in his life-time, and accompanying it with ſuch declarations, would not have been an ademption of any legacy bequeathed to her under a will, *a fortiori* I ought in this caſe to decree the executor to pay 1000*l.* to the plaintiff, with intereſt at 4 *per cent.* from one year after the teſtator's death: I ſhall give no coſts on either ſide.

Middlecome verſus *Marlow, February* 28, 1742. Caſe 311.

A. Who was intitled to a leaſehold eſtate, and a ſhare in the reſidue of her father's perſonal eſtate, amounting to 500*l.* marries during her infancy; the huſband, by deed after marriage, agrees with her father's executors that the 500*l.* ſhall be ſettled to her ſeparate uſe for life, and after her death, to the iſſue of the marriage; and in the deed is a proviſo empowering the truſtees to advance the huſband all or any part of the money by way of loan.

A. intitled to 500*l.* marries whilſt an infant, the huſband, by deed after marriage, agrees the 500*l.* ſhall be to her ſeparate uſe for life, and after her death, to the iſſue of the marriage; in the deed was a proviſo, impowering the truſtee to lend a part, or the whole, to the huſband; he lent him the 500*l.* and in fourteen months after he became a bankrupt; the truſtee brought his bill to be admitted a creditor. *Lord Hardwicke decreed, he ſhould come in as a creditor under the commiſſion for the money he paid to the huſband.*

In purſuance of this proviſo, the truſtees lent the huſband all the money, and, fourteen months after the execution of the deed, he became a bankrupt.

The

The bill is brought by the truſtees to be admitted creditors under the commiſſion.

The defendant, the aſſignee of the bankrupt, inſiſts this was not a loan by virtue of the proviſo to the huſband, but a payment to him of the legacy.

Receipts were produced under the huſband's hand, for money due on account of the legacy, one of which was before the deed, for the ſum of one hundred pounds, the reſt after the execution of it.

LORD CHANCELLOR.

The queſtion is, whether this deed is upon ſuch a conſideration as to prevail againſt creditors.

A ſettlement made after marriage is good, where the huſband was not indebted at the time, and the wife, when married, an infant.

I am of opinion it is; for if a man marries an infant, and makes no manner of proviſion before marriage, a ſettlement made afterwards is good, where there is no proof of his being indebted at the time.

In the preſent caſe, it is very far from being an unreaſonable ſettlement, as there was no part of the huſband's eſtate ſettled.

This is not within the meaning of the 13 *Eliz.* which confines it to ſuch conveyances as are made to defraud creditors; now at the time this deed was made, there was not ſo much as a ſingle creditor; ſo that, even taking it at law, it would be difficult for the creditors to come at it.

If there was any doubt as to the time of the execution, it might be a ground for directing an iſſue; but the evidence is, that it was executed about the time it bears date.

Neither the huſband, nor a perſon ſtanding in his place, can have the fortune of the wife, without making a proviſion.

This being ſo, if you conſider it upon the general equity in this court, neither the huſband, nor any perſon ſtanding in his place, can have the fortune of the wife, without making a proviſion.

If the truſtees of the huſband have done the ſame thing with regard to the wife, which the court would have obliged them to do, how is it unreaſonable? For though I agree the court would not have directed this ſettlement, ſuppoſing the huſband had any eſtate of his own to ſettle, yet it was very proper, as there is no conſideration of the huſband's ſide, and as the court would have done juſt the ſame thing, upon the Maſter's reporting this to be the circumſtance of the caſe, there is no ground to call it an unreaſonable ſettlement.

The court never weighs nicely, what will be the particular advantage on one ſide, or the other, under a ſettlement if it is juſt in general.

If a ſettlement be juſt in general, a particular advantage on one ſide or the other will not affect it.

Though, after the execution of the deed, the receipts are given as for a legacy, yet it muſt be taken to be upon the footing of the deed of truſt, and therefore I muſt decree the plaintiff to come in as a creditor under the commiſſion for ſuch money as he paid to the huſband after the deed was executed.

Wood verſus *Briant*, *March* 3, 1742.

Caſe 312.

THE plaintiff's wife was intitled to the reſidue of her grandmother's eſtate, under her will, and likewiſe was left executrix, and *durante minore ætate* her father was adminiſtrator: At the time of her marriage with the plaintiff, he was by agreement, to have 800*l.* from the father, which in the ſettlement is mentioned to be a portion, and in conſideration of natural love and affection.

A father, adminiſtrator *durante minore ætate* of his daughter, who was executrix and reſiduary legatee of her grandmother's eſtate, agreed, when ſhe married with the plaintiff, that he ſhould have 800*l.* which in the ſettlement is called *a portion*: Lord *Hardwicke* refuſed to decree an account of the grandmother's perſonal eſtate, as ſhe had been dead 20 years; but directed the father's repreſentative ſhould account for his perſonal eſtate as to the 800*l.* only, and intereſt at 4 *per cent.* from the marriage.

It was inſiſted for the plaintiff, that he is intitled to an account of the reſidue of the grandmother's eſtate from the repreſentative of his wife's father; and that the 800*l.* paid by her father, upon her marriage, was not in ſatisfaction of this reſidue, eſpecially as it is expreſſed to be given for natural love and affection; and as the father, at the time of the marriage, was worth, at leaſt, 8000*l.* and had only this daughter and one ſon, his council argued, it was not probable he meant it as a ſatisfaction.

That conſtructive ſatisfactions muſt be drawn from circumſtances.

That there is no caſe to be produced, where a father is indebted to a child on account of a demand under the will of a collateral relation; that before the demand is liquidated, his giving a ſum as a portion to this child has been held to be a ſatisfaction of this demand: For this purpoſe was cited *Prec. in Chan. Chidley* verſus *Lee*, 228. *and Barnham* verſus *Phillips*, heard about a year ago, before Lord *Hardwicke*.

The council for the defendant reſted chiefly upon the parol declarations of the plaintiff and his wife, ſoon after the marriage, that the 800*l.* was intended both as a portion, and a ſatisfaction likewiſe as to the reſidue of the grandmother's eſtate, and the depoſitions

ſitions of ſix or ſeven witneſſes were read, which were very full to this point.

To encounter this, on the plaintiff's ſide was read, the evidence of the father's declarations before and after the marriage; that, he ſaid, his mother had left 500*l.* at leaſt, to his daughter; and that he would give *John Wood* (the plaintiff) 1000*l.* and make a man of him; and, not above ſix weeks before his death, ſaid to the plaintiff, thou knoweſt I owe thee a great deal of money, and thou ſhall not be wronged of a farthing.

LORD CHANCELLOR.

The plaintiff is intitled, of courſe, to what remains due upon the 800*l.*

The doubt is, whether there ought to be an account taken of the grandmother's eſtate.

I am of opinion, there are no grounds to direct ſuch an account.

If I was to do it, after ſuch a length of time as twenty years, for ſo long the grandmother has been dead, it would be laying down a rule that muſt create great confuſion.

The firſt queſtion is, Whether there is a preſumptive ſatisfaction of the legacy to the plaintiff's wife, under the grandmother's will, by the 800*l.* being advanced to her by the father on her marriage.

I do not think any certain rule can be laid down, but the caſes muſt depend upon their particular circumſtances.

In moſt caſes a father will be preſumed to have paid the debt he owes a daughter, when in his life-time he gives her a greater ſum in marriage.

There are very few caſes where a father will not be preſumed to have paid the debt he owes to a daughter, when in his life-time, he gives her in marriage, a greater ſum than he owed her: For it is very unnatural to ſuppoſe that he would chuſe to leave himſelf a debtor to her, and ſubject to an account.

Portion, not only implies a fortune out of the father's eſtate, but may alſo relate to what the wife brings with her in marriage, and anſwers to the word *Dos* in *Latin*.

The word *portion*, to be ſure, may imply a fortune out of the father's eſtate; but, on the other hand, it relates likewiſe to what the wife bring's with her in marriage, and anſwers to the word *Dos* in *Latin*; ſo that it is as properly and naturally applied to this ſenſe as the other, and no argument in favour of the plaintiff is to be drawn merely from the term *portion* being made uſe of in the marriage ſettlement.

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As

As to the caſe of *Chidley* verſus *Lee*, the ground Sir *John Trevor* went upon was, that the huſband knew nothing of the legacy to the wife from the collateral anceſtor, and therefore held it was not ſatisfied by the portion, though it was a much larger ſum than the legacy: But I muſt own I think that was an extreme hard caſe, and I believe I ſhould have been inclined to determine it otherwiſe.

Lord *Hardwicke* expreſſed his diſlike of the decree, in the caſe of *Chidley* verſus *Lee*, and ſaid, he ſhould have been inclined to have determined it otherwiſe.

The other caſe was *Barnham* verſus *Phillips*, heard before me in 1741.

There the father, a freeman of *London*, made his will, and divided his eſtate according to the cuſtom, and the dead man's part he deviſed among his wife and children; afterwards in his life-time he marries one of his daughters, and gives her 1000*l.* which the court declared to be a ſatisfaction of her orphanage ſhare, but not as to her ſhare in the dead man's part, becauſe it was uncertain, at the time the will was made, to what ſum it would amount.

A freeman of *London* by will divided his eſtate according to the cuſtom, and deviſed the dead man's part among his wife and children; afterwards, he gave a daughter 1000*l.* in marriage; held to be a ſatisfaction of the orphanage ſhare, but not as to her ſhare in the dead man's part.

If the preſent caſe, therefore, reſted upon the preſumption only, I ſhould be of opinion, that the 800*l.* was a ſatisfaction for the reſidue under the grandmother's will.

It has been ſaid, the legacy was unliquidated, and no account has been taken of the grandmother's eſtate to this day; and if there were any grounds to think that the reſidue under her will was more than the fortune given to the plaintiff's wife in marriage, it might be a reaſon for directing an account of this eſtate, but 500*l.* is admitted to be the utmoſt amount.

The evidence on the defendant's ſide, with regard to the declarations of the plaintiff and his wife, are very ſtrong, and applied directly to the point of ſatisfaction.

And, on the other ſide, there are only looſe and general declarations of the father, that he was indebted to the plaintiff.

Lord Chancellor decreed, an account of the father's perſonal eſtate, as to the 800*l.* only, and intereſt at 4 *per cent.* from the marriage, againſt his repreſentative; the plaintiff's council preſſed very much for 5 *per cent.* but from 1725, the time Lord Chancellor *King* had the ſeals, the court have never directed 5 *per cent.*

From 1725, the time Lord *King* came to the Great Seal, the court have never directed more than 4 *per cent.* intereſt in theſe caſes.

Vaillant

Caſe 313. *Vaillant* verſus *Dodemead*, *March* 4, 1742. *at Lord Chancellor's houſe.*

The defendant having examined Mr. *Briſtow*, his clerk in court, the plaintiff exhibited interrogatories for croſs-examining him, to which *he demurred*, for that he knew nothing of the matters inquired of, except what came to his knowledge as the defendants clerk in court, or agent: *Lord Chancellor over-ruled the demurrer, and ordered him to anſwer the interrogatories.*

THE bill was to be relieved againſt a colluſive aſſignment made by the defendant *Dodemead*, of a leaſe to one *Laſcells*, a priſoner in the *Fleet*, in order to avoid paying a ground rent to the plaintiff; the defendant *Dodemead* had examined Mr. *Briſtow*, clerk in court in the cauſe, who demurred to the plaintiff's interrogatories, on a croſs examination.

The demurrer was, for that he knew nothing of the ſeveral matters inquired of by the interrogatories, beſides what came to his knowledge as clerk in court, or agent for the defendant, in relation to the matters in queſtion in this cauſe, and therefore ſubmitted to the court, whether he ſhould be obliged to anſwer thereto.

LORD CHANCELLOR.

This demurrer covers too much, it ought to conclude, that he knew nothing but by the information of his client.

Theſe demurrers ought to be held to very ſtrict rules; I am of opinion, there are ſeveral objections to this demurrer, I think it covers too much, and is very looſely drawn, for all demurrers of this ſort, ought to conclude, that he knew nothing but by the information of his client.

The firſt objection made againſt this demurrer is, That it appears in this caſe, that the matters inquired after by the plaintiff's interrogatories were antecedent tranſactions to the commencement of the ſuit, the knowledge whereof could not come to Mr. *Briſtow*, as clerk in court, or ſolicitor.

Where at law the party calls upon his attorney for a witneſs, the other ſide may croſs-examine him to the point in the cauſe.

The ſecond objection, That this is a croſs-examination, and wherever at law the party calls upon his own attorney for a witneſs, the other ſide may croſs-examine him, but that muſt be only relative to the ſame matter, and not as to other points of the cauſe.

The third objection, That it is too general; for the words are, that he knew nothing but as clerk in court, or *agent*.

Council, ſolicitor, or attorney, may be privileged from being examined in ſuch caſes, but not an agent.

Now, the word *agent* is very extenſive and uncertain, for no perſons are privileged from being examined in ſuch caſes, but perſons of the profeſſion, as council, ſolicitor, or attorney, for an *agent* may be only a ſteward, or ſervant.

The fourth objection, That one of the interrogatories was an enquiry concerning the proving of the deed of aſſignment, which was exhibited; I am of opinion, that he ought to anſwer to this, though he ſhould be privileged as to other matters.

Lord *Hardwicke* ſeemed chiefly to rely on the caſe of the *South Sea Company* and *Dolliffe*, which was this: Mr. *Dolliffe*, upon his going abroad, as ſupercargo to the *South Sea* company, entered into articles, wherein was a covenant from Mr. *Dolliffe*, not to demur to any bill the company ſhould bring within two months after his return to *England*, which time was altered to ſix months.

Dolliffe, on going abroad as a ſupercargo, by articles covenanted with the *South Sea* company he would not demur to any bill they might bring within two months after his return, which was altered afterward to ſix: *Gambier*, who drew the articles, demurred, as council to the company, to *Dolliffe*'s examining him; *the demurrer over-ruled, for that what he knew was as the conveyancer only.*

Mr. *Dolliffe* wanted to examine Mr. *Gambier*, who had ſettled the articles touching the time, which Mr. *Dolliffe* ſuggeſts was altered without his privity or knowledge.

Mr. *Gambier* demurred, as being council for the company, but the demurrer was over-ruled, for that what he knew was as the conveyancer only.

It was heard before Lord Chancellor *King*, and Lord *Hardwicke* was council in it.

For the plaintiff was cited *Cutts* verſus *Pickering*, *Ventr.* 197. *

Lord Chancellor over-ruled the demurrer.

Godwin verſus *Winſmore*, *March* 10, 1742. Caſe 314.

A Bill was brought by a widow for a cuſtomary eſtate in land at *Worceſter*; the huſband's father bought the lands, which were conveyed to him and *D.* and the heirs of the father; the father dies after deviſing the lands to the huſband in tail; *D.* ſurvived the huſband.

The father of the plaintiff's huſband bought cuſtomary freehold lands, which were conveyed to him and *D.* and the heirs of the father, who dies, after deviſing the lands to his ſon in tail, who dies; living *D.* the plaintiff, lays the cuſtom for the whole, as her free bench. *Lord Hardwicke ſaid, this was a demand of cuſtomary dower out of the truſt of a freehold eſtate, and diſmiſſed her bill.*

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* *A ſolicitor was produced concerning a raſure of a clauſe in a will, ſuppoſed to be done by his client*; but it appearing that this diſcovery, of which he was now about to give evidence, had been made *before the retainer of him as ſolicitor*, the court were of opinion, that he might be ſworn; otherwiſe, if he had been retained his ſolicitor before; the ſame law of an attorney or council. *Cutts* verſus *Pickering*, *Ventr.* 197.

The cuſtom is laid for the wife to have the whole lands as her *free bench.*

LORD CHANCELLOR.

That a wife is not dowable of a truſt eſtate is now an eſtabliſhed doctrine.

It is an eſtabliſhed doctrine now, that a wife is not dowable of a truſt eſtate; indeed a diſtinction is taken by Sir *Joſeph Jekyll*, in *Banks* verſus *Sutton*, 2 *P. W.* 632. in regard to a truſt, where it deſcends or comes to the huſband from another, and is not created by himſelf; but I think there is no ground for ſuch a diſtinction, for it is going on ſuppoſitions which hold on both ſides; and at the latter end of the report, Sir *Joſeph Jekyll* ſeems to be very diffident of it himſelf, and reſted chiefly on another point of equity, ſo that it is no authority in this caſe.

In *Banks* verſus *Sutton*, Sir *Joſeph Jekyll* took a diſtinction in regard to a truſt, where it deſcends to the huſband from another, and not created by himſelf; but Lord *Talbot* afterwards, in the caſe of the *Attorney General* verſus *Scott*, determined directly contrary to this diſtinction. *also*, *Brian v Saville 1702 — Pr. Ch. 290 —*

But there is a late authority in direct contradiction to the diſtinction above-taken in *Banks* verſus *Sutton*, the caſe of the *Attorney General* verſus *Scott*, before Lord *Talbot*, *Caſ. in Eq. in Lord Talbot's time* 138.

In *Vernon's caſe*, 4 *Rep.* 1. a wife was held not to be dowable of a uſe, before the ſtatute.

I think the wife here cannot have the cuſtomary dower.

The only caſe for the plaintiff, is *Otway* verſus *Hudſon*, 2 *Vern.* 583. there it was free bench, and is ſo called here, but appears plainly to be only cuſtomary dower.

It is a dying ſeiſed of the huſband, and not a ſeiſin during the coverture, intitles the widow to her free bench.

Free bench is merely a widow's eſtate in ſuch lands as the huſband *dies ſeiſed of*, not that he is ſeiſed of during the coverture, as dower is.

There were many circumſtances in the caſe in 2 *Vern.* 581. and it was decreed, on the endeavour of the huſband, to get the legal eſtate ſurrendered, and refuſal of the truſtees, and grounded on his will; but as to the general doctrine at the latter end, that is not warranted by the decree.

The demand here is of cuſtomary dower out of the truſt of a freehold eſtate, the legal eſtate ſtanding out in *D.* Lord *Hardwicke* diſmiſſed the bill, but without coſts.

Ex

Ex Parte Bennet, March 29, 1743. Caſe 315.

LINGOOD being indebted in ſeveral large ſums of money to *Bennet*, and there being ſome diſpute as to the quantum of the debt, *Bennet*, who apprehended *Lingood* to be a failing man, came to an agreement with him in 1741, to refer the diſpute to arbitration, and articles were accordingly entered into, by which it was agreed, to leave to arbitrators the adjuſting the ſum that ſhould be due to *Bennet*, which, when it ſhould be ſo fixed, *Bennet* was to take of *Lingood*, at the rate of eleven ſhillings in the pound only; the arbitrators awarded 1700*l.* to be due to *Bennet*, out of which, deducting nine ſhillings in the pound, in purſuance of the articles, there remained 948*l.* 1*s.* which was to be paid to *Bennet* by inſtalments of 25*l.* every quarter of the year. *Lingood* paid the firſt, and for the ſecond, gives *Bennet* two notes payable at a future day, which *Bennet* accepts, but before they were due, *Lingood* becomes a bankrupt. *Bennet* inſiſted before the commiſſioners, that he had a right to prove his whole debt of 1700*l.* but the commiſſioners doubting whether he ought to come in as a creditor for any more than the compoſition of 948*l.* 1*s.* and refuſing to admit him, even for that ſum, unleſs he would give up, for the benefit of the creditors in general, ſeveral bonds entered into by Lord *Clanrickard*, and others, to *Lingood*, and by him delivered to *Bennet* as a further ſecurity; he petitioned the Chancellor upon both theſe points, to be let in under the commiſſion for his whole debt of 1700*l.* and to keep the bonds notwithſtanding.

Where a creditor for 1700*l.* agrees with his debtor, a failing man, to take eleven ſhillings in the pound, to be paid by inſtalments; and the debtor, after the firſt payment, becomes a bankrupt; Lord *Hardwicke* was inclined to think the 1700*l.* and not the groſs ſum of the compoſition only, might be proved under the commiſſion of bankruptcy.

LORD CHANCELLOR.

The queſtion is, Whether *Bennet* ought to be admitted a creditor for 948*l.* 1*s.* only, which is the ſum due upon the compoſition or for the whole 1700*l.*

Bennet's acceptance of the two notes from *Lingood*, inſtead of the money, is a waver of the particular default in the payment of this inſtalment: But then the queſtion is, with regard to the defaults which have been made ſince *Lingood* became a bankrupt.

Now the general rule of equity, with reſpect to compoſitions of debts, has been rightly laid down, that the court will not diſpence with the point of time in compoſitions; for where a creditor agrees to take leſs than his debt, ſo that it be paid preciſely at the day, and the debtor fails of payment, he cannot be relieved. *Eq. Caſ. Abr.* 28. *ſect.* 3. This was in the caſe of common creditors and debtors:

Where a creditor agrees to take leſs than his debt, provided it be paid preciſely at the day, and the debtor fails of payment, the general rule of equity is, that he cannot be relieved.

But the queſtion here is, between a creditor, and a debtor who becomes a bankrupt, by which other perſons are intereſted, the creditors at large.

The reaſon why commiſſioners of bankrupt compute intereſt on debts no lower than the date of the commiſſion, is becauſe it is a dead fund.

Commiſſioners, after a man becomes a bankrupt, compute intereſt upon debts no lower than the date of the commiſſion, becauſe it is a dead fund, and in ſuch a ſhipwreck, if there is a ſalvage of part to each perſon, in this general loſs, it is as much as can be expected.

Under old acts of parliament, a man was conſidered as guilty of a crime or tort, in becoming a bankrupt.

But then the caſe of a compoſition differs, for it is broke by the default of the debtor, as he is guilty of a crime and a tort in becoming a bankrupt; and though the genius and turn of bankrupt acts is altered of late, yet it is by the old acts of parliament conſidered as a wrong.

Therefore, whatever the accident is, which happens to the debtor, it ſhall not affect a creditor, who has compounded to take a leſs ſum than the original debt.

Upon the reaſon and juſtice of the thing, it would be very hard, after Mr. *Bennet* had agreed to reduce his debt to eleven ſhillings in the pound, if he ſhould not be admitted to prove the whole 1700*l.*

Next queſtion, As to the bonds delivered to *Bennet* by *Lingood*, before his bankruptcy.

If it had been a mortgage aſſigned to *Bennet*, I ſhould have directed the mortgaged premiſſes to be ſold, and if the produce ariſing from the ſale had not been ſufficient, I would have ordered that *Bennet* ſhould be admitted under the commiſſion, as a creditor for the deficiency.

The doubt is, Whether he can be admitted to prove the whole ſum, unleſs he will deliver up the bonds.

I do not remember this caſe has ever come before me ſince I have had the ſeals.

If they had been joint bonds from the bankrupt and another perſon to *Bennet*, he might have come in for his whole debt under the commiſſion, without being compelled to deliver up ſuch joint ſecurities, as he was entitled to get in what he could from the co-obligor.

I do not abſolutely determine the point now, but will direct the commiſſioners to inquire what has been received by the creditor Mr. *Bennet* from theſe bonds, and to ſtate likewiſe the nature of them, and to certify the ſame to the court.

Bennet

Bennet verſus *Lee*, *March* 23, 1742. *upon a petition for a bill of review.* Caſe 316.

LORD CHANCELLOR.

THIS is a caſe of very great conſequence to the practice of the court, it comes before me upon two petitions; one is on the petition of *Francis Lee*, a perſon of full age, who prays that he may rehear the cauſe which was determined the 28*th* of *June* laſt, (*vide ante* under the title *Bennet* verſus *Vade*,) and that he may likewiſe exhibit a bill againſt the plaintiff, one of the heirs at law of Sir *John Lee*, to eſtabliſh an entail under the will of Sir *John Lee*'s father in 1690.

Where parties apply for leave to bring a new bill, upon new matter diſcovered after a decree, they muſt ſhew that it is relevant, for its being merely new matter will not intitle them to ſuch a bill.

The other is on the petition of *Richard Lee*, an infant, and a party in the cauſe, who claims under the ſame entail a moiety of an eſtate in *Kent*, being gavelkind, with his brother *Francis Lee* the other petitioner, and as to the freehold eſtates of the late Sir *John Lee*, he claims only a remainder after *Francis*.

The original bill was brought by *Bennet* and others, coheirs of Sir *John Lee*, to ſet aſide the ſeveral deeds and conveyances by which Sir *John Lee* diſinherited them, upon a ſuggeſtion of inſanity and fraud, for the conteſt there related to the ſanity, and capacity of Sir *John Lee*, and charged doubly, that if not abſolutely inſane, yet of a weak underſtanding, and therefore if the court could not ſet the deeds aſide for inſanity, yet for fraud and impoſition upon a weak man they might.

The decree was founded on the latter charge, and the conveyances were ſet aſide as obtained againſt a weak and improvident perſon, and the eſtate directed to be reconveyed to *Bennet*, *&c.* and *Francis Lee* was ordered to join in the conveyance; but *Richard Lee* as an infant had a day to ſhew cauſe after he comes of age.

The petition is founded on different rights; Sir *John Lee*, father of Sir *John Lee*, made a will in 1690, and after giving an eſtate-tail to his ſon, limited to *Francis Lee* the grandfather of the petitioners, the remainder in tail of his *Surry* eſtate, and the remainder in fee of his *Kentiſh* eſtate.

It was inſiſted by Mr. *Bennet*'s council, that this remainder to Sir *Francis Lee*, both in the *Surry* eſtate and the *Kentiſh* eſtate, were well barred by a recovery ſuffered of the former by Sir *John Lee*, the ſon, on his marriage in 1703. and of the latter in 1718. and that conſequently the court will not ſuffer a new bill in the nature of a bill of review.

Now as to Mr. *Francis Lee*, he has no right by the courſe of the court to be let in to make a new defence, or to put in a better anſwer, ſo that it is only by a bill of review he can be admitted, and this not unleſs there is new matter diſcovered ſince the laſt bill, and if he brings himſelf within this rule, to be ſure he is entitled.

Two queſtions will ariſe as to him.

Firſt, Whether the intail in the will of 1690. is new matter, unknown to him at the time of the original cauſe, and came to his knowledge ſince.

Secondly, If it did, whether ſo material, as to induce the court to put the parties to the expence of a new hearing.

Now it appears to me plainly, that he was acquainted with this, antecedent to the publication of the cauſe; for that the will was known to him is admitted by himſelf in his anſwer, and taken notice of in the bill itſelf.

The only way his council avoid it is, that though he had notice of the right under the will, yet he had no notice of the ſettlement and recovery on Sir *John Lee*'s marriage; this is no anſwer, for it was incumbent upon Mr. *Francis Lee* to look out for the limitations under the ſettlement on Sir *John Lee*'s marriage; for as there was a limitation ſtanding out in *Francis Lee*, whether it took effect now or hereafter, it was very proper he ſhould make uſe of this title, againſt the heirs at law of Sir *John Lee*, becauſe ſuch a limitation was a ſufficient bar to them, and their bill brought in contradiction to this very title claimed by *Francis Lee* under the will.

In all theſe caſes, where parties apply for leave to bring a new bill upon new matter diſcovered after a decree, they muſt ſhew that it is relevant; for the court will not, merely becauſe it is new matter, direct a new bill to be brought, where it will be entirely vain and fruitleſs.

Therefore upon a former petition, I directed the recovery to be looked into, that *Francis Lee*'s council might have ſhewn ſome errors in it, which they have not been able to do.

But then it is ſaid Sir *John Lee* was inſane at the time of the recovery ſuffered of the *Kentiſh* eſtate.

To let Mr. *Francis Lee* bring a new bill upon this footing would be moſt extraordinary.

I will

I will lay it down ſo ſtrong, that *Francis Lee* had better loſe the eſtate if he had ever ſo good a right, than the public ſuffer from ſuch a precedent.

For, in the laſt cauſe he brought a croſs-bill upon the very point of the ſanity of Sir *John Lee*, and examined a multitude of witneſſes to prove him ſane: and to let him in the next day, and in the ſecond cauſe to contradict what he attempted to prove in the firſt, would introduce all the perjury in the world: for where the ſame point came in queſtion, and where he endeavoured to prove in direct contradiction to what he does now, is a practice the court will never ſuffer.

Where a party in a firſt cauſe has examined a great number of witneſſes to eſtabliſh a particular point, the court will never ſuffer him in a ſecond, to contradict what he attempted to prove in the firſt, as it muſt neceſſarily introduce perjury.

The great difficulty is with regard to *Richard Lee* the infant.

For he comes upon the foundation of that right, an infant has, to make the beſt defence the nature of the caſe will allow: for when infants come of age they are certainly entitled to put in a new anſwer, and to make a better defence if they can.

Infants when of age intitled to put in a new anſwer, and if they can, to make a better defence.

This rule is founded upon the reaſoning of all other courts, where the parol is allowed to demur, till the infant comes of age.

For at law where even the ſuit is brought by an infant as demandant, the courts in ſome caſes will admit the parol to demur, but then they make a difference between droitures, and poſſeſſory actions: *vide* the rules of the common law as to *the parol demurring* in *Markal*'s caſe, 6 *Co.* 3.

At law the courts in ſome caſes will admit the parol to demur, even where the ſuit is brought by the infant as demandant.

In equity too, even where the infant has been plaintiff, the court has in ſome few inſtances given him a day to ſhew cauſe, as in the caſe of Sir *John Napier* verſus *Lady Effingham*, but then there were ſome extraordinary circumſtances. *

This court has in ſome few inſtances given an infant, where he was plaintiff, a day to ſhew cauſe, but it muſt be on extraordinary circumſtances.

There is no ſuch thing as a difference in this court between writs of right and poſſeſſory actions, for the decrees here are the ſame, and one has not more force, or is more binding than the other.

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* The plaintiff Sir *John Napier*, an infant, exhibited his petition to Lord Chancellor *Parker*, for leave to bring a new bill, ſhewing that his cauſe had been miſmanaged by his former ſolicitor, and making out the ſame by affidavits; the court gave him leave to bring a new bill.

The defendant Lady *Effingham* appealing from the order to the houſe of Lords, ſhe was let into the poſſeſſion of the premiſſes, which ſhe claimed under a conveyance from Sir *Theophilus Napier*, her firſt huſband and uncle of Sir *John*, who brought a bill to be relieved againſt this conveyance as unduly obtained; but they gave leave to the plaintiff to ſhew cauſe within ſix months after he came of age. Sir *John Napier* verſus *Lady Effingham*, 2 *P. Wms.* 401.

It has been objected, that the infant comes too early, and ought to ſtay till he is of age.

I have been looking into a note I have of Sir *John Napier*'s caſe, by which it appears that Lord Chancellor *King*, in giving his opinion, agreed with Sir *Joſeph Jekyll* as to Sir *John*'s putting in a better anſwer, but diſagreed with him as to amending the bill, and ſaid, as he was of age, he might be at liberty to rehear the cauſe.

The preſent caſe differs, for here the perſon comes before he is of age, and prays he may be allowed to put in a better anſwer now.

An infant is proper, in applying to put in a better anſwer, where he might not be able to come at the ſame evidence when he is of age, as the fact he wants to examine to is of long ſtanding, and the witneſſes conſequently very old, and may die before he arrives at 22.

I am of opinion, provided there is a foundation for it upon the merits, that the infant before he comes of age is proper in applying to put in a better anſwer.

I do not ſay this is of courſe, but it muſt depend upon circumſtances here; if the infant did not put in a better anſwer now, he might not perhaps be able to come at the ſame evidence when he is of age.

Indeed if it depended upon deeds only, which would be forth coming as well when he is of age, as now, it would be otherwiſe; but the witneſſes to Sir *John Lee*'s inſanity, ſwearing to a fact of very long ſtanding, muſt be advanced in years, and may very probably die before he comes of age.

Beſides, deferring it would be putting the infant's eſtate to the hazard; for though I do not ſay it will happen in this caſe, yet a perſon who is put in as a receiver, may imbezil, or prove inſolvent.

I ſhall now come to the merits.

If it reſted ſingly upon the entail, and Sir *John Lee* was *compos mentis*, when the recovery was ſuffered, it would be very wrong to let the infant keep up this conteſt, where no fruit is to be expected from it.

But it is inſiſted that Sir *John Lee* was *non compos*, or if not quite inſane, yet ſo weak and of ſuch a mean capacity, that he was in no part of his life capable of ſuffering a recovery.

Now the infant has a right to ſay, my intereſt has not been conſulted in this cauſe; for I ought to have been allowed to join with the plaintiff, and to have inſiſted on carrying the incapacity of Sir *John Lee* ſo far back, as to over-reach the recovery of the eſtates in 1703 and 1718.

Therefore

Therefore he is juſtified, in ſaying, that his guardian has miſtaken his caſe entirely, and I cannot in juſtice refuſe him putting in a better anſwer, and making the beſt defence he can.

Now this will introduce Mr. *Francis Lee*'s right; for though he cannot amend his anſwer, or put in a new one, or bring a new bill, yet if upon a defence ſet up by another perſon, it ſhould come out to be the juſtice of the caſe, that the entail of the *Kentiſh* eſtate is ſtill in being, why then Mr. *Francis Lee* will by the cuſtom of *Kent* be intitled to a moiety: for there are many caſes where one party ſets up a title inconſiſtent with the title ſet up by another party, and though he fails in his own claim, yet he may appear to have a right to ſomething under the other's claim; and this court cannot conſiſtently with juſtice deprive him of it.

Where one Party ſets up a title inconſiſtent with the title ſet up by another, though he fails in his own claim, yet he may appear to have a right to ſomething under the other's claim, and in that caſe the court will not deprive him of it.

I will not abſolutely determine this point now, but will ſuſpend that part of the decree which directs Mr. *Francis Lee* to join in the conveyance of the *Kentiſh* eſtate until this queſtion is ſettled, and diſmiſs Mr. *Francis Lee*'s petition as to every thing elſe.

Gould verſus *Tancred*, *March* 23, 1742.

Caſe 317.

THE plaintiff being a mortgagee in poſſeſſion of Mr. *Tancred*'s eſtate, brought a bill againſt him to redeem, or that he might be foreclоſed; and it being referred to a Maſter to take the account, he made his report, which was confirmed as long ago as the year 1736. the defendant petitions now for a bill of review, upon three ſuggeſtions: Firſt, That the Maſter in taking the account has not made any reſts, or ſunk the principal of the mortgage. Secondly, That there are three years omiſſion in the account; and Thirdly, That there is matter come to his knowledge, ſubſequent to the maſter's making his report, though it exiſted at the time.

It being referred to a Maſter to take the account between a mortgagor and mortgagee under a bill of foreclоſure, his report was confirmed in the year 1736. Lord *Hardwicke* diſmiſſed the defendant's petition for *a bill of review*, as it appeared the defendant's agent, attorney and ſolicitor attended the ſettling the account on his behalf before the Maſter, which bound the party.

LORD CHANCELLOR.

This is a very unfavourable application when the Maſter's report has been confirmed ſo long, and where the defendant might properly have excepted to the report, upon every one of the ſuggeſtions which he now makes for the bill of review.

It has been ſaid by his council to ſtrengthen the application, that the defendant being an unfortunate man, has lain in priſon ſome part of the time, and forced to leave the kingdom for the reſt.

This is thrown in to move compaſſion, for all perſons in the defendant's caſe, who are incumbered, are liable to ſuch accidents, and if I was to give any weight to it, a creditor would lie under very

great hardſhips, and the ſaying inverted, for *a lender then would become a ſlave to the borrower.*

Here the defendant's agents, attorney, clerk in court, *&c.* attended the ſettling the account before the Maſter, which muſt bind the party, or there would be no end of controverſies: and yet the whole tendency of this application is, that all may be ſet loſe again: this makes me ſay it is a moſt unfavourable application; but however, if juſtice is with the defendant, it ought to prevail.

The petition is upon three grounds:

Firſt, that the Maſter has not made any reſts, or ſunk the principal.

It is very true the rule of the court in directing an account between a mortgagor and mortgagee is, that wherever the groſs ſum received exceeds the intereſt, it ſhall be applied to ſink the principal.

Where the ſum is larger, and the mortgagee is forced to enter on the eſtate, he ſubjects himſelf to an account; but the Maſter is not obliged for a ſmall exceed of intereſt to apply it to ſink the principal, nor is it an invariable rule, that in taking ſuch account he muſt make annual reſts.

But this is often attended with great hardſhips to mortgagees, where, as in this caſe, the ſum was large, 4000*l.* principal, and the mortgagee forced to enter upon the eſtate, and could only ſatisfy his debt by parcels, and is a bailiff to the mortgagor without ſalary, ſubject to an account; and therefore truly ſaid, the Maſter is not obliged for every trifling ſmall exceed of intereſt, to apply it to ſink the principal; nor do I know that the court has ever laid it down for an invariable rule, that the Maſter muſt always in taking ſuch account make annual reſts.

The leave of the court muſt be aſked before a bill of review for *new matter* can be filed; *otherwiſe*, if brought to reverſe a decree upon error appearing on the face of it.

If a bill of review be brought to reverſe a decree, upon new matter, in ſuch caſe the plaintiff in the bill of review muſt have the leave of the court for filing ſuch bill; but there is no need of leave, if the bill of review be brought to reverſe a decree upon error appearing on the face thereof; *vide* Lord *Bacon's ordinances.*

I take it, this has always been underſtood to be the rule; and the courſe of proceedings ſhew it.

A defendant may plead the decree, and demur againſt opening the Inrolment to a bill of review brought for error apparent, and on the plea and demurrer the court will judge, whether there are grounds for opening the inrolment.

For when a bill of review is brought for error apparent, the conſtant method is, for the defendant to put in a plea and demurrer, a plea of the decree, and a demurrer againſt opening the inrolment.

So that in effect, you cannot bring a bill of review, without having the leave of the court in ſome ſhape; for if it is for matter

apparent in the body of the decree, then upon the plea and demurrer of the defendant to the bill, the court judges, whether there are any grounds for opening the inrolment, if it is for matter come to the plaintiff's knowledge after the pronouncing the decree, then upon a petition for leave to bring a bill of review, the court will judge if there is any foundation for ſuch leave.

The ſecond ground is, that there are three years omitted in the account by the Maſter.

Now this is likewiſe error apparent, and might have been excepted to, and therefore falls within the ſame rule with the other.

The third ground is, that there matter came to his knowledge, ſubſequent to the maſter's making his report.

And this is a proper ground for a bill of review, ſuppoſing the evidence came up to it, but it turns out quite otherwiſe, this being ſo, the petition muſt be diſmiſſed.

Woodhouſe verſus *Shepley, et e contra, March* 17, 1742. Caſe 318.

THE original bill was brought by *Hannah Woodhouſe* to be relieved againſt a bond, obtained from her by the defendant upon this caſe.

Lord Hardwicke of opinion, that on the original bill the plaintiff was intitled to be relieved, and declared, though none of the circumſtances ſingly might prevail on the court to overturn her bond, yet they were ſufficient altogether; but the chief of them was, the encouragement this might give to diſobedience, and the fraud on parents; and on the whole decreed it to be delivered up to be cancelled.

The defendant who was a taylor by trade, and entitled to a ſmall real eſtate of about 14*l. per Ann.* in the year 1730. made his addreſſes to the plaintiff, who was then about the age of 26 years, and was the daughter of a man who was eſteemed in the neighbourhood to be a perſon of ſubſtance, and who could give her about 500*l.* for her fortune: the courtſhip had been carried on ſometime before it came to her father's knowledge, who as ſoon as he was acquainted with it, declared a great diſlike of the match, and forbid the plaintiff giving the defendant any encouragement; notwithſtanding which, the courtſhip was carried on in a clandeſtine manner till *January* 1732. when the defendant met the plaintiff at *Macclesfield*, a market-town in the neighbourhood, and there at an alehouſe the following bonds were executed, no body being preſent except the witneſſes, who were two ſtrangers and were called in for that purpoſe, *videlicet*, " A " bond from her in the penalty of 600*l.* with condition that if the " above bound *Hannah Woodhouſe* do, on or before the expiration " of 13 months after the deceaſe of her father *Robert Woodhouſe*, " according to the uſage and ceremony of the church of *England*, " eſpouſe

" eſpouſe and marry the above named *Ralph Shepley*, if the above " named *Ralph Shepley* will thereunto aſſent, and the laws of this " realm permit the ſame, or if it ſhall happen the ſaid *Hannah Wood-* " *houſe* ſhall not, nor will not marry and take to huſband the ſaid *Ralph* " *Shepley* as aforeſaid, but ſhall happen to marry with ſome other " perſon, then the ſaid *Hannah Woodhouſe*, ſhall and will well and " truly pay or cauſe to be paid unto the ſaid *Ralph Shepley* the ſum " of 500*l.* of lawful *Britiſh* money, at or immediately after failure " of ſuch marriage; but if it ſhall happen that the ſaid *Hannah* " *Woodhouſe* ſhall die before the time limited and appointed for the " ſaid marriage, then the ſaid *Hannah Woodhouſe* ſhall leave and give " the ſaid *Ralph Shepley* 10*l.* as a token of her love, to buy him " a ſuit of mourning with, then this obligation to be void, or elſe " ſhall remain in full force.

A bond from him in the like penalty, " *with condition*, that if " the above bounded *Ralph Shepley* do, on or before the expiration " of thirteen months after the deceaſe of *Robert Woodhouſe*, father " of the above named *Hannah Woodhouſe*, according to the uſage and " ceremony of the church of *England*, eſpouſe and marry the ſaid " *Hannah Woodhouſe*, if the ſaid *Hannah Woodhouſe* will thereunto " aſſent, and the laws of the realm permit; or if it ſhall happen the " ſaid *Ralph Shepley* ſhall not nor will not marry and take to wife " the ſaid *Hannah Woodhouſe* as aforeſaid, but ſhall happen to mary " with ſome other woman, then the ſaid *Ralph Shepley* doth hereby " covenant and agree to forfeit, ſurrender and yield up unto the ſaid " *Hannah Woodhouſe* for her own uſe all his eſtate real and perſonal " in *Macclesfield* park, and *Somersford* booths, or elſewhere by ſea " or land, but if it ſhall happen that the ſaid *Ralph Shepley* ſhall " die *fore* the time limited and appointed for the ſaid marriage, then " the ſaid *Hannah Woodhouſe* is to have to her own uſe one half " of all the ſaid *Ralph Shepley*'s eſtate both real and perſonal that " he ſhall be poſſeſſed of at the time of his deceaſe, then this obli- " gation to be void, or elſe to remain in full force.

An indorſement on the back of *Shepley*'s bond: " *Memorandum*, " that before the ſealing of this bond that *Ralph Shepley* doth promiſe, " covenant and agree that he will ſettle and aſſure the within named " *Hannah Woodhouſe* a yearly dower, according to what portion ſhe " ſhall have, and make her a good aſſurance as the law directeth, " either of lands, money or living, that ſhall pleaſe her; if this ſaid " *Hannah Woodhouſe* ſhall have child or children, then ſhe ſhall have " one half of his eſtate, and the child or children the other half that " he ſhall die poſſeſſed of, or that may by any means belong to him, " or his inheritance, that may either fall to him by ſea or land; and " if this ſaid *Hannah Woodhouſe* ſhall marry this *Ralph Shepley*, and " have no children by him, then ſhe ſhall pay to *Sarah Shepley* 20 *l.* " of lawful money as a legacy, and then all his lands, livings, goods,

" chattels, money and any thing that ſhall ever belong to him, or " that ever did in his life-time, that has not been received, ſhe ſhall " have and peaceably enjoy, and take for her own uſe and at her " own diſpoſing both in her life and at her death, unto which I " have put my hand. *R. S.*

Upon the examination of the witneſſes to the bonds it appeared they differed in their account of the execution, one ſaying the bonds were read over before execution, the other that they were not; one that they were exchanged, the other that both of them remained in the cuſtody of the defendant; and in fact at the time the anſwer was put in, they were both in the hands of the defendant: after this tranſaction, the execution of theſe bonds remained unknown, and the intercourſe was continued till *May* 1736. when the plaintiff's father died, who by his will left her a fortune of about 340*l.* the 13 months expired, and then the plaintiff filed the original bill to be relieved againſt her bond, and dying ſoon after, the cauſe was revived by the preſent plaintiff her adminiſtrator.

The croſs-bill was brought by *Ralph Shepley* to have ſatisfaction for this bond out of the aſſets of *Hannah Woodhouſe*, alledging he was always ready and willing to have married her, but was prevented from having any acceſs to her by her brothers.

Mr. Attorney General and others for the plaintiffs inſiſted, that this bond ought to be delivered up, and relied firſt upon the circumſtances of fraud attending the execution of theſe bonds, the inequality of the circumſtances of the parties, and the circumſtance of both the bonds being now in his cuſtody.

Secondly, That here was no breach of the condition, in regard the plaintiff never married any other perſon, and becauſe he had not ſhewn any tender on his part, or refuſal on her part, to perform the contract.

Thirdly, That ſuppoſing the condition was broken, and the bond fairly obtained, yet that the bond was of ſuch a nature, as that a court of equity for public conſiderations, and the general inconveniencies that would attend the permiſſion of ſuch ſort of contracts, ought to ſet it aſide; and it was compared to marriage brocage bonds; bonds obtained by ſolicitors from their clients; bonds from young heirs, *&c.* that it was in reſtraint of marriage, tends to incourage improvident matches, and diſobedience to parents, and would be void both by the civil and canon law; and the caſes of *Key* verſus *Bradſhaw*, 2 *Vern.* 102. and *Baker and his wife* verſus *White*, 2 *Vern.* 215. were cited.

Mr. *Brown* and other council for the defendant inſiſted that there was no circumſtance of fraud in obtaining the bond, ſufficient for a court of equity to ſet it aſide: that ſhe was of full age; that it was a ſuitable match; that the obligations were mutual, which ſhewed no deſign of fraud: that the bargain appeared to be moſt beneficial on her ſide; that as to the breach of the condition, there is no occaſion to prove a tender at law, for a plaintiff may declare generally upon the bond, and the defendant muſt have pleaded performance, payment, or a tender and refuſal, and from the circumſtances it appears he was always ready to have performed his contract: that as to the neceſſity of marrying, although the condition is inaccurately penned, yet upon the whole it appears to be the intention and agreement of the parties, that the bond ſhould be forfeited if ſhe refuſed to marry the defendant: that there was nothing improper or unreaſonable in this agreement; nor doth this caſe fall within the inconveniences in the caſes which have been mentioned; for being of full age ſhe had a right to diſpoſe of herſelf, and if ſhe parted with the liberty of marriage, it was for a valuable conſideration; that this was a contract for the breach of which (if there had been no bond) damages might have been recovered at law: which likewiſe the eccleſiaſtical courts would enforce, conſequently neither unequitable nor improper, nor can the adding a penalty vitiate the contract itſelf: that ſuch penalty ought to be conſidered as the ſtated damages ſettled betwixt the parties themſelves: that the arguments drawn from the reſtraint on marriage, the promoting improvident matches, and diſobedience to parents, prove too much, becauſe they tend to ſhew that all ſuch contracts are void in themſelves, which they certainly are not. The caſe of *Atkins* verſus *Farr*, *vide* 1 *Tra. Atk.* 287. were cited as in point, before Lord *Hardwicke*, *Feb.* 28, 1739. in that caſe the defendant *Farr* had given the plaintiff's daughter in her life-time a bond in the penalty of 500*l.* conditioned for the payment of 500*l.* if he did not marry her within the twelvemonth from the date of the bond; the defendant did not marry her within the time, but clandeſtinely got the bond from her; ſhe died ſoon afterwards, and the plaintiff her mother took out adminiſtration to her daughter, and brought a bill for the 500*l.* and inſiſts that upon the breach of the condition the bond became abſolute, and the 500*l.* veſted in the daughter, and was tranſmiſſible to the plaintiff as her repreſentative; the defendant inſiſted that the obligee was an orange girl at the playhouſe, and a common ſtrumpet, that it was *turpis contractus*, and ought not in a court of equity to be carried into execution, but failed in his proof: the Chancellor was of opinion that it was a good bond, and the penalty in the nature of ſtated damages between the parties; and therefore decreed the defendant to pay the 500*l.* to the plaintiff as repreſentative of her daughter the obligee.

LORD

LORD CHANCELLOR.

This is a new caſe, and in the decree which I ſhall make I ſhall not found myſelf on any circumſtances of actual fraud appearing in it; for though there may be ſome ſuſpicion ariſing from the manner of the execution of this bond, yet I think there is not ſufficient foundation to decree on the actual fraud; the parties being both of full age, the bonds mutual, and their circumſtances not greatly unequal.

And as I ſhall go upon the nature of ſuch bonds, I ſhall begin with mentioning the points I give no opinion upon at preſent.

Firſt, I do not give any opinion what would be the judgment of this court on ſuch bonds entered into by parties both equally *ſui juris*, having an abſolute power over themſelves and their fortunes, and where the parents are not living; neither do I give any opinion that ſuch bonds would be void in all caſes between perſons not *ſui juris* to all purpoſes, though this caſe and *Atkins* verſus *Farr* fall under very very different conſiderations, for that was of the firſt kind before mentioned; but there was alſo ſomething of the *præmium pudoris*, and his defence was her bad character, which was not proved: though indeed that caſe is contrary to the general rule of the civil law: in the preſent caſe I am of opinion that I ought not to decree ſatisfaction of this bond on the croſs-bill, but direct it to be delivered up to be cancelled on the original bill; and the points upon which I found my judgment are theſe.

That bonds of this ſort where parents are living, are liable to great fraud and abuſe; that to decree in favour of ſuch a bond would be a great encouragement to perſons to lie upon the catch to procure unequal marriages, againſt the conſent of parents, and though they dare not ſolemnize the marriage in the life-time of the parent, but only engage the affection, and draw the unfortunate perſon into a bond to forfeit their whole fortune, as is the caſe here, yet it is of very dangerous conſequence, and tends to bring great misfortunes into families.

Another principal ground of my opinion is, that this tends to incourage diſobedience to parents, and indeed is *a fraud* and impoſition on the parent, though there is no actual fraud as between the parties.

In this caſe ſhe lived with her father, and was dependant on him for her portion, and he conſidered her as a child to be advanced, and though a parent has no power by law to prevent the marriage of his child, yet it is expected that ſhe ſhould take his conſent and approbation, and by the laws of ſome countries that is made neceſſary.

Though a parent has no power to prevent the marriage of his child, yet his conſent is expected, and by the laws of ſome countries neceſſary.

It

Compared to the caſes of bonds given before marriage to return a part of the portion, where the fraud was not between the contracting parties, but on the parents of one of them, who being deceived in this reſpect, has induced the court to ſet aſide ſuch bonds.

It is therefore *a fraud* on the father, who thinks his child has ſubmitted to his opinion of the match, and in that opinion, makes a proviſion for her, to advance her in marriage, which, had he known of the bond, he would not have done, or might have done in ſuch a manner as would have prevented the marriage; it is therefore *in fraud* of the father's right of diſpoſing of his fortune among his children according to their deſerts, and may be compared to the caſes of bonds given before marriage to return a part of the portion; for there is no fraud in thoſe caſes between the contracting parties, but on the parents or friends of one of them, who are deceived by ſettling lands equal to the portion that appears to be given, and for that reaſon ſuch bonds have been ſet aſide: Another ground of relief, is the penalty; for this differs greatly in the reaſonableneſs of it from executory promiſes, where the jury can conſider the whole caſe, and whether the party has been unwarily drawn into ſuch a contract or not, and the change of circumſtances ſince the execution, and give damages accordingly; and though it has been truly ſaid, that a great alteration of circumſtances or character, would be a ground of relief here, yet that cannot be offered at law againſt the penalty, and bonds tend in themſelves to prevent ſuch circumſtances from being properly conſidered; bonds of this ſort therefore deſerve leſs favour upon this account, though perhaps that alone would not be ſufficient to ſet them aſide.

As to the caſes cited, none of them come up to this, 2 *Vern.* 102. the reaſon of that caſe was, the inequality of circumſtances, and the party's being a ſervant, and the danger of admitting ſuch tranſactions into families; *Baker* verſus *White* 2 *Vern.* 215. went upon the general reſtraint of marriage.

There are ſome circumſtances further attending this caſe, which makes it unfavourable: The bonds are executed in an ale-houſe, where ſhe had no friend; two ſtrangers are called in to witneſs it; and the witneſſes differ as to its being read over: The bond executed by him was, at the time of her death, in his hands; one witneſs ſays, it was left in his hands at the time of the execution, and there is no evidence how it came into his hands; he ſays, by his anſwer, ſhe gave it him, but even that is an evidence of the great power he had over her, and if there was no mutual obligation, there had been no colour to ſupport this bond.

I am therefore of opinion, that on the original bill the plaintiff ought to be relieved; and I ſay the ſame in this caſe as Lord *Cowper* did in *Floyer* verſus *Lavington*, 1 *P. Wms.* 268. that though none of theſe circumſtances ſingly, might be ſufficient to overturn this bond, yet, altogether, they are ſo; but the chief of them, and which has great weight with me, is the encouragement this might give to diſobedience, and *the fraud* on parents.

As to the caſe made by the croſs-bill, I am not very clear that here is a ſufficient breach of the condition; the breach inſiſted on muſt depend on the firſt part, for in the ſecond, it is conjunctive, and the payment of the 500*l.* is connected with that; and if it reſts on the firſt part, the whole penalty is forfeited, not the 500*l.* and, it is pretty ſtrange to think, that it was agreed, if ſhe married another, that ſhe ſhould loſe 500*l.* if ſhe only refuſed to marry the plaintiff, ſhe muſt loſe 600*l.* I therefore muſt have decreed the 600*l.* penalty, which would have been very extraordinary. As to *the tender*, I doubt whether a breach could have been aſſigned, without his ſhewing a tender of himſelf, by writing, or ſending; though, by the circumſtances of this caſe, a perſonal tender might have been excuſed, and I ſhould think the aſſent of the man muſt have been, in this caſe, an actual propoſal, and the firſt act, like the caſes put by Lord *Coke* upon frank-marriage, where the modeſty of the ſex is conſidered by the common law.

Lord *Hardwicke* doubted, whether a breach of the condition could have been aſſigned without *Shepley*'s ſhewing a tender of himſelf, by writing, or ſending, and thought his aſſent muſt have been an actual propoſal, and the firſt act.

As to coſts: I think it would be too hard to make him pay them, as here is no actual fraud, and he might think he had acted fairly by her; ſince therefore I decree this chiefly on publick and general conſiderations, there ſhall be no coſts on either ſide.

Lord *Chancellor* decreed the bond to be delivered up to be cancelled, and diſmiſſed the croſs-bill.

Caſe 319.

Harvey verſus *Philips*, *April* 14, 1743. *On Exceptions.*

A purchaſer made an objection to a title for want of a deed, which had been inrolled at a publick office, but could not be found; a copy of it, taken in 1632, atteſted to be a true one by five witneſſes, produced in court: Lord *Hardwicke* of opinion, this would have been ſufficient, even without an atteſtation.

IT had been referred to a Maſter, to ſee whether a good title could be made to a purchaſer; the Maſter reported in favour of the title; ſeveral exceptions were taken, and among the reſt, that a deed of bargain and ſale, ſaid to be inrolled at the chapel of the *Rolls*, and which is very material to make out the title, is not to be found there.

A copy of this very deed, taken at the *Rolls* in 1632, and atteſted to be a true copy by five witneſſes, was produced now in court.

LORD CHANCELLOR.

If the original had been in the hands of a private perſon, there might have been ſome doubt; but where it appears to have been lodged in a public office, and the copy is ſo very ancient, I am of opinion that it would have been ſufficient, even if there had been no atteſtation to the copy: *Vide* 1 *Mod. Medlicot* verſus *Joiner* 4. and 6 *Mod.* 225. the two laſt ſections in the caſe of *Stanyon* verſus *Davis*.

Caſe 320. *Wood* verſus *Freeman*, *April* 15, 1743.

AN exception was taken by a ſequeſtrator to a Maſter's report, becauſe he had not allowed him ſix ſhillings and eight pence a day for his trouble.

LORD CHANCELLOR.

A ſequeſtrator is not intitled to a ſtated fee of 6*s.* 8*d.* a day for his fee.

I do not remember that ſix ſhillings and eight pence is an abſolute ſtated fee, to all ſequeſtrators, whether the effects ſeized under the ſequeſtration are large or ſmall; and as the ſequeſtrator, in this caſe, has not got in 40*l.* in almoſt two years, I think the groſs ſum the Maſter has allowed him, is ſufficient for his trouble.

Caſe 321. *The Marchioneſs of Blandford* verſus *The Dowager Dutcheſs of Marlborough and others*, *April* 21, 1743.

Where a perſon had a power to make a jointure without any deduction for any charges impoſed, or to be impoſed, parliamentary or otherwiſe; this does not mean only ſuch as are fixed and certain, but the land tax, though a fluctuating one, is clearly within the power.

A Bill was brought to have certain manors, lands, *&c.* part of the truſt eſtate of the firſt Duke of *Marlborough*, and ſettled upon the Marchioneſs in marriage with the Marquiſs of *Blandford*, made up a clear 3000l. a year out of the aſſets of her late huſband, whilſt he was in poſſeſſion, or out of the aſſets of *Harriot*, late Dutcheſs of *Marlborough*, or out of the aſſets of the preſent Duke.

The caſe ariſes principally upon the will of the firſt Duke of *Marlborough*, made the 19th of *March* 1721. this was a very ſtrict ſettlement of his real and perſonal eſtate; he made the perſons who were then in being tenants for life only, of the whole, among which were *Harriot*, late Dutcheſs of *Marlborough*, and her ſon, the Marquiſs of *Blandford*.

There were certain powers given to each particular tenant, and one of the powers is ſpecially given to the Marquiſs of *Blandford*, to make a jointure in his mother's life-time, not exceeding 3000*l.* *per ann.* and this to ariſe out of land which he was ſeiſed of, or out of perſonal eſtate when laid out in land.

After the death of *John* late Duke of *Marlborough*, Lady *Godolphin* was in poſſeſſion, and the Marquiſs of *Blandford*, her ſon, in her life-time, married the preſent plaintiff, and by articles of marriage, he covenanted to ſettle out of the eſtate of the late Duke of *Marlborough*, to the yearly value of 3000*l.* for a jointure, over and above all repriſes, purſuant to the power given him under the will of the late Duke of *Marlborough*.

July

July 7, 1729. A ſettlement was executed, or deed of appointment of the lands, which recites the will of the Duke of *Marlborough*, the Letters of Denization of the plaintiff, to enable her to take lands; recites the conſideration of marriage, and covenants that the lands ſhall produce to the plaintiff 3000 *l. per ann.* clear of all reprizes.

The plaintiff entered into the lands after the death of the Marquiſs of *Blandford*, and continued in poſſeſſion till ſhe married Sir *William Windham*, who then received the rents and profits till the time of his death, but have not produced 3000 *l.* a year; and *communibus annis* there has been a deficiency of 600 *l.*

The *firſt queſtion*, What is the true conſtruction of the power?

Secondly, What is the conſtruction of the articles?

Thirdly, Whether upon the proofs, there appears to be any deficiency in the annual value of the lands ſettled in jointure.

Fourthly, Whether the plaintiff has a right to have this deficiency made good againſt the ſeveral defendants.

The words of the power: Provided alſo, and my will and meaning is, " That Lord *Rialton* ſhall in his life-time be impowered by " any deed or deeds, in the preſence of two witneſſes, or by will, " *&c.* to ſettle upon any woman, *&c.* he ſhall marry, for her " jointure, not exceeding 4000 *l. per annum*, without any deduc- " tion or abatement for any taxes, charges, or impoſitions, impoſed, " or to be impoſed, parliamentary, or otherwiſe, ſubject neverthe- " leſs to leaſes in being at the time of ſuch jointure made."

I think both ſides are miſtaken in the conſtruction of the power.

For the plaintiff's council carry it too far, in extending it to a clear rent-charge, and have inſiſted upon deducting for every little ſum laid out in manuring, or any way relating to the land.

And, on the other hand, the defendant's council have narrowed it too much, by inſiſting *taxes and impoſitions* ought to receive a limited and reſtrained ſenſe, and mean ſuch taxes as are fixed, and certain in their nature, which the land tax is not, being a fluctuating one.

I think the land tax clearly within the power, for it would be very ſtrange, when there are the words, impoſed or to be impoſed, that the principal, and moſt conſiderable publick tax ſhould be intended

to

to be excluded. *Vide Brewſter* verſus *Kidgill*, *Carthew* 438. 1 *Salk.* 198. 5 *Mod.* 368.

A biſhop, by covenanting to pay all charges, ordinary, or extraordinary, does not ſubject himſelf to the land tax, becauſe he cannot bind his ſucceſſors; otherwiſe in the caſe of a common perſon, becauſe he can bind his heirs.

There was a cauſe in this court between the *Biſhop of Oxford* and *Wiſe*, in 1698. where the biſhop covenanted, that he would pay all charges ordinary and extraordinary.

Lord *Somers* conſulted with Lord Chief Juſtice *Treby*, and Mr. Juſtice *John Powell*, who were both of opinion, the biſhop was not liable to pay the land tax; and the decree was according to their opinion; but then the judges ſaid, if it had been in the caſe of a common perſon, it would have been otherwiſe, becauſe he can bind his heirs, but a biſhop cannot bind his ſucceſſors.

Now a perpetual tax has, and may be laid upon land, as for repairing bridges, *&c.* but though certain and permanent when fixed, yet not certain at what time it may be ſo fixed.

The beſt rule is to conſtrue the power as referring to ſuch *taxes* as were in being at the time the articles were executed.

If by any accident after the execution of a power, there is an exceſs in the lands ſettled on a jointreſs, ſhe ſhall have the benefit; *e contra*, if there is a deficiency by caſualties, ſhe muſt acquieſce under it.

The jointure is not to exceed in the whole the annual value of 4000*l.* and, in my apprehenſion, the value of the land is to be eſtimated as it ſtood at the time of the power: If, by any accident after the execution of the power, there ſhould have been an exceſs, it would be for the benefit of the jointreſs: By parity of reaſon, if there ſhould be any deficiency, by inundation or caſualties, the jointreſs muſt acquieſce under it; to conſtrue it otherwiſe, would make theſe powers deſultory.

Upon the *firſt queſtion*, therefore, the meaſure of the charges the jointured eſtate is to be freed from, muſt be taken from the valuation at the time of the execution of the power, and of ſuch charges as were then in being.

The *ſecond queſtion* is, As to the conſtruction of the articles?

A great inaccuracy in the Drawer of the articles, for want of purſuing the power; nay even the articles and ſettlement have not ſo much as the ſame words, but differ in many places: and yet, I think, they ought both to be conſtrued ſo as to make them conſiſtent, and by this means, I ſhall have ſome reaſons for what I ſay, and ſome foundation to ſtand upon.

On the part of the defendant, an advantage has been attempted to be taken from this expreſſion, that the jointure ſhould be clear of *repriſes*.

Now

Now the word *repriſes* is of a very uncertain ſignification, and ought to be conſtrued *ſecundum ſubjectam materiam.*

Repriſes muſt be conſtrued *ſecundum ſubjectam materiam.*

For the genuine meaning of the word, *Vide Cowell's Interpreter*, and *Blount's Law Dictionary*: But the fees of ſtewards or bailiffs mentioned there as an out-going, muſt mean the fees of ſtewards or bailiffs of the crown: Sir *Henry Spelman* is a far better antiquary and critick than either of them, and he has not the word in all his Gloſſary.

Cowell's Interpreter, and *Blount's Law Dictionary*, explain the meaning of repriſes; but *Spelman* has not the word in all his Gloſſary.

The articles begin with a recital of the power, and the intended marriage, and the meaning of this inaccurate drawer, under the word *repriſes*, was to take in taxes, charges or impoſitions, impoſed or to be impoſed, parliamentary or otherwiſe, according to the ſubject matter, and purſuant to the power to which it refers.

Nothing is clearer, than that the Marquis intended to ſettle 3000*l.* *per ann.* free from all taxes whatſoever.

And if the conſtruction of the articles ſhould be doubtful, from the uncertain ſignification of the word *repriſes*, yet taxes inſerted in the ſettlement may explain the meaning; and this way of reaſoning will hold better in this court, becauſe articles are conſidered here as minutes only, and the ſettlement may afterwards explain more at large the meaning of the ſame parties.

Articles are conſidered in this court as minutes only, which the ſettlement may explain more at large.

As to the *third* and *fourth queſtion*, relating to the deficiency, though the plaintiff took a collateral covenant from the Marquis of *Blandford*, that the land ſhould continue of the value, yet this has nothing to do with the power; for to make a covenant amount to an execution of the power, is not agreeable to the rules of conſtruction in this court.

Therefore the plaintiff muſt rely upon the articles, and if a deficiency appear there, they are *executory*, and not executed, and there is no difference between articles unexecuted in toto, or in part only, for all the caſes go upon this ground, that what is covenanted to be done, is conſidered as done; the ruling caſe in this reſpect, is *Coventry* verſus *Coventry*, *Vide Max. in Eq.* at the latter end, and *Lady Clifford* and *Lord Burlington*, 2 *Vern.* 379.

No difference between articles unexecuted in toto or in part, for the ground the court goes upon is, what is covenanted to be done, is conſidered as done.

The plaintiff's council have inſiſted, ſhe is intitled to be relieved under the head of miſtake, and I think very rightly, for the inattention or laches of a married woman, cannot hurt or affect her right.

The inattention or laches of a married woman cannot hurt her right.

As this is my opinion upon the whole,

I muſt declare that the plaintiff by virtue of the power under the Duke's will and the marriage articles of the 13*th* of *April* 1729. " is " entitled to ſuch a jointure out of the truſt eſtate ſubject to the ſaid " power, as at the time of executing the ſaid articles was of the yearly " value of 3000 *l.* free from all incumbrances, rent charges, rents " ſeck, fee farms, quit rents, annuities, ſtipends to miniſters, penſions " and procurations payable thereout.

" And alſo free from all parliamentary taxes, or impoſitions of " ſuch nature and kind as were in being at the time of executing the " ſaid power: and particularly from the land tax then in being.

And I decree that it be referred to a Maſter to inquire and certify whether the lands and tenements compriſed in the articles were at the time of the execution of the ſaid articles of the yearly value of 3000 *l.* according to the rule herein before declared and laid down, and if not, what was the deficiency thereof, and to be made good out of the truſt-eſtate according to the ſaid power.

And let the defendants the truſtees, with the approbation of the Maſter, ſet out and convey lands and tenements of an annual value, equal to ſuch deficiency, according to the fruits of the ſaid power to the plaintiff for her life, in full of the reſidue of her jointure.

Caſe 322. *Valliant* verſus *Dodemede*, *May* 2, 1742.

As at law an aſſignee of a term may aſſign, and thereby get rid of his ſubſequent rent, and the covenants which run with the land, *a fortiori* he may do it in equity,

THE plaintiff claims under a term for years which originally belonged to one *Herbert*, and after having been granted to different perſons at laſt veſted in one *Charles Grake*, his reſiduary legatee, and one *Sedgewick* his executor: In *May* 1727. *Suſan Grake* created a new term out of the old by granting an under-leaſe to *Richard James* for 36 years, rendring the rent of 70*l.* *per ann.* The executor of *Charles Grake* did not join in this leaſe, and therefore only the equitable intereſt in the houſes paſſed by it. In 1728. *Richard James* made a mortgage of theſe houſes to *Valliant*; afterwards on the 31*ſt* of *May* in the ſame year, *Suſan* or her repreſentatives by indenture aſſigned to *Valliant* a term of 39 years and a half, together with another reverſionary term of 20 years in theſe premiſſes, ſo that *Valliant* became not only mortgagee under *Richard James*, but was entitled likewiſe to the rent of 70*l.* *per ann.* which before belonged to *Suſan*; *Sedgewick* was no party to this deed: ſoon after the execution of the laſt deed *Richard James* built ſome new houſes upon the premiſſes, in conſideration of which *Valliant* agreed to pay him a rent of 20 *l.* *per ann.* and in order to ſecure the payment of this rent in 1730. *Valliant* demiſed the premiſſes to *Rouſe* in truſt to pay

20 *l. per ann.* to *Richard James*, and as to the reſidue for the benefit of *Valliant*.

The conſequence of theſe things was, that as matters then ſtood *Valliant* would have had a remedy againſt *Richard James* for the 70 *l. per ann.* and *Richard James* would have been entitled to a deduction of the 20 *l. per ann.*

In *July* 1731. *Richard James* makes an aſſignment to *Dodemede* of his equity of redemption in the 36 years term, and alſo of the rent of 20 *l. per ann.* by way of mortgage for ſecuring 300 *l.* lent by *Dodemede:* in the mortgage deed was an exception of the rent of 20 *l. per ann.* and likewiſe of four houſes which *James* had lately built.

On the 17*th* of *July* 1733. other ſums were advanced by *Dodemede* to *Richard James*, amounting in the whole to 1300 *l.* or 1400 *l.*

In a ſhort time after *Dodemede* enters into poſſeſſion as mortgagee, and whilſt he was ſo poſſeſſed, paid the rent of 70 *l. per ann.* to *Valliant*.

In 1737. a fire broke out which conſumed five of the houſes, but *Dodemede* had inſured ſome of them.

About this time *Dodemede* made a propoſal to *Valliant* to ſurrender the premiſſes to him, and in order to induce him to it offered that he ſhould have the inſurance money, amounting to 250 *l.* and that he would ſell him the rent of 20 *l. per ann.* for 300 *l.* and that, if he would not agree to do it, he would aſſign the premiſſes to any body.

Valliant rejected this propoſal without making any on his ſide, and applying to the fire-office for the 250 *l.* inſurance, upon *Dodemede*'s refuſing to rebuild the houſes which were burnt, and *Valliant*'s agreeing to do it, the fire-office paid *Valliant* the money accordingly.

Dodemede took a good deal of pains to find out a perſon who would accept of the aſſignment, and at laſt prevailed upon *Lomax*, a priſoner in the *Fleet*, for the price of four guineas to accept of it, and *Dodemede* made an aſſignment of it accordingly: from that time *Dodemede* never received any part of the profits of theſe houſes.

The bill is brought by *Valliant* and others againſt *Dodemede* and others, praying amongſt other things that the aſſignment made by *Dodemede to Lomax* might be ſet aſide as fraudulent, and in conſequence of it that *Dodemede* ſhould be obliged to pay the rent of 70 *l. per ann.* to *Valliant*.

LORD

LORD CHANCELLOR.

As to the arrears of rent incurred before the fire, it is extremely plain, that *Dodemede* is liable to make ſatisfaction to the plaintiff, becauſe during that time he was in poſſeſſion of the rents and profits of the eſtate; however as he has made an aſſignment to *Lomax*, *Valliant* has no remedy for theſe arrears at law, and is under a neceſſity of coming into this court for its aſſiſtance.

The next queſtion is, whether *Valliant* is entitled to the aid of this court to recover the arrears which incurred after the fire, and before the aſſignment to *Lomax*; and though it is more doubtful than the other queſtion, yet I am of opinion he is intitled; for notwithſtanding the accident of the fire, *Dodemede* continued in poſſeſſion of the houſes which were unburnt, and received the rents of the under-tenants, and was certainly liable therefore at law; and as *Valliant* cannot diſtrain on account of the aſſignment to *Lomax*, he ought to have the aſſiſtance of this court.

But there is a great difference in regard to the arrears incurred ſince the aſſignment to *Lomax*; and it would be going too far if the court was to aſſiſt the plaintiff againſt *Dodemede* in this reſpect, for the law ſays an aſſignee of a term may aſſign, and thereby get rid of his ſubſequent rent, and the covenants which run with the land; and if it be ſo at law, it is reaſonable he ſhould in equity, which in caſes of this kind follow the law; though indeed it is true, that in ſome ſort of aſſignments made by tenants the court has interpoſed. *Vide Treacle* verſus *Coke*, 1 *Vern.* 165. and *Philpot* verſus *Hoare*, *Nov.* 26, 1741. *Vide ante*, *p.* 219.

But theſe caſes are diſtinguiſhable from the preſent, and particularly the laſt, for the great point there was, that the party to whom the aſſignment was made, or pretended to have been made, acted really as an agent only for the aſſignor; there was no propoſal, as in the preſent caſe, to ſurrender up the premiſſes to the landlord, and if there had, the court declared they ſhould not have relieved.

Whereas here there was an expreſs offer by *Dodemede* to ſurrender the premiſſes to *Valliant* on certain terms, which by no means appear to be unreaſonable.

Beſides too here was a general calamity, and an unforeſeen one from fire; and as *Dodemede* lent to *James* 1300*l.* or 1400*l.* upon the eſtate, which he is likely to loſe, it would be extreamly hard to oblige *Dodemede* to pay the 70*l.* rent, ſince the aſſignment to *Lomax*, eſpecially as *Valliant* has received the 250*l.* from the fire-office, notwithſtanding *Dodemede* made the aſſurance.

The

The laſt queſtion relates to the 20 *l. per ann.* which was agreed to be paid by *Valliant* to *Richard and James*, whether it ought not to be deducted out of the 70 *l. per ann.*

I am of opinion that it ought, whoever is entitled to it, the repreſentative of *Richard*, *James*, or the defendant *Dodemede*; for it is the ordinary direction of this court, that ſuch ſort of demands ſhould be ſet one againſt the other.

Elizabeth Hawkyns, widow of Philip Hawkins, verſus *Obyn*, *executor of Philip*, *May* 7, 1743.

Caſe 323.

THIS cauſe came on before the Chancellor upon appeal from the Rolls.

A huſband may diſpoſe of a poſſibility in equity, if aſſigned for a valuable conſideration; but it muſt be an aſſignment of that particular thing, and not reſt only on intention and conſtruction of words in a covenant.

The queſtion aroſe out of the following covenant entered into by *Philip* upon his marriage with the plaintiff.

He covenants for himſelf with truſtees, "that as well the 6000 *l.* "portion with *Elizabeth* his wife, as all other ſums of money "which ſhould be given or bequeathed to *Elizabeth* by any of her "relations during her coverture, ſhould immediately after the deceaſe "of *Philip* be paid by his heirs, executors, *&c.* to truſtees, in truſt "to place out the ſame at intereſt on land or government ſecurities, "and the intereſt thereof to be applied for and towards the main-"tenance of the children of *Philip* by *Elizabeth*, and the remainder "of ſuch intereſt, if any, together with the whole 6000 *l.* to go "or be paid equally among his children, except his eldeſt ſon, to "ſons at 21. to daughters at 21. or marriage; and in caſe of the "death of any of them before time of payment, to the ſurvivors.

"Proviſo in caſe there ſhould be no iſſue, then the 6000 *l.* and "all other ſums of money, that during the marriage ſhould be given "to the ſaid *Elizabeth*, ſhould be enjoyed by him the ſaid *Philip* "*Hawkins*, his executors, adminiſtrators and aſſigns, to his and their "own proper uſe and behoof.

On the 4*th* of *June* 1730. *Mary Ludlow*, mother of *Elizabeth* made her will, "and bequeathed to her ſon and daughter *Elizabeth*, "and *Philip Hawkyns*, 2000 *l.* to be enjoyed by them and the "ſurvivor of them, and if there was no iſſue of her ſon and daughter, "then ſhe deviſed, after the death of the ſurvivor of *Philip* and *Eliza-*"*beth*, the 2000 *l.* to her executor, and directs the legacy to be paid "one half 15 months after her deceaſe, and the remainder in two "years and a quarter, and appointed *Lambert Ludlow* ſole execu-"tor.

Lambert Ludlow paid 1000 *l.* in the life-time of *Philip Hawkyns.*

Philip Hawkyns the huſband died, but left no iſſue; and by his will "deviſed the 1000 *l.* which remained unpaid by *Lambert Lud-* "*low*, to his wife, to be diſpoſed of as ſhe ſhall think proper, and "bequeathed all the reſt and reſidue of his real and perſonal eſtate "to his nephew *Thomas Hawkyns* when he attained 21. and then "made him his executor, and in the mean time deviſed all his real "and perſonal eſtate to *Obin* in truſt for *Thomas Hawkyns.*

It was heard before the preſent *Maſter of the Rolls* on the 10*th* of *December* 1742. who decreed the plaintiff was entitled to the intereſt of the 2000 *l.* deviſed by Mrs. *Ludlow*'s will, for her life.

The defendant *Obin* inſiſted the decree was wrong, in decreeing the intereſt of the 2000 *l.* to the plaintiff for her life, whereas he is well entitled as executor of *Philip* under the agreement and proviſo in the marriage ſettlement to all ſuch ſums as ſhould be given to the plaintiff by any of her relations during the coverture, and therefore is not obliged to pay intereſt to the plaintiff for the 1000 *l.* received by *Philip* in his life-time, but inſiſted it belongs to him as repreſentative of *Philip.*

Mr. *Brown* cited for the plaintiff the caſe of *Thompſon* verſus *Butler*, *Moore* 522.

Lord Chancellor; I am of opinion this is not a ſum of money at all within the meaning of the proviſo; for it is a covenant merely by the huſband, and conſequently an agreement of what is to be done by him, his heirs, *&c.*

It has been objected, that though it ſets out with a covenant of the huſband, yet the proviſo is attended with other words, and that it is itſelf a covenant.

But then it muſt be connected with and controlled by that covenant, and muſt relate only to ſuch ſums of money as fall under the deſcription of the firſt covenant, which is relative to nothing, but ſuch ſums of money as came to *Elizabeth* during the coverture, to which Mr. *Hawkins* might be intitled, and the covenant therefore thrown in on purpoſe to reſtrain Mr. *Hawkyns* from diſpoſing of it to the prejudice of his younger children; for even the ſum of 6000 *l.* would abſolutely have been the huſband's if it had not been for this covenant.

It was ſaid on the defendant's part likewiſe, that (as the covenant runs that from and immediately after the deceaſe of *Philip Hawkyns*, his heirs, executors, *&c.* ſhould pay to truſtees as well the 6000 *l.*

as

as all other ſums of money which ſhould be given to *Elizabeth*, &c.) the executors muſt neceſſarily receive, or how will they be enabled to pay?

But it would be an abſurd thing for him to covenant that his heirs ſhould pay ſums they could never be entitled to receive; nor can I reſtrain theſe words, to prevent any future diſpoſition that the huſband might be inclined to make for the benefit of the wife?

It has been inſiſted too, in order to make this fall within the proviſo, that the huſband's diſpoſition in his life-time would have bound the wife, notwithſtanding ſhe had ſurvived him, and if not good in law, yet it would have been in equity.

I will not ſay, but the huſband might have diſpoſed of this poſſibility in equity, if aſſigned for a valuable conſideration; but then, that muſt have been upon an actual aſſignment of this particular thing, and here it reſts only upon the intention of the parties, and the conſtruction of the words in the covenant.

Upon the whole, I am of opinion, this is not ſuch a ſum of money as was intended under the covenant; and it would be very hard to make a ſtrained conſtruction of the deed to take away this 1000*l.* from the wife; therefore the decree muſt be affirmed.

The Bailiffs and Burgeſſes of the Corporation of Burford verſus *Lenthall and others*, *May* 9, 1743.

Caſe 324.

EXCEPTIONS had been taken to the decree of the defendants, as commiſſioners of charitable uſes, and 39 exceptions out of 43 were allowed; but there being ſome doubt as to coſts, the Chancellor took time to conſider it till to day.

Exceptants to a decree of charitable uſes were allowed coſts on thoſe exceptions, where they prevailed, and on thoſe where they did not, the reſpondents are intitled to coſts.

There have been ſix precedents brought to me, in which coſts were given, and as I find the point thus ſettled, I will follow the juſtice of theſe caſes, whatever doubts I might have had originally myſelf, eſpecially as there are no precedents on the other ſide to the contrary.

The firſt precedent is *Chapman* verſus *The Inhabitants of Tedbury*, before Lord Keeper *Coventry*, 5 *Car.* 1.

The ſecond was in Lord Chancellor *Nottingham*'s time, *February* 29, and the 28th year of *Car.* 2. relating to the rectory and parſonage of *Crowland*, in the county of *Lincoln*.

The

The third was before Lord *Somers*, which began in the year 1693, and laſted ſome time, relating to the college of *Bromley*, a charity founded by *Ward*, biſhop of *Rocheſter*.

The fourth was before the Lords Commiſſioners, *H. T.* 1700.

The fifth was before Lord Keeper *Wright*, *Chriſtchurch* verſus *The Inhabitants of Newton*, the 4th of Q. *Ann*.

The ſixth was *Hancock* verſus *Walker*, before Lord *Cowper*, *January* 3, 1715.

It is ſaid by the reſpondent's council, that theſe precedents are erroneous, becauſe there is no authority whatever given to the Lord Chancellor to award coſts, by the ſtatute of charitable uſes, the 43d of *Eliz.*

Notwithſtanding a decree under a commiſſion of charitable uſes, the court of chancery may ſtill permit a ſuit to be inſtituted here, in which neither ſide is bound by what appeared before the commiſſioners, but may ſet forth new matter.

If the court were merely to confine themſelves to the verdict of a Jury, or a decree of commiſſioners, they muſt have ſhut their eyes as to the evidence before the jury or commiſſioners, becauſe there it was *vivâ voce*, and from hence have ariſen theſe precedents; for the court finding theſe words in the act of parliament, *ſect.* 9. *That the Lord Chancellor, or Lord Keeper, ſhall and may take ſuch order for the due execution of all or any of the ſaid judgments, decrees, and orders, as to them ſhall ſeem fit and convenient*, have put it in the ſhape of an original cauſe, in which the exceptants are conſidered as *plaintiffs*, and the reſpondents as *defendants*, and put in an anſwer upon oath; and in the examination of witneſſes in the cauſe, neither ſide is bound by what appeared before the commiſſioners, but may ſet forth new matter if they think proper.

This has made the court all along conſider it as an original cauſe, or, otherwiſe, the court would have known nothing of the merits.

Therefore the court have mixed the juriſdiction of bringing informations in the name of the Attorney General, with the juriſdiction given them under the ſtatute, and proceed either way, according to their diſcretion.

It is ſaid the court ought to reſort back to the original juriſdiction, in point of coſts, upon arguments chiefly drawn from caſes of coſts at common law, and the old acts, the ſtat. of *Marlebridge* 52 *Hen.* 3. (now *Marlborough*,) &c.

It is conſcience, and not any authority, directs this court in giving coſts.

But courts of Equity have in all caſes done it, not from any authority, but from conſcience, and *arbitrio boni viri*, as to the ſatisfaction on one ſide, or other, on account of vexation.

But ſtill it is ſaid this ariſeth on the common law ſide, as it comes out of the petty-bag.

The return of the commiſſion indeed being in that office, the petty-bag retains the proceedings, yet it comes before the Lord Chancellor perſonally, and not in his ordinary or extraordinary juriſdiction.

I ſhould be glad to know what authority I have to give coſts in bankruptcy, if I cannot give coſts here; for it would be difficult to ſhew from the bankrupt acts, that I have any ſuch authority.

It is only by orders ſigned *propriâ manu*, and proceſſes of contempt.

The ſame as to commiſſions of lunacy, for though it is ſaid the whole of it ariſes from the ſign manual of the king, yet I am of opinion it does not.

Before the courts of wardſhip were erected, the juriſdiction was in this court, both as to lunaticks and ideots, therefore all theſe commiſſions were taken out in this court, and returned here, and after the court of wards was taken away by act of parliament, it reverted back to the court of chancery; and the ſign manual of the king is a ſtanding warrant to the Lord Chancellor, to grant the cuſtody of the lunaticks, and is a beneficial thing in caſe of ideocy, becauſe the king could not only give the cuſtody of ideots, but the rents and profits of ideots lands to perſons.

After the court of wards was taken away, the juriſdiction over lunaticks and idiots reverted back to the court of chancery, to whom it originally belonged.

Therefore it is not an authority in the Lord Chancellor ariſing from his ordinary or extraordinary juriſdiction, but a perſonal one, and very difficult to maintain, upon a nice foundation, how this authority of coſts did ariſe, but falls exactly within the caſes of bankrupts and ideots: *Vide The caſe of the corporation of Bewdley*, 1 *P. Wms.* 207. relating to awarding *venires de vicineto & de corpore comitatus*, where the court was governed by precedents of about ſeven years ſtanding, before the iſſue of the *venire*.

Lord chancellor's authority in the caſes of charitable uſes, is a perſonal one, not from his ordinary or extraordinary juriſdiction.

So likewiſe in the caſe of juſtices of peace, they have taken upon them to exerciſe ſeveral juriſdictions, which the court of king's bench would not have allowed, if it had come originally before them.

I am of opinion, therefore, I ought to be bound by theſe precedents, eſpecially as it is in aid of juſtice.

The queſtion then is, What ought to be done as to coſts above, and coſts below?

And as to the firſt, the exceptants ought to have coſts upon thoſe exceptions, in which they have prevailed, and the reſpondents coſts in thoſe where they have prevailed.

As to coſts below, it muſt reſt upon the agreement made between the parties, and I will not interfere.

Caſe 325. *The Sadlers Company* verſus *Badcock and others*, *May* 9, 1743.

It is neceſſary the party injured ſhould have an intereſt or property in the houſe inſured, at the time the policy is made out, and at the time the fire happens; and therefore, after the leaſe of the houſe expired, the inſured's aſſigning the policy does not oblige the inſurers to make good the loſs to the aſſignee.

ANN Strode having ſix years and a half to come in the leaſe of a houſe from the plaintiffs, on the 27 of *April* 1734, became a proprietor of the Hand in hand office, by inſuring the ſum of 400*l.* on the houſe, for ſeven years, and on paying twelve Shillings down, and three pounds ſome time after, the company agreed "to raiſe and pay out of the effects of the contribution ſtock, the "ſaid ſum of 400*l.* to her and her executors, adminiſtrators, and "aſſigns, ſo often as the houſe ſhall be burnt down within the "ſaid term, unleſs the directors ſhall build the ſaid houſe, and "put it in as good plight as before the fire: and on the back "of the policy it was indorſed, that if this policy ſhould be aſ"ſigned, the aſſignment muſt be entered within twenty-one days "after the making thereof.

Mrs. *Strode*'s leaſe expired at *Midſummer* 1740, the houſe was not burnt down till the *January* after 1740. and ſhe made an aſſignment of the policy to the plaintiffs the 23d of *February* after, 1740.

The queſtion is, Whether the plaintiffs, the aſſignees of Mrs. *Strode*, are entitled to the 400*l.* inſurance money, or to have the houſe built again; or whether the houſe being burnt down after Mrs *Strode*'s property ceaſed in it, the company are obliged to make good the loſs, to her aſſignee, of the policy.

The company made an order, ſubſequent in time to Mrs. *Strode*'s policy in 1738. "That, whereas Policies expire upon the property "of the inſured's ceaſing, if there is no application of the inſured "to aſſign, or to have the loſs made up, then the perſon having "the property may inſure the ſaid houſe in the ſaid office, not"withſtanding the term for which the houſe was originally inſured "is expired.

There was evidence read for the plaintiffs, to ſhew that they tendered the aſſignment to the defendants, to enter in their books, but they refuſed to accept of it.

LORD

LORD CHANCELLOR.

During the progreſs of this cauſe, while the defendants ſeemed to depend chiefly upon the ſubſequent order, I was of opinion againſt them.

But, upon hearing what was further offered, I think the plaintiffs are not intitled to be relieved.

There may be three queſtions made in this cauſe.

Firſt, Whether this accident which has happened is ſuch a loſs, as obliges the defendants to make ſatisfaction to the plaintiffs?

Secondly, Whether upon the terms of the original policy, the office is obliged to do it?

Thirdly, Which is rather conſequential of the former, whether the plaintiffs are properly aſſignees of Mrs. *Strode* under this policy?

If this matter reſted ſingly upon the policy itſelf, I ſhould not think it ſuch a loſs, as would oblige the defendants to make ſatisfaction.

Under this policy, the ſtate of the caſe is, Mrs. *Strode* was only a leſſee, her time expired at *Midſummer* 1740, the houſe was burnt down the *January* after, *within the ſeven years*; the plaintiffs, the Sadlers company, were ground landlords, and entitled to the reverſion of the term: Upon the 23d of *February* 1740, ſeven months after the expiration of the term, and one month after the fire, the aſſignment was made, and in conſideration of five ſhillings only, ſo that it muſt be taken as a voluntary aſſignment as it ſtands before me.

It has been inſiſted, on the part of the defendants, that the plaintiffs are not entitled to recover as ſtanding in the place of Mrs. *Strode*, becauſe ſhe had no loſs or damage, her intereſt ceaſing before the fire happened.

And this introduces the ſecond and third queſtions.

I am of opinion, it is neceſſary the party inſured, ſhould have an intereſt or property at the time of the inſuring, and at the time the fire happens.

It has been ſaid for the plaintiffs, that it is in nature of a wager laid by the inſurance company, and that it does not ſignify to whom they pay, if loſt.

Now theſe inſurances from fire have been introduced in later times, and therefore differ from inſurance of ſhips, becauſe there intereſt or no intereſt is almoſt conſtantly inſerted, and if not inſerted, you cannot recover unleſs you prove a property.

The inſuring of ſhips is as old as the laws of *Oleron* and *Rhodes*, whoſe inhabitants were the great traders of the world; look into the books that treat of inſuring, and you will find the term is, *averſio periculi*, the intention of all inſurances being to avert any damages or loſs the inſured might ſuſtain: Upon this principle, in all modern inſurances of ſhips *intereſt or no intereſt* is introduced, and, between the ſubjects of different nations, for this reaſon, becauſe a great deal of contraband trade is carried on, and I believe began in the *Spaniſh* trade firſt.

The common law leant ſtrongly againſt theſe policies for ſome time, but being found beneficial to merchants, they winked at it.

New laws have been enacted, which make it felony to deſtroy ſhips, and the temptation to it has ariſen from *intereſt and no intereſt* inſerted in policies.

The term in books that treat of inſuring is *averſio periculi*, the intention being to avert any damages or loſs *the inſured* might ſuſtain.

No longer ago, than when I firſt ſat in the Court of King's Bench, I have heard theſe inſurances called fraudulent, but though inconveniences may have ariſen from theſe words to the inſurance companies, yet ſome inconvenience too may ariſe on the other ſide, becauſe, if any perſon may inſure, whether he has a property or not, it may be a temptation to burn houſes, to receive the benefit of the policy: By the firſt clauſe in the deed of contribution in 1696, the year this ſociety, called the *Hand in Hand Office*, incorporated themſelves, the ſociety are to make ſatisfaction in caſe of any loſs by fire.

To whom, or for what loſs, are they to make ſatisfaction?

Why, to the perſon inſured, and for the loſs he may have ſuſtained; for it cannot properly be called inſuring the thing, for there is no poſſibility of doing it, and therefore muſt mean inſuring the perſon from damage.

By the terms of the policy, the defendants might begin to build and repair within ſix days after the fire happens.

It has been truly ſaid, this gives the ſociety an option to pay or rebuild, and ſhews moſt manifeſtly they meant to inſure upon the property of the inſured, becauſe no body elſe can give them leave to lay even a brick, for another perſon might fancy a houſe of a different kind.

Thus it ſtands upon the original agreement: The next queſtion will be, Whether the ſubſequent order, made by the defendants in 1738, has made any alteration?

I am of opinion it has not; for it was made only to explain a particular caſe in the policy; for it might have been a queſtion, whether Mrs. *Strode* could have come before the expiration of the term, to have examined the books of the office, and therefore this order was made to give her ſuch a power.

It has been ſtrongly objected, that the ſociety could not make ſuch an order.

I am very tender of ſaying, whether they can or not.

Becauſe, on one hand, it might be hard to ſay, that, as a ſociety, they cannot make any by-order for the good of the ſociety.

And, on the other hand, it would be a dangerous thing to give them a power to make an alteration that may materially vary the intereſt of the inſured.

The aſſignment is not at all within the terms of this order, becauſe it is plain, it meant an aſſignment before the loſs happened.

Now, with regard to the loſs happening before the aſſignment made, Mrs. *Strode* was entitled to nothing but what was to be paid back upon the depoſit.

It is plain ſhe thought ſo, for if ſhe had imagined ſhe had been intitled to 400 *l.* would any friend have adviſed her to make a preſent of it to the plaintiffs?

The caſe of *Lynch* verſus *Dayrell*, in the Houſe of Lords, the 13th of *March* 1729, ſhews how ſtrict this court and the Houſe of Lords are in the conſtruction of policies to avoid frauds: Lord Chancellor *King* was of opinion there, the plaintiff had no right to the money under the policy, becauſe no loſs had happened to him, he having no intereſt in the thing inſured at the time of the fire, and that policies are not in the nature of them aſſignable, nor intended to be aſſigned from one perſon to another, without the conſent of the office.

Policies of aſſurance not aſſignable in their nature, nor intended to be aſſigned from one to another perſon, without the conſent of the office.

The bill here muſt be diſmiſſed.

Caſe 326. *Tyrrell* verſus *Hope*, *May* 10, 1743. *at the Rolls.*

The Maſter of the Rolls of opinion, that a note under the hand of the huſband ought to be looked upon as part of the marriage agreement, and conſequently as part of the ſettlement; and as the wife would have been relieved if ſhe had brought a bill againſt the huſband, equally ſo, as brought againſt the aſſignees, who ſtand in his place.

THE plaintiff before her marriage with *John Tyrrell* was ſeiſed in fee, or her mother Mrs. *Stanton* was, of an eſtate in *Berkſhire*, and in conſideration of the intended marriage, and of 1500*l.* paid to Mr. *Tyrrell* as her marriage portion, it was agreed that the eſtate ſhould be ſettled previous to the marriage, ſo as that one moiety might be enjoyed by the plaintiff's mother for her life, and after her deceaſe by the plaintiff, or her truſtees, for her ſole and ſeparate uſe, excluſive of her huſband, and that ſhe ſhould receive the rents and profits during her huſband's life, and that as well the ſaid moiety after the plaintiff's deceaſe, as the other moiety, ſhould be ſettled upon ſuch truſts as the plaintiff by any deed in her life-time or by will ſhould appoint.

Mr. *Tyrrel* the intended huſband undertook to procure deeds to be drawn purſuant to the agreement.

But when the deeds were reading over to the plaintiff in order for execution, ſhe obſerved there was a miſtake, for that the moiety of the premiſſes limited to her mother for life, was after her deceaſe limited to the uſe of Mr. *Tyrrell* for life, and not to her ſeparate uſe, as had been agreed; and ſhe refuſed to execute unleſs the miſtake was rectified: in order to do this it was then propoſed by the truſtees, that Mr. *Tyrrell* ſhould give a note or writing under his hand, that the plaintiff ſhould take and receive one moiety of the eſtate after her mother's death for her ſole and ſeparate uſe, according to the agreement, as if the ſame had been ſo ſettled by the releaſe; and thereupon Mr. *Tyrrell* previous to the execution of the deeds gave the plaintiff a note or writing to the purpoſe aforeſaid, and delivered it to the truſtee named in the releaſe, to keep for the plaintiff's benefit.

The marriage was had ſhortly after, and upon the 8*th* of *July* 1739. Mrs. *Stanton* the mother died, and on the 14*th* of *July* 1740. a commiſſion of bankruptcy iſſued againſt Mr. *Tyrrell*, and he being found a bankrupt, Mr. *Hope* and others were choſen aſſignees, and being got into the receipt of all the rents of this moiety, refuſed to let the plaintiff receive them, or to make any ſettlement for ſecuring the receipt thereof to her, purſuant to the agreement before her marriage.

The bill was therefore brought againſt *Hope* and the other aſſignees for an account of what they have received of the rents, and that a moiety of them for the future may be aſſured to the plaintiff for her ſole and ſeparate uſe.

Mr. *Tyrrell* by the note *promiſed and agreed with the plaintiff by the name of his intended wife Mary Stanton, that ſhe ſhould enjoy and receive the iſſue and profits of one moiety of the eſtate, then in poſſeſſion of her mother Mrs. Jane Stanton, after the deceaſe of her mother.*

Mr. *Noel* for the defendants inſiſted that both note and deed muſt ſtand together, and if they cannot, the deed ought to controul the whole becauſe a deed is of more authority in the notion of law than a note ſigned by one perſon only; and for this purpoſe he cited *Bawdes* verſus *Amhurſt*, *Eq. Caſ. Abr.* 21.

That while courts have deeds only before them they have a ſure foundation, but if they go out of the deeds, witneſſes may be guilty of perjury, and therefore the court has always leant ſtrongly againſt parol evidence, becauſe this may err, that cannot.

That as no body was preſent when the note was given, but perſons in the intereſt of the plaintiff, it would be of dangerous conſequence to lay much ſtreſs upon ſuch evidence, eſpecially as it is not poſſible to produce any on the other ſide. *Vide Clarkſon* verſus *Hanaway*, 2 *P. Wms.* 203.

That ſuppoſing the word *ſeparate* had been inſerted in the note, that it would not have given the wife, as it is a note to her, a *ſeparate intereſt* during the coverture. *Hob.* 113. *Clark* verſus *Thompſon*, *Cro. Jac.* 571.

Mr. *Brown* for the plaintiff relied upon the caſe of *Walker* verſus *Walker*, *December* 11, 1740. as an authority in point, (with regard to the evidence that is offered on the part of the plaintiff,) and which ought to be allowed upon this footing, that it was a fraud in the huſband to draw in the wife to reſt upon his promiſe without altering the deed; and upon this ſuggeſtion parol evidence may be admitted, notwithſtanding the ſtatute of frauds and perjuries.

Maſter of the Rolls. The caſe now depending ariſes upon the deed executed before marriage, and upon the note ſigned before the deed.

The firſt queſtion is, what relief the plaintiff would have had, if it had been a bill brought againſt the huſband.

The ſecond queſtion, if ſhe is entitled under this bill to the ſame relief againſt the aſſignees of the huſband.

I ſhall conſider it in the ſame light as the council have done.

Now

In ſeparate maintenances the court muſt be directed by judicial determinations, and not by what they think of them in their private judgment.

Now, as to what has been ſaid with regard to the miſchiefs produced by *ſeparate maintenances*, I ſhall lay that out of the caſe, for we muſt not be directed by what we think of it in our own private judgments, but upon what the court has judicially done in ſeparate maintenances.

Then as to the firſt point.

Upon the deed to be ſure the wife can have no relief, for there are no words in it that can convey a *ſeparate* eſtate to the wife.

But then it is inſiſted the note has ſupplied this defect; and that a witneſs has explained the matter fully.

Parol evidence cannot be admitted to explain the agreement between the parties, but as to the occaſion of ſigning the note it may.

An objection was made to admitting this evidence: and a caſe cited in *Eq. Caſ. Abr.* 21. *Bawdes* and *Amhurſt*, where evidence was offered to ſhew the uſes of a marriage ſettlement, but was not admitted there, becauſe it was not ſigned by the party.

Here the note inſiſted on is ſigned by the party the huſband himſelf.

The next queſtion, how far I ſhall give weight to this evidence: it ſays, that a moiety of the eſtate was to be ſettled to the *ſeparate* uſe of the wife after the death of the mother; now if the matter reſted ſingly upon the note, no parol evidence ought to be admitted to explain the agreement between the parties.

But I am certainly warranted in admitting this evidence, ſo far as it goes to the reaſon and occaſion of ſigning this note.

The next conſideration what effect it ſhall have.

I readily agree, where there is any writing executed after the ſettlement, and differs from it, the ſettlement ſhall controul it.

A ſettlement will controul a writing executed after, but the parties refuſing to execute the ſettlement without it, they muſt be conſtrued as one intire agreement and both conſiſtent.

But if I take the evidence into the caſe with regard to the reaſon of giving this note, it will have a different conſideration with me, becauſe the wife refuſed to execute the ſettlement without it: and if ſo, I muſt conſtrue it as one entire agreement before marriage, and both of them conſiſtent.

For it is plain here was a new agreement between the parties, and that it was upon the credit, faith and footing of the note, the ſettlement was executed by the mother and the wife.

As to the fraud which the plaintiff's council have ſuggeſted in the caſe, it is not ſo clear; becauſe the ſettlement was read to the mother and the wife before execution, ſo that they did it with their eyes open: now fraud is what is done in ſecret, and where there is a concealment from the party in a matter which concerns him in intereſt.

Fraud is what is done in ſecret, and where there is a concealment from the party in a matter which concerns him in intereſt.

I cannot ſay indeed the note is good in law againſt the marriage ſettlement, but in equity it ought to be looked upon as part of the marriage agreement, and conſequently as part of the ſettlement, and therefore, if the wife had brought a bill againſt the huſband, ſhe would have been entitled to relief.

Several caſes have been cited to ſhew that this note is void in law, and equity: but upon the circumſtances of this caſe I do not think it is.

There is a ſtrong caſe to this purpoſe, where a bond is given by a huſband to a wife before marriage to ſecure a ſum of money to her uſe, which is void in law, and yet in equity will be conſidered as a truſt for the wife.

One thing more before I leave the conſideration of the note is, what will be the effect of it.

It has been ſaid by the plaintiff's council that though it is not expreſſed, yet it is implied in the note, that ſhe ſhall have this moiety to her *ſeparate* uſe.

Though the words *ſeparate uſe* are not in the note, the words *enjoy* the profits imply it.

Now the word *ſeparate* uſe indeed is not in the note, but there are other words which amount to it.

That ſhe ſhall enjoy and receive the iſſues and profits of one moiety of the eſtate, &c.

Which can admit of no other conſtruction but that it muſt be for her *ſeparate* uſe; for to what end ſhould ſhe receive it, if it is the property of the huſband the next moment?

The word *enjoy* too is very ſtrong to imply a *ſeparate* uſe to the wife.

The ſecond queſtion is, if the wife is entitled to the ſame relief againſt the aſſignees of the huſband, as ſhe would againſt the huſband himſelf.

It has been inſiſted by the defendant's council that aſſignees are truſtees for creditors, and creditors are always favoured in law, ſo that when they have the legal intereſt, they ſhall have the equitable eſtate againſt a perſon who has only a equitable intereſt.

It muſt be owned the legal eſtate veſts in the huſband, and by aſſignment in his aſſignees, and the general rule is, that they ſtand in the place of the bankrupt; but I think it does not hold in every caſe.

The court will not carry a voluntary conveyance of a bankrupt into execution againſt his aſſignees, otherwiſe as to a conveyance for a valuable conſideration, before the bankruptcy.

For inſtance; Where there is a voluntary conveyance by a bankrupt, the court may carry it into execution againſt the bankrupt himſelf, but not againſt his aſſignees.

The reverſe, where it is a conveyance by the bankrupt for a valuable conſideration before an act of bankruptcy committed; as it moſt certainly is here, for then the wife takes in conſideration of *marriage*, and of an eſtate moving from her.

The caſe for *Tayler* verſus *Wheeler*, 2 *Vern.* 564. comes very near the preſent; for there the legal intereſt was veſted in the aſſignees.

Where by acts before marriage the huſband made himſelf in the nature of a truſtee for the wife, his aſſignees muſt be ſo too of courſe.

There is another reaſon why I think the aſſignees can be conſidered no otherwiſe than as the bankrupt himſelf, becauſe what has been done upon *the marriage* is in the nature of a truſt only for the wife: and therefore if the huſband is only a truſtee for the wife, the aſſignees of courſe muſt be truſtees in the ſame manner as the huſband was.

Taking then all the circumſtances together; as ſhe would have been entitled to the relief ſhe prays againſt the huſband, ſhe is equally entitled to relief againſt the aſſignees, but without coſts, as it was their duty, being truſtees only for the creditors at large, to bring a caſe ſo circumſtanced before the court.

Caſe 327. *Cook* verſus *Duckenfield*, *May* 14, 1743.

Where truſtees have a power of ſelling real eſtate and turning it into money, or keeping it in land at their option, it will be ſubject to the ſame truſt as the perſonal eſtate is applied to, whether ſold or kept as real eſtate.

THE queſtion in this cauſe aroſe on the will of Mr. *Thomas Cotton* of *York*: who in the firſt place ſays, "I give my whole real eſtate to my ſon and the heirs of his body, and in caſe of his dying a minor, or without iſſue, then I give all my lands, tenements, *&c.* in and about *Tollerton*, to the defendant and four others by name, for ſuch charitable uſes and purpoſes as I ſhall direct by codicil or otherwiſe.

"And as to his perſonal eſtate, the ſame truſtees are to diſcharge a ſum left to an hoſpital in *York*, and ſome pecuniary legacies out of it; and then directs them to call in and diſpoſe of the reſidue of his perſonal eſtate, as they or the ſurvivors or ſurvivor of them ſhall think fit, and to apply the intereſt and produce, or ſo much as they ſhall judge neceſſary, towards the maintenance of his ſon till his age of twenty-one, and upon his attaining ſuch age or mar-

" riage, to pay and deliver up the ſame to his hands: but if he ſhall " happen to die before ſuch age or marriage, the teſtator ſays, I then " will that the reſidue of my perſonal eſtate be diſpoſed of among " widows and ophans of diſſenters, and to my *poor relations* in ſuch " proportion as they ſhall think fit: and makes the truſtees executors.

The codicil.

" Whereas I have by my laſt will, to which this is a codicil, gi- " ven and deviſed to my truſtees therein named and their heirs my " lands, *&c.* in *Tollerton*, in caſe of my ſon's dying a minor or with- " out iſſue, for ſuch uſes and purpoſes as I ſhall direct by a co- " dicil or otherwiſe: now I do hereby, purſuant to that clauſe in " my will, order and direct in that caſe, that the ſaid lands and te- " nements ſhall at the diſcretion of my ſaid truſtees be ſold and diſ- " poſed of, or kept in their hands or poſſeſſion, and that the pur- " chaſe money ariſing thereby, or the rents and profits thereof, ſhall " be applied and diſtributed to and amongſt ſuch perſons, or to and " for ſuch uſes or purpoſes, and in ſuch manner, as I ſhall by any " writing direct and appoint, and for want of ſuch direction and " appointment, then to ſuch perſon, or ſuch uſes or purpoſes, and " in ſuch manner and proportions, as they the ſaid truſtees, or the " major part of them, or in caſe of death, the ſurvivors or ſurvivor " of them, or the heirs of ſuch ſurvivor, ſhall judge fit and con- " venient: I do further, but yet only in caſe of my ſon's dying a mi- " nor, or without iſſue, give and deviſe by this codicil unto my " aboveſaid truſtees my dwelling-houſe in *York* with the appurte- " nances, for to ſell or keep the ſame in their hands, and apply and " diſpoſe of the purchaſe money, or of the rents and profits ariſing " from the laſt mentioned premiſſes, to and for the ſame uſes, in- " tents and purpoſes, as all the other lands and tenements above " named, that is to ſay, ſuch as I ſhall by any writing or memoran- " dum direct; or for want thereof, as they the ſaid truſtees ſhall " judge fit and convenient.

The teſtator's ſon is dead under age and without iſſue.

The teſtator has left no directions by writing or memorandum as to the application of the lands at *Tollerton*, or his dwelling houſe at *York*.

The truſtees inſiſt upon the beneficial intereſt in both: and the heir at law of the teſtator claims them as a reſulting truſt.

For the truſtees were cited, *Floyd* verſus *Spillet*, before Lord *Talbot*.

And for the heir at law, *Hobart* verſus *The Counteſs of Suffolk*, 2 *Vern.* 644.

LORD

LORD CHANCELLOR.

The bill muſt be amended; and the Attorney General, in behalf of the charity to widows and orphans of diſſenters, and to teſtator's *poor relations*, muſt be made a party.

But, however, I will break the caſe at preſent, which is attended with ſome difficulty.

The general queſtion is, Whether there is a reſulting truſt for the heir at law?

Secondly, Whether defendants are to be conſidered as truſtees throughout?

Thirdly, Whether they take any beneficial intereſt for themſelves?

Fourthly, If not, Whether they are truſtees for the heir at law, or for any other perſon?

It appears to me, a very ſtrong caſe, from the intention of the teſtator, that they ſhould be truſtees throughout, both as to the real and perſonal eſtate.

I have looked into the truſtees anſwer, and they are not ſo ſanguine as to inſiſt upon a beneficial intereſt, but only ſay the heir at law has none, and that upon the contingency of the ſon's dying a minor, and without iſſue, the intereſt devolved upon themſelves.

It will be extremely difficult to give the truſtees a beneficial intereſt.

The deviſe to his ſon is an immediate deviſe, and what follows to the truſtees, is by way of remainder, in caſe the ſon die without iſſue.

It is admitted that if the teſtator had given no directions by his codicil, they would have been truſtees for the heir at law under the will. *See before the deviſes of the perſonal eſtate, and of the reſidue of the perſonal.*

The general queſtion is, whether the will and codicil muſt be taken together?

Nothing can be plainer, than that the teſtator has treated them as truſtees throughout, both as to the real and perſonal eſtate, and has only given them a power of appointment.

It

It has been inſiſted for the truſtees, that, as it is a general power of diſpoſing, that it amounts to a deviſe of the beneficial intereſt to them.

It will be ſtraining the power very much, to conſtrue it as giving them a beneficial intereſt.

Wherever a power is given, whoever takes the eſtate, takes from the grantor by whom that power is created, and not from the power it ſelf.

Whoever takes under a power, takes from the grantor, and not from the power it ſelf.

They are to appoint to ſuch uſes as they, or the major part of them, &c. ſhall judge fit and convenient.

If, as has been ſaid, they may appoint to themſelves, will not the major part be ready to ſay, we will exclude you, or you, becauſe we will make our ſhares larger?

Suppoſe they were to diſpoſe of it in proportion, may not three out of the five ſay, we will exclude the other two.

In all caſes of powers, where it is not executed, it reſults to an heir at law; if executed, it is out of the heir at law.

It has been inſiſted for the truſtees, that the beneficial intereſt may be given them by way of power, as well as by expreſs words.

But then this is a power executable eternally, and as long as the world endures, becauſe it is given to the heir of the ſurvivor.

Mr. Attorney General, for the truſtees, put this caſe: Suppoſe five perſons ſhould agree amongſt themſelves, that ſuch a ſum of money or eſtate be diſpoſed of by them as they ſhould appoint; this would be a good agreement, and if they made no diſpoſition, a reſulting truſt for themſelves.

But this appears to me quite a different caſe from a power of appointment over a third perſon's property.

Now I think there is great colour to ſay, ſome charity was intended.

The teſtator had both real and perſonal eſtate; theſe truſtees are likewiſe truſtees of his perſonal eſtate, and executors.

The queſtion will be, whether upon the codicil, the real eſtate may not be connected with the directions the will has given as to the perſonal eſtate.

Several caſes have been cited, to ſhew that a deviſe of real eſtate to be ſold, will make it perſonal eſtate.

Where real eſtate is given to a deviſee of perſonal, for payment of debts, it is aſſets.

But this is where the real eſtate is given to a deviſee of perſonal, for the payment of debts and legacies; and the rule of law is, that it is aſſets in his hands. *Vide Mallabar* verſus *Mallabar*; *Caſ. in Eq. in Lord Talbot's time* 78.

A bare intention, or even negative words, will not exclude an heir at law from inſiſting on a reſulting truſt.

In the caſe, cited by the Solicitor General, of *Floyd* verſus *Spillet*, there was this farther circumſtance, that they were very near relations, *a wife and children*, and in all ſuch caſes, inferences of bounty have been drawn, and conſequently rebuts any equity the heir at law might have of a reſulting truſt; though it is very true, a bare intention will not exclude an heir at law, nay negative words will not.

But here the charity, which is in this caſe, is of another conſideration.

The teſtator has given a power to the truſtees to ſell this land: Suppoſe they had ſold it, and turned it into money, it abſolutely becomes perſonal eſtate; and ſo *vice verſâ*, would it not then, if ſold, have fallen under the ſame directions with the perſonal eſtate?

It is true, it is not abſolutely and imperatively directed to be ſold: But the queſtion will come to this, as the teſtator has given the truſtees a power of ſelling and turning it into money, or keeping it in land, at their option, if it will not be ſubject to the ſame truſt as the perſonal eſtate is applied to, whether ſold, or kept as real eſtate.

I am of opinion, it will fall under the ſame directions, becauſe he has given it under a truſt, and to the ſame truſtees.

This is the ſtronger, by reaſon of the abſurdity, that he ſhould give it to truſtees who cannot keep it themſelves, though his particular friends, and yet may give it away to ſtrangers, if they thought fit; and it would be very extraordinary, that their keeping it in one form, or both, ſhould change the nature of the deviſe, and intention of the teſtator.

This makes it a conſiderable queſtion for the charity, and *his poor relations*; and therefore the cauſe muſt ſtand over, and the Attorney General be made a party in behalf of the charity.

Cook verſus *Duckenfield and others*, *February* 7, 1743. Caſe 328.
This cauſe was again in the paper.

LORD CHANCELLOR.

THERE can be no doubt at all but it was the intention of the teſtator to give it from the heir.

A man by empowering other perſons to diſpoſe of his eſtate, diſinherits his heir, as much as by his own actual diſpoſition.

The *firſt* general queſtion is, Whether here is any reſulting truſt?

Secondly, If there is not, Whether the defendants are to take the eſtate for *their own benefit*?

This can be no reſulting truſt, for, as has been truly ſaid, a man may diſpoſe of his eſtate by an actual diſpoſition himſelf, or by empowering other perſons to diſpoſe of it, which equally diſinherits the heir at law.

By the will, " in caſe of his ſon's dying a minor, or without " iſſue, the teſtator gives all his lands, tenements, *&c.* to the de- " fendant, and four others, by name, for ſuch uſes and purpoſes as " he ſhall direct by codicil, or otherwiſe."

The codicil takes up the conſideration of his ſon's dying a minor, or without iſſue; and then ſays, " I do hereby, purſuant to that " clauſe in my will, order and direct in that caſe, the ſaid lands " and tenements ſhall, at the diſcretion of my ſaid truſtees, be " ſold and diſpoſed of, or kept in their hands and poſſeſſion."

If the teſtator had ſtopped here, the heir at law indeed would not have been diſinherited; but it follows, " And that the purchaſe " money ariſing thereby, or the rents and profits thereof, ſhall be " applied and diſtributed to and amongſt ſuch perſons, or to and " for ſuch uſes or purpoſes, and in ſuch manner, as I ſhall by any " writing direct and appoint, and for want of ſuch direction and " appointment, then to ſuch perſon or perſons, or ſuch uſes and " purpoſes, as they the ſaid truſtees, or the major part of them, or " in caſe of death, the ſurvivors or ſurvivor of them, *or the heirs* " *of ſuch ſurvivor*, ſhall judge fit and convenient.

This comes within the latter part of the diviſion of a man's power over any branch of his eſtate, by directing another perſon to diſpoſe of it.

It

It was ſaid to be ſo vague and uncertain, that it is void in it ſelf.

A deviſe to *A.* and ſuch uſes as he ſhall appoint, was good before the ſtatute of uſes; for when he appoints, the *ceſtuy que uſe* is in by the feoffor, and not by the appointer.

But, why ſhould it be ſo? Cannot a teſtator do it as to a ſingle perſon? To *A.* and ſuch uſes as he ſhall appoint, was good before the ſtatute of uſes and wills; for when *A.* ſhall appoint, the *ceſtuy que uſe*, he is in by the feoffor from the beginning, and not by the appointer.

As the ſurvivors, or ſurvivor of them, *&c.*

It is true, if you conſider this as a beneficial intereſt for the truſtees, it might be liable to abſurdities; but when you conſider this as diſinheriting the heir, you muſt try whether it can be carried properly into execution, to any uſe or purpoſe, excluſive of the heir.

Where a teſtator ſays, I will my heir ſhall ſell the land, without mentioning for what purpoſe, he is not obliged to ſell; but if he appoints his executor to ſell, it is turned into perſonal aſſets, and leaves no reſulting truſt in the heir.

If a teſtator ſays, I will my heir ſhall ſell the land, and does not mention for what purpoſe, it is in the breaſt of the heir at law, whether he will ſell it or no, and he may chuſe to keep it, and who can compel him to do otherwiſe?

But when the teſtator appoints an executor to ſell, his office ſhews that it is intended to be turned into perſonal aſſets, without leaving any reſulting truſt in the heir.

Here they are truſtees throughout for charity, ſo that it is determined for what it ſhall be ſold, and if there are no words expreſſing any particular purpoſe, it muſt be ſpelt out by circumſtances; and I am of opinion, on the circumſtances of this caſe, that the heir at law is plainly diſinherited, and there is no reſulting truſt.

As to the ſecond point, it is as plain that the defendants have no beneficial intereſt, for ſeveral parts of the will and codicil ſpeak there being *truſtees*, ſuch as indemnifying them againſt any coſts or charges they might be put to, and ſeveral other paſſages in the will and codicil confirm it.

A teſtator deviſing an eſtate to perſons whom he names truſtees, for ſuch purpoſes as they, or the major part of them, ſhall think fit, gives no benefit to them, but is an authority only, by appointing a *quorum* out of them.

Giving it to *five* perſons, whom he names truſtees, to ſuch purpoſes, as they or the major part of them ſhall judge fit, ſhews plainly he intended no benefit to them, but an authority only, by appointing *a quorum* out of the truſtees.

It is almoſt nonſenſe to ſay, that he did not intend to give it for charity, becauſe veſting it in truſtees, to give to ſuch perſons as they think fit, would be putting it in their power to ſell the eſtate, and ſink the money in their own pockets.

Therefore

Therefore, this naturally leads me to look out for other particular paſſages in the will, *to ſuch charitable uſes and purpoſes*, in caſe his ſon die a minor, or without iſſue, ſo that the whole turns upon the ſame event, the ſon's dying a minor, and without iſſue.

The expreſſion in the codicil, " *upon ſuch perſons, and to and for* " *ſuch uſes*," are common words in deviſes to charity.

The defendants too are the very perſons who are the truſtees for charity in the reſidue of the teſtator's perſonal eſtate, and likewiſe for another real eſtate of 20*l. per annum*.

All the objections ariſing from want of objects, or from certainty of time, are eaſily obviated, upon conſtruing the teſtator's intention to be for charity; becauſe, if the truſtees have miſapplied or abuſed their power, they might have been called to an account, at the relation of any perſon, in the name of the attorney general, for the benefit of the charity.

The defendants were directed to lay a ſcheme before the Maſter for applying the teſtator's eſtate to ſuch charitable uſes and purpoſes, as ſhall anſwer the intention of the teſtator, and alſo for the application and diſtribution of the money that ſhall be coming in out of the growing rents and profits, or out of the money that ſhall ariſe from any future ſale; and in this ſcheme the defendants were to have a particular regard to the *poor relations* of the teſtator, and their circumſtances.

Wellington verſus *Mackintoſh*, *May* 13, 1743. Caſe 329.

THIS came on before the Lord Chancellor, on the defendant's plea, that the plaintiff and he, on the 15th of *November* 1728, executed articles of co-partnerſhip, by which they covenanted to become joint traders, as *Blackwell Hall* factors, for eight years, and agreed, in caſe any difference ſhould ariſe relating to their buſineſs, or of any covenant in the articles, it ſhould be referred; and avers, that all matters in the plaintiff's bill relate only to the partnerſhip, and that they have never been ſubmitted to arbitration, nor did the plaintiff ever propoſe a reference, or nominate any perſon to be an arbitrator, though the defendant offered, and was always ready to ſubmit all matters to arbitration, and demands judgment, if he ſhall further anſwer.

One partner brings a bill againſt another, to diſcover and be relieved againſt frauds, &c. the defendant pleaded an agreement, that in caſe any difference ſhould ariſe between them, it was to be referred; and that the matters in the plaintiff's bill relate only to the partnerſhip, and yet have never been ſubmitted to arbitration, nor has he ever propoſed a reference, though the defendant offered, and was always ready to do it. *Lord Hardwicke diſallowed the plea; for as it is a bill to diſcover and be relieved againſt frauds, the arbitrators cannot examine on oath, which, by the agreement, they ſhould have had a power of doing.*

LORD CHANCELLOR.

The plea ought to be diſallowed in this caſe; and yet I would not have it underſtood, that ſuch an agreement might not be made in ſuch kind of articles, and pleaded; but ſuch a clauſe ſhould have in it a power given to the arbitrators to examine the parties, as well as witneſſes, upon oath.

But this bill is to diſcover and be relieved againſt frauds, impoſitions, and concealments, for which the arbitrators could not examine the parties on oath.

Perſons might certainly have made ſuch an agreement as would have ouſted this court of juriſdiction, but the plea here goes both to the diſcovery and relief; and if I was to allow the plea as to relief, I could not as to the diſcovery, and then the court too muſt admit a diſcovery, in order to aſſiſt the arbitrators, which is not proper for the dignity of the court to do.

Caſe 330. *Bagſhaw* verſus *Spencer*, *Hillary Term* 16 *Geo.* 2. *before the* Maſter of the Rolls.

The *Maſter of the Rolls*, after taking ſome time to conſider of this caſe, declared it was his opinion, that the deviſe in the will of *A.* to *Benjamin Bagſhaw*, was in tail, and that he took ſuch eſtate in a moiety of the premiſſes, and conſequently the recovery was well ſuffered, and barred all the remainders.

ONE *Benjamin Aſhton*, being ſeiſed in fee of ſeveral manors, lands, mines, *&c.* by his will duly executed, deviſed the ſame to *William Spencer* and others, their heirs and aſſigns, upon truſt, out of the rents and profits, or by ſale, or mortgage, to pay all the teſtator's juſt debts, and after payment thereof, he deviſed the ſame eſtates to three of the ſame truſtees, their executors, *&c.* for 500 years, upon truſt to pay the teſtator's legacies, and an annuity of 200*l.* a year to the teſtator's ſiſter for her life; and after the determination of the ſaid eſtates for years, he deviſed the ſame premiſſes to all the ſaid truſtees, and their heirs, in truſt, as to one moiety, (being the eſtates in queſtion) to the uſe and behoof of his nephew *Thomas Bagſhaw*, for and during the term of his natural life, without impeachment of waſte; and from and after the determination of that eſtate, he deviſed the ſame to the truſtees for the life of *Thomas Bagſhaw*, to preſerve contingent remainders; and from and after his deceaſe, then to the uſe and behoof of the heirs of the body of *Thomas Bagſhaw* lawfully begotten, and for want of ſuch iſſue, then to his nephew *Benjamin Bagſhaw*, for and during the term of his natural life, without impeachment of waſte; and from and after the determination of that eſtate, to the ſame truſtees for and during the life of *Benjamin Bagſhaw*, to preſerve contingent remainders; and from and after his deceaſe, then to the uſe of the heirs of the body of *Benjamin Bagſhaw*, lawfully begotten, with like remainders to other nephews; and amongſt other legacies,

gacies, gave 1000*l.* to *Benjamin Bagſhaw*, and appointed two of his truſtees executors of his will.

Thomas Bagſhaw dying without iſſue, *Benjamin Bagſhaw*, in *Trinity* term 1731, brought his bill againſt the executors and deviſees, and alſo againſt the heir at law of the teſtator, praying an account of the perſonal eſtate of the teſtator, and alſo of the rents and profits of his real eſtates, that his debts and legacies might be paid, and in particular the 1000*l.* legacy to the plaintiff *Benjamin*; that a commiſſion of partition might iſſue, and that the plaintiff might be let into poſſeſſion of a moiety of the eſtates.

To this bill the defendants put in their anſwers, and the cauſe being brought to hearing in 1732, at the *Rolls*, his Honour decreed, that an account ſhould be taken of the perſonal eſtate, and alſo of the rents and profits of the real eſtates, and of the debts and legacies of the teſtator, and that ſo much of the real eſtates ſhould be ſold, as ſhould, with the perſonal eſtate, and the rents and profits of the real eſtates, be ſufficient to pay all the debts and legacies; and a commiſſion of partition was directed to iſſue, for dividing the real eſtates, or ſo much thereof as ſhould remain after payment of the debts and legacies; and all further directions were reſerved till after the Maſter ſhould have made his report.

In 1737, the Maſter, to whom the cauſe was referred, made his report, and ſoon after *Benjamin Bagſhaw*, the plaintiff, died, whereupon *Catherine Bagſhaw*, his widow, deviſee and executrix, brought a bill of revivor, and ſupplemental bill, upon the former proceedings againſt the ſurviving deviſees and executors of the will of *Benjamin Aſhton*, and alſo againſt the heir at law of *Aſhton*, to whom the other moiety of the eſtates were deviſed, and alſo againſt the heir at law of *Benjamin Bagſhaw*, and againſt *John Statham*, a deviſee under the will of *Benjamin Bagſhaw*, charging, by way of ſupplement, that *Benjamin Bagſhaw* in his life-time, by bargain and ſale inrolled, conveyed his moiety of the eſtates to *Wells* and *Hawkyns*, and their heirs, to the intent that they, or one of them, might become tenant or tenants of the freehold of the ſaid moiety, in order for the ſuffering a common recovery thereof, which was thereby declared ſhould be to the uſe of *Benjamin Bagſhaw* and his heirs.

That a common recovery was accordingly ſuffered, in which *Benjamin Bagſhaw* was vouched, and being thereby made tenant in fee of the moiety left to him, he, by his will duly executed, deviſed to the defendant *Statham*, and his heirs, all his lead mines, and parts and ſhares of mines and mineral intereſts; *and his moiety of the eſtate in queſtion*, to his wife, the plaintiff in fee, and appointed the plaintiff his ſole executrix, and died, leaving the defendant *Fitzherbert* his heir at law.

The ſeveral defendants having put in their anſwers to this bill of revivor, and ſupplemental bill, and the will of *Benjamin Bagſhaw*, and the deed leading the uſes of the recovery, being proved, the cauſe came on at the *Rolls*, for further directions upon the Maſter's report, and this ſupplemental matter; and the general queſtion between the parties was, whether an eſtate tail, or an eſtate for life only, paſſed by the will of *Benjamin Aſhton* to *Benjamin Bagſhaw*; if an eſtate tail paſſed, it was allowed that he had made himſelf tenant in fee by the recovery, and had well deviſed the eſtates to the plaintiff, and the defendant *Statham*; but for the defendant *Spencer*, the heir at law of the teſtator *Aſhton*, it was inſiſted, that an eſtate for life only, paſſed; that the recovery *nihil operatur* to affect the remainder in fee, to the right heirs of the teſtator; and that *Benjamin Bagſhaw* being dead without iſſue, he, as heir at law of the teſtator *Aſhton*, was become well intitled to the eſtates in queſtion.

Mr. *Noel*, council for the plaintiff, inſiſted on the general rule, that where there is a limitation to one for life, with a remainder in the ſame inſtrument, to the heirs of his body, it is an eſtate tail.

A teſtator, let his intention be what it will, muſt deviſe according to the rules of law; and cited *Soulle* verſus *Gerrard*, *Cro. Eliz.* 525.

If the rule be right, the limitation to the truſtees, to preſerve contingent remainders can make no difference.

In ſupport of the rule, he cited *Shelley's Caſe*, 1 *Co.* 88. *b.* and *King* and *Melling*, 1 *Ventr.* 231. and obſerved, that in this caſe there was a power to make a jointure, and yet held to be an eſtate tail. *Broughton* verſus *Langley*, 1 *Lutw.* 815. and *Goodright* and *Pullin*, 13 *Geo.* 2. at a trial at bar, the limitation there was to *the heir male* of the body after a limitation for life, and held to be an eſtate tail.

He ſaid, he had hitherto conſidered it as a legal eſtate, but the rule of equity is the ſame: Here is a truſt veſted, nothing required to be done by the truſtees; and, to ſhew that truſts are to be governed by the rules of law, he cited *Bale* verſus *Coleman*, 2 *Vern.* 607. *Legat* verſus *Sewell*, 2 *Vern.* 571.

In every light, therefore, in which this can be conſidered, it appears to be an eſtate tail in *Benjamin Bagſhaw*.

Mr. *Clarke*, of the ſame ſide, cited *Co. Lit.* 319. *b.* and *Bret* verſus *Rigden*, *in Plowden* 340. *Shaw* verſus *Weigh*, *Caſ. in Eq. Abr.* 185.

Mr.

Mr. *Wilbraham* of the ſame ſide cited *Watts* verſus *Ball*, 1 *P. Wms.* 105.

Mr. *Coxe* for the defendant *John Statham*, who ſtands in the ſame light with the plaintiff, inſiſted, that though the truſtees in this deviſe have a power to ſell the eſtates, which is performing the higheſt act of ownerſhip, yet it hath conſtantly been held that they take only a chattel intereſt, and if ſo, it is clear that ſuch eſtate and intereſt will not prevent a ſubſequent deviſe from veſting as an immediate eſtate, ſubject to and charged with the debts.

And cited the following caſes to this purpoſe. *Carter* verſus *Barnardiſton*, 1 *P. Wms.* 509. *Hutchins* verſus *Hutchins*, 2 *Vern.* 404.

Trinity Term 16 *G.* 2. *the Maſter of the Rolls gave judgment.*

Before I enter into what ſeems to be the main queſtion; whether *Benjamin Bagſhaw* took an eſtate-tail, or for life, by the will of *Benjamin Aſhton*, I ſhall conſider two things: Firſt, whether this eſtate ought to be taken as a truſt or a legal eſtate, and Secondly, whether the Maſter's report, that it is for the benefit of all parties the eſtate ſhould be ſold, will make any difference.

As to the firſt, I am clear of opinion that this is a truſt-eſtate, and not a legal eſtate: it might have been otherwiſe, if no particular eſtate had been given to the truſtees, and it had been given only for the payment of debts generally; and in this it differs from the caſes of *Gore* verſus *Gore*, 2 *P. Wms.* 28. *Stanhope* verſus *Thacker*, *Prec. in Chan.* 435.

There is no doubt but that if an eſtate is deviſed to a man and his heirs to the uſe of him and his heirs, that this would be a uſe executed, and all the ſubſequent limitations would be truſt-eſtates: and this is different from *Popham* verſus *Bampfield*, 1 *Vern.* 79, for there the eſtate-tail was executed by the ſtatute, and is like *Cordell*'s and *Manning*'s caſe.

But as this is throughout called a truſt-eſtate in the decree, that ſhould further govern this caſe.

Then as to the other queſtion, what difference the Maſter's report will make, *that the eſtates are proper to be ſold for the benefit of all parties*; I think, though the eſtates were ſold, it would not have given the court a handle to make a different determination, and the rather becauſe a recovery has been ſuffered on which a new eſtate aroſe.

The great queſtion then will be what eſtate paſſed by the will of *Benjamin Aſhton* to *Benjamin Bagſhaw*, and whether he took an eſtate-tail, or for life only; and though I think this a caſe of great difficulty, yet upon the beſt conſideration, I am of opinion, that he took an eſtate-tail.

Eſtates are to be governed by the ſame rules in law and equity, and technical expreſſions there to receive the ſame interpretation here.

And with regard to this, I ſhall take it as a ſettled maxim that eſtates are to be governed by the ſame rules in law and equity, and technical expreſſions at law are to receive the ſame interpretation, and in ſupport of this many caſes have been cited. *Watts* verſus *Ball*, 1 *P. Wms.* 143. *Duke of Norfolk's caſe*, 3 *Ch. Ca.* 48. *Cowper* verſus *Cowper*, 2 *P. Wms.* 668. *Philips* verſus *Philips*, 1 *P. Wms.* 35. *Pierce* verſus *Read*, *Pollexf.* 29. *Hopkyns* verſus *Hopkyns*, 7 *March* 1731. *Maſſingburg* verſus *Aſh*, 1 *Vern.* 295.

Now it is inſiſted for the plaintiff that this is an eſtate-tail, upon the rules, that where lands are limited to a man for life with limitation in the ſame deed or gift to the heirs of his body, that this makes an eſtate-tail; and for this was cited 1 *Co. Shelley's caſe*, *&c. Smy* verſus *June & al'*, *Cro. Eliz.* 219.

And it hath likewiſe been inſiſted, that a deviſe of lands in the ſame way paſſes the ſame eſtate; and for this have been cited ſeveral caſes. *King* verſus *Melling*, 1 *Ventr.* *Soule* verſus *Gerrard*, *Cro. El.* 525. *Bail* verſus *Coleman*, 1 *P. Wms.* 143.

In anſwer to this it hath been inſiſted, that thoſe rules are merely artificial, not founded in juſtice, but for ſupport of the feudal tenures; and that it being contrary to juſtice, judges ought, from the common ſenſe of the caſe, according to Lord *Hobart*'s rule, to ſhew themſelves *Aſtuti*, in finding out reaſons to ſupport exceptions to ſuch rules; and ſeveral caſes have been cited in ſupport of this, particularly *Liſle* verſus *Grey*, *Sir T. Jones* 114. *Raymond* 315. and 2 *Lev.* 223. Sir *Thomas Jones* ſays in his report, that judgment was for the defendant: but that is a miſtake, as appears from the reaſon of the caſe, which is contrary, and ſo are the other books; and though it is ſaid in *Jones's Reports* this judgment was reverſed, yet that is a miſtake, for in *Legate* verſus *Sewell* in 1 *P. Wms.* 87. it appears Mr. Juſtice *Tracy* had examined the record, and found that the judgment was affirmed. *Vide* 2 *Vern.* 43. *Peacock* verſus *Spooner*. To the ſame purpoſe alſo was cited *Daffern* verſus *Daffern*, 2 *Vern.* 362. *Hodgeſon* verſus *Buſſey* the *5th of December* 1740. * and it is inſiſted from all theſe caſes that the intention of the parties may even on deeds, and much more on wills, be taken as an exception to this rule, and one other caſe is cited to this purpoſe of *Trevor* verſus *Trevor*, 1 *P. Wms.* 622.

Sir *Thomas Jones* in his report of *Liſle* verſus *Gray* has intirely miſtaken the caſe.

* 1 Tr. Atk. 89.

The

The next caſes are thoſe which have been adjudged and determined in caſes of wills, on which the rule of judging by the intention of the teſtator hath been inſiſted on; and for this hath been cited *Boraſton*'s caſe, 3 *Co.* and *Plowden* 414.

And upon the general queſtion hath been cited *Clark* verſus *Day*, *Moore* 593. *Lodington* verſus *Kime*, *Eq. Caſ. Abr.* 183. *Backhouſe* verſus *Wells*, cited in a caſe in a book called *Modern Caſes* 181. *Leonard* verſus *The Earl of Suſſex*, 2 *Vern.* 526. which caſe was mentioned on both ſides. *Lord Glenorchy* verſus *Boſville*, *Caſes in Lord Talbot's time* 3. *Sands* verſus *Dixwell*, *December* 8, 1738. * *James* verſus *Richardſon*, *Pollex.* 457. Lord *Stamford* and Sir *John Hobart* on Serjeant *Maynard*'s will, *December* 19, 1709.

* 1 Tr. Atk. 607.

But the neareſt caſe of all, and which is inſiſted to be in point with the preſent, is *Papillion* verſus *Voyce*, 2 *P. Wms.* 471.

Theſe are the ſeveral caſes that have been cited for the defendant, and I ſhall now conſider how far they come up to the preſent caſe, and then how far the intent is to govern in caſes of deeds, and likewiſe how far it is to prevail in caſes of wills.

On deeds the rule is certain, and I hope always will be the ſame, that they ſhall be controuled by the rules of law, and the intent that appears on the face of the deeds; for to admit of other conſtructions would let in the greateſt uncertainty, as we find every day in the conſtruction of wills.

Deeds are to be controuled by rules of law, and the intent that appears on the face of them.

As to *Liſle* verſus *Grey*, it differs from this caſe in reſpect of the ſuperadded clauſe.

The caſes of *Daffern* verſus *Daffern*; *Peacock* verſus *Spooner*, *&c.* are all different; ſo is *Trevor* verſus *Trevor*: though they are to be ſure authorities, for what they determine; beſides the reaſons in thoſe hold not in the caſe of wills.

How far then is the intent of the teſtator to be obſerved?

It is laid down in general, that it is to be obſerved; but then it is laid down as general too, that this muſt be conſiſtent with and according to the rules of law; and if this was not adhered to, the greateſt incertainty and inconvenience would follow.

The intent of the teſtator muſt be conſiſtent with the rules of law, and in many caſes his intent has been reſtrained, as where he has attempted a perpetuity, or to reſtrain a tenant in tail from alienation.

When a teſtator expreſſes himſelf in inaccurate words, but ſhews his intention, the law, as Lord *Coke* ſays, ſhall be his counſellor; and this is what I take to be the meaning of *Plowden* 414. and there are many caſes wherein an intent is ſo reſtrained, as where a perpetuity is attempted to be made, or a reſtraint of alienation put on tenant in tail, *&c.*

Where

Words that are doubtful, and afford implication only, are not to be attended to, where the teſtator has expreſſed himſelf in legal words.

Where the teſtator expreſſes himſelf in legal words, they are not to be left, to follow the intent ariſing by other words that are doubtful, and afford implications only; for when we quit a clear and ſettled rule, which the law ſets up for our guide, and follow ſuch intent, we leave certainty for incertainty; and we muſt now take the law to be ſettled, that where the iſſue take by purchaſe, it gives the anceſtor an eſtate for life only; but the caſes cited for this do not come up to the preſent, for here is no deviſe over to the heirs of the body of the iſſue, as was in thoſe caſes of *Liſle* and *Grey*, and *Backhouſe* verſus *Wells*; and in the caſe of Lord *Glenorchy* verſus *Boſville*, and *Sands* verſus *Dixwell*, the lands were deviſed to the truſtees to convey, which made it executory, and altogether different from this caſe.

Aſh verſus *Rouſe* was of a deviſe of money to be laid out in lands; which differs from the rule in *Shelley*'s caſe and *Co. Litt.*

But the preſent caſe is an immediate deviſe, and not of a deviſe of lands to be ſettled.

As to *Papillion* verſus *Voyce*, 1 *P. Wms.* 471. (which I have left to conſider laſt, becauſe moſt material) the deviſe is the ſame, only there it is of a legal eſtate, this of a truſt; but that, as I have ſaid before, I ſhall conſider as making no difference.

And had this caſe ſtood unimpeached, I ſhould have been very unwilling to have departed from it, whatever might have been my opinion; but in *P. Wms.* it appears plainly that Lord Chancellor *King* was of a different opinion, and if the ſupplemental bill had not been brought, would have reverſed the decree, and ſo it rather ſtands an authority for the plaintiff; and there is another report of this caſe, where it is ſaid at the end of it, that in the caſe of *Williams* verſus *Brown*, Lord *King* had declared he ſhould reverſe the decree. *Vide Caſes in Chancery*, printed in 1740. *page* 34.

Then conſider if this deviſe be executory or not, though all truſts are in ſome ſort executory, yet it is well underſtood what an executory truſt is.

As to the debts, it cannot be executory, becauſe the truſtees can ſell no more than is ſufficient to pay the debts, nor is there any proviſion for laying out the ſurplus money; for after the debts and legacies are paid, the deviſe is immediate, and it is the will I ought to go by, and not what hath happened ſince on the decree and the Maſter's report.

The words, without impeachment of waſte, do not give a power inconſiſtent with an eſtate-tail, or at leaſt will not defeat it.

Conſider then the conſtruction of the words of this will, and then let us examine what the effect is of the limitation to the

truſtees

truſtees to preſerve the contingent remainders, the words without impeachment of waſte give a power not inconſiſtent with an eſtate-tail, or at leaſt would not defeat the eſtate, as ſaid by Lord *Talbot* in the caſe of *Lord Glenorchy* verſus *Boſville*, and in *Shaw* verſus *Weigh*, no weight was laid on theſe words to reſtrain the eſtate, and if words can have a reaſonable conſtruction not to defeat eſtates, they ought to be ſo taken.

As to the intent, from the limitation to the truſtees to preſerve contingent remainders, they do not with certainty ſhew an intent not to give an eſtate-tail, and might be inſerted with no ſuch reaſon; we ſee the words inſerted frequently where there could be no reaſon for them, and the teſtator might think this limitation neceſſary to create an eſtate-tail, or might have inſerted the words to reſtrain an alienation by the tenant in tail, which if it had been expreſſed could not, as in the caſe of *Leonard* and the Earl of *Suſſex*, have taken effect.

Great inconveniences have ariſen by departing from ſtrict words, from the uncertainty it produces, and I could wiſh that it had never been allowed, but that words had been left to legal conſtruction.

Departing from ſtrict words has produced ſuch uncertainty, that it is to be wiſhed they had been left to legal conſtruction.

The Maſter of the Rolls declared the deviſe in *Aſhton*'s will was in tail to *Benjamin Bagſhaw*, and in conſequence thereof that the eſtate ſhould be ſold, and the money ariſing from ſuch ſale be paid to ſuch perſon as would have been entitled to the eſtate itſelf under *Bagſhaw*'s will, if it had not been ſold.

Caſe 331.

Bagſhaw verſus *Spencer*, *November* 12, 1748. *on an appeal from a decree at the Rolls.*

LORD CHANCELLOR. Nothing which has happened ſince the will of *Benjamin Aſhton* can vary the will, but the rights of the parties muſt ſtand as they were at his death; and if a ſurplus of money ariſing from the ſale of the lands is now to be laid out, it muſt be in the ſame manner as if the lands originally were now to be ſettled.

Lord *Hardwicke* being of opinion that *Benjamin Bagſhaw* took only an eſtate for life, he reverſed the decree at the Rolls, *pro tanto* as decreed that *Benjamin* had an eſtate tail.

Neither can the recovery ſuffered by *Benjamin Bagſhaw*, or his will, be of any ſignification, for the determination muſt be the ſame as if *Benjamin Bagſhaw* had been living, and prayed a conveyance of the moiety himſelf, according to *Benjamin Aſhton*'s will.

There are two general queſtions upon this will:

The eſtate deviſed to *Benjamin Bagſhaw* was not an uſe executed, but a mere truſt in equity, and the whole fee being deviſed to the truſtees, no legal fee could be limited upon it, and he could take no legal eſtate.

Firſt, Whether the eſtate deviſed to *Benjamin Bagſhaw* was a truſt, or a legal eſtate, that is, a uſe executed, or a mere truſt in equity?

Secondly, If it is a truſt, whether an eſtate-tail paſſes, or an eſtate for life, with contingent remainders to all the iſſue of his body.

As to the firſt queſtion, I am of opinion it is merely a truſt in equity.

The deviſe is to truſtees and their heirs; which carries the whole fee in law; the deviſe to ſell would have carried the fee, if the word *heirs* had not been mentioned. *Shaw* verſus *Weigh*, *Eq. Caſ. Abr.* 185. *April* 28, 1729.

And upon this ground the caſe differs from *Cordell*'s caſe, *Cro. Eliz.* 315. and *Popham* verſus *Bampfield*, 1 *Vern.* 79. and *Carter* verſus *Barnardiſton*, 1 *Wms.* 505. which were all merely chattel intereſts.

The only caſe which made me doubt was the caſe of Lord *Say* and *Seal*, but that was only an eſtate *pur auter vie*.

In the preſent caſe the whole fee being deviſed to the truſtees, no legal fee could be limited upon it, and *Benjamin Bagſhaw* could take no legal eſtate.

Benjamin Bagſhaw's recovery bad, for he could not make a good tenant to the *præcipe*, being before the debts were paid, and the fee deviſed to the truſtees was ended; and whatever defeats the recovery, defeats the plaintiff's title.

Next as to it's being good by way of executory deviſe: by executory deviſe, *Benjamin Bagſhaw* could take no legal eſtate, for it is too remote, it being after all the debts paid, which may take in a much further time than the law allows: but here the recovery was ſuffered before the debts were paid, and before the fee was ended, and therefore he could make no good tenant to the *præcipe*, and whatever defeats the recovery defeats the plaintiff's title: the plaintiff therefore muſt admit that all the eſtates are truſts in equity; which brings in the ſecond queſtion;

Whether this is an equitable eſtate for life only, with contingent remainders, or an eſtate-tail?

And this depends upon the conſtruction of the words *heirs of his body*, whether they are words of purchaſe or limitation.

Here are three things to be conſidered:

Firſt, What appears to be the teſtator's true intent?

Secondly, If ſuch intent is conſiſtent with the rules of law and equity.

Thirdly, Whether there is any particular ſettled rule which will prevent the teſtator's intent from taking effect, which will let in the diſtinction of truſts executed and executory.

As

As to the firſt queſtion, what is the teſtator's true intent?

It is extremely clear that he intended to make a ſtrict ſettlement of his eſtate among his nephews.

To every one of his nephews he uſes the words, *for and during his natural life.*

To every deviſe is added *without impeachment of Waſt*, which ſhews he intended to give ſuch an eſtate as would be puniſhable for waſte, if not excepted.

The limitation is to truſtees to preſerve contingent remainders, *&c.* but to permit *Benjamin Bagſhaw* to receive the profits, *&c.*

This clauſe ſpeaks, that the teſtator intended ſuch an eſtate only, as might be forfeited: for the limitation to the truſtees, is, after the determination of the eſtate, *&c.* which determination could be only two ways: by death, or forfeiture: and the former could not be meant, becauſe the limitation is to truſtees during the life of *Benjamin Bagſhaw.*

It alſo implies that there are ſome contingent remainders or uſes to be preſerved, and there are none, unleſs the limitations to the heirs of the bodies of the ſeveral nephews are ſuch, which I think, is as ſtrong to ſhew the teſtator's intent, as if he had inſerted ſome negative words equally ſtrong; as in the caſes of *Backhouſe* verſus *Wells*, *Eq. Caſ. Ab.* 184. and *King* verſus *Melling*, 1 *Ventr.* 225. to give an eſtate for life not abſorbed in the ſubſequent limitations.

The plaintiff's council relied upon the teſtator's knowing the difference between words of limitation and purchaſe: and that in the other moiety of the eſtate he had deviſed it properly to create an eſtate for life, by giving it to his ſiſter and the heirs of her body and the iſſue of ſuch heirs.

But I think the difference of the penning, ſhews a different intent.

For there he has inſerted no limitation to truſtees to preſerve, *&c.* which ſhews he intended to make uſe of the words *heirs of the body* as words of purchaſe or deſcription only.

Secondly, I am to conſider if this intent can take effect.

Here the council for the plaintiff placed their great ſtrength, that ever ſince *Shelley's Caſe*, 1 *Co.* 93. *b.* the law has ſettled a clear rule, that in ſuch caſe, the word heirs, is a word of limitation, and that the law will not ſuffer any man to make a deviſe, contrary to the rules of law.

But

But I think that rule is now miſapplied: This principle is not to be applied to the conſtruction of words, but to the nature of the eſtates themſelves.

As the law will not permit a man to create a perpetuity, or to make a chattle deſcendable to heirs generally, which ariſes from a want of power in the teſtator; but here is no want of power in the teſtator to give ſuch eſtate for life; the only objection is, that he has uſed improper words.

Where a teſtator's intent appears plain, this court will help an unapt expreſſion, by making the words heirs of the body, words of purchaſe.

But to make that defeat his intent is very hard, and contrary to the firſt rule of law in expounding wills, *viz.* That if the teſtator's intent appears plain, as he is ſuppoſed to be *inops concilii*, the law will help an improper and unapt expreſſion, which cannot be done here, but by making the words, *heirs of the body*, words of purchaſe.

The objection is, That by law theſe are words of limitation.

Heirs of the body have, at law, been conſidered as words of purchaſe, even in a deed.

I anſwer, There are many caſes, even at law, where they are words of purchaſe, *Archer's Caſe*, 1 *Co.* 66. *b.* *Clark* verſus *Day*, *Mo.* 192. 1 *Ventr.* 334. *Long* verſus *Beaumont*.

And, upon this point, the caſe of *Liſle* verſus *Grey*, is a ſtronger authority, in 3 *Lev.* 323. it is reported different from Sir *Thomas Jones*, as to the eſtate decreed, and the decree was not reverſed, but affirmed.

An objection was raiſed, *There were ſeveral other words which might govern that caſe, as the firſt, and every other ſon were mentioned.*

I anſwer, *It is an authority, that the words*, heirs of the body, *even in a deed, may be conſidered as words of purchaſe at law.*

The eſſential difference between this caſe, and *Coulſon* verſus *Coulſon*, is, that was a mere legal eſtate, the preſent, a truſt in equity.

But it is ſaid, that by a late authority, the interpoſition of truſtees to preſerve contingent remainders, is not ſufficient to make theſe words, words of purchaſe; the caſe of *Coulſon* verſus *Coulſon*, in the court of King's Bench, the 8th of *May* 1744, which was the date of the judge's certificate, but that caſe differs widely from the preſent: That was not without impeachment of waſte; it was a mere legal eſtate, not a truſt; and the words were to be taken according to their legal operation, there was no conveyance to be made, or any thing further to be done.

But here, all the limitations are the directions of a truſt, which this court is bound to carry into execution, according to the intent of the teſtator.

And therefore a greater latitude is to be allowed in the conſtruction to make it agree with the intent of the teſtator.

In conſtruing words, to make them agree with the intent of the party, a court of equity is more liberal than a court of law.

And in *Coulſon* verſus *Coulſon*, the judges held, that the interpoſing the limitation to truſtees prevents the merger of the eſtate for life, and that *Coulſon* took a diſtinct eſtate for life, with a remainder in tail in himſelf.

The great difference is, that was a mere legal eſtate; the preſent caſe is a truſt in equity.

It has been relied upon, that limitations of truſts, and legal eſtates, are governed by the ſame rules, otherwiſe there would be different rules of property in the two courts.

I agree, that there ought not to be one rule of property in law, and another in equity: But, ſure, a court of equity may be more liberal in the conſtruction of words, to make them agree with the intent of the party.

And Lord *Nottingham*'s reaſoning is to be applied to the meaſure of the limitations, that they cannot be carried further in caſes of a truſt, than at law.

Papillon verſus *Bois*, *Eq. Caſ. Abr.* 185. eſtabliſhes the diſtinction of a legal eſtate, and a truſt in the ſame caſe, and upon the ſame will.

There, both the judges were clear of opinion, that the teſtator's intent was plain to give an eſtate for life only, from the clauſe to preſerve contingent remainders, and that the court was bound to follow that intent, notwithſtanding the words *heirs of the body*.

The opinion Lord Chancellor *King* gave, was a ſort of extrajudicial opinion; but, taking time to form his decree, he ſaid, he had looked into the caſe of *Liſle* verſus *Grey*, and ſeemed to be leſs clear as to the legal eſtate than before; but as the ſupplemental bill had brought a new right, he took care to expreſs, that the direction to reverſe that part of the decree, as to deeds, *&c.* was expreſsly founded upon that ſupplemental bill.

Leonard verſus *Com' Suſſex*, 2 *Vern.* 526. If this had been a legal eſtate, the ſons would have been tenants in tail; but, in equity, upon a truſt eſtate, the clauſe for interpoſing truſtees, *&c.* governed the whole caſe.

On the conſtruction of Serjeant *Maynard*'s will, heirs of the body were held to be in the ſenſe of the firſt and every other ſon.

Sir John Hobart verſus *Lord Stamford*, on the conſtruction of Serjeant *Maynard*'s will: This court, and the Houſe of Lords, conſtrued the words *heirs of the body* in the ſenſe of the firſt, and every other ſon.

It is eſtabliſhed, that in a will, the word *iſſue* is as ſtrong as the word *heirs*.

Aſhton verſus *Aſhton*, at the *Rolls*, *November* 14, 1734. A ſtrict ſettlement was decreed, the words there were iſſue of the body, not heirs; but it has been eſtabliſhed, that in a will, the word iſſue, is as ſtrong as the word heirs.

In *Withers* verſus *Algood*, *July* 1735. An eſtate for life only, was decreed.

An *objection* was taken, That there the words heirs of the body of *A.* were joined with other perſons, who clearly muſt take by purchaſe.

I anſwer, It amounts only to this, that a plain intent of the teſtator will change theſe words from being words of limitation, to words of purchaſe; and Lord *Talbot* ſaid, the rule of law was not ſo ſtrict, as to controul the teſtator's intent, where it is plain.

The diſtinction of truſts *executed* and *executory*, eſtabliſhed in *Lord Glenorchy* and *Boſville*.

Lord Glenorchy verſus *Boſville*, *Caſ. in Eq. in Lord Talbot's time* 3. has eſtabliſhed the diſtinction of truſts *executed* and *executory*.

It was objected for the plaintiff, that in caſes of articles before marriage, the court will make ſuch conſtruction, as may anſwer the intent of the party; but in wills, where all parties are volunteers, the court cannot take ſuch liberty.

Notwithſtanding all the parties are volunteers under a will, it is not neceſſary, the words muſt be taken as they are, but, in many caſes, may be varied.

It is true, ſuch diſtinction has been taken, notwithſtanding it has been objected, that the intent of the parties ought to be obſerved in both; but I deny that, becauſe all parties are volunteers under a will; the words muſt be taken as they are, and cannot be varied from: Nay, in many caſes they muſt be varied; as where the court is obliged to direct a conveyance, for, if they were to uſe in ſuch conveyance, the ſame words as are in the will, they would in a deed, have a different conſtruction from a will, and thereby fruſtrate the teſtator's intent.

Iſſue in a deed is always a word of purchaſe.

As the word *iſſue* in a will, may be a word of limitation, but in a deed, is always a word of purchaſe.

An *objection* has been raiſed, that theſe caſes ariſing upon wills, are very different from marriage articles, where the parties are conſidered

ſidered as purchaſers, and the iſſue male particularly regarded, and take as purchaſers; but that no caſe has been cited of a will, where all parties claim voluntarily; and the ſame words of limitation in a will, ought to receive the ſame conſtruction in equity as at law, even where they are to be carried into execution by a future truſt, ſo as to create an equitable eſtate.

I anſwer, The firſt part of the diſtinction is right, but not applicable to the preſent caſe.

And, I think, in the caſe of *Baile* verſus *Coleman*, 2 *Vern.* 670. the precedents were not fully laid before Lord Chancellor *Cowper*, a great many of which have been cited in this preſent judgment.

Next, As to truſts *executed* and *executory*.

All truſts are in the notion of law executory, and are to be executed in this court.

At law, before the ſtatute of uſes, every uſe was a truſt, then the ſtatute executed the legal eſtate, and joined it to the uſe, and therefore a truſt executed is now a legal eſtate; and to bring it to a truſt in equity, the legal eſtate muſt want to be executed by a conveyance.

The ſtatute of uſes has executed the legal eſtate, and joined it to the uſe; and the legal eſtate therefore muſt want to be executed by a conveyance to make it a truſt in equity.

The caſe where this was moſt argued, was the caſe of Lord *Glenorchy* verſus *Boſville*.

But there is another queſtion, How far in truſts executory, the teſtator's intent is to prevail over the ſtrict rule of law? And I think the decree in that caſe ſo right, it did not want the aſſiſtance of ſuch diſtinctions.

Teſtators are generally preſumed to know, that ſome further conveyance of the eſtates deviſed to truſtees muſt be made, for they cannot preſume, the eſtates will always remain in their truſtees, but muſt be by them conveyed to other perſons, according to the tenor of the will.

There is one thing more that is deciſive in this caſe; nothing which has happened ſince *Aſhton*'s death can vary the caſe, but it muſt be the ſame as if *Benjamin Bagſhaw*, the firſt deviſee, came for a decree; and if he had been the plaintiff now, the court muſt have decreed the ſurplus to be laid out in land, one moiety to the uſe of *Benjamin Bagſhaw*, with remainder over; and the queſtion would have been, whether the court would, or would not have inſerted truſtees to preſerve contingent remainders in ſuch conveyance: If they had been inſerted, the next limitation muſt have been to the firſt and

every other ſon, in ſtrict ſettlement; for if they had been inſerted, there muſt have been ſome remainders for them to preſerve; and if the remainders had been to the heirs of the body of *Benjamin Bagſhaw*, it would not have been a remainder to have been preſerved.

Where the court are obliged to depart from the words of a will, it ſhould rather be to ſupport, than to fruſtrate the intention of the teſtator.

And therefore the court muſt have departed from the words of the will; and if it muſt depart from the words of the will, ſuch departure muſt be rather to ſupport, than fruſtrate the plain intent of the teſtator, and to have limited the remainder to the heirs of the body of *Benjamin Bagſhaw*, would plainly have contradicted the teſtator's intent.

An *objection* was ſtarted, That if the court departs from the words of the will, it ought to adhere to the legal operation of the words.

I anſwer, That cannot be in the preſent caſe, without giving to *Benjamin Bagſhaw* a different legal eſtate from the eſtate given him by the words of the will.

By the will, it is a life eſtate, not united with the remainders; but, by leaving out the clauſe of the truſtees, it would have been an immediate eſtate-tail.

By the will, it is an eſtate liable to forfeiture.

By the conveyance, an eſtate-tail not liable.

For theſe reaſons, I am of opinion, *Benjamin Bagſhaw* took only an eſtate for life, and that ſo much of the decree at the *Rolls*, as decrees *Benjamin Bagſhaw* to have an eſtate-tail under the will, muſt be reverſed.

Caſe 332.

Wrotteſley verſus *Wrotteſly*, *June* 1, 1743.

The words under the marriage ſettlement, *ſuch child as married without the father's conſent ſhould forfeit the ſaid intended portion*, extended to the whole intereſt each child might expect under this ſettlement, whether certain or contingent.

A Queſtion aroſe on the marriage ſettlement of Sir *John Wrotteſley*, who created a term for years, in truſt, "to raiſe and pay, if "one child, only 6000*l.* if two, 6000*l.* to be equally divided; if "three, or more, 8000*l.* to be equally divided, and to be paid at "their reſpective ages of twenty-one, or marriage; and it was pro-"vided, that if any of the ſaid younger children ſhould marry in "the father's life-time, without his conſent, and after his death, "without conſent of *the mother*, ſuch child ſhould forfeit his or her "ſaid intended portion, to be diſtributed among the reſt, at the "age of twenty-one, or marriage *with ſuch conſent*; with a farther "proviſo, that if any ſuch child ſhould marry *without ſuch conſent*,

" or die before twenty-one, or marriage *with conſent*, the portion " to be divided among the ſurvivors, at the age of twenty-one, or " marriage *with conſent*."

Frances, one of the daughters, married with Mr. *Bendiſh*, without the conſent of *the mother*; and, on the hearing of the cauſe before Lord *Talbot*, on the 6th of *Auguſt* 1734, it was held, that ſhe had forfeited her portion by ſuch marriage, and was decreed to the other children.

One of the daughters is ſince dead, before twenty-one, or marriage; and the petitioner, Mr. *Bendiſh*, who married *Frances*, applies now, in the right of his wife, who is twenty-one, for her diſtributive ſhare of her ſiſter's contingent portion.

The queſtion is, Whether *Frances*, as ſhe has forfeited her original portion, is intitled to a ſhare of this contingent portion, on the death of her ſiſter, before twenty-one, or marriage.

Mr. *Wilbraham*, for the petitioner, who was not twenty-one when ſhe married, but arrived at that age before her ſiſter died, cited the caſe of *King* verſus *Withers*, as a caſe in point.

Mr. Attorney General, council for the other ſiſters, inſiſted, that the whole term, and the whole 8000*l.* was under conſideration when the cauſe came before Lord *Talbot*, and that he expreſsly declared *Frances* is not intitled to any ſhare of the 8000*l.* which muſt mean, that ſhe had no intereſt at all, and could not poſſibly intend that ſhe had a contingent intereſt.

If the intention of the parties to the ſettlement, was plain to give the portion over on marrying *without conſent*, the court will not ſtrain to conſtrue it no forfeiture.

The whole tenor of the ſettlement is, that none of them ſhould be intitled unleſs they had performed the conditions.

Mr. Solicitor General, in reply for the petitioner, ſaid, that the clauſe of forfeiture does not at all affect the contingency which has happened.

The ſaid intended portion is the only thing which is to be forfeited, and can mean only what ſhe is intitled to at the commencement of the term, nor are there any words whatſoever, that give over any ſhare that might accrue afterwards, by the death of one of the daughters before twenty-one, or marriage.

That *Frances* is intitled to this diſtributive ſhare, becauſe one of the contingencies has happened ſince her attaining the age of twenty-one, and ſhe may yet marry a ſecond huſband with conſent.

LORD CHANCELLOR.

As this is the caſe of a forfeiture of a marriage portion, the court will make as favourable a conſtruction as poſſible.

For, as Mr. Solicitor General ſaid, if this had been *caſus omiſſus*, the court would let it lie where it is fallen, and not take it from *Frances*; at the ſame time I muſt make ſuch a conſtruction, as will ſuit the intention of the parties.

It has been objected by the defendant's council, that the petitioner is precluded, from what is demanded by the petition, by Lord *Talbot*'s decree.

But this will not hold, becauſe the terms of the decree are, *That* Frances Bendiſh *having married* Higham Bendiſh, *after the death of Sir* John *Wrotteſley, without the conſent of Lady* Wrotteſley *her mother, is not intitled to any ſhare of the* 8000l.

The declaration of the court being in the preſent tenſe, cannot be extended ſo far as to exclude any thing ſhe might be intitled to by a ſubſequent contingency, if within the terms of the truſt.

The rather, becauſe the reſt of the daughters were not intitled at the time of the decree, being all under age, and therefore all were at liberty to apply to the court for further directions, and the application left open to Mrs. *Bendiſh*, as well as the reſt.

But, however, the council are right as far as they have argued from the reaſon of the decree, which brings me to the conſtruction upon the truſt it ſelf: Now, as to this, it depends upon the frame and tenor of the whole truſt.

There is one thing pretty extraordinary in the petitioner's demand, which is his claiming a groſs ſum of 2000*l.* the whole of her original portion, for 8000*l.* was all the proviſion under the ſettlement, if more than three children.

What is the effect of this? Why, that notwithſtanding ſhe has forfeited her original portion, yet they will take back as much as the original portion they have forfeited, which would be a great abſurdity, and therefore muſt be laid out of the caſe, for they cannot claim a fourth part of the original portion as it is given over: Therefore, the

the queſtion is reduced ſingly to a fourth part of the deceaſed daughter's fifth, and this muſt depend upon the clauſe of forfeiture.

Firſt, What is the meaning of *his* or *her* ſaid intended portion.

Now I do not think that the word *ſaid* can be narrowed ſo far, as to relate only to the original portion; for the word portion or portions in this clauſe or declaration of truſt does not mean the original portion only, but the whole intereſt which each child might expect under this ſettlement, whether certain or contingent.

If it reſted ſingly upon the clauſe of forfeiture, I ſhould be of opinion the petitioner is not intitled, but if you go on to the next clauſe it is ſtill plainer.

Here it is not *in terrorem* only, but a legal determination of the term, and the court cannot ſet it up again.

Suppoſe the other three ſiſters had married under age and without conſent, would not the term have determined; can it be inſiſted then that the two ſiſters marrying with conſent ſhall keep the term on foot for the petitioner's benefit, when the whole term would have ceaſed, if they had all married without conſent.

As to the part of Lord *Talbot*'s decree, that gives Mrs. *Bendiſh* the ſum which the father has left by his will to make up any deficiency in his childrens fortunes, I think it a very proper direction, and ſhould have been of the ſame opinion, becauſe it would be very hard to extend the words *make up* to a forfeiture if a daughter married without conſent; it could not be ſo conſtrued unleſs the father had repeated the words in the ſettlement marrying *without conſent*; upon the whole circumſtances he diſmiſſed the petition.

Pullen verſus *Ready*, *et e con'*, *January* 8, 1743. Caſe 333.

THE queſtion in this cauſe aroſe upon the will of *Colſton* in the year 1720.

Edward Colſton "deviſes ſeveral meſſuages, lands, &c. to five "truſtees and their heirs, in truſt for his grand niece *Sarah Colſton* "for her life, with limitations to her ſons and daughters in tail, "and the laſt remainder in truſt for *Mary Edwards*, and her ſons "and daughters in tail.

C. by his will gives legacies to his nieces, to be paid to them *at* 21. *or marriage*, which ſhall firſt happen, provided they marry with the conſent of their father and mother, which ſhall firſt happen, or the ſurvivor of them; otherwiſe to ſink into his perſonal eſtate. The legacies veſted at their attaining the age of 21. and either of them marrying without conſent afterwards is of no conſequence; for Lord *Hardwicke* held that the marriage with conſent of father and mother muſt be conſtrued ſo as to relate to the time of the legacies veſting.

He

He gives ſeveral pecuniary legacies (*inter alia*) " he ſays, I give " to my couſin *Mary Edwards* 500 *l.* to be put out to intereſt for her " ſeparate uſe; and after her deceaſe I appoint the ſaid principal ſum " of 500 *l.* to be paid to her daughter *Sophia* at her day of marriage " or twenty-one, which ſhall firſt happen. *Item*, I give to her " daughter *Mary* 8000 *l.* and I further give to her ſiſter *Sophia* 5000 *l.* " which ſaid ſeveral ſums ſhall be paid to them *at their ages of* " *twenty one, or day of marriage, which ſhall firſt happen*, provided " they marry with the conſent of their father and mother, or the " ſurvivor of them, or otherwiſe their legacies to ſink into my per- " ſonal eſtate.

" *Item*, it is my will, and I do hereby declare, that if the ſaid " *Sophia* and *Mary*, daughters of my ſaid niece *Mary Edwards*, or " either of them, ſhall hereafter marry with any perſon or perſons " whatſoever *without the conſent of their father and mother and the* " *truſtees named in the ſaid will, or the greater number of them living*, " *ſignified under their hands*: then it is my will, that ſuch of the " daughters ſo marrying ſhall have or receive no more benefit or ad- " vantage by my ſaid will, or any thing therein contained, than if " they were actually dead, or not named in my ſaid will, either by " particular names or daughters in general.

Sarah Colſton dies without iſſue unmarried. *Mary Edwards* had iſſue three daughters, *Sarah*, *Mary* and *Sophia*. *Sarah* married in the life-time of the teſtator in a manner diſagreeable to him: *Mary* married to Lord *Middleton*, with ſuch conſent as the will required: *Sophia* in *Auguſt* 1732. arrived at her age of twenty-one on the 19*th* of *Jan.* 1732. By deed inrolled between *Thomas Edwards* of the firſt part and *Sophia Edwards* his wife of the ſecond part, a recovery was ſuffered (Mr. *Edwards* being then living) and the uſes declared to *Thomas Edwards* for life, then to the uſe of ſuch perſon or perſons and for ſuch eſtate, *&c.* as the ſaid *Sophia* ſhould by deed or writing, to be by her duly executed with the conſent of the ſaid Mr. *Edwards* during his life, teſtified by his ſealing ſuch deed in the preſence, *&c.* direct, *&c.* and for want of, *&c.* to the uſe of *Sophia*, her heirs and aſſigns for ever.

In *Feb.* 1736. *Sophia* married without conſent of Mr. *Ready*, ſhe being then near 26 years of age, and previous to ſuch marriage he ſettled an annuity out of his own eſtate of 200 *l. per ann.* and ſettled her own eſtate to him and her for their lives and the life of the ſurvivor, and to the iſſue of the marriage, and for default of, *&c.* to her in fee.

Mr. *Edwards* neglecting to pay Lord *Middleton* part of his Lady's fortune, a ſequeſtration iſſued out of the court of Chancery againſt the ſaid Mr. *Edwards*, and his eſtates were ſequeſtered, and he abſconded.

On

On the *9th* of *July* 1737. In order to make Lord *Middleton* ſatiſfaction for his demand, and to ſettle the whole family affairs, a draught of articles was prepared and approved by council, between *Thomas Edwards* and *Mary* his wife of the firſt part, *Lord Middleton* and his Lady of the ſecond part, *John Pullen* and *Sarah* his wife of the third part, and Mr. *Ready* and *Sophie* his wife of the fourth part.

It was executed by all the parties.

In theſe articles, Lord *Middleton*'s marriage and ſequeſtration is recited; and in order to ſatisfy Lord *Middleton*'s debt of 10000 *l.* *Edwards, Pullen and Ready*, covenant for themſelves and their wives, to convey to Lord *Middleton* certain fee-farm rents, as part of the eſtate and ſhare of Lady *Middleton* given by the teſtator's will, and thereby agreed that within one month after the death of Mrs. *Edwards, Pullen and his wife* ſhould convey as many lands as were worth 10000 *l.* in like manner to *Ready* and his wife: and further agreed that after Mrs. *Edward*'s death an equal diviſion ſhall be made between the three daughters of Mrs. *Edwards*, of all the eſtates belonging *to Mrs. Edwards* as deviſee of *Colſton*.

On the *29th* of *September* 1739. there was an indenture executed between the ſame parties, wherein the will and ſettlement of *Colſton* were recited, and fines and recoveries ſuffered.

Sophia hath received her legacies of 5000 *l.* and ſhe and her huſband apply to Lord *Middleton* and to Mr. *Pullen* and his wife, to have a diviſion of the eſtate purſuant to the will and articles.

Lord and Lady *Middleton* are willing to do their part.

Mr. *Pullen* and *Sarah* his wife, who had married very meanly a ſecond time, object that *Sophia* marrying without conſent hath forfeited her right in the third of what ſhould come to her upon the death of her mother.

The three ſiſters are now coheirs to the teſtator.

Mr. *Ready* by his anſwer to Mr. *Pullen's bill puts* in iſſue the articles, and inſiſts upon them more at large by his croſs bill.

LORD CHANCELLOR.

There are two queſtions in theſe cauſes:

Firſt, as to the five hundred pounds legacy.

Secondly, as to the clauſe and condition in *Colſton*'s will, by which the plaintiffs in the original bill inſiſt on a moiety on account of Mrs. *Ready*'s forfeiture.

As to the firſt queſtion there is nothing in it, and has been determined over and over; the uſufructuary benefit is given to the mother for life only; and is like the caſe of *King* and *Withers*, *H. Term* 1712. and ſeveral other caſes ſince.

The marriage *with conſent* of father and mother is always conſtrued now ſo as to relate to the time of the legacies veſting, and if the party arrives at the age of twenty-one, it veſts, and the marrying without conſent afterwards is of no conſequence.

The ſecond queſtion is more difficult, and depends upon the limitations in *Colſton*'s will; as to the real eſtate in poſſeſſion, and the money which is directed to be laid out in land given to Mrs. *Edwards* for life, *&c. vide* the will.

Item, It is my will, and I do hereby declare that if the ſaid *Sophia* and *Mary*, *&c.*

Now this clauſe as to the legacy of five hundred pounds, and five thouſand pounds, if it is taken to extend to them, (the clauſe being very general) having no deviſe over attending upon it, muſt be conſidered only *in terrorem*, and therefore no forfeiture enſues, and may be laid out of the caſe.

I muſt conſider it then with regard to the *real* eſtate.

To be ſure the eccleſiaſtical court have no juriſdiction here, nor has it ever been applied to conditions annexed to real eſtates: there might perhaps be ſome doubt as to the money, but as this court conſiders money directed to be laid out in land, as land, this is likewiſe exempt from the eccleſiaſtical law.

One queſtion has been ſtarted, what would be the conſequence of this forfeiture with regard to the real eſtate, and who can claim the benefit of it.

It has been inſiſted by the council for Mr. *Pullen*, that here is ſomething in the nature of a croſs remainder; now if it reſts only in the intention of the teſtator, that is by no means ſufficient; for if a man deviſes to daughters as tenants in common, and there is no expreſs deviſe over to the others upon one of them dying, or not performing a condition, the ſhare of ſuch daughter would deſcend upon the heir at law of the teſtator.

The clauſe is thus worded, *that a daughter ſo marrying ſhall have or receive no more benefit or advantage by my ſaid will, or any thing therein contained, than if ſhe was actually dead:* the conſequence of this is, that it will go as the law would have ſaid, to the right heirs of Mr. *Colſton*.

After *Sophia Edwards*, now *Ready*, arrived at her age of twenty-one, ſhe joined with her father in ſuffering a recovery, and declaring the uſes of her ſhare.

The general notion of common recoveries is that it bars eſtate-tails, remainders over, and extinguiſhes all conditions and powers, and all incidents annexed to an eſtate-tail; indeed as Mr. Attorney General ſaid, it will not bar a mortgage, becauſe that is to be conſidered as a charge upon the eſtate, and cannot be defeated: but the force of a conveyance by common recovery to extinguiſh all theſe powers ariſes from hence, that the law conſiders it in the nature of a real action, and the recoveror is in by right. *Vide* the caſe of *Page* verſus *Heyward* in *Pigot* 170. and *Salk.* 570. which is in point: therefore all that was in poſſeſſion at the time, is out of the queſtion, and the condition as to that is barred: and as to the money not yet laid out in land, the articles of the *9th* of *July* 1737. have likewiſe barred any right that might have accrued from the forfeiture to the other two ſiſters upon Mrs. *Ready*'s marrying without conſent.

The force of a conveyance by common recovery to extinguiſh all conditions, powers and incidents annexed to an eſtate-tail, ariſes from hence, that the law conſiders it in the nature of a real action, and the recoveror is in by right.

For, at the time of the execution of the articles, it could not but be known that Mr. and Mrs. *Ready* married without conſent, becauſe Mr. and Mrs. *Edwards*, Lord and Lady *Middleton*, Mr. and Mrs. *Pullen* were all parties, and cannot poſſibly be ſuppoſed to be ignorant of this fact, which happened ſome years before.

It is ſaid they might know the fact, and yet not know the conſequence in law: but if parties are entring into an agreement, and the very will out of which the forfeiture aroſe is lying before them and their council, while the draughts are preparing, the parties ſhall be ſuppoſed to be acquainted with conſequence of law as to this point, and ſhall not be relieved under a pretence of being ſuppriſed with ſuch ſtrong circumſtances attending it.

If parties are entring into an agreement, and the will out of which the forfeiture aroſe was lying before them, and their council while the draughts were preparing, the parties ſhall be ſuppoſed to be acquainted with the conſequence of law as to this point.

Beſides, here is a departure from the will, for the articles are plainly different, being a conveyance to *Pullen* and his heirs, inſtead of an eſtate-tail given under the will.

So that with the knowledge of *the will*, and all the clauſes in it, *the condition annexed*, and the *forfeiture*, the parties with their eyes open execute this deed.

It has been inſiſted chiefly by Mr. *Pullen*'s council, that they executed the articles under a miſtake.

There

There is nothing more miſchievous than for this court to decree a forfeiture after an agreement, in which, if there is any miſtake, it was the miſtake of all the parties to the articles, and no one of them is more under an impoſition than the other.

After an Agreement has intirely ſettled all diſputes between parties and their ſeveral rights, the hands of the court are ſo tied up, they will not enter into a queſtion which might have been ſtarted, had there been no ſuch agreement.

This court is ſo far from aſſiſting to ſet up the forfeiture again, that they would rather rejoice at the agreement, becauſe it has abſolutely tied up the hands of the court from meddling in the queſtion: and if I was to decree the forfeiture now, it would be making all agreements vain and nugatory: the caſe that comes neareſt to the preſent is *Can* verſus *Can*, before Lord *Macclesfield*.

I muſt decree therefore *Pullen*'s bill to be diſmiſſed without coſts, ſo far as it ſeeks any relief with regard to the forfeiture: and under Mr. *Ready*'s croſs bill, I ſhall direct the articles to be ſpecifically performed, and to be carried into execution.

Caſe 334.

Vailiant verſus *Dodomede*, *May* 16, 1743.

Though on a demurrer to a perſon's being examined as a witneſs has been over-ruled, a *ſubpœna* cannot be taken out againſt him for coſts, yet the court will give them upon an application by motion.

MR. *Briſtow*, one of the ſixty clerks, demurred to his being examined in a cauſe, for that he knew nothing but what came to his knowledge as clerk in court, or agent for the defendant.

And the demurrer having been over-ruled, the plaintiff now moved that Mr. *Briſtow* might pay 5*l.* coſts, or in default of payment to be ſuſpended from being a ſixty clerk.

There was a croſs notice to diſcharge a *ſubpœna* which had been taken out for coſts againſt *Briſtow*.

LORD CHANCELLOR.

This is a new caſe, and there are two queſtions ariſing out of it.

Firſt, Whether any coſts can be obtained againſt a witneſs (upon ſuch a demurrer being over-ruled) by way of *ſubpœna*.

Secondly, Whether it is in the power and diſcretion of this court to give coſts by any order.

As to the Firſt, there can be no *ſubpœna* for ſuch coſts; and this appears by Lord *Clarendon*'s rules, which relate only to demurrers between parties.

But I am of opinion that the party is intitled to have coſts upon application to the court; and if I was to lay it down as a rule, that no coſts ſhould be given in any caſe where a witneſs demurs, it would

be of very bad conſequence, and tend greatly to the delay of the proceedings in this court, in regard to publications; and in ſome caſes it would be worth the parties while to put in ſuch a demurrer for ſake of delay; and I think the court may very well do this by way of analogy to the courts of common law.

Though originally the party was left to his ſatisfaction by action, yet at law the court now grants an attachment againſt the witneſs for not appearing, and he ſhall not be diſcharged till he has paid the coſts.

The ſatisfaction formerly for the non-appearance of a witneſs was by action only, but now the courts of law grant an attachment againſt him.

As to the merits, I think it a proper caſe to give coſts in; for it appeared to me upon arguing the demurrer, that Mr. *Briſtow* came to the knowledge of the facts before he was concerned in the cauſe, and therefore ordered him to pay 5*l.* coſts, and if he neglected ſo doing, the court would then conſider the other part of the notice.

As to the caſe of *Hilderſley* and *Deviſcher* in 1730. cited by Mr. *Sambourne*, where one of the defendants demurred as to his being examined as a witneſs, for that he was a party intereſted, and that upon the demurrer's being allowed, he was ordered his coſts; it is ſo far in point, that the court went out of the common rule of Lord *Clarendon*'s orders, where demurrers are confined to parties in a cauſe.

Sir Thomas Abney verſus *Miller*, *June* 10, 1743. Caſe 335.

MR. *Littleton Burton*, clerk, ſometime in the year 1732. made his will, and thereby gave and deviſed all his college leaſes which he then held of *Magdalen* college to Mrs. *Elizabeth Burton* his mother, to be ſold by her immediately after his deceaſe, and ordered and directed that the money ariſing by ſuch ſale ſhould be diſtributed ſhare and ſhare alike to his ſaid mother and the defendant *Edmund Burton* his brother, *Ann Miller* his ſiſter, wife of *John Miller* of *Banbury*, excluſive of her huſband, and after her deceaſe to *Ann Miller* her daughter, and to *Mary Buſfield*, now *Fletcher*, another of his ſiſters, and after ſeveral ſmall bequeſts and legacies appointed his mother ſole executrix and reſiduary legatee.

B. after making his will, ſurrenders the college leaſes he had deviſed by the will, and accepts two new leaſes, and pays a large fine, the laſt was not ſealed with the college ſeal till after the death of the teſtator.

Lord Hardwicke decreed that the leaſe actually renewed after the deviſe of it, was a revocation of that deviſe, otherwiſe as to the leaſe not perfected for want of the college ſeal.

The teſtator, divers years after making the will, ſurrendered the college leaſes deviſed by it, and accepted two new leaſes of the ſaid premiſſes, one in *December* 1736. and the other in *Auguſt* 1740. and paid large ſums of money by way of fine, *but the laſt was not ſealed with the college ſeal till after the death of the teſtator.*

On the 27*th* of *Feb.* 1740. the teſtator died without having revoked, republiſhed, or in any wiſe altered his will: *Elizabeth* the mother died after making the will, but before the teſtator, ſo that the bequeſt of the reſidue of the teſtator's perſonal eſtate became lapſed, and undiſpoſed of, and ſubject to the ſtatute of diſtributions.

The plaintiff has brought his bill in the right of his wife, who is one of the teſtator's five ſiſters, and inſiſts upon her ſhare in the reſidue under the ſtatute of diſtributions, which depends principally upon this queſtion, whether the renewal of the leaſes by the teſtator after making his will is a revocation of the will.

Mr. Attorney General, council for the plaintiff, cited the caſe of *Marwood* verſus *Turner*, 1 *April* 1732. before Lord Chancellor *King*.

He inſiſted, that if it had been in the caſe of a freehold, there could not have been no doubt, and therefore it is incumbent on the gentlemen of the other ſide, to ſhew that there is any ſubſtantial difference between a revocation of a will of leaſehold and of freehold.

Mr. *Chute* of the ſame ſide argued, that it is not the identical thing the term deviſed, but a different intereſt from what was in being at the time the will was perfected, and therefore as to one of the leaſes, at leaſt, a clear revocation of that ſpecific thing: he cited *Bunter* verſus *Cooke*, 1 *Salk.* 237. and *Maſon* verſus *Day*, *Prec. in Chan.*

Mr. *Noel* of the ſame ſide, inſiſted, that a renewal is in the nature of a purchaſe, and that the fine having been paid for both leaſes, though the college ſeal was not put to one, it is a revocation notwithſtanding, for that a revocation need not be quite perfect, but where an inclination to revoke appears from circumſtances, as a feoffment without livery, a bargain and ſale without inrolment, it will be conſtrued a revocation though the acts are not compleat, and as the money, the material thing, was paid, the putting the ſeal of the college is rather a matter of ceremony: he cited the caſe of *Alford* verſus *Earl* for this purpoſe, 2 *Vern.* 209.

Mr. Solicitor General, council for the defendants, inſiſted that the executrix was certainly entitled to the new leaſes under a bequeſt of the reſidue, and that notwithſtanding ſhe died before the teſtator, yet in equity, ſo far as ſhe was barely a truſtee, the right of the *ceſtui que truſts* is not at all hurt, but is equally the ſame as if the truſtee was living.

The teſtator, in this inſtance of renewal, has done no more than what he had done ſeveral times before, for he always renewed with

the college at the end of ſeven years, becauſe if he had not, a ſevere fine would have been put upon him.

That common caſes of leaſehold eſtates are extremely different from biſhops and college leaſes; nor have they cited one caſe to ſhew that barely renewing a college leaſe has been held to be a revocation, but only where it has been a common leaſehold eſtate. *Vide* Lord *Lincoln*'s caſe, and *Swinbourne, part* 7. *ſec.* 20. ſays, ademption of legacies is twofold, expreſs and ſecret; expreſs when the teſtator doth by words take away the legacy before given; ſecret, when the teſtator doth by deeds without words take away the legacy, as when he doth give away the thing bequeathed, or doth voluntarily alienate the ſame before his death.

Now in the preſent caſe there is no expreſs ademption, becauſe the teſtator has never ſaid, the defendants ſhould not have their legacy; neither is there an implied ademption, for here is no tranſlation (as the civilians call it) or beſtowing of the legacy bequeathed upon ſome other perſon, and therefore there is no implication in this reſpect.

Then from whence can the implication ariſe? why it muſt neceſſarily ariſe from the renewal only: and it muſt be ſubmitted whether this will amount to an implied revocation.

Now in all theſe kind of eſtates the tenants by cuſtom have a ſort of tenant-right of renewal: a 14 years leaſe is always kept on foot, and ſometimes the tenants renew within ſeven years, and ſometimes after: therefore this is not properly a new leaſe, but only a continuation of it, for it is never ſuffered to run out entirely.

As this is the nature of theſe intereſts, and it is well known there is a great deal of property of this kind in the kingdom, and the teſtator has done no more than what is uſual, there is no pretence to ſay that his increaſing the value of the thing given is revoking the legacy, but it is more natural to ſuppoſe it was done for the benefit of the deviſees.

Swinbourne, part 7. 1 *Edit.* 278. *ſec.* 7. ſays, if the teſtator do bequeath a ſhip, and afterwards doth by piecemeal repair and renew the ſame, ſo that there remaineth nothing of the old ſhip but only the bottom tree: here is no ademption of the legacy.

To apply this to the preſent caſe, will any body ſay that in this court there is no part of the old bequeſt remaining; ſo that all which is ſubſtantially done is only an increaſe of the thing deviſed and a continuation of the old intereſt; the ſtatute of 4 *Geo.* 2. conſiders college leaſes in this light with regard to the tenant right of renewal.

He cited *Arne* verſus *Smith*, 2 *Vern.* 681. and *Brunſdale* verſus *Winter*, before Mr. *Verney*, where the queſtion was upon two navy bills deviſed by the teſtator, which were afterwards paid off, and yet held to be no ademption. *Vide Ford* verſus *Fleming*, *Abridgment of Caſ. in Eq.* 302. and *Elliot* verſus *Davenport*, 2 *Vern.* 472.

The general doctrine to be gathered from theſe caſes is, that unleſs the teſtator's intention appears to revoke, the court will not preſume an ademption.

In *Partridge* verſus *Partridge*, *Caſ. in Eq. in the time of Lord Talbot* 226. *A.* deviſes 1000*l.* *South Sea* ſtock to *B.* at the making of his will he had 1800*l.* and by ſale reduced it to 200*l.* which he after increaſed to 1600*l.* and died; between the making his will and his death, the act took place, which changed three-fourths of the ſtock into annuities, and held that the legacy was not taken away or impaired by the ſale, nor by the act.

Swinbourne, old edit. 7th part 278. *ſect.* 6. If the teſtator do bequeath all the corn in his barn, and, after the making of his will, the teſtator ſurviveth until all the corn be ſpent, and other corn be put in the place thereof, this ſpending of the corn is no ademption of the legacy.

Why may not this renewal be as well meant for the benefit of the deviſee, and a continuation of the intereſt for his advantage?

Mr. *Browne*, council of the ſame ſide, compared it to a teſtator's giving a bond debt, and afterwards changes it into a mortgage, and ſo alters the nature of the ſecurity; yet, this is only new modifying it, and is not an ademption of the legacy.

That, though in point of law, the ſurrender makes it a new independant and original leaſe, yet, in equity, it is conſidered only as an ingrafting upon the old, and to be regarded as one conſolidated intereſt.

LORD CHANCELLOR.

There are two queſtions in this cauſe.

Firſt, Whether a college leaſe, actually renewed, after a deviſe of it in a will, is a revocation of that deviſe?

Secondly, Whether an attempt in the teſtator only to renew, is a revocation?

As to the *firſt*, I am of opinion for the plaintiff.

And as to the *ſecond*, for the defendants.

I will conſider it, in the firſt place, as if it had been an expreſs legacy, or gift of the term, to the three *ceſtuy que truſts*: For, ſuppoſe he had ſaid, I give and bequeath both the leaſes to my mother, *&c.* equally, ſhare and ſhare alike; and afterwards the teſtator renews the leaſes;

What would have been the effect in point of law? There is no doubt, but in this caſe, it would have been an ademption, or revocation; and even if the executrix had aſſented, the legatees could never have recovered the term upon the renewal by an ejectment, for the thing it ſelf is annihilated and gone.

It is not in this caſe a deviſe of the land, but a deviſe of the leaſe, which I hold, *&c.* of *Magdalen* college, *&c.*

Juſt as if he had ſaid, I deviſe the term, and that term is ſurrendered and gone: Where a teſtator expreſſes himſelf in the preſent tenſe, it muſt relate to what is in being at the time of making the will, and can mean only the firſt leaſe, and the term to come in it.

Where a teſtator expreſſes himſelf in the preſent tenſe, it relates to what is in being at the time of making the will.

The defendant's council have compared it to a gift of a ſhip, or a houſe which is re-built after the making of the will; but they are different, for this reaſon, becauſe a ſhip, or houſe, is the ſame corpus: And, in the preſent caſe, it is an abſolute new term, and the old one is gone.

But then ſome ſtreſs has been laid on its being the common courſe and method of renewal in biſhops and college leaſes.

This court does regard the cuſtom of renewal in ſome caſes, becauſe if ſuch an eſtate is given upon truſt, and the eſtate ſo given is renewed after the death of the donor, yet the court conſiders it as governed by the old truſts, with reſpect to perſons claiming under the teſtator; and the executor renewing would have been bound by the truſt: But this will not extend ſo far as to bind the teſtator himſelf in his life-time, under any truſt that he may have created.

The ſame as to freeholds; for if there is an eſtate for three lives in the teſtator, and he has deviſed it, yet if he ſurrenders theſe three lives, and takes a new leaſe, this is admitted on all hands to be a revocation.

If a teſtator, who had deviſed an eſtate for lives, ſurrenders it afterwards, and takes a new leaſe, it is a revocation.

Therefore, I am of opinion, if it had been an expreſs bequeſt, it would have been a revocation in law.

A deviſe of a leaſe, and of the right of renewal, carries both the leaſe and the right.

At the ſame time I agree, if a man had deviſed a leaſe, together with a right of renewal, and had done nothing in it himſelf, that then the expiration of the old term would not have barred the legatee, becauſe the deviſe carried the right of renewal, as well as the leaſe it ſelf.

Conſider the caſe as it is penned under the will, that it ſhould be diſtributed, ſhare and ſhare alike, to his mother and defendant, *&c.*

It is ſaid, that the executrix would have had the legal intereſt, if ſhe had been living.

This makes no difference, becauſe, one way or the other, it would ſtill have been a bequeſt of the term to the legatees.

The perſonal eſtate veſts in the executor, and no legacy comes out of him without his conſent.

In all caſes of deviſes of perſonal eſtate, the whole veſts in the executor; and therefore no legacy can come out of the executor without his conſent; and, according to the definition of the civil law, it is a command or direction to the executor what he ſhall do with ſuch and ſuch parts of his eſtate.

But, whether it veſts in the executor, or is directory, if the thing is annihilated, it makes no difference.

The rule of revocation of wills is the ſame in equity as at law.

As I am clear of opinion, this would have been an ademption in law, ſo muſt it be here; for the rule as to revocations is the ſame in equity.

It is ſaid, that courts of law, or equity, will not allow of revocations, unleſs there is *animus revocandi.*

Though a feoffment be to the ſame uſes with thoſe in a precedent will, yet it is a revocation.

This would be laying down the rule of revocation much too narrow; and contrary to the known caſe of a feoffment to the ſame uſes with thoſe in a precedent will, and yet held to be a revocation. *Id. in Lord Lincoln's Caſe, Eq. Caſ. Abr.* 411.

The preſent caſe is much ſtronger, becauſe here is an utter annihilation of the old term, and a purchaſe of a new one.

The argument of the act of parliament turns the other way, becauſe the leſſees had no remedy before to compel a renewal, and wanted the aid of the legiſlature.

Another argument has been raiſed from the inconvenience of theſe eſtates going contrary to the intention of the teſtator; and it certainly would be an inconvenience, if upon every renewal, I muſt make a new will.

But perſons who are acquainted with the proper method of conveying theſe eſtates by will, give in this manner, *all my eſtate, right, and intereſt, I ſhall have to come in this leaſe at the time of my death,* or by a general deviſe of the reſidue.

Where a teſtator ſays, I give all my eſtate, right and intereſt I ſhall have to come in a college leaſe at the time of my death, though renewed after the will, it paſſes notwithſtanding.

A deviſe of corn in a barn, is not a ſpecific legacy of particular corn, but a legacy of quantity, and muſt be made up by the executor. *Id.* as to the caſe cited of the deviſe of *South Sea* ſtock.

Theſe perſons are not to be conſidered in the ſame light with the executor, for they do not claim under her; but on a ſuppoſition that the thing is not at all given, they claim under the ſtatute of diſtributions, as an heir at law claims in real eſtate: And if I was of opinion there is no revocation, a much greater inconvenience would ariſe, as it would overturn, and ſhake the eſtabliſhed rules of law.

As to the point of re-publication, it was very faintly inſiſted on by the defendants council.

For the fact was no more than this, the teſtator was looking for another paper after renewing his leaſes; and the perſon who was aſſiſting him, having taken up the teſtator's will by miſtake, he ſaid, *that is my will*; not meaning to republiſh, but only to ſhew it was not the paper he wanted.

To make it a republication, there muſt be *animus republicandi* in the teſtator; but even if there had been a republication, I am of opinion, it would not have altered the caſe; becauſe the very thing it ſelf was intirely annihilated and gone.

A republication of the will would not have altered the caſe, becauſe the very thing it ſelf was intirely annihilated.

His Lordſhip decreed for the plaintiff, as to the leaſe renewed, and perfected by the college ſeal.

And for the defendants as to the other leaſe.

Taylor

Caſe 336. *Taylor* verſus *Jones*, *June* 13, 1743. *ſtood for judgment at the Rolls.*

A huſband who had 1733*l.* ſtock deviſed to him after marriage, veſts it in truſtees, for the benefit of himſelf for life, of his wife for life, and afterwards for the benefit of his children. *The ſettlement is void both as to creditors before and after the marriage; and the truſt eſtate was decreed to be ſold, and applied to the payment of the huſband's debts.*

THE bill was brought by ſimple contract creditors of the defendant: The intent of the bill was, that the plaintiffs may be paid their debts out of 1733*l.* ſtock, veſted in truſtees for the benefit of the defendant for life, of his wife for life, and afterwards for the benefit of his children: The money ſo inveſted in truſtees, was a legacy left to the huſband after marriage.

Maſter of the Rolls: This is a caſe between creditors on the one ſide, and a wife and children on the other, and therefore I directed the cauſe to ſtand over, not from any particular difficulty in the caſe, but becauſe a wife and children were concerned.

I am of opinion it is a fraudulent ſettlement with regard to creditors.

Such a ſettlement good as againſt a father after marriage, and againſt a voluntary conveyance.

The *firſt* queſtion is, Whether this ſettlement, made in truſt for the wife and children, is fraudulent in general, as it ſtands ſingle and independant of the plaintiffs the creditors?

It has been inſiſted on for the wife and children, that this ſettlement is for a good conſideration; nay, looked upon very often as a valuable conſideration, ſince they are, in ſome reſpects, eſteemed as creditors with regard to the father.

There is no doubt, in this reſpect, but it is a valuable conſideration as againſt a father even after marriage, and even againſt a voluntary conveyance.

But I look upon it to be a ſtanding rule as to creditors for a valuable conſideration, that it is always looked upon as fraudulent, and within 13 *Eliz. c.* 5. againſt fraudulent deeds, alienations, *&c.*

The next queſtion is, Whether this deed is within the proviſo, or ſaving of the ſtatute?

Now there is no doubt, though this is upon a good conſideration with regard to the perſon making it, yet otherwiſe as to creditors. *Vide Twyne's caſe*, 3 *Co.* 80. The chief reaſon there was, that the perſon by whom the conveyance was made, continued in poſſeſſion:

It was reſolved likewiſe, in *Upton* verſus *Baſſet*, cited in *Twyne's caſe*, that no purchaſer can avoid a precedent conveyance made by fraud or covin; but he who is a purchaſer for money, or other valuable conſideration; for though in the preamble to this ſtatute of 27 *Eliz. c.* 4. it is ſaid for money or other good conſideration, and likewiſe in the body of the act, yet thoſe words, good conſideration, are to be underſtood only of valuable conſideration; and this appears by the clauſe of lands firſt conveyed with condition of revocation, for there it is ſaid for money or other good conſideration paid, or given; the word *paid* is to be referred to money, and *given* is to be referred to good conſideration; ſo the ſenſe is for money paid, or other good conſideration given, which words exclude all conſiderations of nature, or blood, or ſuch like, and are to be intended only of valuable conſideration, which may be given; and therefore he who purchaſes land for valuable conſideration, is a purchaſer only within this ſtatute.

Now, in the preſent caſe, here is a truſt left to the huſband in the firſt place, under this deed; and his continuing in poſſeſſion is fraudulent, as to the creditors, the plaintiffs.

The next conſideration is, Whether the debts contracted after the ſettlement made, are included in this ſtatute of 13 *Eliz.*

The preamble is for the avoiding and aboliſhing of feigned covenous, *&c.* fraudulent feoffments, gifts, bonds, ſuits, *&c.* which feoffments, *&c.* are deviſed and contrived of malice, *&c.* to the end to delay or defraud creditors and *others* of their juſt and lawful debts, *&c.* Be it enacted, *&c.*

The word *others* ſeems to be inſerted to take in all manner of perſons, as well creditors after, as before the ſettlement, whoſe debts ſhould be defrauded.

In the enacting clauſe ſtill ſtronger, becauſe the word creditors are not mentioned, but general words perſon or perſons, " That all " and every feoffment, *&c.* at any time had or made, or hereafter " to be had or made, to or for any intent or purpoſe herein before " declared, ſhall be from henceforth deemed, *&c.* (as againſt that " *perſon or perſons*, his or their heirs, executors, *&c.* whoſe debts, " *&c.* by ſuch fraudulent practices as is aforeſaid, are, ſhall, or " might be, in any wiſe, or in any way, diſturbed or defrauded, " *&c.*) to be clearly and utterly void."

The words of the ſtatute, therefore, ſeem to be ſo general, in order to take in all perſons who ſhall be any ways hindered or delayed, *&c.*

This being the Intention, I think it is highly reaſonable it ſhould be ſo conſtrued, and no rule of law that hinders creditors after marriage, any more than creditors before, from being paid.

And it is very probable that the creditors, after the ſettlement, truſted *Edward Jones*, the debtor, upon a ſuppoſition that he was the owner of this ſtock, upon ſeeing him in poſſeſſion.

Three caſes have been cited to make this a fraud: *Firſt*, *Oſborn and Bradſhaw* verſus *Churchman*, *Cro. Jac.* 127. but it does not come up to the preſent caſe, for the queſtion there, was not whether the deed was fraudulent, but whether the intereſt in the lands paſſed.

Secondly, *Lavender* verſus *Blackſtone*, which comes nearer the preſent, *vide* 2 *Levinz* 146. where *Hale* was of opinion, that every conveyance ſhould be eſteemed *primâ facie* fraudulent againſt a purchaſer; but circumſtances may alter the caſe.

Whitborne verſus *Jumper*, before Sir *Joſeph Jekyl*, is ſtill nearer, and though it is not quite the preſent caſe, yet it reſembles it very much, with regard to the agreement between the plaintiffs and defendant, *viz.* That if they would allow him two years to pay their debts, he would give a warrant of attorney to confeſs a judgment.

The great queſtion is, if this deed be fraudulent? For if it is, Whether the creditors have any ſpecific lien is not material; for as ſoon as the judgment was entered it would have been a ſpecific lien.

Theſe are the caſes which confirm me in my opinion.

For the defendant was cited the caſe of *Littleton* verſus *Marlow*, before Lord *Hardwicke*; but there it was the wife's fortune that was ſettled, which varies the caſe; for here it was not the wife's fortune that was ſettled, but what the huſband was intitled to in his own right.

The caſe of *Stileman* verſus *Aſhdown*, *December* 8, 1742, which was cited, though a ſettlement after marriage was in conſideration of the wife's portion, and therefore different.

It is not material, in the preſent caſe, what the circumſtances of the father was at the time of making this deed, any further than as an evidence, to ſhew, if he was in indigent circumſtances, that it was made with an intent to commit a fraud.

But

But the material conſideration is, Whether it is within the proviſo of 13 *Eliz.* for if it is not, the court will not require a ſtrict proof of its being fraudulent; and as it is likewiſe accompanied with a truſt, the court will look upon it to be ſo, and there is no occaſion to prove it; for it lies on the part of the defendant to prove what his circumſtances were at the time of making the deed, as he may be ſuppoſed to know it much better than the plaintiffs.

It is upon theſe reaſons I muſt decree for the plaintiffs, the creditors againſt the wife and children; for though I have always a great compaſſion for wife and children, yet, on the other ſide, it is poſſible, if creditors ſhould not have their debts, their wives and children may be reduced to want.

He decreed the deed of ſettlement to be void, as againſt the plaintiffs, and the truſt eſtate to be ſold, and applied to the payment of the creditors.

Sir Cæſar Child verſus *Gibſon*, *June* 15, 1743. *A plea of a former decree.*

Caſe 337.

LORD CHANCELLOR.

THE queſtion in this caſe is, Whether this is ſuch an exception, as to be a bar to this new bill.

To ſupport a plea of a former decree, you muſt ſet forth ſo much of the firſt bill and anſwer, as will ſhew the ſame point was then in iſſue.

Every plea that is ſet up as a bar muſt be *ad idem.* Therefore, if a judgment or decree is pleaded, it muſt appear to be *ad idem.*

Now, the defendant ſhould have ſet forth ſo much of the former bill and anſwer, as to have ſhewed the ſame point was then in iſſue; he has not done this, but only pleads, that a bill was brought for an account, and a decree made.

For it is extremely hard to ſay, that becauſe the plaintiff failed in the caſe which he made on the former account, that now he has made a new caſe, and brought a new bill, that he ſhall not be allowed to go on, but be barred by a plea of a former decree in the ſame matter.

The court will not charge intereſt upon an executor, who makes uſe of aſſets come to his hands, in the way of his trade.

I will not ſay, but if an executor had placed out aſſets that were ſpecifically deviſed, but the court would oblige him to account for the intereſt he may have made of thoſe aſſets; but there never was a caſe in this court where a Maſter was directed to charge intereſt upon an executor, who makes uſe of aſſets come to his hands in the way of his trade.

The bill would to be ſure have been more formally brought, if it had charged the decree made in the former cauſe, and not have ſaid only, as it does now, that it is for an acount.

But this is merely a matter of form, and it would be very hard to allow this plea, for a defect in form in the bill, and turn the plaintiff quite round by diſmiſſing this bill, and obliging him to bring a new one; therefore, I think, the juſtice of the caſe will be, to let the plea ſtand as to ſo much of the bill as ſeeks a general account of the perſonal eſtate, and as to all matters in the bill relative to demands of intereſt, let the plea ſtand for an anſwer, with liberty for the plaintiff to except.

Caſe 338. *Anonymous, June* 16, 1743.

If the plaintiff produces the order for a *ſubpœna* to rejoin, and an affidavit of ſome of the parties being out of the kingdom, the court will not diſmiſs his bill for want of proſecution.

LORD CHANCELLOR laid down theſe rules:

Where a motion is made to diſmiſs a bill for want of proſecution, if it is not an affected delay, but ariſes merely from the circumſtances of the caſe; as for inſtance, from the number of defendants, and ſome of them being abroad, ſo that it requires time to get in all their anſwers; *there* upon producing the order obtained for a *ſubpœna* to rejoin upon the defendant, and affidavit of the number and diſtance of the parties, and of ſome of them being out of the kingdom, the court will not grant the motion.

Though a bill has been diſmiſſed for want of ſuch order and affidavit, yet upon producing them afterwards, and payment of coſts out of purſe, the court will retain it.

If for want of producing the order (for ſuggeſtion of council is not ſufficient) and affidavit, the bill is diſmiſſed; yet upon the plaintiff's moving afterwards to retain the bill, upon payment of coſts out of purſe to the defendant, and producing ſuch order and affidavit, the court will retain the bill notwithſtanding.

On motion to retain the bill, the plaintiff muſt ſhew that the order for the *ſubpœna* to rejoin was dated before the notice to diſmiſs.

Upon moving to retain a bill on payment of coſts out of purſe, the court will not grant it, when on a former motion the bill was diſmiſſed for want of proſecution, and defended by council, unleſs the plaintiff can ſhew that the order for the *ſubpœna* to rejoin was dated before the notice to diſmiſs the bill.

3

Hills

Hills verſus *Wirley*, *July* 6, 1743. Caſe 339.

THE words of the will on which the principal queſtion depended were as follow:

" If it ſhall happen that my perſonal eſtate which ſhall not be otherwiſe by this my will diſpoſed of, ſhall fall ſhort to pay my debts, legacies, and funeral expences, *then I do order and direct that my copyhold lands, gardens and premiſſes, which I bought of Dorothy Combe, ſhall ſtand charged with ſuch deficiency*, and the ſum and ſums of money ſo falling ſhort as aforeſaid, ſhall be paid out of the ſaid copyhold eſtate; then ſhe gives ſeveral ſpecific legacies, and then follows this deviſe: *I give unto the right honourable Henry Earl of Rochford all and ſingular the houſehold goods in the ſchedule hereunto annexed, and by me aſſigned, he paying forty pounds per annum to ſuch perſon and in ſuch manner as herein aftermentioned, and giving ſecurity to my executor for payment thereof.* Then ſhe gives twenty pounds *per annum* to one perſon for life, ten pounds to another for life, and five pounds to the plaintiff for life, to be paid her half-yearly; the firſt payment to begin and to be made ſix months after her deceaſe.

As long as the fund itſelf exiſts upon which a legacy is charged, though it devolves either upon the heir or executor, yet they take it ſubject to the charge.

Then all *the reſidue* of her eſtate ſhe gives to *Knightly Birch*, Eſq; and appoints *Humphry Birch*, Eſq; her executor.

The teſtatrix left more than ſufficient to anſwer her annuities.

The queſtion is, whether under the circumſtances of this caſe the perſonal eſtate being ſufficient, the annuity of five pounds *per annum*, *&c.* ought to be paid to the plaintiff and the other perſons.

LORD CHANCELLOR.

One thing is very plain, that the teſtator intended her legatees ſhould have the annuities, and therefore if there is any room to aſſiſt them, the court will do it notwithſtanding the accident has happened of the teſtatrix's annexing *no ſchedule* of the houſehold goods.

The queſtion is, whether this annuity of five pounds and the reſt of the annuities are not gone, the fund failing upon which they were charged.

Now it does not appear to me that there is that abſolute uncertainty, or no fund upon which this legacy can attach.

Vide the words of the deviſe to Lord *Rochford*. It has been truly ſaid that the five pounds a year, part of the forty pounds *per annum*, is

given out of the houſhold goods; and it was admitted by the council for the executor, it is not neceſſary that the deviſe to Lord *Rochford* ſhould take effect to make the annuity legacies effectual, for if he had died, the executor ſhould notwithſtanding have been truſtee for the forty pounds *per annum*.

It is admitted further, that if the fund had been aſcertained by the ſchedule, and Lord *Rochford* had refuſed to give ſecurity, then the goods would have been directed to be ſold for payment of the legacies.

The fund itſelf being applicable, it is juſt the ſame as if the teſtator had given a particular piece of plate, or a bond to Lord *Rochford*, and he had died, for then theſe things muſt have been ſold to anſwer the legacies.

It was inſiſted on, here is a difference in the preſent caſe; for that if it had become void in the life-time of Lord *Rochford*, ſtill it might have been well enough; but here it is void in the original creation for the uncertainty, and this is the ſtrength of the defendant's caſe.

I do admit, if this had been void in it's original creation, and that it had not been *in rerum naturâ*, and nothing conſequently had gone to the executor which had been charged with the annuities, they would have been void: but here the fund out of which the annuity is to be charged is moſt undoubtedly gone to the executor, *viz.* her houſhold goods, for they cannot in any propriety of ſpeech be taken to be any other perſon's than the teſtatrix's; and ſhe not having annexed any ſchedule to her will, thoſe houſhold goods are of courſe gone to her executor.

But, ſaid Mr. Attorney General, ſuppoſing the houſhold goods had been deficient, and Lord *Rochford* had refuſed them, why then the annuities muſt have fallen equally ſhort, and I allow that to be right.

But the caſe cited by Mr. Solicitor General out of *Swinbourne*, *7th part* 254. is a full anſwer. " If a teſtator do bequeath lead, mo-
" ney, or wheat, not expreſſing the quantity, the bequeſt is unpro-
" fitable, becauſe of the great uncertainty, at leaſt it ſeemeth the
" executor is delivered, by delivering a very little; howbeit if the
" legacy conſiſting in weight, number or meaſure, be diſpoſed for
" the performance of ſome act, or other certain conſideration, as for
" the building of *ſome bridge, or amending of highways, or for the edu-*
" *cation or alimentation of ſome perſon, or maintaining him at ſtudy,*
" *or for the relief of the poor, or for the repairing of the church*, or
" for other like uſes: in theſe caſes the legacy is not void, albeit no
" quantity be expreſſed: for ſo much is underſtood to be diſpoſed of
" as may ſatisfy, or anſwer that purpoſe whereunto it is appointed.

If

If the teſtator has deſcribed ſuch houſhold goods as are ſufficient, and the executor does not controvert that there are ſuch houſhold goods; can any thing be ſtronger, than that the teſtator intended they ſhould be applied, at all events, towards ſatisfying the annuities as far as they will go?

The words *hereunto annexed*, muſt be conſtrued as if ſhe had ſaid, which I intend to annex to my will, for ſhe could not *eo inſtante* deviſe the houſhold goods, and direct a ſchedule to be taken, but the legacy muſt precede, and is the ſame thing as if ſhe had given them at once by way of teſtamentary ſchedule.

The other point deſerves to be conſidered; whether (if there ſhould be a deficiency of *the houſhold goods*, to ſatisfy the annuities) the executor muſt not make it good out of the perſonal eſtate?

See the firſt part of the will, which directs the copyhold lands, *&c.* to ſtand charged with ſuch deficiency.

It is plain that there are ſome legacies the teſtator intended her copyhold eſtate, *&c.* ſhould make good, if the perſonal fell ſhort.

All the legacies except a month's wages to her ſervants, and theſe annuities are, ſpecific legacies.

When the teſtatrix mentions legacies in general, ſhe means that all legacies, which could not find a ſufficient fund out of the perſonal eſtate to be ſatisfied, ſhould be thrown upon the copyhold eſtate, *&c.*

As to the deviſe to the ſervants, as the teſtatrix had given a month's wages, or a month's warning, nothing might have become due by way of legacy, for the ſervants might have been turned away, and then the month's warning would have been a debt, and not a legacy, and therefore ſhe could have nothing material in her contemplation, or any other legacy, beſides the annuities which ſhe could intend to charge in this manner on her copyhold eſtate.

The eſſential rule in all theſe caſes, is, that as long as *the fund* itſelf exiſts upon which the legacy is charged, though it devolves either upon the heir or executor, yet they take it ſubject to the charge.

His Lordſhip decreed the houſhold goods in the hands of the executor, to be applied towards ſatisfying the annuities, and if thoſe were not ſufficient, the reſidue of the perſonal eſtate to be applied for that purpoſe; and if there ſhould be ſtill a deficiency, to be made good out of the copyhold lands, *&c.*

Stileman

Caſe 340. *Stileman* verſus *Aſhdown*, *June* 18, 1743. *A rehearing.*

Lord *Hardwicke*, being of the ſame opinion he was at the former hearing, affirmed the decree he made on the 8th of *December* 1742.

THE ſingle point here was, whether a judgment creditor ſhall have the whole real aſſets (deſcended upon the heir of the conuſor) ſold to ſatisfy his debt, or only a moiety, being obliged to come into this court to ſet aſide a fraudulent conveyance.

This clauſe was heard the 8*th* of *December* 1742. and the Chancellor was then of opinion that only a moiety of the real aſſets ſhould be ſold.

Mr. Attorney General was council for the heir at law and executor.

The ſtatute of *Weſtminſter*, he ſaid, which gives the *elegit*, means no more than to give the judgment creditor an election to come upon the lands of conuſor for one moiety of his debt, and as to the other moiety, upon the perſonal eſtate of the conuſor.

The preſent defendant is bound no otherwiſe than as *terretenant*.

Suppoſe this was the caſe of a mortgagee, would the court do it to his prejudice? if the court would not do it in that caſe, why will they do it againſt an heir at law?

The caſes cited on the other ſide do not come up to the preſent purpoſe, the firſt caſe was *Compton* verſus *Pigot*, before Lord *Harcourt* the 14*th* of *December* 1711.

There a bill was brought by a judgment creditor againſt an executor and the heir at law, to have the perſonal eſtate applied firſt, and if not ſufficient, then the real eſtate to be ſold.

The words of the decree there, to have the whole real aſſets ſold *liable* to the judgment, may admit of this doubt, whether the decree does not confine it to ſuch aſſets as are only *liable* to the judgment, and not to all aſſets deſcended upon the heir.

He cited two caſes as in point for the defendant in Lord Chancellor *King*'s time, *Harvey* verſus *Woodhouſe*, *October* 30, 1730. and *Fiſh* verſus *Burdos*, the *February* following.

LORD CHANCELLOR.

Had it not been for the caſe of *Compton* verſus *Pigot*, I ſhould have thought it very clear for the heir at law.

The judgment affects the land as it is bound by the judgment: equity follows the law in this caſe, and as the plaintiff can extend only a moiety there, he ſhall have no more here.

It appears to me in this light; ſuppoſe it was in the caſe of a bond creditor, he might have an action of debt againſt the heir, and judgment againſt him upon aſſets deſcended; and this he is intitled to at common law, for it is the debt of the heir, and the action is in the *debet & detinet*, but againſt the executor only *in the detinet*, and the heir can diſcharge himſelf no otherwiſe than by pleading *riens per deſcent*.

But if a judgment was obtained againſt the anceſtor, a *ſcire facias* could not be brought againſt the heir, becauſe at common law the heir was not bound; and there is no inſtance before the ſtatute of *Weſtminſter*, of a *ſcire facias* brought againſt the heir on ſuch judgment obtained againſt the anceſtor.

There is no doubt but if it had continued a bond, the whole aſſets would have been liable in the hands of the heir: but before the ſtatute of *Weſtminſter* there was no remedy againſt the anceſtor in his life-time upon a judgment, *on his land*: and it is that ſtatute ſubjects one moiety thereof to the judgment creditor.

The conſequence of this is, that notwithſtanding the anceſtor is dead, if the land comes into the hands of the heir or purchaſer, it comes equally bound.

In what right then is the *Scire facias* brought againſt the heir or purchaſer? Why only as *terre-tenants*, and by virtue of the ſtatute.

I thought of the objection myſelf, that a bond creditor would be in a better condition then a judgment creditor, and ſo he is.

For as ſoon as the bond debt is turned into a judgment it is extinct againſt the anceſtor, and the creditor cannot in the life-time of the anceſtor bring any action upon the bond; can he then bring an action againſt the heir after it is entirely extinct? But ſtill he obtains a great advantage by a judgment, as it gives him an opportunity of binding the land immediately, and likewiſe gives him a preference over all other bond creditors.

After a bond debt is turned into a judgment, the creditor cannot in the life-time of the anceſtor bring any action upon the bond, nor againſt the heir, for it is intirely extinct; but he ſtill obtains a great advantage as the judgment binds the land, and gives him the preference to all bond creditors.

And therefore the creditor prefers this real advantage to a precarious one of aſſets deſcending upon the heir after the death of the anceſtor.

A court of equity will not oblige a judgment creditor to wait till he is paid out of the rents, but will accelerate the payment by directing a ſale.

If this is the caſe at law, what is there in equity to better his caſe? Why, nothing more than to accelerate the payment, by directing a ſale of the moiety, and not let the judgment creditor wait till he has been paid out of the rents and profits; but equity cannot change the right of the parties.

As to the caſe of *Piggot* verſus *Compton*, perhaps it was not conſidered ſufficiently; or, beſides, a moiety in that caſe, when ſold, might perhaps be enough to diſcharge the judgment.

The decree was affirmed; and the depoſit ordered to be delivered to the defendant.

Caſe 341. *Sturt* verſus *Melliſh*, *July* 13, 1743.

LORD CHANCELLOR.

The caſe being very much entangled, and the tranſactions of long ſtanding, the court choſe rather to diſmiſs the bill, and leave the plaintiff to his action at law, than direct an account before the Maſter.

THIS cauſe has taken up more time than the court could well ſpare, but I was willing to hear ſuch an entangled affair, that I might not ſend it to a Maſter, if it could be avoided.

I do not ſee that more papers or more letters can be laid before a Maſter than are already before me.

The plaintiff's bill is not for a general account, but for a particular demand.

One of the two conhezimentos received by *Villa Real* was under a letter of attorney from Mr. *Sturt*.

The ſecond, is a demand of three other orders, or army debentures, or *Folka's*, as they are called in *Portugal*.

The matter for the conſideration of the court is, whether there has been a ſatisfaction made by *Villa Real* in his life-time, or whether the long acquieſcence of the plaintiff, and the ſtatute of limitations, is a bar to his demand on the defendant, as repreſentative of *Villa Real*.

The *firſt* queſtion is, Whether the court ought to decree there has been a ſatisfaction of theſe two demands, or either of them.

Secondly, Whether theſe demands are barred by the ſtatute?

There

There was an account ſtated between the plaintiff and *Villa Real* on the 27*th* of *September* 1721. and a conſiderable debt was due from *Sturt* to *Villa Real.*

A letter of attorney was executed by the plaintiff to *Villa Real* the next day, conſtituting him his ſufficient attorney to recover in 23 millions of *mill-rees*, 3000 *dollars*, and 3 *folhas.*

I cannot preſume, in ſuch ſolemn tranſactions in writing, that the plaintiff would under his hand have acknowledged that he had a counter obligation from *Villa Real*, if he had not really ſuch counter ſecurity, though it is not forth-coming now; but as Mr. *Sturt* ſwears that he has no ſuch counter obligation, unleſs I could find out ſome way of clearing up this matter, it is a ſtrong objection againſt ſending it to an account.

From the year 1722, to the year 1730, when *Villa Real* died, there is no evidence of the plaintiff's making any demand upon him for the two conhezimento's, though he made other demands of a very ſmall amount, which is a very material circumſtance in favour of *Villa Real.*

A merchant's copy book of letters has been allowed to be read, where a perſon who has the original letters refuſes to produce them.

If the plaintiff has a mind to clear up this affair, why does he not produce *his copy book* of letters, which all merchants keep, and which have been allowed to be read in evidence in this court, where the perſon who has the original letters refuſes to produce them.

It is extremely material, that there is no demand of the conhezimentos, or any part thereof, during all this time; but the plaintiff even acquieſced under Mr. *Villa Real*'s refuſing to anſwer ſo ſmall a ſum as 2000*l. Mill-Rees*, without any complaint, or expoſtulating upon it.

So it reſted till both *Villa Real* and the plaintiff came into *England:* And now a demand is made, after the death of Mr. *Villa Real*, upon his executors, who are not ſo capable of clearing up this affair of the two conhezimentos, *&c.* as Mr. *Villa Real* would have been in his life-time.

From the evidence I have heard, if nothing more was before me, and the preſumption from circumſtances, I ſhould have been of opinion, that the plaintiff would have been barred of the account he demands; for beſides the length of time, which is a ſtrong argument in favour of the defendant, the counter ſecurity or obligation is loſt, the letters likewiſe are loſt, and no copies of them have been produced by the plaintiff; then how is it poſſible to take an account; and therefore the plaintiff's own acquieſcence from 1722, to 1736, is a

preſumptive ſatisfaction. *Sherman* verſus *Sherman*, 2 *Vern.* 276. is a material caſe, with regard to length of time, and alſo as to accounts current between merchants. *

Suppoſing there were not all the objections ariſing from the plaintiff's contradicting himſelf, and the courſe of the evidence, yet I ſhould be of opinion, that the ſtatute of limitations would be a bar to the plaintiff's demands.

The *firſt* queſtion is, Whether this caſe is at all within the ſtatute of 21 *Jac. c.* 16, and whether it ought not to be conſidered as a truſt in equity, as the plaintiff's council inſiſt?

A truſt is where there is ſuch a confidence between parties that no action will lie, but is a caſe merely for the conſideration of equity.

I agree, if it is a truſt, it would not be within the ſtatute, but there is no colour to call it ſo here; for a truſt is where there is ſuch a confidence between parties, that no action at law will lie, but is merely a caſe for the conſideration of this court; and every bailment might as well be ſaid to be a truſt as this.

The next queſtion is, if it is not a truſt, Whether it falls within the exception, as between merchant and merchant, their factors and ſervants? *Sect.* 3. of the ſtatute, " And be it enacted, that all actions " of treſpaſs, *&c.* all actions of account, other than ſuch accounts " *as concern the trade of merchandize* between merchant and mer- " chant, their factors and ſervants, ſhall be commenced and ſued " within ſix years next after the cauſe of ſuch actions or ſuits, " and not after."

It has been ſaid, that though Mr. *Villa Real* was not a merchant, yet the plaintiff plainly was.

Tranſactions with a foreign prince and his government, do not concern the trade of merchandize.

But does the tranſaction in the preſent caſe at all concern the trade of merchandize? I am of opinion it does not; for theſe are only tranſactions with the King of *Portugal*, and the government of *Portugal*; and are like tranſactions here with the victualling office, and other offices of the government.

It is not the dealing of a merchant with any other perſon, which will make that perſon a trader within the meaning of this ſtatute.

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* Though length of time is no bar betwixt merchant and merchant, yet if dealings betwixt them have ceaſed for ſeveral years, and one of them dies, and the ſurviving merchant brings a bill for an account, the court will not decree an account, but leave the plaintiff to his remedy at law. 2 *Vern.* 276. *Sherman* verſus *Sherman.*

Suppoſe a merchant, who has debts owing him, gives another merchant a letter of attorney to get in thoſe debts, ſuch a tranſaction will not make ſuch a perſon, ſo deputed, *a merchant* within the exception, no more than if he had given that letter of attorney to a perſon not a merchant.

A letter of attorney from one merchant to another, to get in debts, will not make the perſon ſo deputed a merchant within the exception of 21 *Jac.* 1.

Then the next queſtion will be, Whether this caſe is not within 4 *Ann. c.* 16. for the amendment of the law.

I own, I was at firſt doubtful, but, upon conſideration, am of opinion, that it is not within the clauſes of that ſtatute. *Vide Prec. in Chan. Locky* verſus *Locky* 304.

When theſe contracts were made, the plaintiff was in *Portugal*; in 1729, returned into *England*, Mr *Villa Real* being then in *England* likewiſe; and the plaintiff afterwards returned to *Portugal.*

Conſider this then under the proviſo of 21 *Jac.* 1. *ſect.* 7. "Provided, and that if any perſon, that is or ſhall be intitled to any "ſuch action of accounts, *&c.* be, or ſhall be, at the time of any "ſuch cauſe of action given or accrued, within the age of 21 years, "feme covert, *non compos mentis*, impriſoned, or *beyond the ſeas*, "that then ſuch perſon ſhall be at liberty to bring the ſame actions, "ſo as they take the ſame within ſuch times as before limited af"ter their coming to, or being of full age, diſcovert, of ſane me"mory, at large, *and returned from beyond the ſeas*, as other perſons, "having no ſuch impediment, ſhould have done."

The plaintiff in this caſe having been in *England* after both theſe demands had accrued, he ought to have brought his action within ſix years from that time.

Conſider the ſtatute of Q. *Ann. ſect.* 19. Be it further enacted, "That if any perſon, againſt whom there ſhall be any cauſe of ac"tion of treſpaſs, *&c.* or of action of account, *&c.* be, or ſhall "be, at the time of any ſuch cauſe of ſuit, or action given, *&c.* "*beyond the ſeas*, that then ſuch perſon, who is or ſhall be intitled "to any ſuch ſuit or action, ſhall be at liberty to bring the ſaid "action againſt any ſuch perſon *after their return from beyond the* "*ſeas*, ſo as they take the ſame, *after their return from beyond the* "*ſeas*, within ſuch times as are reſpectively limited for the bringing "of the ſaid actions before by this act, and by the ſaid other act "made in 21 *Jac.* 1."

The creditor here has the ſame privilege given him by this laſt act, in reſpect to the debtor's being beyond ſea when the cauſe of action accrues,

The creditor, by 4 *Anne*, has the ſame privilege on the debtor's being beyond ſea, as he had by the ſtatute of *James*, on his being beyond ſea himſelf.

accrues, as he had by the former act, in reſpect to his being beyond ſea himſelf.

Theſe ſtatutes muſt be ſo conſidered as if the clauſes in the laſt had ſtood originally in the firſt.

I agree with the plaintiff's council, that theſe ſtatutes muſt be ſo conſidered, as if the clauſes in the laſt had ſtood originally in the ſtatute of King *James*.

What is the ſaving there? Why, that if any perſon is beyond ſea at the time of the cauſe of action, he ſhall be at liberty to bring the ſame action *when returned from beyond the ſeas*, ſo as, *&c.*

Therefore this muſt be a perſon abſent at the time the action accrued, for if he was not beyond ſea then, he is out of the ſaving of this ſtatute.

The ſtatute of 4 & 5 *Ann.* ſays, if a debtor be beyond ſea at the time, *&c.* that ſuch perſon, who ſhall be intitled to ſuch ſuit, ſhall be at liberty to bring, *&c.* ſo as they take the ſame *after their return from beyond ſeas, &c.* within ſix years.

Within ſix years after what? Why, after the return of the debtor, which is the natural and only conſtruction of the words, *after their return.*

Where a creditor who has been out of the kingdom returns, the time will run, and his going abroad again will give him no privilege, for that was gone by his having once returned after cauſe of action accrued.

The plaintiff's own privilege was gone, for he was returned into *England*; and taking it that this action accrued from the execution of the contract; why, then from his being returned into the kingdom the time will run, unleſs he takes the advantage of his debtor's being out of the kingdom; and the plaintiff's going abroad again, will give him no privilege whatſoever, for that was gone by his having once returned to the kingdom, after cauſe of action accrued.

Suppoſe a creditor, both of non-ſane memory, and out of the kingdom, comes into the kingdom, and then goes out of the kingdom, his non-ſane memory continuing; why, his privilege, as to being out, is gone; and his privilege, as to non-ſane, will begin from the time he returns to his ſenſes.

So here the plaintiff had a double privilege: But by being in the kingdom after the cauſe of action had accrued, and not bringing any, though he went out of the kingdom again, his privilege is gone, as much as if he had been in the kingdom the whole ſix years; ſo likewiſe, the debtor having returned to the kingdom, and the plaintiff bringing no action againſt him, within the ſix years, this privilege is likewiſe gone, notwithſtanding the plaintiff was out of the kingdom himſelf.

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As this caſe is very much entangled, though the evidence is not quite poſitive, yet it is ſufficient to juſtify me in diſmiſſing the plaintiff's bill, rather than to direct an account, where, after a long litigation, it may come back again upon the very ſame points, as in all probability there will be no new light before the Maſter, and therefore I will diſmiſs it without coſts: But if the plaintiff ſhould have a mind to bring an action at law upon the promiſe pretended to be made by *Villa Real*, with regard to the three *Folhas*, I will direct that the time which has run during the pendency of this ſuit, ſhall not be taken advantage of at law.

Haws verſus *Hand*, *July* 13, 1743.

Caſe 342.

ADMIRAL Hoſier, in his abſence, employed one *Biſhop* to manage his affairs, and gave him a letter of attorney for that purpoſe; after *Hoſier*'s death, ſeveral ſuits were brought againſt *Biſhop*, who employed *Hand* the attorney to defend him, who, by that means, became poſſeſſed of ſeveral papers and writings belonging to *Hoſier*; the original bill was brought by *Haws*, the father of the preſent plaintiff, who was adminiſtrator to *Hoſier*, for theſe writings, and examined his ſon, who was a material witneſs to the merits of the cauſe, pending this ſuit; *Haws* the father dies, and *Hawes the ſon*, by this means, becomes intereſted in *Hoſier*'s perſonal eſtate, by being left executor under the will of his father, and by having taken out adminiſtration *de bonis non* to *Hoſier*, and brings on this cauſe now by bill of revivor.

The father of *H.* the plaintiff in the original cauſe, examined *H.* to the merits; after his father's death, he brought a bill of revivor, and became a party intereſted; this does not diſqualify him from being an evidence.

An objection was taken by the defendant's council to reading his evidence, as he is now a party intereſted; and Lord Chancellor, at firſt, thought it a proper objection; becauſe the plaintiff, by his own act of taking out *adminiſtration de bonis non to Hoſier*, has diſqualified himſelf from being an evidence; but upon the authority of *Goſs* verſus *Tracy*, 2 *Vern.* 699. * which is in point, as to admitting the evidence, notwithſtanding his becoming intereſted, the Chancellor allowed the depoſition of the plaintiff to be read.

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* One examined as a witneſs, when diſintereſted, afterwards becomes intitled to the eſtate in queſtion, his depoſition ſhall be read, *Goſs* verſus *Tracy*.

Caſe 343. *Chauncy and others* verſus *Graydon and others*, *July* 16, 1743.

THE queſtions in this cauſe aroſe upon the following will.

Where there is a condition annexed by a will to a deviſe of real or perſonal eſtate, and no notice required to be given, unleſs the legatees perform the condition, they cannot be intitled, and where there is a deviſe over, a forfeiture incurs.

" *Rene Badouin* by will dated the 22*d* of *June* 1727, did conſtitute his nephew *Gabriel Tahourdin*, and three others, executors; and, among ſeveral bequeſts, gave 1500*l. South Sea* ſtock to his executors, *in truſt* to pay the yearly dividends and profits thereof to his brother *Claude Badouin*, during his natural life, and from and after his death, in truſt to pay the ſaid 1500*l. South Sea* ſtock among the ſeven children of his nephew *Gabriel Tahourdin*, *in the manner and proportion therein after directed* and appointed concerning 7000*l. South Sea* ſtock, by him herein after deviſed to and for the uſe and benefit of the ſaid ſeven children of *Gabriel Tahourdin*; and did thereby alſo give to his ſaid executors 7000*l. South Sea* ſtock, in truſt to transfer 1000*l.* thereof to each of the ſeven children of his ſaid nephew *Gabriel Tahourdin*; to wit, *Elizabeth*, *Gabriel*, *Mary*, *Rene*, *Dorothy*, *Peter*, *Caſſandra*, *at their reſpective ages of twenty-one years, or days of marriage, they marrying with the conſent of the ſaid* Gabriel Tahourdin *the father, or his executors, or the ſurvivors or ſurvivor of them, to be teſtified by their ſubſcribing their names to the marriage articles, or ſettlement of the ſaid children, as witneſſes, or by being parties thereto, and executing the ſame: And in caſe any of the ſaid children ſhould die before twenty-one, or ſhould marry without conſent as aforeſaid, then, and in ſuch caſe, his will was, that the ſhare or ſhares in the ſaid 7000l. of ſuch child or children as ſhould die, or marry without conſent as aforeſaid, ſhould go and be tranſferred, ſhare and ſhare alike, to the others of the ſaid ſeven children, at twenty-one, or marriage with conſent as aforeſaid*; and did thereby direct, that his nephew *Gabriel Tahourdin* ſhould receive and enjoy to his own uſe the yearly dividends and profits of the reſpective proportions of his ſaid ſeven children, in the ſaid 7000*l.* until their age of twenty-one, or marriage as aforeſaid."

The teſtator died ſoon after; his brother is likewiſe dead, and *Gabriel Tahourdin*, the nephew of the teſtator, is dead; *Caſſandra* married the defendant *Graydon*, *July* 25, 1740, *without conſent*; and *Peter* married the day after *without conſent*; *Gabriel*, junior, arrived at his age of twenty-one, but died before the forfeitures were incurred by his ſiſter *Caſſandra*'s, or his brother *Peter*'s marriages without conſent.

The bill is brought by the perſons who have married the other children of *Gabriel Tahourdin*, the elder, *with conſent*, to be let into their reſpective ſhares forfeited by *Caſſandra* and *Peter*.

Mr. Solicitor General council for the plaintiff: One point made by the defendants, in their anſwer is, that the executors may ſtill conſent: But he ſaid, the caſe of *Fry* verſus *Porter*, 1 *Ventr.* 199. was directly contrary, for at the time of the marriage only, *the conſent* muſt be given, becauſe then it muſt immediately go over to the other children if *without conſent*; ſo that the executors upon conſenting afterwards cannot bring a bill to take it from the other children.

Wrotteſley verſus *Wrotteſley*, *June* 1. 1743. *Vide ante* 584. is almoſt in point; but, beſides, the executors do not ſay, that they approve of it now.

From the moment of the children's marrying with conſent, or arrival at twenty-one, they are entitled to the capital, and then there is an end of the dividends; ſo that the produce of the ſtock in the father's hands cannot make a fund for the benefit of the children, as part of his perſonal eſtate; nor will the defendants be entitled to a ſhare of this produce; for this was certainly given only in lieu of maintenance, and from the death of the father, the intereſt muſt follow the ſame fate with the capital.

Mr. Attorney General, council for *Peter Tahourdin*.

The firſt marriage *without conſent* was by *Caſſandra*, the ſecond was by *Peter*.

It is inſiſted by the plaintiffs, that *Caſſandra* and *Peter* have forfeited their ſhares in the 1500*l.* and 7000*l.* *South Sea* ſtock.

The queſtion then is, Whether *Peter* has forfeited or not?

There is a fact which the gentlemen on the other ſide have induſtriouſly omitted; *videlicet*, *that the executors did not give him any notice of the condition*; and though it was determined in *Fry* verſus *Porter*, not to be neceſſary, yet that was, becauſe *real eſtate* was forfeited, and it is, the law ſays there, it is not neceſſary, and therefore, in that caſe, a perſon muſt bring himſelf within the terms: But I do not recollect it has ever been determined ſo, where perſonal eſtate has come in queſtion; for then it is in the nature of a legacy, and muſt be governed by rules of the civil law: Where the whole veſts in the executors, they ought to give notice; for where there are legacies in a will, they are bound to pay them, though not demanded.

Mr. *Brown* on the ſame ſide: The words *manner and proportion* in the firſt clauſe may have another conſtruction than to extend in general to both clauſes, and if it can be conſtrned to any other ſenſe, the court will incline to it, as forfeitures are not favoured, and that the teſtator did not intend to involve the 1500 *l.* with the 7000 *l.*

He argued that *Gabriel Tahourden*'s, though it was a contingent intereſt in theſe forfeitures, yet was tranſmiſſible to his repreſentatives, as he lived to be 21, for a poſſibility is aſſignable in equity, and the defendants in that light are entitled: for there is no caſe that makes it neceſſary for the perſon, who has a contingent intereſt, to be living, when it takes place. *Vide King* verſus *Withers*, *Caſes in Lord Talbot's time* 117. *Corbet* verſus *Palmer*, 26 *Feb.* 1734. and *Pinbury* verſus *Elkin*, 1 *P. Wms.* 563.

Did thereby alſo give to his executors 7000 *l. South-ſea ſtock, in truſt to transfer* 1000 *l. South-ſea ſtock to each of the ſeven children at their reſpective ages of twenty-one years or days of marriage, they marrying with the conſent of, &c.*

As this is given payable at a future time, theſe two different periods muſt be conſidered ſeparately, and relate only to the transfer either at twenty-one, if that happen firſt, or on the day of marriage, if that happen firſt: and though there is a marriage *without conſent*, yet it is payable at twenty-one afterwards, if they live to arrive at that age.

Mr. *Chute* for Mrs. *Caſſandra Graydon:* This is a mere legacy, and not given by way of portion, for the teſtator was not obliged by a debt of nature to provide for them: and therefore ought to be governed by the rules of the civil law, which diſcourages forfeitures, eſpecially with regard to the 1500 *l.* to which there is no forfeiture annexed.

Mr. Solicitor General in reply ſaid, that the words *manner and proportion* have two different conſtructions, the word *proportion* relates to the ſhares both in the 1500 *l.* and the 7000 *l.* and the word *manner* relates to the time when it becomes payable, *viz.* the arriving at twenty-one and the marriage *with conſent*, according to the rule that *verba relata ineſſe videntur.*

As to what has been inſiſted on with relation to *Gabriel*, junior, that a ſhare in the fortunes forfeited by *Peter* and *Caſſandra* veſted in his repreſentatives.

It is impoſſible it could take place, for *Caſſandra and Peter* both married before twenty-one without conſent, and on ſuch marriage it is given over immediately, ſo that their fortunes were forfeited before the time of veſting came, and are therefore abſolutely gone.

LORD CHANCELLOR.

Several queſtions have been made at the bar.

Firſt, Whether there is any forfeiture at all.

Secondly, What will be the extent of it.

Thirdly, What ſhares *the parties* claiming under the forfeiture are to take.

Now as to *the firſt*, it is extremely plain there is a forfeiture incurred by a marriage *without conſent*, or otherwiſe this caſe would not be conſiſtent with the reſt of the caſes on this head.

The only excuſe attempted to be made, is, that the defendants had no notice of *the condition* in the will of *Badouin*.

I ſhall lay this out of the caſe, for where there is a condition annexed by a will to a deviſe of real or perſonal eſtate, and no notice required to be given, nor any perſon obliged to give notice, there the legatees muſt perform the condition, or cannot be entitled; and if they do not, where there is a deviſe over, a forfeiture incurs.

Nor in the reaſon of the thing, do I ſee any difference at all between real and perſonal eſtate: and therefore where no body is bound to give notice, the parties muſt themſelves take notice.

It is ſaid *the executors* ſhould have given *notice*, but the teſtator has laid no ſuch obligation upon them, neither do the executors take any beneficial intereſt, whether the condition be performed or broken.

The ſecond queſtion is, What will be the extent of the forfeiture? whether the forfeitures are confined only to the 7000 *l.* or by relation extend to the 1500 *l.* likewiſe.

This is not quite ſo clear, but I am however of opinion that the forfeiture extends to both: nor can I make any other conſtruction, without contradicting the teſtator's own intention, and making the court contradict themſelves.

For the teſtator's putting the two ſums in different clauſes, was on account of the gift of the produce of the 1500 *l.* ſtock to his brother during his life, or otherwiſe he would have thrown the whole into one clauſe.

The original proportion would have been a diviſion into ſevenths, but is different when one or two or more of the deviſees marry *without*

out conſent, and therefore the proportions ariſe, and are to be regulated by the ſeveral contingencies as they happen.

The word *manner*, as has been rightly argued, takes in every thing.

To one for life, and to *B.* on certain conditions and reſtrictions, and to *C.* in *formâ prædictâ*, will take in every condition and reſtriction in the preceding limitation to *B.*

Suppoſe an eſtate be limited to one for life, and to *B.* on certain conditions and reſtrictions, and to *C.* in *formâ prædicta*, this will take in every condition and reſtriction in the preceding limitation to *B.* this expreſſion may be found in conveyances even to this day, but very commonly in admittances to copyholds.

The third *queſtion* will be, what are the ſhares and proportions the ſeveral parties claiming under this forfeiture are to take?

Mrs. *Caſſandra Graydon* was married on the 25*th* of *July*, and *Peter* the next day.

It is inſiſted by *Peter*'s council, that he is entitled to a ſhare in *Caſſandra*'s forfeiture.

It would be very extraordinary that *Peter* by marrying *without conſent* ſhould forfeit his own fortune, yet take advantage of the very ſame offence in his ſiſter which he had committed himſelf.

See the clauſe in the will, beginning with, *and in caſe any of the ſaid children ſhould die, &c. the ſhare or ſhares, &c.*

What is the meaning of the words *ſhare or ſhares*? Why the whole that the children ſhall be entitled to, as well the original as the contingent portions ſhall go and be transferred, *&c.* and this brings it to the caſe of Mr. *Bendyſh* in *Wrotteſley* verſus *Wrotteſley*, where I determined in the ſame manner on the word *portion*, which is not at all more general than the word *ſhare* in the preſent caſe.

" And did thereby alſo give to his ſaid executors, *&c.* in truſt " to transfer, *&c.* to be at their reſpective ages of twenty-one years " *or* days of marriage, *they marrying with the conſent, &c.*

It is ſaid this is a condition not annexed to the age of 21. but confined to the day of marriage only.

But if they marry without conſent before 21. the condition is broke; and it was the intention of the teſtator, that there ſhould be no new time which ſhould ariſe, but the legacy to be abſolutely gone.

Therefore, this making a forfeiture of the whole avoids the abſurd conſtruction, that they may take advantage of the very ſame breach of condition which they have been guilty of themſelves.

As

As to the point relating to *Gabriel*, I am of opinion, as he attained his age of 21, that it veſted in him notwithſtanding he died before the contingency of his brother and ſiſter's marrying without conſent happened, and therefore his repreſentative is equally entitled to a ſhare of the forfeiture with the other children, as that fact has taken place, and the dying before makes no difference, for where either real or perſonal eſtate is given upon a contingency, and that contingency does not take effect in the life-time of the firſt deviſee, yet if real *his heir*, if perſonal *his executor* will be entitled to it; for though in law a poſſibility is not aſſignable, yet in equity where it is done for a valuable conſideration, it has been held to be aſſignable, and tranſmiſſible to the repreſentative of deviſee. *Vide Higden* verſus *Williamſon*, 3 *P. Wms.* 132.

Where either real or perſonal eſtate is given upon a contingency, and that contingency does not take effect in the life-time of the firſt deviſee, yet if real his heir, if perſonal his exeecutor, will be intitled.

Lord Chancellor declared *Chauncy and his wife* were entitled to one fifth part of the portions ſo forfeited, *Weſtern and his wife* to another *fifth*, *Small and his wife to* another *fifth*, and one of the defendants, the executor of *Gabriel* the younger, to another *fifth*.

The ſhare of *Gabriel* under the will, his Lordſhip ſaid, muſt be divided into *ſix* ſhares, and the forfeiting children muſt take equally in this with the others.

Anon. July 21, 1743. *Rehearings.* Caſe 344.

IN decrees to account before a Maſter, formerly there was a clauſe in it, that if there ſhould be *any ſpecial matter*, in taking the account, the Maſter might ſtate it ſpecially, but decrees now are drawn up without this clauſe, and a Maſter may ſtate *ſpecial matter notwithſtanding*.

A Maſter in taking an account may ſtate *ſpecial* matter, though he has no expreſs direction from the decree to do it.

Paul verſus *Birch*, *July* 21, 1743. *ſtood for judgment.* Caſe 345.

TWO perſons who are now bankrupts hired a ſhip of the plaintiff at the rate of 48 *l.* a month, and executed *a charty-party* by which the goods to be put on board were made liable to the plaintiff: ſome merchants who live in the *Weſt-Indies* loaded this ſhip with goods, and allowed the bankrupts their factors 9 *l.* a tun for the carriage.

Where a factor makes an agreement for the hire of a ſhip with *the Maſter* on his own account for 48 *l.* a month, and not on the part of the merchants his principals, they are not liable, nor their goods put on board, to ſatisfy the maſter's demand, but they are liable to pay the factor the freight for the cargo; and as he was bound by the charter-party, which gave the maſter a ſpecific lien on the goods, he has a right to be paid in the firſt place, before the aſſignees of the factor under a commiſſion of bankruptcy againſt him, who ſtand only in the place of the bankrupt.

The plaintiff inſiſts that as the bankrupts are not able to ſatisfy him the whole hire of the ſhip, that the merchants are liable to do it in reſpect of their goods, which are bound by the charter-party.

LORD CHANCELLOR.

Two queſtions ariſe in this caſe, the firſt between the plaintiff and the aſſignees of the bankrupts; and the ſecond between the plaintiff and the defendants the merchants.

As to *the aſſignees*, the queſtion is, whether the charter-party is ſuch a ſpecific lien on the goods as to pay the plaintiff, or whether the right is in *the aſſignees*, and the plaintiff ſhall come in only as a creditor.

I am of opinion that the right is in the plaintiff, for as the bankrupts themſelves are bound, of conſequence the aſſignees are who ſtand in their place.

But what ſeems to be of great conſequence to merchants in general, is, whether the cargo is further liable to make up the deficiency to the plaintiff upon what is due to him for freight.

Firſt, Whether it is liable under the general law of merchants.

As to the general law, the cargo is no doubt liable to pay the freight, or the expence of carrying the goods.

What occaſions the difficulty, is, that the 48 *l.* a month is termed for the freight of the goods: but improperly, for it is rather for the hire of the ſhip, the bankrupts being at full liberty to put in what maſter they pleaſed, and alſo the mariners.

In Molloy de jure maritimo 496. *ſec.* 9. it is ſaid, "If a factor enter "into a charter-party with a maſter for freightment, the contract "obliges him: but if he lades aboard generally, the goods, the prin- "cipals and the lading are made liable, and not the factor for the "freightment.

Now the preſent caſe is ſtronger, the bankrupts the factors enter into the contract for the hire of the ſhip, and the merchants enter into a contract only for the freight of the goods: and is like the caſe of a common carrier, where if a perſon loads his waggon, the goods are liable to pay him.

The next conſideration is, whether the bankrupts themſelves by virtue of *the charter-party* can bind the goods of the merchants to anſwer the freight.

I think not.

The

The merchants are no doubt liable to pay the bankrupts the freight, but it would be very hard to make the goods liable to ſatisfy the plaintiff's demand.

Conſider what a factor is. *Molloy*, in the book juſt now cited, *page* 493. *ſec.* 1. ſays, " A factor is a ſervant created by a merchant's " letters, and taketh a kind of proviſion called factorage; ſuch per- " ſons are bound to anſwer the loſs, which happens by overpaſſing, " or exceeding their commiſſion; but a ſimple ſervant or apprentice " can only incur his maſter's diſpleaſure.

Where a factor becomes bankrupt, it has been held, if the merchant's goods are not mixed with his own, they ſhall go to the merchants.

If a factor becomes bankrupt, and the merchants goods are not mixed with his, they ſhall have them.

The bankrupts made an agreement with the maſter on their own account, and not on the part of the merchants, and therefore the merchants are not liable. Otherwiſe they would be in the hardeſt caſe imaginable, for they would be liable to any private agreement between the occupiers of a ſhip, and the original owners of it.

A perſon that lets out his ſhip to hire, ought to take care that the hirer is a ſubſtantial man, and ſufficient to make good the hire, and it is his buſineſs to look into this, and if the perſons who hire are not competent, the maſter muſt ſuffer for his neglect.

Whoever lets his ſhip to hire, muſt take care the hirer is ſubſtantial, for if he be not competent, the maſter muſt ſuffer for his neglect.

Whatever hardſhip therefore may be on one hand, to the perſon who lets out to hire, the hardſhip is much greater on the other ſide, and what gives an additional weight to the merchants caſe, is the great conſequence this is to trade in general.

It is ſaid that ſome of the defendants, the merchants, were indebted to the bankrupts, and therefore they might detain the goods to pay themſelves, and that by the charter-party the plaintiff ſtands in the place of the factor, and has the ſame lien on theſe goods.

A factor may detain goods to pay cuſtoms in any place, or for ſalvage, but more doubtful as to any other pretence. *Vide Wiſeman verſus Vandeput*, 2 *Vern.* 203.

To pay cuſtoms, or for ſalvage, a factor may detain goods.

Walker

Caſe 346. *Walker* verſus *Jackſon*, *July* 22, 1743.

The perſonal eſtate under *B.*'s will paſſed as a ſpecific legacy to the executrixes, and ſhall not be applied in exoneration of the real eſtate.

THE queſtions in this cauſe aroſe out of the following will of *Beauprè Bell*, who was indebted to the plaintiffs upon bond, and ſeiſed in fee of lands in *Cambridgeſhire*, *Norfolk*, and *Lincolnſhire*, to the amount of 1500 *l. per annum*, and poſſeſſed of a conſiderable perſonal eſtate.

" I will that all my eſtate in the county of *Lincoln*, or a ſufficient " part thereof, be ſold as ſoon as my executrixes conveniently can, " for the payment of my lawful debts and the legacies hereafter men- " tioned, and the expence of my funeral, which I leave to their di- " ſcretion: I give to Mrs. *Emma Marſhall* one annuity or yearly " rent-charge of 200 *l.* to be raiſed out of all my eſtate not hereafter " otherwiſe engaged in the county of *Norfolk*, to be paid her half- " yearly.

Then he gives ſeveral ſpecific legacies and a miniature picture, and ſeveral prints to *Emma Marſhall*.

" Laſtly, I appoint the abovementioned *Emma Marſhall* and *Do-* " *rothy Beauprè* joint executrixes of this my will, written with my " own hand this 10*th* of *December* 1740.

On the 21*ſt* of——1741. the teſtator added theſe words to his will: " And I give and deviſe to them all my perſonal eſtate not herein " before deviſed; and then executed it over again in the preſence of " three witneſſes, whoſe names appear under it.

A bill has been brought by the plaintiff and other bond creditors of the teſtator, againſt Mr. *Jackſon*, who married *Dorothy Beauprè*, one of the executrixes, and likewiſe heir at law to the teſtator, and *againſt Emma Marſhall* the other executrix, to ſet forth the teſtator's perſonal eſtate poſſeſſed by them, and for adminiſtring of aſſets ſufficient to pay the plaintiffs, and for the ſale of the *Lincolnſhire* eſtate.

The principal queſtion was, whether the perſonal eſtate ought in favour of the heir at law to be applied in exoneration of the real eſtate.

LORD CHANCELLOR.

That the perſonal eſtate is to be applied for the payment of debts in the firſt place, is the general rule, and it is as certain that a teſtator cannot as againſt his creditors exempt the perſonal eſtate.

But againſt his heir at law, or the deviſee of his real eſtate, he may ſubſtitute the real in the room of the perſonal eſtate, and charge the debts upon another fund, which is not in it's nature primarily liable.

There are ſeveral different ways of giving *real eſtate* ſubject to his debts.

A teſtator may do it by a deviſe of the real eſtate for a term for years, in order to pay the debts; or he may do it by way of charge, and let it deſcend upon the heir at law: or he may do it by direction only without deviſing it over.

But let him do it by either of theſe three ways, (of which doing it by way of charge is much the ſtrongeſt) yet neither of them ſhew the real eſtate is to be primarily applied.

For if a man deviſes his real eſtate by way of truſt, either to be ſold for a term of years, or the inheritance to be ſold, if he has done nothing to exempt the perſonal eſtate, it ſhall be primarily liable.

Though a real eſtate be deviſed to be ſold, yet if a teſtator has done nothing to exempt the perſonal, it ſhall be primarily liable.

The general rule of this court, though delivered ſometimes in one form, and ſometimes in another, is, that the perſonal eſtate ſhall be applied, unleſs there be expreſs words, or a plain intention of the teſtator, to exempt his perſonal eſtate, or to give the perſonal eſtate as *a ſpecific legacy*, for he may do this, as well as give the bulk of *the real eſtate* by way of ſpecific legacy.

The rule is, perſonal eſtate ſhall be firſt applied, unleſs there are expreſs words, or a plain intention of the teſtator, to exempt it, or to give it as a ſpecific legacy.

Therefore in the preſent caſe, there muſt be a manifeſt plain intention in this will to exempt his perſonal eſtate.

And I am of opinion there is ſuch a manifeſt plain intention to give the perſonal eſtate as a ſpecific legacy to his executrixes, and to exempt it from his debts.

See the deviſe of his *Lincolnſhire* eſtate.

After giving ſeveral ſpecific legacies, he ſays laſtly, I appoint the above-mentioned *Emma Marſhall, and Dorothy Beauprie*, joint executrixes of this my will.

If the teſtator had reſted there, it was only making them executrixes, and the perſonal eſtate would then have been applicable to exonerate his real.

But the teſtator ſome time after adds theſe words: *And I give and deviſe to them all my perſonal eſtate not herein before deviſed*, and in

a formal manner re-executes his will: and this I muſt take notice of as it muſt be made part of the probate.

This is an extreme ſtrong circumſtance to ſhew the intention of the teſtator, and indeed unſurmountable, and a much ſtronger caſe than if inſerted in the will when firſt executed; but if inſerted at firſt, I ſhould even have thought it a ſtrong caſe of exemption.

The additional words upon the republiſhing the will, do not mean what the teſtator had before ſpecifically deviſed out of the perſonal eſtate.

A proviſion out of the real eſtate for one executrix will not bar her, neither will ſpecific legacies given to one, bar either of the reſidue in the perſonal eſtate, but are put in only to give one a preference of the other.

Making a proviſion out of his real eſtate for one executrix, will not bar her, neither will the ſpecific legacies given to one executrix bar either of the reſidue in the perſonal eſtate, for they are put in to give one a preference of the other, and to diſtinguiſh their two caſes, for he intended *Mrs. Marſhall* ſhould have particular parts.

As the will ſtood originally, the executrixes would have had very little benefit from it, and therefore upon the re-execution the teſtator threw in this clauſe to give them the perſonal eſtate by way of ſpecific legacy; when this circumſtance is conſidered, the caſes already adjudged are not ſo ſtrong as the preſent. *Adams* verſus *Meyrick*, *Eq. Caſ. Abridged* 271. *at the Rolls*, was a much weaker caſe: * thoſe caſes, where reſt and reſidue are given by will, are the weakeſt of all, and ſeveral caſes upon theſe words, where it has been held that the perſonal eſtate is not exempted from payment of debts in the firſt place.

A teſtator may give an executor the perſonal eſtate, as a legacy, and exempt from debts.

It is no objection here, that the perſons to whom it is deviſed are made executrixes, for a teſtator may give an executor the perſonal eſtate as a ſpecific legacy exempt from debts, as well as to another perſon.

The words debts, legacies and funeral expences, are only words of ſtile, and no weight to be laid upon them. *Bradyſh* verſus *Liſle* the 30*th* of *November* 1732. was not ſo ſtrong as this, nor *Hall* verſus *Broker*, *Gilbert* 73. nor *Stapleton* verſus *Colvill*, *Trin. T.* 1736. there was only a power given which ſpeaks moſt ſtrongly that it was intended merely in aid of the perſonal eſtate.

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* *A.* by will gave ſeveral pecuniary legacies, and after deviſes lands to truſtees, in truſt that they do and ſhall by mortgage or ſale pay his debts, legacies and funeral expences; then deviſes all his goods, chattels and houſhold ſtuff in ſuch a houſe to *B.* and then goes on in theſe words: *all the reſt and reſidue of my perſonal eſtate, I give and deviſe to my wife, whom I make ſole executrix.* Sir *Joſeph Jekyll* held, that the reſidue of the perſonal eſtate belonged to the wife as a ſpecific deviſe, and that the words were to be underſtood, *the reſidue* of what he had not before particularly deviſed, not the reſidue after debts paid. *Adams* verſus *Meyrick at the Rolls*, *Hill. T.* 1724.

The caſe of *Bampfield* verſus *Windham*, *Prec. in Chan.* 101. and *Wainwright* verſus *Benlowes*, 2 *Vern.* 718. do not come up to this, but are much weaker than the preſent.

Upon the whole, a ſtronger circumſtance cannot be than the republiſhing his will, and an alteration from what it was before; and unleſs it is conſtrued to be his intention to exempt his perſonal eſtate in favour of the executrixes, the words are fruitleſs and vain, and do no more in their favour than the will, as it originally ſtood would have done before; therefore theſe words can have no other ſignification than to exempt his perſonal eſtate.

The real eſtate was by his Lordſhip decreed to be ſold, or a ſufficient part thereof, for the payment of the teſtator's debts.

Morris and Elizabeth his wife verſus *Burrows and others*, *July* 26, 1743.

Caſe 347.

THIS cauſe comes on now for further directions after the Maſter's report, and it is upon this caſe:

First heard before Lord *Hardwicke* on the third of *February* 1737. (See the caſe fully ſtated in *Tracy Atkyns's Reports*, 1 *Vol.* 399.)

John Burrows at his death left iſſue five children, the plaintiff *Elizabeth*, *Gyles* and *John*, and *Mary* married to *Wollaſton*, and *Ann* to *Edward Roſe*, which *Gyles*, *John*, *Mary* and *Ann* were advanced by their father in his life-time.

A freeman of *London* by will took upon him to diſpoſe of all his eſtate, as well the orphanage as the teſtamentary part; where ſome of the children ſhall elect to abide by the cuſtom, and others to take by their will, *their ſhares of the orphanage part ſhall not accrue to that part, but ſhall go according to the diſpoſition of the father.*

He by will gave legacies to all his children, and to other perſons, and the reſidue of his eſtate real and perſonal he gave to his ſons *John* and *Gyles*, and his daughters *Mary*, *Elizabeth* and *Ann*, their heirs, executors and adminiſtrators, equally to be divided.

The teſtator died on the 7*th* of *October* 1732. leaving iſſue as aforeſaid, and *Gyles Burrows* alone proved the will, and poſſeſſed his perſonal eſtate, which was more than ſufficient to pay the teſtator's debts.

The plaintiff's counſel at the hearing of the cauſe argued, that the teſtator being a freeman of *London*, and leaving ſuch iſſue as aforeſaid had not power to diſpoſe of his perſonal eſtate by his will, but the ſame ought to be diſtributed according to the cuſtom of the city of *London*, and the teſtator having given plaintiff *Elizabeth* no more than 900 *l.* on her marriage, which is far ſhort of what he gave the reſt of his children, and not having by his will advanced her equally with his other children, inſiſted the will ought to be ſet aſide.

The

The defendants inſiſted that the teſtator and the plaintiff *Elizabeth* before her marriage, together with *George* and *Phillis Burrows*, two other children, before the teſtator became a freeman, entered into an agreement with him, whereby they did releaſe their right to any part of his perſonal eſtate by the ſaid cuſtom.

The plaintiffs brought their bill to ſet aſide the agreement and the will, and that *Gyles Burrows* may account with the plaintiffs for teſtator's perſonal eſtate, and that plaintiffs may bring their advancement into hotch-pot, and be paid their cuſtomary ſhares of the teſtator's perſonal eſtate, and of the dead man's part.

The cauſe was heard the 3*d* of *February* 1737. at which time his Lordſhip decreed " the agreement to be voluntary, and under the cir- " cumſtances of the caſe ought not to be conſidered as binding between " the teſtator and his ſaid children, and that the plaintiffs are entitled " to their cuſtomary ſhare of the orphanage part of the teſtator's " eſtate, which is a moiety of the clear perſonal eſtate; but that " the plaintiffs electing to claim by the cuſtom, are not to have any " benefit by the will; and that the defendants *Gyles Burrows*, *John* " *Burrows*, *Mary Woollaſton* and *Ann Roſe*, the children of the te- " ſtator, were to be at liberty to make their election, whether they " will take by the will of the teſtator, or by the cuſtom of *London*.

The defendants *Mary Woollaſton* and *Ann Roſe* have not yet under the decree made their election whether they take by the will only, or by the cuſtom, becauſe they do not know what will be the conſequence of ſuch election.

LORD CHANCELLOR.

The queſtion is, whether when ſome elect to abide by the cuſtom, and others to take by the will, the ſhares of the latter ſhall go among the others, or go according to the will.

I thought at firſt that it ſhould go according to the will; but no caſe being cited, and it not appearing to have been conſidered on the part of the plaintiffs, I was willing to give them time to look into caſes, and hear what could be alledged in their favour.

Mr. *Chute* cited a caſe of *Rawlinſon* verſus *Rawlinſon* before Lord *Harcourt* the 8*th* of *July* 1714. there a freeman had nine children, of whom one choſe to abide by the cuſtom, the other by the will, *Lord Chancellor* decreed that child one ninth, and the other eight ninths of the perſonal eſtate, to be ſubject to the diſpoſition of the teſtator's will.

This caſe has been generally cited to ſhew the cuſtom is, that (when a wife is compounded with) the orphanage is one moiety,

but according to Mr. *Chute*'s ſtate of it, it is a caſe in point: I think it agreeable to the reaſon and equity of the thing, and that the preſent caſe differs entirely from the caſe of a wife compounded with.

In the caſe of *Townſend* verſus *Townſend*, Lord *Talbot*'s opinion *arguendo* ſeemed to be the ſame way; though this point happened not to be material, as the election was not made there, and ſo was not mentioned in the decree.

This is a queſtion not of the cuſtom, but depending on the equity of this court, which is that no perſon ſhall take by the will, and at the ſame time do any thing that ſhall deſtroy the will.

No perſon can take by a will, and at the ſame time do any thing that ſhall deſtroy the will.

Where a father has only diſpoſed of the teſtamentary part, they may take both: but where he has taken upon him to diſpoſe of both, they cannot, becauſe it is inconſiſtent, and muſt one way or other break in with his diſpoſition.

The children of a freeman may take both parts, when the father has diſpoſed of the teſtamentary only.

Therefore I muſt put them to make their election.

If they elect to take by the will, it is only a ſubmiſſion that their part ſhall go according to the diſpoſition of the father.

Now making the ſhare of the child who elects to take by the will to accrue to the orphanage part, is, to give it contrary to that election: it is not directly, but in conſequence, letting thoſe who take by the cuſtom, take benefit by reaſon of the will.

But it is ſaid that letting it accrue to the orphanage part, is agreeable to other caſes.

As for example, that of a wife compounded with; but this depends on a different reaſon, *viz.* the cuſtom which divides the teſtator's eſtate, in caſe a wife is compounded with, into two parts, as if there was no wife: it has been compared likewiſe to the caſe of children provided for, but this alſo depends on the cuſtom.

The cuſtom, where a wife of a freeman is compounded with, is to divide his eſtate into two parts, as if there was no wife.

The preſent is a caſe of children all capable of taking within the cuſtom, and depends on the election of the child, and not on the act of the father, which was the caſe put by Mr. *Brown*.

Is any wrong done to the children who take by the cuſtom? No certainly, for they have all that they would have had, if all had taken by the cuſtom.

Therefore, as the whole depends on the election of the children, and as all might have taken by the will, ſo may *any one*,

The diſtinction between acts of the father and the children is plain, and the election being that this part ſhall go by the will, if the court was to declare that this ſhare ſhould go to the orphanage part, it is contrary to the election: and therefore, if there had not been a caſe in point, I ſhould have determined it this way: and I dare ſay it was taken to be ſo at the time of pronouncing this decree.

Therefore I muſt declare the ſhare of *Anne Roſe*, who elects to take by the will, accrues to the teſtator's eſtate, and to go according to his will.

Caſe 348. *Story* verſus *Lord Windſor and others*, *July* 30, 1743.

On a plea of a purchaſe for a valuable conſideration without notice of the plaintiff's title, it is ſufficient to aver, that the perſon who conveyed was ſeiſed or pretended to be ſeiſed, when he executed the purchaſe deeds, but where a purchaſer ſets up a fine and non-claim as a bar, he muſt aver that the ſeller was actually ſeiſed.

THE defendant pleads a purchaſe of the eighth part of a colliery, for a valuable conſideration, without notice.

Mr. *Noel* for the defendant went chiefly upon the poſſeſſion of 50 years in the ſeller of this eſtate.

LORD CHANCELLOR.

Where you plead a purchaſe for a valuable conſideration without notice of the plaintiff's title, it is ſufficient to aver, that the perſon who conveyed was ſeiſed, or pretended to be ſeiſed, at the time that he executed the purchaſe deeds; but if the purchaſer ſets up a fine and non-claim as a bar to the plaintiff's right, it is not ſufficient to aver that at the time the fine was levied, the ſeller of the eſtate *being ſeiſed*, or *pretending to be ſeiſed*, conveyed, *&c.* but you muſt aver he was actually ſeiſed; it is not neceſſary indeed to ſay that he was ſeiſed in fee, for if you aver he was ſeiſed *ut de libero tenemento*, *& ſic ſeiſito exiſtente quidem finis ſe levavit*, it will do.

A colliery is a trade, and therefore an account may be taken of the profits here.

Though the plaintiff's is a legal title, yet he is proper in coming into this court, becauſe this is not a title of land, but of a colliery, which is a kind of trade, and therefore an account may be taken of the profits here.

The defendant ſets up firſt an equitable bar, and ſecondly a legal bar.

To allow the firſt, it muſt be brought within the rules of this court.

A purchaſer's denying notice at or before the execution of the deeds is not ſufficient, he muſt aver that he had none at or before the payment of the money.

The firſt objection was, That there is not a ſufficient denial of notice, becauſe it is not averred the purchaſe-money was paid before

notice, but only that the purchaſer had no notice, at or before the time of the execution of the deeds.

As it ſtands upon this plea, the money might not be paid before notice.

And if it be the eſtabliſhed rule of this court, that notice muſt neceſſarily be denied at or before the execution of the deed, and at or before the payment of the money;

Then there is not a proper averment here, and therefore I am of opinion this *denial of notice* is not ſufficient, unleſs it had gone farther, and ſhewn that the purchaſer had no notice before he paid the money.

Then the plea muſt reſt upon the other bar, which is a mere legal one, and yet is equally good in equity, as in law, provided it is pleaded with proper averments.

If it is a mere legal title, and a man has purchaſed an eſtate which he ſees himſelf has a defect upon the face of the deeds, yet the fine will be a bar, and not affect him with notice ſo as to make him a truſtee for the perſon who had the right, becauſe this would be carrying it much too far; for the defect upon the face of the deeds is often the occaſion of the fine's being levied.

If a perſon purchaſes an eſtate, which he ſees has a defect upon the face of the deed, yet the fine will be a bar, for that defect is the very occaſion of levying the fine.

If a man indeed purchaſes from a truſtee, and levies a fine, he ſtands in the place of the ſeller, and is as much a truſtee as he was: ſo in the caſe of a grantee of a mortgagee, though he levies a fine, that will not diſcharge the equity of redemption.

A perſon who purchaſes from a truſtee who levies a fine, is as much a truſtee as he was; the ſame as to a grantee of a mortgagee, his fine will not diſcharge the equity of redemption.

But there are fines and non-claim that will bar, notwithſtanding notice at the time of levying.

The material objection was, that the plaintiff only claims one 8th part, and then it is a fine levied by one tenant in common, and will not bar the other.

It is ſo in many caſes; but it will be carrying it too far, to ſay that a perſon in poſſeſſion of the whole, levying a fine of the whole, ſhall not bar.

The operation of a fine and non-claim is not by turning it into a right, but it is by force of the bar ariſing from the ſtatute of non-claims.

The operation of a fine and non-claim, is by force of the bar ariſing from the ſtatute of non-claims.

It

If after an ouſter of the reſt, one tenant in common or jointenant continues in poſſeſſion of the whole for 20 years, it is a bar.

It has been ſaid the ſtatute of limitations will not run againſt one jointenant, or tenant in common, unleſs an actual ouſter is made; and to be ſure there ought to be ſome ouſter; but if after ſuch ouſter a tenant in common or jointenant continues in the poſſeſſion of the whole for twenty years, it is a bar.

So in the caſe of a fine and non-claim by one tenant in common, it will bar his companion, or him who claims a ſhare, if he does not call the perſon levying to an account of the profits, for this has always been admitted to be evidence of an actual ouſter.

Another objection has been made, That it could not be ſaid to be a mine open, becauſe there was no coal way; but that will not hold, for though this might not be ſo great a temptation to a perſon to claim, yet it was enough to induce him to make an entry.

In pleading there is the ſame ſtrictneſs in equity, as in law.

But as to the objection that the fine is not ſufficiently pleaded to be a bar, I own I cannot get over it, becauſe in pleading there muſt be the ſame ſtrictneſs in equity as in law.

For it ought to have been pleaded as an actual ſeiſin in the ſeller, and not that he being ſeiſed, or pretended to be ſeiſed, *&c.*

But I will not over-rule the plea, only order it to ſtand for an anſwer till the hearing, with liberty to except, ſave as to matters of account.

Lord Chancellor the next day cited the two following caſes in ſupport of the rule as to pleading a fine. *Reading* verſus *Royſton*, 2 *Ld. Raym.* *Earl of Suſſex* verſus —— 1 *Ld. Raym.*

Caſe 349.

Weyland verſus *Weyland*, *May* 1742.

Where a huſband by a ſettlement before marriage was obliged to do a particular thing for the benefit of the wife, and he did a thing equally ſatisfactory, the court will preſume a ſatisfaction by implication.

MARK Weyland, on his marriage with the defendant in 1709, by marriage ſettlement conveyed ten long annuities, of ten pounds a year each, to truſtees, in truſt to permit him to enjoy them during his life; then to permit his intended wife to enjoy them for her life, with a remainder to all the children of the marriage equally: This limitation was ſubject to two proviſoes: *Firſt*, That the huſband and wife, with the conſent of the truſtees, might diſpoſe of theſe annuities abſolutely, (and no proviſion is made for any other ſettlement in caſe they did ſo): A *ſecond* proviſo, That it ſhould be lawful for Mrs. *Weyland*, after the death of her huſband, to diſclaim the benefit of theſe annuities, and in ſuch caſe ſhe ſhould enjoy ſuch ſhare or intereſt of and in his perſonal eſtate, as ſhe would be entitled to, in caſe he was a freeman of *London* at the time of his death; and in caſe ſhe elected to take as a freeman's widow, the annuities

annuities were to go to the executors and adminiſtrators of Mr. *Weyland*.

About the year 1720, Mr. *Weyland*, without the conſent of his wife, ſold theſe annuities, and converted the money, ariſing by ſale, to his own uſe.

In 1741, Mr. *Weyland*, upon the marriage of his eldeſt ſon, ſettled 5000*l.* old and new *South Sea* annuities upon himſelf for life, then upon Mrs. *Weyland* for life, remainder to his ſon for life, with remainder to his intended wife for life, with remainder to the iſſue of the marriage, *&c.*

In 1742, Mr. *Weyland*, who never was a freeman of *London*, died inteſtate, leaving a widow and ſeveral children: And this bill was brought by ſome of the children, to have an account and diſtribution of his eſtate; and the two following points were made.

Firſt, Whether the eſtate for life, limited to Mrs. *Weyland* by the ſettlement in 1741, is not to be taken as a ſatisfaction for her intereſt in the long annuities, in the ſettlement of 1709, and conſequently obliged to elect whether ſhe will take that, or come in as a freeman's widow, and wave the benefit of it?

Secondly, Whether before the ſon can be admitted to come in for his ſhare of the inteſtate's eſtate, he muſt not bring in the whole 5000*l.* old and new *South Sea* annuities, into hotchpot, or only ſo much as his eſtate for life in thoſe annuities is valued at.

LORD CHANCELLOR.

I think the wife under the firſt ſettlement might, if ſhe waved her annuity, take her ſhare as a freeman's widow, and alſo her ſhare under the ſtatute of diſtributions in the teſtamentary third.

As to the queſtion of ſatisfaction, I am of opinion that ſhe muſt make her election; and that the proviſion in the ſecond ſettlement, is an implied ſatisfaction for her intereſt under the firſt.

By the firſt proviſo the ſettlement is entirely in the power of the huſband and wife, for if they ſold theſe annuities, there was an end of the ſettlement, and the children could claim nothing; and in ſuch caſe, there was an end of her election likewiſe, for that ſuppoſes them *in eſſe* at the time of his death.

So, if after the death of Mr. *Weyland*, ſhe diſclaimed theſe annuities, the children could have no benefit of the ſettlement, for in that caſe, they were to go to the executors of the huſband.

If no ſecond ſettlement had been made, ſhe would have had a right as againſt her huſband, who had diſpoſed of theſe annuities without her conſent, to be ſatisfied for them out of his eſtate, ſubject to the election given her by the deed.

This ſhews that the huſband, by his diſpoſition of them, became a debtor to her for this proviſion, and muſt be ſo conſidered at the time of making the ſecond ſettlement.

The queſtion then ariſes upon the effect of the deed, and is, whether or no ſhe can claim the proviſion made for her, as a mere bounty, and alſo her ſhare of the perſonal eſtate, by the proviſo in the firſt deed.

The general rule is, that where a party to a deed is obliged to do a particular thing, for the benefit of another, and he does a thing equally ſatisfactory, the intent being anſwered, this court will preſume a ſatisfaction by implication: Some exceptions I allow to this rule.

Now, if in this caſe the huſband by his act was become a debtor for this proviſion, it is the ſame as if he had, by the articles, originally been bound to make it.

If he had been ſo bound by articles, or a covenant, I know no caſe wherein this court has not conſidered ſuch ſubſequent ſettlement to be a ſatisfaction; and I think his being bound to do it by his own act is the ſame thing: Suppoſe a covenant to ſettle lands, and the perſon ſuffers lands to deſcend, it is a preſumptive ſatisfaction. *Wilcocks* verſus *Wilcocks*, 2 *Vern.* 558. *Hern* verſus *Hern*, 2 *Vern* 555. and the caſe of *Brown* verſus *Dawſon*, 2 *Vern.* 498. comes very near to this.

The preſumption of ſatisfaction is ſtronger in the caſe of a deed, than of a will, where a bounty is ſuppoſed to be intended.

There is no difference between a deed and a will, except that the preſumption of ſatisfaction is ſtronger in the caſe of a deed, than of a will, where a bounty is ſuppoſed to be intended.

To this, it has been objected, that this cannot be a ſatisfaction to her, becauſe it cannot be a ſatisfaction throughout, (*viz.* to the children); and the rule has been laid down, that the ſatisfaction muſt be commenſurate to the thing ſatisfied, and a total ſatisfaction to all the parties; and here it is no ſatisfaction to the children.

But the children by the firſt deed were left abſolutely in the power of the huſband and wife, and if ſhe elected her widow's ſhare, they were to be totally deprived: Mr. *Weyland* therefore had no reaſon to think himſelf bound to ſatisfy them, and it was the ſame thing to them, as they were entitled to an equal ſhare of the reſidue.

But I think that the rule laid down is not a right one; the caſe of *Wilcocks* verſus *Wilcocks*, is contrary to it, for there was a conſtructive ſatisfaction, not co-extenſive with the deed to all.

Where lands deſcended have been held a ſatisfaction, I know no caſe where the court have directed a ſettlement of thoſe lands, ſo as to anſwer the remainders over.

I think therefore that this proviſion for the wife is a ſatisfaction for her demand, under the former ſettlement, but ſubject to her power of election, which no act of his could deprive her of.

As to the ſecond queſtion, What the ſon advanced is to bring into hotchpot;

I am of opinion, That where a father makes a proviſion for a ſon on his marriage, all the limitations in ſuch ſettlement to the wife and children of ſuch ſon muſt be conſidered as part of that advancement; and it is not the child's eſtate for life only, that ought to be valued, and brought in.

W. on his ſon's marriage, ſettled 5000 l. old and new annuities, on himſelf for life, then on *W.*'s wife for life, remainder to his ſon for life, with remainder to his intended wife for life, with remainder to the iſſue of the marriage: *Not only ſo much as his eſtate for life in theſe annuities is valued at, but the whole* 5000 l. *muſt be brought into hotchpot before the ſon can be admitted to a ſhare of* W.*'s perſonal eſtate, who died inteſtate.*

The intent of the ſtatute was to make all equal; and if a daughter's portion was covenanted by her huſband to be laid out in land, and ſettled, it will he very ſtrange if that ſhould make any alteration, or give her a better right to the reſidue of her father's eſtate.

So if the ſon had died in the life of the father, leaving children, if his advancement only was to be brought in, they would be obliged to bring nothing into hotchpot, and yet would be entitled to an equal ſhare with his other children, which would be directly contrary to the intent of the ſtatute.

Lord *Hardwicke* declared, *That the proviſion made for the defendant* Ann Weyland, *the widow, by* Mark Weyland, *the inteſtate in his life-time, by giving her an eſtate for life in the* 5000 l. South Sea *annuities, mentioned in the deed of the* 15*th of* May 1741. *ought in equity to be conſidered, as a ſatisfaction to her for the ten long annuities, of* 10 l. *a year each, ſettled by the deed of the* 20*th of* March 1709.

But the defendant *Ann Weyland*, the widow, having ſignified her conſent to relinquiſh any intereſt or benefit *in the* 5000 l. *South Sea annuities*; and to take a proportion of the inteſtate's perſonal eſtate, as ſhe could have claimed, or been intitled to, in caſe he had been a freeman of *London* at the time of his deceaſe, Lord *Hardwicke* declared, that ſhe is intitled to her *widow's chamber and paraphernalia*, and to one third of the clear ſurplus of the inteſtate's perſonal

perſonal eſtate, and to a third part of another third of the ſaid ſurplus of the perſonal eſtate; and that the dividends of the 5000*l.* *South Sea* annuities, which had accrued, and ſhould accrue, from the death of the inteſtate, *during the life of* Ann Weyland, *the widow*, ought to be paid to the adminiſtrator of *Mark Weyland*, and conſidered as part of his perſonal eſtate; and decreed, that *the widow's chamber and paraphernalia* be delivered to *Ann Weyland*; and that the clear ſurplus of the inteſtate's perſonal eſtate, after payment of his debts, be divided into three equal parts, one third whereof to be paid to *Ann Weyland, the widow*, and one other third to be divided between the plaintiff and the defendants, the other children of *Mark Weyland*; and the remaining third, to be divided into three equal parts, one third whereof is to be paid to the ſaid *Ann Weyland*, and the other two thirds to be equally divided between *the plaintiff and the defendants.*

Caſe 350. *The Duke of St. Alban's* verſus *Miſs Caroline Beauclerk and others, February* 16, 1743. *At Lord Chancellor's houſe, by conſent.*

Where the ſame ſpecific thing is given by two codicils, it can be only conſidered as a repetition. The ſame rule as to legacies of the like

DIANA Dutcheſs Dowager of *St. Alban*'s, made her will in 1734, and after diſpoſing thereby of ſome of her perſonal eſtate, as to the reſidue, ſays, "My intention is to diſpoſe thereof by a codicil, or codicils, ſigned by me, which codicil, or codicils, I do direct and appoint to be part of, and to have the full effect of my laſt will and teſtament, notwithſtanding any defect in point of form, or otherwiſe."

ſum, or of the like quantities or things, though given in different writings, unleſs it can be ſhewn it was the teſtator's intention to make them additions.

Legacies of greater ſums, values, or quantities, given by a laſt, than by a firſt codicil, are not additional, but augmented ones.

Legacies of leſs ſums, or quantities, or values, given by the laſt, than by the firſt codicil, are not additional, but ademptions, or diminutions *pro tanto*.

On the 19*th* of *October* 1738, ſhe made a codicil; in 1740, and 1741, ſhe made two others, not to the preſent purpoſe: On the 24*th* of *September* 1741, ſhe made a fourth codicil, under which, the particular legatees claimed additional legacies: But the reſiduary legatee contended it was by the frame and meaning of it intended to be ſubſtituted in the place of the firſt codicil: After very long arguments, the *Lord Chancellor* declared, he thought it a caſe of very great difficulty; and took time till the 6*th* of *July* 1743, when he gave his opinion, ſtating largely the two codicils; the material parts whereof are as follows; comparing each article with the oppoſite columns.

Firſt

Firſt Codicil.

By virtue and in purſuance of the power reſerved in my laſt will and teſtament, I do declare that this writing ſhall be a codicil to, and part of my will: I give and bequeath, *viz.*

To Lord *Henry Beauclerk* 1000*l.*
To Lord *George* —— 1000*l.*
To Lord *Aubery* —— 1000*l.*
To Lord *Vere* 100*l.* worth of either pictures, china, or japan.

To Lord *Sidney* 100*l.* worth of either pictures, furniture, or plate.
To Lord *James* 100*l.* of plate, books, or furniture.
To Miſs *Caroline* my ſingle ſtone diamond ring.
To my eldeſt ſon my ruby ring.
To his wife my emerald ear-rings.
To Lady *Die* my rubie ear-rings with pearl drops.
To *Webb*, my woman 500*l.* for her diligent, honeſt, faithful ſervice.
To *Catherine Dickens* 200*l.*
To *Die Wiſe* —— 100*l.*
To *James Buchanell* — 50*l.*
To *Biar* the cook — 50*l.*
To all her ſervants one year's wages.
To ſeveral perſons legacies of china.
To ſeveral perſons ſmall legacies, both ſpecific and pecuniary, of whom no notice is taken in the fourth codicil.
And now I deſire that what remains in money, *&c.* may be applied to the beſt uſe, for the advantage and increaſe of Miſs *Caroline Beauclerk*'s fortune, which I leave to the fidelity, diſcretion and care of my executors and ſons, Lord *Sidney*, *Vere*, *Henry*, *George*, and *James*.

Fourth Codicil.

The ſame introduction, *by virtue, &c.*

To Lord *Henry* — 300*l.*
To Lord *George* — 300*l.*
To Lord *Aubery* — 300*l.*
To Lord *Vere* 100*l.* worth of either pictures, china, japan, or furniture.
To Lord *Sidney* 100*l.* worth of either pictures, plate or furniture.
To Lord *James* 100*l.* worth of furniture, china, or plate.
The legacies to Miſs *Caroline*, her eldeſt ſon, his wife, and Lady *Die*, in the ſame words as by the firſt codicil.

To my woman *Webb* 600*l.* for her diligent, honeſt, faithful ſervice.
To *Catherine Dickens* 200*l.*
To *Die Wiſe* —— 100*l.*
To *James Buchanell* — 50*l.*
To *Francis Biar* the cook 50*l.*
To *T. Jones* 20*l.* and to the reſt of her ſervants one year's wages.
To Lady *Diana* all her china.

And now I deſire that whatever remains in money, *&c.* may be applied to the beſt uſe, for the advantage and increaſe of Miſs *Caroline Beauclerk*'s fortune, which I leave to the diſcretion, care, and fidelity of my executors and ſons, Lords *Vere*, *Sidney*, *George*, and *Henry*.

Upon theſe two codicils, the principal queſtion that has been made is, whether the legacies given by the fourth codicil to the ſame perſons, to whom legacies are alſo given by the firſt, ought to be conſidered as additions to, or ademptions, or variations of thoſe legacies given by the firſt; and this queſtion divides it ſelf into different parts, according to the nature of the legacies, *viz.*

Firſt, Where the ſame ſpecific thing, or corpus is given by both codicils; for inſtance, the ruby ring, there, in the nature of the thing, it can be but a repetition, there being no pretence there were two ruby rings, or the like.

Secondly, Where legacies of the ſame ſum of money, or of the like quantities, or values of things, are given by both, if theſe had been inſerted in the ſame writing, all the books of the civil law agree they would be only repetitions, and not additions, or duplications; and in the reaſon of the thing, and according to the beſt authorities, theſe legacies being in different writings, will make no difference, unleſs it could be ſhewn, it was the Dutcheſs's intention to make them additions; inſtead of that, I think her intention appears to the contrary.

Thirdly, When legacies of greater ſums, values, or quantities, are given by the laſt, than by the firſt, I think this falls under the ſame rule, *viz.* that they are not additional, but augmented or increaſed legacies.

Fourthly, Where legacies of leſs ſums, or quantities, or values, are given by the laſt, than by the firſt, I think theſe are not additional, but according to the circumſtances, and the intention of the teſtatrix ademptions, or diminutions *pro tanto*.

The text civil law takes the differences and diſtinctions in caſes much more rationally than the commentators do.

My reaſons are borrowed from the text civil law, which (as it often happens) takes theſe differences more rationally than the commentators do, and in this I have been aſſiſted by an eminent civilian: That text puts it all along on the intention of the teſtator, and on the will and codicil making but one inſtrument, and it turns the proof rather on the legatee, than the executor. *Digeſt*, *Lib.* 30. *T.* 1. *De legatis & fidei commiſſis*, *Lex* 34. *Si eadem res ſæpius legatur in eodem teſtamento, &c. uſque ad finem. Dig. Lib.* 34. *T.* 4. *De adimendis vel transferendis legatis. Lex* 32. *Dis. Lib.* 22. *T.* 3. *De probationibus & præſumptionibus. Lex* 12. *De legato in teſtamento & in codicillis relicto.* In *Gotofred*'s note upon this law, he lays it down, that the heir is not bound to prove both the will and codicil.

There is another law in the *Digeſt. Lib.* 31. *T.* 1. *De legatis et fidei commiſſis, Lex* 47. *De duobus exemplariis Binæ Tabulæ teſtamenti*

menti eodem tempore exemplarii cauſa ſcriptæ, ejuſdem patriſfamilias proferuntur, in alteris centum, in alteris quinquaginta aurei legati ſunt Titio; utrumque legatum nullo modo debetur, ſed tantummodo quinquaginta aurei.

There is a law in the *Code* more appoſite than any yet mentioned. *Lib.* 6. *T.* 36. *De codicillis Lex* 3. *De codicillis contrariis, Cum proponatis, pupillorum veſtrorum matrem diverſis temporibus ac diſſonis voluntatibus duos codicillos ordinaſſe; in dubium non venit id, quod priori codicillo inſcripſerat, per eum, in quem poſtea ſecreta voluntatis ſuæ contulerat, ſi a prioris tenore diſcrepat, & contrariam voluntatem continet, revocatum eſſe.*

The rule to be collected from the paſſages cited out of the *Code* and *Digeſt* is, that the apparent intention of the teſtator muſt govern in double legacies.

It appears to me from hence, that the true rule which reſults from all theſe paſſages in the *Code* and *Digeſt*, is this, that the apparent intention of the teſtator muſt govern in double legacies; and though moſt of the commentators ſay, the proof is to lie on the other ſide, yet they too put it upon the intention.

This being ſo, conſider, ſecondly, the internal evidence that appears upon theſe two codicils, to ſhew, it was not the intention of the teſtatrix, all theſe legacies ſhould ſtand together.

A codicil is in its nature a part of the will, and an extenſion of the intention of the teſtator.

The frame of the will is conſiderable, for ſhe gives no legacies by that, but ſhews her intention to give all by the codicil; and though a codicil is in its nature part of the will, and an extenſion of the intention of the teſtator, yet it is made ſtronger by this expreſſion of hers, *et ineſſe videtur.*

I have looked into a large number of the commentators upon the civil law, who, though they have thrown a great cloud upon the text, yet ſeem to agree in this, that where it is in the ſame writing, there can be but one legacy demanded; and here ſhe has made no codicil, but under the power reſerved to her by the will.

But what creates a more material obſervation is, that ſhe has here, in many inſtances, given the ſame ſpecific things by both codicils; and the quantities and values of the goods are as to two thirds the ſame, and in theſe variant only in a ſingle circumſtance; for inſtance, 100*l.* worth of *plate, books, or furniture*, in one, and 100*l.* worth of *furniture, china, or plate*, in the other.

Now, can it ever be imagined that ſhe would have done this, if ſhe intended to give two legacies: As to Lord *Vere*, her meaning muſt be to extend his election as to other ſorts of furniture; for in the firſt codicil, it is to Lord *Vere Beauclerk*, 100l. *worth of either pictures, china, or japan*, and in the fourth codicil, to Lord *Vere*

Beauclerk, 1001. *worth of either pictures, china, or japan, or furniture.*

Another reaſon, and ſtill ſtronger, ariſes out of the body of the codicils themſelves, and that is, the legacies to her ſervants, and particularly to her woman *Webb*.

By the firſt codicil, ſhe ſays, *I give to* Webb, *my woman, a legacy of* 500l. *for her diligent, honeſt, faithful ſervice*: By the fourth codicil, ſhe ſays, *I give to my woman* Webb *a legacy of* 600l. *for her diligent, honeſt, faithful ſervice.*

Can it be conceived that ſhe would give theſe two legacies to Mrs. *Webb*, and all for the ſame cauſe?

Where another legacy is given for the ſame cauſe, though in different inſtruments, there ſhall not be a double legacy.

Now, the commentators on the civil law agree, that where another legacy is given for the ſame cauſe, though in different inſtruments, there ſhall not be a double legacy. *Minocchius de præſumptionibus*, in the margin of *Swinburn*, *4to edit.* 201.

As to the legacies of one year's wages to her ſervants, which is an ordinary gift from perſons of rank, it can never be imagined that ſhe intended to give more, and therefore this is a ſtrong corroboration of my opinion as to the point in general.

The gift of the reſidue, which is *totidem verbis* the ſame in the firſt and fourth codicil, makes it manifeſt the teſtatrix intended to ſubſtitute one in the place of the other.

As to the legacy of the reſt and reſidue to Miſs *Caroline Beauclerk*, which is *totidem verbis* the ſame in the firſt and fourth codicil, it is only a repetition, and may ſerve to explain her meaning as to all the other legatees, and makes it manifeſt ſhe intended to ſubſtitute one codicil in the place of another.

Upon the whole, with regard to the legacies of goods, or money, where the ſecond is leſs, it muſt be conſidered only as a repetition, and conſtrued in diminution of the former *pro tanto*; but where it is greater, then as an augmentation, or addition to her bounty.

The greateſt difficulty is, as to a legacy given to Mr. *Wiſe* by the firſt codicil, (ſubſequent to the giving therein legacies of 1000*l.* each, to three of her ſons, as aforeſaid) in theſe words, " I now allow of 20*l.* to Mr. *Wiſe*, out of the 1000*l.* I leave to my three ſons, to be paid quarterly, for his life, or till ſome place, or other proviſion be made for him.

No manner of notice being taken of him in the fourth codicil, he is conſequently to have his 20*l.* a year; but then, what fund muſt it come out of?

The

The two ſons legacies of 1000*l.* each, being now reduced to 300*l.* each; and the third (Lord *Aubery*'s) lapſed by his death in the life-time of the dutcheſs; the ſtrict rule of equity muſt be obſerved; *viz.* As the ſons legacies are diminiſhed in the proportion of three tenths each, let each of them pay only three tenths of the 20*l.* *per ann.* and the other ſeven tenths be paid out of the reſiduum of the perſonal eſtate, which is augmented by the variations.

I ſhall but briefly conſider the caſes which have been cited, againſt the opinion I have given with regard to *the double* legacies.

The firſt authority was *Swinburne*, *part* 7. *c.* 20. *fol. edit.* 550. who ſays, that where a certain quantity is twice bequeathed, it is twice due, if in two diſtinct writings, as in a *will* and *codicil*, and puts it on their being in two diſtinct writings; and it is true, ſome of the authorities are ſo, but here, the codicil being let in as part of the will, it is otherwiſe: And *Swinburne* himſelf, in the *fol. edit.* 554. puts the caſe, that if the teſtator do bequeath to one man 100*l.* and afterwards, in the ſame teſtament, bequeath to the ſame man an 100*l.* the ſecond diſpoſition is underſtood to be but a repetition of the former, and all but one legacy, *&c.* and afterwards, in the ſame paragraph, he ſays, where two equal ſums be left to one perſon, the one quantity in one writing, and another quantity in another, ſuppoſe 100*l.* in the teſtament, and another 100*l.* in the codicil, here the legatary may recover 200*l.* as two ſeveral legacies, except the executor prove the teſtator's meaning to be contrary.

Now, in the preſent caſe, this is plainly proved by the beſt kind of evidence, the words of the will it ſelf.

Menochius, cited in the margin of *Swinburne* 555. ſays, *Si ob eandem cauſam quantitas ſit uni in diverſis ſcripturis relicta, (puta alimentorum cauſa centum relicta ſunt) illa centum tantum ſemel præſtari debent. Menoch. Præſumpt. L.* 4. *Præſ.* 128. *n.* 14.

I cannot ſee the force of that particular *alimentorum cauſa*, for why may not the teſtator double that, as well as any thing elſe.

Another authority cited againſt my opinion, is the caſe of *Maſters* verſus *Maſters*, 1 *P. W.* 421. before Sir *Joſeph Jekyl.*

The firſt reaſon there given, in *page* 423. will not ſupport the determination; as it is plain by all the books of civil law, where two legacies are given under the ſame will, that one of them is void; and the only doubt there, about legacies to the ſame perſon is, where they are given in different inſtruments: And Sir *Joſeph Jekyl* ſeems rather to have gone on the concluding reaſon founded on the addi-

tional eſtate, which was a very material circumſtance, and if it had been proved here, there was any conſiderable variation in the dutcheſs's fortune, it would be very material; but as it is probable he had not time to look into the books of civil law ſo well as I have done now; and as in the caſe put by *Swinburne*, there was nothing of that internal evidence which is here; in the decree I ſhall make, I declare,

" That the legatees here are entitled only to the legacies under the " fourth codicil, and ſhall give theſe directions to the regiſter: A " queſtion ariſing on the conſtruction of the firſt and fourth codicils " to the Dutcheſs of *St. Alban*'s will, whether ſuch perſons to whom " any pecuniary legacies, or any legacies conſiſting in quantity or " value, in plate, books, japan, china, or furniture, or any of them, " given by both the ſaid codicils, are intitled to both the ſaid le- " gacies, or only to one of them; I declare that ſuch perſons are " not entitled to both, but only to the legacy given by the laſt " codicil."

Caſe 351. *Read* verſus *Snell*, *Auguſt* 5, 1743.

LORD CHANCELLOR.

THIS is brought before the court upon the following caſe.

A wife, who in articles before marriage, is by expreſs words barred of every thing ſhe could claim out of her huſband's perſonal eſtate, by *the common law, cuſtom of London, or otherwiſe howſoever*, has no right to *paraphernalia*.

Samuel Read, upon his marriage with the mother of the plaintiff, entered into articles to lay out 11000*l.* in the purchaſe of land, to be ſettled to the uſe of himſelf for life, remainder to his intended wife for life, *in bar and ſatisfaction of her dower and thirds, and all other parts of the real and perſonal eſtate of the ſaid* Samuel Read, *which ſhe might claim by the common law of* England, *the cuſtom of* London, *or otherwiſe howſoever*.

Mr. *Read* was then a freeman of *London*, and having iſſue a daughter, *Mary Read*, the plaintiff, he made his will, and gave his wife *all her jewels, and perſonal ornaments* of every kind, with his houſhold goods and furniture; and after giving a few legacies out of that part of his eſtate which, as a freeman of *London*, he had a power to diſpoſe of, he left the reſidue to his wife.

In 1734, a bill was brought by the preſent plaintiff, for an account of her father's perſonal eſtate, and to have the 11000*l.* laid out purſuant to the articles, and to have her orphanage ſhare placed out for her benefit.

In the decree upon this bill there is a particular direction, *that the mother*, Mrs. Read, *ſhall have her paraphernalia*, and all other juſt allowances.

Mrs. *Read* upon the 2*d.* of *May* 1734, made her will, and after ſome ſmall legacies, gave the reſt in the words following:

" As for the reſidue of my eſtate, real and perſonal, whereof I " ſhall be poſſeſſed, or to which I ſhall be intitled at the time of " my deceaſe, I give and bequeath all, and the whole of it, to my " brother-in-law *William Snell*, and *Matthias King*, my executors " after named, in truſt, the intereſt of it to be paid to the uſe of my " dear daughter *Mary Read*, or to be reſerved in the hands of my " ſaid executors, at their diſcretion; and alſo that the ſaid intereſt, " with the principal, be ſettled *on her, or the heirs of her body* law- " fully to be begotten, as they my executors, or the ſurvivor of " them, ſhall think fit; but in caſe ſhe my ſaid daughter ſhould die, " *leaving* no heirs of her body lawfully begotten, then I give and " bequeath the ſaid reſidue as follows: Whereas my huſband *Samuel* " *Read*, Eſquire, deceaſed, hath left my brother-in-law *William* " *Snell*, a conſiderable contingent legacy already, I give and be- " queath one half of the aforeſaid reſidue to my brother-in-law " *Matthias King*, and *Jane* his wife, and their heirs for ever; and " the other half I give to the two daughters of my ſiſter *Sarah* " *Watſon*, deceaſed, they the ſaid *Matthias*, and *Jane* his wife, " and the two daughters of my ſiſter *Sarah Watſon*, or the ſurvi- " vor of them, paying 1000*l.* out of the ſaid reſidue to charitable " uſes, to be diſtributed at the diſcretion of my executors."

Where executors are made truſtees, they can take nothing for their own benefit, unleſs it be particularly given to them; nor, as they have no ownerſhip, can they alter the intereſt of the *ceſtuy que truſts*.

A direction in a will, that the intereſt, with the principal of the reſidue of a teſtatrix's real and perſonal eſtate, ſhall be ſettled on her daughter, *or* the heirs of her body, as the executors ſhall think fit, will not empower them to give it from the daughter to the grandchildren; for in this caſe, the word *or* muſt be conſtrued *and*, in order to put a reaſonable conſtruction on the will.

After Mrs. *Read*'s death, the plaintiff brought a ſupplemental bill, and bill of revivor againſt the executors and contingent legatees, for an account of the perſonal eſtate of her father and mother; and to have directions as to the management of the reſidue for the benefit of the plaintiff, who was then an infant.

Upon hearing of this cauſe in 1735. Sir *Joſeph Jekyll* decreed the former decree to be carried into execution, and as to the ſurplus directed it ſhould be laid out in *South-Sea* annuities, in truſt for the plaintiff during her life, and after her death then upon truſt for her firſt ſon to be paid him when he ſhould attain his age of twenty-one years, and in caſe he ſhould die before he ſhould attain that age without leaving any iſſue living at the time of his death, then in truſt for the ſecond, and every other ſon in the like manner; and in caſe the plaintiff ſhould leave no ſon or ſons, or all and every ſuch ſon or ſons ſhould die before attaining the age of twenty-one without leaving any iſſue living at the time of their deaths, then upon truſt for the daughters of the plaintiff; if but one, to be paid to her at the age of twenty-one years or day of marriage, and if more than one, then in truſt for all ſuch daughters, to be equally divided among them, and paid to them when they ſhould reſpectively attain their age of twenty-one years, or be married; and in caſe the ſaid plaintiff ſhould have no daughter, or in caſe ſhe ſhould have a daughter or daughters, and

and all and every ſuch daughter and daughters ſhould die before attaining the age of twenty-one years, or being married, then upon truſt for the ſeveral perſons to whom the ſaid ſurplus is limited over by the teſtatrix's will, and the accountant general was to declare the ſaid truſt accordingly.

It is from theſe two decrees that the appeal is brought.

And the complaint againſt the firſt is touching the wife's *paraphernalia* being allowed.

The other is as to the whole directions given for the ſettlement of the reſidue.

The queſtion as to *the firſt* will depends entirely upon the articles by which ſhe was compounded with, and by expreſs words barred of every thing that ſhe could claim out of her huſband's perſonal eſtate by the common law, cuſtom of *London*, or otherwiſe howſoever.

Now her claim to *paraphernalia* muſt be either by the common law, or the cuſtom; and it is a claim out of his perſonal eſtate, for he might in his life-time have diſpoſed of them, and after his death they remained liable to the payment of his debts.

Where the wife has compounded with the huſband, a freeman of *London*, he is to be conſidered in regard to the cuſtom as leaving no wife.

It was determined in *Rawlinſon* verſus *Rawlinſon*, *July* the 8*th* 1714. and has been ſo held ever ſince, that where the wife has compounded with the huſband, he is to be conſidered in regard to the cuſtom as leaving no wife; it follows therefore that ſhe can have no claim by the cuſtom to the *paraphernalia*, and this caſe is ſtronger than the caſe of *Chomley* verſus *Chomley*, 2 *Vern.* 47.

But then it is ſaid that the huſband has given it to her by his will; but that makes no difference, becauſe the cuſtom will interpoſe, and he can only diſpoſe of a moiety of his perſonal eſtate.

Therefore the firſt decree muſt be varied by leaving out the direction, *that in taking the account of the plaintiff's father's perſonal eſtate, the defendant the mother ſhall be allowed her paraphernalia*, and let the reſt be affirmed.

Having ſaid this in regard to the firſt decree, the material part of this appeal relates to the mother's perſonal eſtate.

And there are three queſtions:

Firſt, What power is given to the truſtees by her will.

Secondly, What intereſt is given by it to the daughter and the heirs of her body.

Thirdly,

Thirdly, Whether the deviſe over, in caſe the daughter *dies leaving* no heirs of her body, is good.

The firſt depends upon a very minute conſideration of the penning of that clauſe in the will, I have ſtated at large, which is very defectively penned, and therefore it will be neceſſary for the court to ſupply words in order to make a reaſonable conſtruction.

Here the executors are made truſtees, and therefore from the nature of the thing are to take nothing for their own benefit, unleſs it had been particularly given to them; they have no ownerſhip, and therefore cannot alter the intereſt of the *ceſtui que truſts*.

It is inſiſted that in this caſe, by the expreſs words of the will, they may accumulate the intereſt during the life of the plaintiff.

But my opinion is, her meaning was, only to give them that power during her daughter's minority, and the words *to be paid to the uſe of my ſaid daughter*, ſeem to imply as much.

In the firſt codicil are theſe words, *if my daughter ſhall not live till of age, or be married*, then I give the ſum of 10 *l. per ann.* to *J. S.* during her life.

In the ſecond codicil, ſhe gives her wearing apparel to her ſervant in caſe her daughter die under age or unmarried: now it cannot be conceived that ſhe who was taking ſuch minute care of her daughter's intereſt, as not to give away ſuch a ſmall ſum as 10 *l.* a year, nor even her wearing apparel unleſs ſhe ſhould die under age or unmarried, ſhould intend to put it in the power of two ſtrangers in blood (for ſuch they appear to be to her) to deprive her of the whole intereſt during her life.

But there are other words from whence it is argued that the executors have a diſpoſing power, and theſe are, *that the intereſt and principal be ſettled on her, or the heirs of her body, as they ſhall think fit*.

But I think there is no ground either in law or reaſon to conſtrue theſe words ſo largely.

It was admitted by the defendant's council that the word *or* may be conſtrued *and*; as, ſuppoſe a deviſe of land to *A.* or his heirs, it would be a deviſe in fee, and in *Plowden's Comment.* 288. *b.* many caſes are put where *or* ſhall be conſtrued *and*.

And there is one caſe in this very will, where it muſt be ſo conſtrued, and that is in the ſecond codicil, where ſhe gives her wearing

apparel to her maid, in caſe her daughter dies under age, *or* unmarried.

And can it be imagined that the mother could intend to put it in the power of her executors to give her perſonal eſtate from her daughter (of whom ſhe appears to be ſo fond) to her grandchildren (whom ſhe had never ſeen.)

But then it is aſked what power is given to the truſtees? I anſwer a conſiderable one; they may judge of the fund in which it ſhall be placed, of the manner in which the ſettlement ſhall be made; they may inſert proper clauſes to make the diſpoſition effectual; and that may be a very material power in the preſent caſe: and this is agreeable to the nature and office of truſtees; but the other (which has been contended for) would be to give them an ownerſhip, and not an authority.

But there is an unſurmountable obſtacle to their having this power in the preſent caſe, and that is, Mr. *King* is one of the legatees over; ſuppoſing he ſhould be the ſurviving truſtee, if he had the power contended for, he might direct that the whole ſhould accumulate during Miſs *Read*'s life, and ſo better his own intereſt.

As to the ſecond queſtion, I am of opinion it is a gift to the daughter for life, with a contingent remainder to ſuch heir of her body as ſhall be living at the time of her death.

The words in Mrs. *Read*'s will, *in caſe my daughter ſhould die, leaving no heirs of her body*, is a gift to the daughter for life, with a contingent remainder to ſuch heir of her body as ſhall be living at the time of her death.

There have been many caſes where heirs of the body have been conſtrued words of purchaſe; *Liſle* and *Grey*, and *Papillon* and *Voyce*, in the caſe of a real eſtate. *Peacock* and *Spooner*, *Daffern* verſus *Bolt*, and laſt of all *Hodgeſon* verſus *Buſſey*, *November* 18, 1740. *vide ante page* 89. which was determined by me upon a thorough conſideration of all the other caſes, in a queſtion relating to perſonal eſtate.

The only doubt therefore is, whether there are ſufficient words in the will to indicate this intention: and I think there are; but as it will be neceſſary for me to take notice of them in conſidering the third queſtion, I will reſerve myſelf for it, and therefore what I ſay under that head muſt be conſidered as applicable likewiſe to the preſent.

The third queſtion is, whether the bequeſt over is good; and this is the principal one in the caſe.

The general objection is, that the contingency is more remote than the law will allow. Firſt, becauſe it is after a general dying without iſſue. *Secondly*, Becauſe the original gift is to the daughter and the heirs of her body.

As to the firſt part of this objection, I think this does not amount to a limitation over after a general dying without iſſue, which would certainly be bad, as was determined in the caſe of *Lord George Beauclerk* verſus *Miſs Dormer*, *vide ante page* 308. (which was heard before me *June* 17, 1742. as a cauſe by conſent, but was fully ſpoke to and conſidered) and ſo were all the other caſes from that of *King* and *Melling*.

But here the words are, in caſe ſhe ſhall die *leaving* no heirs of her body: now the word *leaving* is a participle of the preſent tenſe, which relates to the time of her dying.

Leaving is a participle of the preſent tenſe, and relates to the time of the daughter's dying.

In *Forth* verſus *Chapman*, (which is reported in 1 *P. Wms.* but I have choſen to take it from my own note of the caſe, in which I was council) the words were (after giving it to the firſt taker *William Gore*, without the words *for life*) *and if my ſaid nephew ſhall depart this life and leave no iſſue of his body*, then he gives it over. And in that caſe Sir *Joſeph Jekyll* was of opinion that the deviſe over was void; but Lord *Macclesfield* reverſed that decree, which has never been impeached; but many caſes have been determined in conformity to it; as for inſtance, *Sabbarton* verſus *Sabbarton*, *Caſes in Lord Talbot's time* 245. which was determined much upon the ſame foundation? And, if any thing, this caſe is ſtronger, for here it being *leaving*, it ties it up more to the time of dying.

But the ſecond part of the objection has been urged as ſtrengthning this caſe.

In the caſe of *Paine* verſus *Stratton*, where *Paine* had bequeathed a moiety of his perſonal eſtate to his ſiſter *Mary Stratton* for life, and after her deceaſe to the heirs of her body, and the other moiety (upon the deviſe of which the queſtion aroſe) he gave to his ſiſter *Anne Paine* and the heirs of her body lawfully begotten, or to be begotten; and for want of ſuch iſſue or heirs of her body as aforeſaid, he gave the ſame to the children of his ſiſter *Mary Stratton* equally among them, and to their heirs and aſſigns for ever, immediately after the deceaſe of his ſaid ſiſter *Ann Paine*. And Lord *Macclesfield* was of opinion, upon the probate, that the deviſe over was void; but the original will being ſome way or other blunderingly produced, he obſerved that the words *after the deceaſe of my ſiſter Ann Paine* had been interlined, and in part raſed out again, but not in ſuch a manner but they were ſtill legible; and therefore he ſent it to a Maſter to enquire, whether thoſe words were raſed out of the will at the time of the teſtator's death.

The cauſe coming on again upon the Maſter's report before the Lords Commiſſioners, they were of opinion that it had not been put into a right way of examination; and they therefore reſpited giving judgment till the matter could be examined in the proper eccleſiaſtical court,

court, and the parties were at the expence of litigating it in the prerogative court, in order to have theſe words pronounced part of the will; however that court was of opinion, they ought not to be inſerted; upon which the cauſe coming on again before Lord Chancellor *King*, he was of opinion the deviſe over was void: upon which an appeal was brought, and the decree affirmed the 8*th* of *March* 1726.

The uſe I make of this caſe, is, that it was the opinion of Lord *Macclesfield*, and of the Lords Commiſſioners, the deviſe over might be good, though the firſt deviſe was to *Ann* and the heirs of her body; for otherwiſe they would never have put the parties to the expence of trying whether thoſe words *after the deceaſe of my ſiſter Ann Paine*, were eraſed.

Another caſe is, that of the *Attorney General, at the relation of the Goldſmiths Company* verſus *Hall*, where the words were, I give the reſidue to my ſon *Francis Hall* and the heirs of his body, to his and their own uſe; but in caſe my ſon ſhould depart this life leaving no heirs of his body *living* at the time of his deceaſe, then I give ſo much of the ſaid reſidue, *as ſhall not have been diſpoſed of by my ſaid ſon*, to the goldſmiths company. It was held the deviſe over was not good, not becauſe of the firſt gift being to his ſon and the heirs of his body, but becauſe by the other words he had given him *a power of diſpoſition*, which was held to be inconſiſtent with a deviſe over.

And here it is no more than the common diſpoſition of real eſtates, which have been frequently given to one and his heirs, with a deviſe over in caſe he dies *leaving* no iſſue.

It has been objected, the words *for life* are not in this will.

No weight has been laid on the want of the words for life, where the intention of the teſtator has otherwiſe appeared, eſpecially in the caſe of *a truſt executory*, for there this court is bound to ſee a ſettlement made agreeable to the intention of the teſtator.

But though weight has been laid upon thoſe words *for life* when they have been in, yet I do not know that any weight has been laid on the want of them when the intention of the teſtator has otherwiſe appeared: but if weight has been laid upon the want of them where it has been a truſt executed, yet there can be none where it is a truſt *executory*, for where it is a truſt executory, this court is bound to ſee a ſettlement made agreeable to the intention of the teſtator; and ſo it was laid down by Lord *Talbot* in *Lord Glenorchy* and *Boſville*, *Caſes in his Time* 3. and was likewiſe one of the many points determined by me in *Roberts* verſus *Dixwell*, *Vide* 1 *Tr. Atkyns* 607. And this caſe is ſtill ſtronger, becauſe the ſettlement is directed to be made according to their diſcretion; and it is a very proper diſcretion for them to exerciſe; but yet I can by no means go ſo far as the decree at the Rolls has done, for that would not be to conſtrue the teſtatrix's will, but would be uſurping a power of making a new will for her.

The decree has added ſeveral new contingencies; if the daughter *leaves* no heirs of her body at the time of her death; by the will it is to veſt in the remainder-men, but the decree gives it them in caſe none of her children live to attain the age of twenty-one. Therefore as to ſo much of the decree of the 17*th* of *February* 1735. as gives any directions, or in any wiſe relates to the truſt of the ſurplus of the plaintiff's mother's perſonal eſtate ſubſequent to the truſt thereby directed and declared for the plaintiff during her life, it muſt be reverſed, and inſtead thereof, I order and decree that in caſe the plaintiff ſhall leave any heir of her body living at the time of her death, then after the plaintiff's deceaſe the clear ſurplus of ſuch perſonal eſtate ſhall be in truſt for and for the ſole benefit of ſuch heir of the body; but in caſe the plaintiff ſhall happen to die without leaving any heir of her body living at the time of her death, then after the plaintiff's deceaſe the clear ſurplus of ſuch perſonal eſtate ſhall be in truſt as to one moiety thereof for the benefit of the defendant *Matthias King*; and as to the other moiety thereof, for the benefit of the defendants *Maria Watſon* and *Cecilia Watſon*, ſubject to the charges in the teſtatrix's will mentioned: and let the Accountant General declare the truſt thereof accordingly ſubject to the further order of this court.

APPENDIX

Michaelmas Term 10 *Geo.* 2. 1736. *In Banco Regis.*

John Middleton and Ann his Wife verſus *Thomas Crofts.*

JOHN *Middleton* and his wife were articled againſt in the eccleſiaſtical court, for being married out of canonical hours, without licence or banns, and in a private houſe; a prohibition was applied for, upon a ſuggeſtion that the power of the eccleſiaſtical court was taken away by the ſtatute of 7 & 8 *Will.* 3. *cap.* 35. by which penalties were laid on the clergymen marrying, and the parties married without banns or licence, which penalties were to be recovered in the temporal court: In order to bring the matter fully before the court, a rule was made for a prohibition, and that the declaration ſhould be delivered before the firſt day of the enſuing term. The ſubſtance of the pleadings, and arguments of council, are fully ſtated by Lord *Hardwicke* Chief Juſtice, in delivering the opinion of the whole court as follows.

Declaration. In an attachment upon a prohibition, the plaintiffs, the huſband and wife, in their declaration, ſet forth the ſtatute of 7 & 8 *Will.* 3. *cap.* 35, whereby a penalty of 100*l.* is inflicted upon every parſon, vicar, or curate, marrying any perſon without banns or licence, and a penalty of 10*l.* on every man ſo married, to be recovered with coſts of ſuit, by any perſon who ſhall inform or ſue for the ſame: That although the lay people of this realm are not ſubject to, or any way puniſhable by, any canons or conſtitutions eccleſiaſtical; yet nevertheleſs, that the vicar general of the biſhop of *Hereford*, intending unjuſtly to oppreſs the plaintiffs, and to draw the cognizance of a plea which belonged to our ſovereign Lord the king, to another trial in the court chriſtian, had, at the promotion of the defendant, articled againſt the plaintiffs in the following manner, *videlicet*;

That

That by the laws, canons and conſtitutions of this realm, it was required, that all perſons, before they ſhall be given together in holy matrimony, ſhould obtain a faculty, or licence, from the ordinary, or have the banns publiſhed according to the book of common prayer, and be married in the church or chapel, between the hours of eight and twelve in the forenoon; and that all perſons offending in the premiſſes, or any of them, ought to be puniſhed by the ſaid laws, canons, or conſtitutions.

That, in the year 1729, 1730, and 1731, and in the year 1732, and before the commencement of this ſuit, *John Middleton*, and *Ann Ellis*, widow, the now plaintiffs, being inhabitants of the pariſh of *Dove*, in the county and dioceſe of *Hereford*, without any licence firſt obtained from their ordinary, and without banns publiſhed in the ſaid church, or any church or chapel, procured themſelves to be clandeſtinely married to each other by one *Thomas Allen*, a clergyman, or pretended clergyman, of the pariſh of *Michael Church Ecley*, in the ſaid county of *Hereford*, in his own dwelling-houſe there, between the hours of one and eight in the morning, and that by virtue of ſuch marriage, they cohabited with each other as man and wife.

Then the declaration alledges, that the court chriſtian hath no juriſdiction or cognizance of this matter, and that it is a mere temporal offence puniſhable by the ſtatute, that the plaintiffs delivered to the defendant the King's writ of prohibition; but notwithſtanding that, the defendant continues to proſecute the plaintiffs in the ſaid court in contempt of the King, to the damage of the plaintiffs, and contrary to the ſaid writ of prohibition.

Plea and demurrer, and joinder in demurrer.

The defendant by his plea denies (in common form) that he hath proceeded in the ſpiritual court contrary to the writ of prohibition; and for a conſultation demurrs generally, and the plaintiffs join in demurrer.

This cauſe hath been ſeveral times argued, and three queſtions have been made at the bar.

Three queſtions made at the bar.

Firſt, *Whether, by virtue of the canons made in the year* 1603, *lay perſons are puniſhable by eccleſiaſtical cenſures for a clandeſtine marriage, had without banns or licence.*

Secondly, *If lay perſons cannot be proſecuted or puniſhed by force of theſe canons, whether the court had juriſdiction of ſuch a cauſe againſt them by the antient canon law, received and allowed within the realm of* England.

Thirdly,

Thirdly, *Supposing the spiritual court had a jurisdiction on either of those grounds, whether that jurisdiction is taken away by the operation of the statute of* 7 & 8 *Will.* 3. *cap.* 35. *sect.* 4. *which inflicts a penalty of* 10l. *for this offence to be recovered in the King's court.*

The first of these questions ought regularly to be divided into two.

First Question. *First*, Whether these canons made in 1603, which relate to clandestine marriages, do, in the words and provisions thereof, extend to the parties contracting matrimony, or affect the laity in such a case as is now before the court?

Secondly, If lay persons are within the words of these canons, whether the authority, by which these canons were made, can bind the laity as to this matter?

1603. Canons which relate to clandestine marriages. As to the first of these two questions, there are five canons comprized in the body of the canons in 1603, that relate to clandestine marriages, *videlicet*, Canon the 62*d* 101*st* 102*d* 103*d* and 104*th*. That no minister, upon pain of suspension *per Triennium ipso facto*, shall celebrate matrimony between any persons without banns or licence, nor at any time but between the hours of eight and twelve in the forenoon, nor in any private place, other than in the church or chapel where one of them dwells, nor, being under twenty-one, without the consent of parents. Canon 101*st* 102*d* and 103*d* relate only to the persons by whom, and the manner in which licences are to be granted, and the security and oaths to be taken on granting such licences: Canon 104*th* contains an exception of persons in the state of widowhood, out of some of the preceding regulations; and provides, that any ordinary or officer offending in the premisses, shall be suspended for six months; and that every licence granted contrary to the directions before mentioned should be void, as if there had never been any granted; and the parties marrying by virtue thereof, shall be subject to the punishment appointed for clandestine marriages.

It seems to be plain from hence, that none of these canons do in the words or terms of them affect the parties contracting, except the last clause of the 104*th* canon, which relates to persons married by colour of void licences, granted without the circumstances before prescribed; but that is not the present case, for the libel does not alledge any void or irregular licence to have been obtained, and that the marriage was thereupon had, but contains a positive charge of a clandestine marriage, without banns published, or any licence at all, which is a different fact, and not within this provision. For this reason, it does not appear to us that the provisions of the

canons of 1603, do extend to the laity in ſuch a caſe as is now before the court.

But, ſuppoſing lay perſons might be within the words of the canons in 1603, the next conſideration is, whether the authority, by which thoſe canons were made, can bind the laity as to this matter. The authority whereby they were made is well known to have been by the biſhops and clergy, in convocation convened by the King's writ, allowed to treat of, and make canons by the royal licence, and afterwards confirmed by the King under the great ſeal; but the defect objected to them is, that they never were confirmed by parliament, and for this reaſon, though they bind the clergy of this realm, yet they cannot bind the laity.

This is a queſtion of very extenſive learning, and great conſequence, upon which there is ſome appearance of variety in the law books, notwithſtanding which, I always underſtood, till it was diſputed in this cauſe, that the law in latter times has been univerſally taken to be, that the canons of 1603 did not bind the laity for want of a parliamentary confirmation.

And upon this ground, I preſume, it was that my brother *Wright*, (that argued laſt for the defendant in this cauſe, who is plaintiff in the eccleſiaſtical court) expreſly admitted, that theſe canons did not *proprio vigore* bind the laity, and inſiſted only on the ſecond point, that the antient uſage of the church of *England*, and the antient canons received by and allowed in this nation do bind them.

But as the contrary doctrine was inſiſted on by the other council, who argued on the ſame ſide, and had a right to urge every thing which they thought material for their client, it is become neceſſary to examine and determine a point of ſo great conſequence to the conſtitution of *England*, in order to ſettle the law thereupon.

The court of opinion the canons of 1603, not having been confirmed by parliament, do not *proprio vigore* bind the laity.

And, upon the beſt conſideration we have been able to give it, we are all of opinion, that the canons of 1603, not having been confirmed by parliament, do not *proprio vigore* bind the laity; I ſay *proprio vigore*, by their own force and authority; for there are many proviſions contained in theſe canons, which are declaratory of the antient uſage and law of the church of *England*, received and allowed here, which, in that reſpect, and by virtue of ſuch antient allowance, will bind the laity; but that is an obligation antecedent to, and not ariſing from this body of canons.

The reaſons upon which they found their opinion.

In treating of this queſtion, it might ſerve for illuſtration and ornament, to look back into the hiſtory of the antient councils of this iſland in the *Britiſh* and *Saxon* ages; but any one who will be

at the trouble of looking through Sir *Henry Spelman*'s laborious collection on this ſubject, will find that it would furniſh very little materials towards fixing the point of law as to the obligations of canons, becauſe thoſe councils were frequently mixed aſſemblies, compoſed partly of clergy, partly of laymen, and ſometimes of the King, with his nobility, and at other times ſome of the commons are mentioned to be preſent; but whether they had ſuffrages in thoſe councils or not, and in what manner they were ſent thither, whether by election, or by what other kind of conſtitution, is very uncertain and obſcure.

The like may be ſaid of ſeveral councils held in the earlieſt times, following the coming in of the *Norman* line; and afterwards there is frequently a mixture of the legantine authority, which aroſe merely by papal uſurpation.

Upon this important queſtion, therefore, it is ſafeſt for judges to proceed upon ſure foundations, which are, the general nature and fundamental principles of this conſtitution, acts of parliament, and the reſolutions, and judicial opinions in our books, and from theſe to draw our concluſions.

No new laws can be made to bind the whole people, but by the King, with the advice and conſent of both houſes, of parliament, and by their united authority.

To argue firſt from the general nature and fundamental principles of this conſtitution, nothing is ſo undoubtedly ſuch, as that no new laws can be made to bind the whole people of this land, but by the King, with the advice and conſent of both houſes of parliament, and by their united authority; neither the king alone, nor the King with the concurrence of any particular number, or order of men, have this high power. To cite authorities for this would be to prove that it is now day, and therefore I will only refer to the parliament roll 2 *H.* 5. *Pars* 2. *No.* 10. and the caſe of proclamations, 12 *Rep.* 74.

Every man may be ſaid to be party to, and the conſent of every ſubject is included in an act of parliament; but in canons made in convocation, and confirmed by the crown only, all theſe are wanting, except the royal aſſent.

The binding force of theſe acts of parliament, ariſes from that prerogative which is in the King, as our ſovereign Leige Lord, from that perſonal right which is inherent in the peers and lords of parliament, to bind themſelves, and their heirs and ſucceſſors, in their honours and dignities, and from the deligated power veſted in the commons, as the repreſentatives of the people, and therefore Lord *Coke* ſays, 4 *Inſt.* 1. theſe repreſent the whole commons of the realm, and are truſted for them by reaſon of this repreſentation, every man is ſaid to be party to, and the conſent of every ſubject is included in an act of parliament; but in canons made in convocation, and confirmed by the crown only, all theſe are wanting except the royal aſſent; here is no intervention of the peers of the realm, nor any repreſentation of the commons.

Indeed, Dr. *Andrews* endeavoured to avoid the force of this objection, by obſerving that the obligation of an act of parliament did

not ariſe from the actual repreſentation of all the people of the land, but from an implied repreſentation conſtituted by the law, for that, in fact, many ranks of men amongſt the commons, had no votes in the election of members in that houſe, and the miniſter of every pariſh in *England* has the care, and is the repreſentative of his particular pariſh in matters ſpiritual, and votes in election of proctors for the clergy.

The fact is undoubtedly true, that many amongſt the commons have no votes, as perſons having no freeholds, freeholders in the antient demeſne, women, *&c.* but that does not make it ceaſe to be an actual repreſentation of the people: No body ever imagined, that in exerciſing a right of this kind, every individual perſon could poſſibly join, but ſome rule of qualification muſt be laid down, and that hath been taken from the moſt worthy, and ſuch as have the moſt valuable and fixed ſort of property, which alſo, to avoid confuſion, hath been reſtrained by later acts of parliament.

But it is quite a new notion, unheard of in the law books, or in any writer upon our conſtitution, that the rector or vicar of a pariſh is the repreſentative of his pariſh, in voting for convocation men: Who choſe this repreſentative of theirs? Not the pariſh themſelves, but the biſhop of the dioceſe, or ſome lay patron. Could this biſhop of the dioceſe, or the lay patron, deligate a power for the pariſhioners to bind them in any act of legiſlation? Surely it never entred into any body's head, that they could do it: But, not to dwell upon this novelty, it is contrary to the very writ conſtantly iſſued to the metropolitan to ſummon his convocation, the words of which are *Convocari facias totum clericum cujuslibet diœceſis veſtræ provinciæ.* It is contrary alſo to the premunitory clauſe in the writ of ſummons to every biſhop, which directs in a more particular manner, who of the clergy ſhall come in perſon, and who by their repreſentations in this form, *Quod decanus et archidiaconus in propriis perſonis ad dictum capitulum per unum Idemque clericus per duos procuratores idoneos plenam et ſufficientem poteſtatem ab ipſis capitulo et clerico diviſim habentes prædictis die et anno perſonaliter interſint ad conſentiendum, &c.*

The words and common ſenſe of theſe writs import, that only the clergy are called; that the proctors of the clergy are merely repreſentatives of the clergy, and have their powers from, and for them, without ſo much as an implication on any thing further: Agreeable to this, Lord *Coke*, 4 *Inſt.* 322. ſays, *in domo convocationis*, the whole clergy of the province are either preſent in perſon, or by repreſentation.

In the convocation, the whole clergy of the province are either preſent in perſon, or by repreſentation.

From hence ariſes the ſubſtantial diſtinction between the antient canons, made in general councils of the church, and confirmed by

by the *Roman* emperors after they embraced the chriſtian faith, and the canons made either in a national, or provincial ſynod of the church of *England*, and confirmed by the crown; as to the extent of their obligation, there is no doubt but the former bound all the ſubjects of their empire, as well laity as clergy, ſo far as they were lawful in reſpect to the ſubject matter; but the difference lies in the root from whence the obligation ſprings.

The binding force of antient canons over laymen, was derived from the ſupreme legiſlative power being veſted in the perſon of the emperors.

The binding force of theſe antient canons over laymen, was not derived from any particular prerogative or ſupremacy of the emperors, as head of the church, but from the ſupreme legiſlative power being veſted in his perſon, for after the *Lex Regia*, whereby it is ſaid to be ordained, " *Quod principi placuit legis habet vigorem, (Juſtinian. Inſt. lib.* 1. *tit.* 2. *ſect.* 16. *Digeſt, lib.* 1. *tit.* 4. *de conſtitutionibus principum)* the whole power of making laws, however originally gained by uſurpation, was devolved upon the emperor; and by conſequence, when a canon was made by the council, and confirmed by the emperor, it had the concurrence of every thing neceſſary to make it a compleat law.

In *England* it is otherwiſe, where the King has but part of the legiſlative power.

But the caſe is far otherwiſe in *England*, where the King has but part of the legiſlative power, and therefore the argument made uſe of in the caſe of *Matthews* and *Burdet*, 2 *Salk.* 673. though it be only the reaſoning of council, is of great weight, and ſuch as I have heard no ſatisfactory anſwer given to.

The anſwers which have been offered are two: *Firſt*, That the reaſon of the emperors confirmation of any canon, was only to give it a civil ſanction; but though this was ſaid, it was not proved; and I do not find any temporal penalties annexed to the antient canons of the church.

The other anſwer was, this argument ſhews, wherever the law has fixed a power, *that* includes the conſent of the people; and therefore, in *England*, the conſent of the people is included in the royal confirmation; but this hath not the ſhadow of an anſwer, becauſe it begs the main queſtion, which is, whether the law of *England* has depoſited in the crown the ſole power of confirming canons to bind the laity, without the advice and conſent of parliament.

Another argument, of like kind with the former, is, that by the *Engliſh* conſtitution, the power of binding by new laws, and that of charging with taxes, are concomitant and co-extenſive, and thoſe who have authority to do the one, can do the other: Thus the parliament makes laws obligatory upon the whole nation, and they impoſe taxes to be levied upon all the people: But the clergy in convocation never pretend to have pow er of granting tenths

or fifteenths, or other taxes to charge any perſons but themſelves; and by analogy from hence, can make no canons or ordinances but only to bind themſelves, *i. e.* the body there aſſembled, or repreſented.

To purſue this argument a little further, and to infer the conſequences which naturally reſult from it, it ſeems almoſt an abſurdity to ſay that the clergy in convocation cannot charge the laity with one farthing by way of tax or impoſition, cannot even create a new fee to be paid to them, and yet may erect new laws to bind them *in re eccleſiaſtica*, for diſobeying which they ſhall incur the penalty of excommunication, which is to be carried into execution by a loſs of their liberty, and a diſability to ſue for and diſpoſe of their perſonal eſtate: this would certainly be to affect the laity in their property in a high degree; and yet it is admitted that the clergy by their ſynodical acts cannot charge the property of the laity.

And again, the rule of any conſtitution in a particular caſe cannot be better found out, than by obſerving what has been the conſtant uniform uſage and practice in ſuch caſe. Now the conſtant uniform practice ever ſince the reformation, (for there is no occaſion to go further back) has been, that when any material ordinances or regulations have been made to bind the laity as well as clergy, in matters merely eccleſiaſtical, they have been either enacted or confirmed by parliament; of this propoſition the ſeveral acts of uniformity are ſo many proofs, for by thoſe the whole doctrine and worſhip, the very rights and ceremonies of the church, and the literal form of publick prayers are preſcribed and eſtabliſhed; and it is plain from the ſeveral preambles of theſe acts, that though the matters were firſt conſidered and approved in convocation, yet the convocation was only looked upon as an aſſembly of learned men, able and proper to prepare and propound them, but not to enact and give them their force.

Ever ſince the reformation, the rule has been, that when any ordinances have been made to bind the laity, as well as clergy, in matters merely eccleſiaſtical, they have been either enacted or confirmed by parliament.

To this way of arguing it hath been objected, that the reaſon of eſtabliſhing proviſions of this kind by acts of parliament, was for the ſake of inforcing them by civil ſanctions and temporal penalties, which could not otherwiſe be obtained, and undoubtedly this was one reaſon for it; but I cannot be perſuaded that it was the only reaſon, ſince if it had been the prevailing opinion of thoſe times, that the clergy in convocation could make new canons to bind the laity, it is moſt unaccountable that they ſhould not think it proper to truſt any regulation of the moſt minute conſequence to the proper force of a canon or ſynodical decree, which if lawfully made might be carried into execution by excommunication, and the conſequences attending upon it were a ſanction fully ſufficient to enforce it.

Upon one of the arguments of this cauſe at the bar, it was, though not in words aſſerted, yet endeavoured to be proved, that the legiſlative power of the clergy in convocation is co-extenſive with the judicial

power of the ſpiritual courts, and that therefore, as the ſpiritual courts had an allowed juriſdiction over the laity, as well as the clergy in matrimonial cauſes, ſo the convocation had power to make canons to bind the laity relating to marriages. This has been expreſſed in other words, that their canons are binding on clergy and laity without diſtinction *in re eccleſiaſtica*, that is in eccleſiaſtical matters, or what according to the law of the land hath been reckoned of a ſpiritual nature.

Lord *Hardwicke* ſaid, the attempt of counſel to make the power of the convocation in ordaining canons co-extenſive with the judicial authority of their courts is full of ſo much miſchief, that it cannot be contended for with any ſhadow of reaſon or of law.

But in this argument, a great deal too much is aſſumed; for the ſpiritual court has undoubtedly juriſdiction for matrimony, and teſtaments, commiſſion of adminiſtration of perſonal eſtates, tithes, and certain crimes, which are all deemed in law in ſome degree of a ſpiritual or eccleſiaſtical nature; and yet if this argument was true, it would equally follow, that they might make canons to limit the degrees of conſanguinity, within which marriage may be contracted, to fix ſolemnities of making teſtaments concerning perſonal eſtates, to regulate the rights of adminiſtrations, and of tithes, and to aſcertain the circumſtances and evidences of thoſe crimes, eſpecially in things not already fixed by particular ſtatutes; what conſequence would this have? Every body ſees how it would enable them without conſent of parliament, to change the law relating to the heirſhip and deſcents of lands, and likewiſe relating to perſonal eſtates which are now become of prodigious value, and relating to the payment of tithes which much concerns temporal intereſts and property, and alſo as to ſeveral crimes whereby the perſonal liberty of the ſubject may be conſequentially affected upon their ſignificavits. This attempt therefore to make the power of the convocation in ordaining canons, co-extenſive with the judicial authority of their courts, is full of ſuch ſtrange conſequences, and ſo much miſchief, that it cannot be contended for, with any ſhadow of reaſon, or of law.

In truth ever ſince the reformation, and for ſometime before, when any alteration hath been made in the law upon any of thoſe points, it hath been done by act of parliament, witneſs 32 *H.* 8. *ch.* 38. about the degrees of marriage, 21 *H.* 8. *ch.* 5. and 22 & 23 *Car.* 2. *ch.* 10. relating to adminiſtration and the diſtribution of inteſtates eſtates, and ſeveral others which might be enumerated.

If this doctrine had been law at the time of making the ſtatute of *Merton*, 20 *H.* 3. the biſhops would have had no occaſion to apply to parliament to change the law of *England*, by legitimating iſſue born before marriage, as they had the juriſdiction to try general baſtardy, or whether a child was baſtard or mulier, as is expreſſed in 2 *Rol. Abr.* 586. *pl.* 25. they might have done it themſelves; and though the Lords with one voice gave that memorable anſwer, *Nolumus leges Angliæ mutari*, the clergy in convocation might have done it by a new canon.

There was but one caſe produced to give colour to this argument, and that was 1 *Rol. Ab.* tit. *Executor* 909. *Letter I. pl.* 5. the words " It is ordained by a canon in 1 *Jac.* 1. *cha.* 93. that *bona notabilia* " ſhall be accounted 5 *l.* at leaſt, and no perſon ſhall be ſaid to " have left *Bona notabilia*, if he have not goods in diverſe dioceſes " to the value of 5 *l.*" and it ſeems, (*ſemble* is the word) that this canon hath changed the law, if it was otherwiſe before; in as much as the granting of adminiſtration appertains to the eccleſiaſtical law, and our law only takes notice of their law in this matter, and therefore they may alter it at their pleaſure, *Hil.* 7. *Jac. B. Needham's* caſe, by the doctors and the court 5 *l.* in every dioceſe ſhall be *bona notabilia*.

The caſe in 1 *Ro. Ab.* tit. *Executor* 909. relating to *bona notabilia*, is of little authority; and *Rolls* himſelf expreſſes his doubt in the place cited; and nothing to the ſame effect is in the report of the ſame caſe, 8 *Co.* 135.

This caſe ſounds ſtrong, but the authority of it amounts to little; for though *Perkins*, *ſect.* 489. *p.* 94. of the old edition ſays, that 40 *s.* in every dioceſe would make *bona notabilia*, yet there were authorities before this canon, that to make *bona notabilia* the value muſt be 5 *l.* and therefore it does not appear that any alteration was attempted to be made in the law; and *Rolls* himſelf expreſſes his doubt in the place cited; beſides, if that did appear, it was a matter which did not concern the laity, but was merely a regulation among themſelves, making a diſtribution of the fees of adminiſtration between the metropolitan and his dioceſan biſhops, and their officers.

I take this caſe to be the ſame with Sir *John Needham's* caſe, 8 *Rep.* 135. in which it is material to obſerve, that Lord *Coke* hath reported nothing to this effect: But let the credit of the paſſage be what it will, this is a point of too great moment to be determined by a ſingle looſe ſaying in an abridgment, contrary to the general reaſon and principles of law.

2dly, I come now to the ſecond head of argument propoſed upon this queſtion, which was ſtatute law; and as I do not find any poſitive declaration of the law, has ever been made by any act of parliament upon this particular point, ſo all that can be expected from hence are implications and inferences, from whence the ſenſe of the legiſlature may reaſonably be collected.

The ſeveral acts of uniformity and other ſtatutes which were mentioned and referred to, when I conſidered the uſage and practice of this kingdom ſince the reformation, furniſh proofs of this nature very material to ſhew that the parliament have from that period at leaſt been of opinion, that the proper power of making conſtitutions in eccleſiaſtical matters to bind the whole nation was in them.

The acts of uniformity &c. *ſince the reformation*, ſhew that the parliament have from that period been of opinion, that the power of making conſtitutions in eccleſiaſtical matters to bind the whole nation was in them.

The

The only act made *ex profeſſo* upon the ſubject of the canons, is, that of the 25 *Hen.* 8. *c.* 19. intitled the ſubmiſſion of the clergy, and reſtraint of appeals, whereby power was given to that King, *H.* 8. to appoint thirty two perſons to review and reform the eccleſiaſtical laws, which power was continued by the ſeveral ſubſequent ſtatutes of 27 *H.* 8. *ch.* 15. 35 *H.* 8. *ch.* 16. and 3 & 4 *E.* 6. *ch.* 11. but was never compleatly carried into execution; theſe acts of continuance are not printed in the latter editions of the ſtatute book, but are all in *Raſtall's ſtatutes at large.*

But even this ſtatute is in the words of it ſilent as to the perſons, over whom the obligation of canons may extend.

It begins with an humble acknowledgment of the clergy, according to the truth, " That the convocation is, always hath been, and " ought to be aſſembled only by the King's writ; then they pro- " miſe *in verbo ſacerdotj*; that they will never from henceforth pre- " ſume to attempt, alledge or claim, or put in ure, enact, pro- " mulge or execute any new canons, conſtitutions, ordinances, pro- " vincial or other, unleſs the King's royal aſſent and licence may be " had, to make, promulge or execute the ſame, and that his Ma- " jeſty do give his royal aſſent and authority in that behalf.

Upon theſe recitals it enacts, " That the clergy, nor any of them " from thenceforth, ſhall preſume to attempt to alledge, claim or " put in ure, any conſtitutions or ordinances provincial or ſynodal, " or any other canons, nor ſhall enact, promulge or execute any " ſuch canons, conſtitutions or ordinances provincial, by whatſoever " name or names they may be called in their convocation in any " time to come, (which always ſhall be aſſembled by authority of " the King's writ) unleſs the ſame clergy may have the King's moſt " royal aſſent and licence to make, promulge and execute ſuch con- " ſtitutions provincial or ſynodal; upon pain of ſuffering impriſon- " ment, and making fine at the King's will.

It enacts further, " That the King's Highneſs ſhall have power " and authority to nominate and aſſign at his pleaſure 32 perſons of " his ſubjects, half whereof, 16, to be of the clergy, and half of " the temporalty, of the upper and nether houſe of Parliament, " who ſhall have authority and power to view, ſearch and examine " the ſaid canons, conſtitutions and ordinances, provincial or ſyno- " dal, heretofore made; and ſuch of them as the ſaid 32 perſons, " or the more part of them, ſhall deem and adjudge worthy to be " continued, kept and obeyed, ſhall be from henceforth kept, " obeyed and accepted within this realm, ſo that the King's royal " aſſent be firſt had to the ſame; and the reſidue of them which the " King's Highneſs and the ſaid 32 perſons, or the more part of " them, ſhall not approve, or ſhall deem worthy to be abolite,

" abrogate and made fruſtrate, ſhall from thenceforth be void and of " none effect, and never be put in execution within this realm."

" Provided that ſuch canons, and conſtitutions and ordinances " provincial or ſynodal, being already made, which be not contra- " riant nor repugnant to the laws, ſtatutes and cuſtoms of this " realm, nor to the damage or hurt of the King's prerogative royal, " ſhall now ſtill be uſed and executed as they were before the ma- " king of this act, till ſuch time as they be viewed, ſearched, or " otherwiſe ordered and determined by the ſaid 32 perſons, or the " more part of them, according to the tenor, form and effect of " this preſent act."

In this ſtatute and the ſeveral acts of continuance nothing occurs, as was obſerved before, touching the perſons over whom the obligation of canons may extend; but notwithſtanding that, two obſervations ariſe upon them material to the preſent conſideration.

Firſt, That both the King and the clergy thought it neceſſary, or at leaſt very expedient, to take along with them the concurrence and authority of parliament, for abrogating part of the antient canons, and for confirming and eſtabliſhing ſuch part as was to remain in force: if the opinion had then prevailed, that the convocation, with the conſent of the crown, could have ordained canons to bind the whole realm, laity, as well as clergy, the King with the convocation, (who had juſt then given the ſtrongeſt evidence of their ſubmiſſion to his will) might have found many and eaſy ways of doing it without reſort to parliament; but the wiſdom of thoſe times choſe to rely upon this other method.

Clear from 25 *H.* 8. *c.* 19. that both the King and the clergy thought it neceſſary to have the authority of parliament for abrogating part of the antient canons, and eſtabliſhing ſuch part as was to remain in force.

Secondly, If the deſign of reviewing and reforming the antient canon law, by commiſſioners authorized by thoſe acts of parliament, had been effectually carried into execution, every body muſt have admitted, that the ſyſtem of eccleſiaſtical laws which they had approved, would have derived its binding force over the whole realm from the legiſlature; for nothing is more certain in law than this, that when any act is done under a power, that act is deemed to be done by the grantor of the power, and to have its validity from him, and not from the perſon that executes it. This muſt be obvious to that King who paſſed the firſt of thoſe acts of parliament, who was as jealous of his prerogative, as any Prince who ever ſat upon the *Engliſh* throne.

Nothing is more certain in law than this, that when any act is done under a power, that act is deemed to be done by the grantor of the power, and to have its validity from him, and not from the perſon who executes it.

I proceed now to conſider the reſolutions and judicial opinions in our books upon this great queſtion.

In the prior of *Leed*'s caſe, 20 *H.* 6. 12. it was laid down, that the ordinary by his convocation had power to make conſtitutions provincial, by which (*ceux de Sainte Egliſe*) ſhall be bound, but they cannot do any thing which ſhall bind *the temporalty.*

The firſt caſe which has been cited on this ſubject is, that of the Prior of *Leeds*, 20 *H.* 6. 12. abridged by *Brooke*, tit. *Ordinary* 1. The clergy of the province of *Canterbury* had given a tenth to the King, and in the act of convocation, whereby it was granted, had inſerted a proviſo, that no perſon ſhould be diſcharged from being a collector of this tenth by force of any privilege or exemption; the archbiſhop appointed the prior of *Leeds* to be collector thereof, and to pay it into the Exchequer. The prior came into the Exchequer, and ſhewed forth letters patent of exemption, whereby the King had diſcharged him from the collection of any tenths and fifteenths, and prayed they might be allowed; upon ſome doubts among the barons, the cauſe was adjourned into the Exchequer-chamber, before the Lord Chancellor and all the Judges, and doth not appear to have been determined; but the argument both at the bar and on the bench turns upon this point, whether the proviſo in the act of convocation, (to which the prior himſelf was to be conſidered as a party) did not amount to an eſtoppel or a waiver of this privilege for that time, and whether he ſhould not have inſiſted on his exemption in convocation, and have got it excepted out of the proviſo.

Upon this occaſion *Hodges*, who was then Chief Juſtice of the King's Bench, ſaid, in reſpect to what had been inſiſted that the prior ſhould have had an allowance of his letters patent in the convocation, it is nothing to the purpoſe, for they have power of things merely ſpiritual; upon this *Newton*, then a judge of the court of Common Pleas, ſaid, the ordinary by his convocation had a power to make faſting-days and holy-days, but not to allow or diſallow the King's patent; and that they have power to make conſtitutions provincial, by which (*ceux de Sainte Egliſe*) ſhall be bound; yet they cannot do any thing which ſhall bind the temporalty, and this opinion was not denied.

Said in the caſe of the Abbot of *Waltham, M.* 24 *E.* 4. 44. *b.* that the convocation has not power to bind *any temporal matter*, but only that which is ſpiritual, as to ordain faſting-days and holy days, and they are only *ſpiritual judges.*

The next caſe in order of time is that of the Abbot of *Waltham*, *M.* 24 *E.* 4. 44. *b.* in which the very ſame point came again in queſtion, before all the judges in the Exchequer-chamber upon the like letters patent of exemption granted to that abby, no judgment was ever given upon the principal point, for the cauſe was determined upon a fault in the pleading; but in the arguments both of the counſel and of the judges much is ſaid of the power of the convocation; *Cateſby* who, as I take it, was King's Serjeant (though he was made a judge of the court of Common Pleas the ſame term) argues, that the Abbot ought not then to have advantage of this exemption, becauſe he was a party to the grant, and concluded by the proviſo; for ſaid he, among the clergy the convocation is as ſtrong as the parliament is among perſons temporal; and by an act of parliament every one to whom the act extends ſhall be bound; for that every one is privy and party to the act of parliament, for the commons have one or two for every county choſen by, and to bind all the county; he goes on, the

reaſon is the ſame as to the convocation; for every abbot, prior and beneficial clerk, is privy and party to the convocation, and therefore it is reaſon that he ſhould be eſtopped by acts done in convocation; *Pigott*, who was on the ſame ſide, adds, they may bind themſelves by an act of convocation, as well as we can bind ourſelves by an act of parliament; and therefore it is reaſonable that he ſhould be eſtopped. To this it was anſwered by *Vavaſor*, that the abbot ought not to be eſtopped, for the convocation had not power to bind any temporal matter, but only that which is ſpiritual; *videlicet*, to ordain faſting-days and holy-days, and they are only ſpiritual judges; and therefore to ſay that he ought to have ſhewn his chart of exemption in convocation, is againſt reaſon, for the King's letters patent are meerly temporal matter.

Upon theſe two caſes ſome obſervations have been made on the part of the defendant; to the firſt of theſe caſes it was ſaid by Doctor *Andrew*, that *Brooke* had miſrepreſented it in his abridgment, by making *Newton* ſay, that the convocation could not do any thing *que liera le temporaltie* in the maſculine gender, for that the words in the original year-book were *la temporaltie*; that *le temporaltie* means ſometimes temporal perſons, but *la temporaltie* in the feminine always temporal matters or things, and therefore what *Newton* ſaid relates only to temporal rights, and imports that the convocation cannot bind thoſe; but it happens that in framing this objection, only the laſt edition of the year-book had been conſulted, which is falſe printed in this place; for I have looked into the old edition, and it is there *le temporaltie* in the maſculine gender, as *Brooke*, who probably tranſcribed it from the original edition has quoted it, and therefore this criticiſm falls to the ground.

The words *la temporaltie* in this caſe ought to have no ſtreſs laid upon them, for though they are in the laſt edition of the year book, it is falſe printed, for in the old edition it is *le temporaltie*.

It was ſaid further, the point in that caſe was not, whether the convocation could bind temporal or lay perſons, but temporal matters or rights, for that the prior of *Leeds* was undoubtedly a ſpiritual perſon, and in that capacity liable to be bound; but the queſtion was, whether they could conclude him from claiming the benefit of the King's letters patent of exemption which was a temporal right: this is true, but affords no anſwer to the inference from *Newton*'s opinion; for it is plain he gives his opinion at large, upon the power of the convocation to bind temporal perſons as well as things; and conſiders the King as being affected by that, from claiming the power of allowing or diſallowing his letters patent, and that he means temporal perſons by the words *le temporaltie* is moſt plain by the oppoſition of it to, *ceux de Sainte Egliſe*, which words ſignify thoſe of holy church, *i. e.* the perſons not the matters or rights of holy church; ſo *Brooke* conſtrued thoſe old *French* words, *ceux de Sainte Egliſe*, for in his abridgment of the caſe, he uſes *le clergy* as a ſynonymous term for them.

That *Newton*, in the opinion he gave on the power of the convocation, means temporal perſons, as well as things, is plain by the oppoſition of it to *Ceux de Sainte Egliſe*, which words ſignify the perſons not the matters or rights of holy church.

The

When the caſe of the Abbot of *Waltham* came before all the Judges in the Exchequer-chamber, *Vavaſor* ſaid the power of the convocation doth not extend over the temporal rights of the clergy themſelves, and the Abbot's claim of exemption from collecting tenths, being a temporal right, he, though a clerk, was not bound.

The like objection hath been made on the caſe of the Abbot of *Waltham*, that what is there ſaid related only to the convocation's power of binding temporal matters or rights, and not temporal perſons in *re eccleſiaſtica*, becauſe the Abbot was a ſpiritual perſon; but this is no anſwer to what is there laid down, becauſe it is clear to any one who will attentively conſider it, that it is taken for granted throughout the caſe, that they could only bind the clergy. *Cateſby*, whoſe point was to carry the ſtrength of the convocation's act as far as poſſible, ſets out with it that amongſt the clergy, *entre le clerks*, the convocation is as ſtrong as the parliament amongſt perſons temporal; and then he expreſſly draws a compariſon between the repreſentation in parliament, and the repreſentation in convocation, and makes the very reaſon of the clergy's being bound, to be, that they are all perſonally preſent or repreſented in convocation; and upon this ground *Pigott* ſays, they may bind themſelves. What *Vavaſor* ſays afterwards is plainly not intended generally, but by way of exception out of this indefinite propoſition, that the clergy in convocation may bind themſelves; for he ſays notwithſtanding this, the Abbot ought not to be eſtopped, for the convocation had not power to bind any temporal matter, but only that which is ſpiritual; the meaning is, though the convocation hath power to bind the clergy, yet the power doth not extend over the temporal rights even of the clergy themſelves, but to matters ſpiritual; but this claim of exemption is a temporal right of the Abbot's, and therefore he, though a clerk, is not bound *quoad hoc*. The nature of the queſtion, and the courſe of the reaſoning in this caſe, ſeems to me to require this way of underſtanding it; and if ſo, the point I am now inſiſting on, will appear to be there allowed on both ſides.

The exception at the end of the convocation caſe, 12 *Rep* 72. is miſprinted, and no weight is to be laid upon it.

The next caſe is called the *convocation caſe*, 12 *Rep.* 72. in which the like opinion is laid down, founded on theſe two year-book caſes that are there cited; there is indeed an exception at the end of the caſe relating to ſpiritual cauſes, or which concern ſpiritual perſons, but that ſentence is certainly miſprinted, for it is neither grammar nor ſenſe, and therefore no weight is to be laid upon it, neither will I attempt to explain it's meaning.

Canons that have been allowed by general conſent within this realm, and not repugnant to the laws thereof, are ſtill in force as the King's eccleſiaſtical laws.

In *Cawdrie*'s caſe, 5 *Rep.* 32. *b.* my Lord *Coke* ſays, "If it be demanded what canons, conſtitutions, ordinances and ſynodals provincial, are ſtill in force within this realm", I anſwer, that it is reſolved and enacted by authority of parliament, that ſuch as have been allowed by general conſent and cuſtom within this realm, and are not contrariant or repugnant to the laws, ſtatutes and cuſtoms thereof, nor to the damage or hurt of the King's prerogative royal, are ſtill in force within this realm, as the King's eccleſiaſtical laws of the ſame. Now as conſent and cuſtom hath allowed theſe canons, ſo no doubt by general conſent of the whole realm any of the ſame may be corrected, enlarged, explained, or abrogated.

Moore 755. caſe 1043. and *Cro. Ja.* 37. *Trin.* 2 *Ja.* 1. At an aſſembly of the Lord Chancellor *Elleſmere*, the lords of the council, and all the juſtices of *England* in the Star-chamber, this queſtion was propoſed, whether deprivations of puritan miniſters by the high commiſſion court for refuſing to conform to the ceremonies appointed by the canons of 1603. were lawful; to which all the judges anſwered that they were lawful, and that they had a conference touching this point amongſt themſelves; the reaſon was, becauſe the King had ſupreme power eccleſiaſtical, which he had delegated to thoſe commiſſioners, whereby they took a power of deprivation by the canon laws of the realm, and they held, that the King without parliament might make ordinances and conſtitutions for the government of the clergy, and might deprive them, if they did not obey; but without the King, the clergy could not make conſtitutions.

At an aſſembly of Lord Chancellor *Elleſmere*, the lords of the council, and all the juſtices of *England* in the Star-chamber, it was held, that deprivations of puritan miniſters by the high commiſſion court were lawful.

In the great caſe of the *Biſhop of St. David and Lucy*, *Paſch.* 11 *W.* 3. *Carth.* 485. it is laid down by Lord Chief Juſtice *Holt*, and not denied by any one, that it is very plain, all the clergy are bound by the canons confirmed only by the King; but they muſt be confirmed by the parliament to bind the laity.

The clergy are bound by canons confirmed only by the King; but to bind the laity they muſt be confirmed by parliament.

The report of this caſe in *Salk.* 134. is in this point to the ſame effect, though not quite ſo full; but as this opinion appeared to be of great weight, I have looked into two manuſcript reports of the ſame caſe, taken by hands of the beſt ability and credit, I mean the late Lord *Raymond* and Lord Chief Juſtice *Eyre*, and find they both agree with the printed report of Serjeant *Carthew*: the words of Lord *Raymond* are theſe: *per Holt* Chief Juſtice, the clergy are ſubject to a law different from that to which the laity are ſubject, for they are obliged to obey the canons, for the convocation may make canons to bind all the clergy, but not the laity, and if the clergy do not conform to them, it may be a cauſe of deprivation.

Lord *Raymond* and Ld. C. J. *Eyre* in a MS. report of the caſe of *the Biſhop of St. David's* and *Lucy*, agree with the printed report of ſerjeant *Carthew* 485.

Trin. T. 3 *Annæ*, *Britton* verſus *Standiſh*, reported in *Modern Caſes* 188. that caſe was upon a motion for a prohibition to the eccleſiaſtical court, in a ſuit againſt the plaintiff for not coming to his pariſh church on *Sundays*, and not receiving the ſacrament at *Eaſter*; againſt the prohibition it was inſiſted on, as it has been in this cauſe, that the ſpiritual court had this juriſdiction by force of the antient canon law, received and allowed in *England*, and likewiſe by the 90th canon in 1603, Mr. Juſtice *Powell* and *Gould* thought that they had an original juriſdiction in this matter by the antient canon law; to this Lord Chief Juſtice *Holt* ſaid, that a juriſdiction allowed to them time immemorial muſt be taken to belong to them by law; but what I doubt at preſent is, whether this be ſo; if there be any antient canon for it, and received here before 1603, I will agree with you; but if not, no canon ſince then, though made in full convoca-

No canon ſince 1603. though made in full convocation, can *proprio Vigore* bind laymen.

tion, can *proprio vigore* bind laymen; afterwards a prohibition was granted to declare in as to this point.

In *Davis*'s caſe, 5 *G.* 1. *C. B.* Lord C. J. *King* ſaid, it was the prevailing opinion the canons did not bind the laity without an act of parliament, there being none to repreſent them in convocation.

Davis's caſe, *Mich.* 5 *G.* 1. *C. B.* the court was moved for a prohibition to a ſuit in the conſiſtory of the Biſhop of *St. David*'s, againſt the defendant, being a layman, for teaching a grammar ſchool without licence; but a prohibition was refuſed by reaſon of the clauſe of the act of 12 *Annæ*, to prevent the growth of ſchiſm, which was then in force; in that caſe it was ſaid by Lord Chief Juſtice *King*, that it was the prevailing opinion the canons did not bind the laity without an act of parliament, there being none to repreſent them in convocation, and therefore laymen could not be ſued in the court chriſtian for breach of the canon for keeping a ſchool without licence before the making of that act 12 *A.*

Having now gone through the authorities that have occurred in ſupport of our opinion, it is neceſſary to conſider thoſe that have been produced on the other ſide, which I think were but three.

Said at the end of the caſe, *Bird* verſus *Smith*, *Moore* 781. to have been reſolved, that the canons of the church made by the convocation and the King, without the parliament, bind in all matters eccleſiaſtical as well as an act of parliament.

The firſt was the caſe of *Bird* and *Smith*, *Moore* 781. caſe 1033. *T.* 4 *Ja.* 1. *Smith* was deprived of the parſonage of *St. Nicholas Avon* in *London*, by the high commiſſioners, for not conforming himſelf to the canons of the church; whereupon the King preſented *Bird*, who was inſtituted and inducted, but *Smith* would not yield the poſſeſſion, which was kept by force; a writ *de vi laica amovenda* was awarded out of Chancery, and returned, and *Smith* appealed from the ſentence of deprivation, whereupon *Bird* filed an *Engliſh* bill of a very unuſual nature, praying that he might be put into poſſeſſion of the living, pending the appeal, and until the ſentence ſhould be defeated. The Lord Chancellor *Elleſmere* heard the cauſe, aſſiſted by Lord Chief Juſtice *Popham*, *Coke*, and *Fleming*, *C. B.* who all concurred that a decree ſhould be made to put *Bird* in poſſeſſion until *Smith* had reverſed the deprivation. It is ſaid at the end of that caſe to have been reſolved, that the canons of the church made by the convocation and the King without the parliament, bind in all matters eccleſiaſtical, as well as an act of parliament; for that by the common law every biſhop in his dioceſe, archbiſhop in his province, and the houſe of convocation in the nation, may make canons to bind within their own limits; that the convocation of the clergy was once a branch of the parliament of this realm, but afterwards ſevered from it for their eaſe, and carried their peculiar function with them into the convocation houſe; that a clergyman cannot now be a member of the houſe of commons, nor a layman of the convocation; and therefore when the convocation makes canons of things appertaining to them, and the King confirms them, they will bind the whole realm.

It muſt be owned that this is a very extroadinary caſe, and the decree ſuch a one as would not be allowed as a precedent at this day, which is a good cauſe to ſuſpect the reaſon upon which it is built. It is a decree upon an *Engliſh* bill in equity, to turn a miniſter out of the poſſeſſion of a living upon a ſentence of deprivation from which an appeal was in fact interpoſed, and to ſtay all ſuits at common law, though the authority whereby the ſentence was pronounced was properly examinable there; in that part of the report which has been relied on in the preſent caſe, it is ſaid by the common law, every biſhop in his dioceſe, archbiſhop in his province, and the houſe of convocation in the nation, may make canons to bind within their limits; but is there any colour of law for this? could every dioceſan alone make canons for that dioceſe? could the metropolitan do it alone without the convocation or ſynod of his province? moſt certainly not, and yet this is delivered.

Bird and *Smith* a very extraordinary caſe, and the decree ſuch as will not be allowed as a precedent at this day.

No colour of law to ſay, that every biſhop in his dioceſe, archbiſhop in his province, and the houſe of convocation in the nation, may make canons to bind within their limits.

But laying theſe peculiarities aſide, though very ſtrong things are there reported to be ſaid of the power of convocation to bind the whole realm in matters eccleſiaſtical, yet it is not expreſſly ſaid they can bind the laity, nor declared in words what perſons they can bind; and all that was neceſſary to the determination of the cauſe was, that they could oblige the whole clergy of the realm *in re eccleſiaſtica*, for both the parties before the court were clergymen, and the deprivation was for a ſpiritual cauſe.

Whatever may be the power of convocation to bind the whole realm in matters eccleſiaſtical, it is no where ſaid in this caſe they can bind the laity.

The next authority was the opinion of Lord Chief Juſtice *Vaughan* in the caſe of *Hill* againſt *Good*, *Vaugh.* 327. that if by a lawful canon a marriage be declared to be againſt God's law, we muſt admit it to be ſo; for a lawful canon is a law of the kingdom, as much as an act of parliament, and whatſoever is the law of the kingdom is as much the law as any thing elſe that is ſo.

Ld. Ch. Juſt. *Vaughan* of opinion a lawful canon is a law of the kingdom as much as an act of parliament.

This is certainly true, but proves nothing in the preſent caſe, becauſe it is ſilent, and does not determine what is neceſſary to make a lawful canon as to this, or that particular ſubject, matter, or perſon, which is the point now in debate.

The laſt caſe cited, was that of *Grove* and *Elliott*, *Paſch.* 22 *Car.* 2. 2 *Vent.* 41. there was a motion for a prohibition to a proceeding *ex officio* in the eccleſiaſtical court againſt the plaintiff, for keeping a conventicle in his houſe; the arguments both at the bar and on the bench turn much upon this, whether the ſpiritual courts had originally juriſdiction of ſuits, for keeping conventicles; and if ſo, whether it was not taken away by the ſtatute of conventicles, which was then in force? It was not alledged in the libel that there was any preſentment of the office charged, but only that it was *ex parte A. B.* a notary publick; but the regiſter of the court made an affidavit that the curate of the pariſh had made a preſentment; upon this it was ob-

In the caſe of *Grove* and *Elliot*, *Ventr.* 41. Mr. Juſtice *Tyrrel* held, the King and convocation without the parliament cannot make any canons which ſhall bind the laity;

objected by the plaintiff's council, that this was not ſufficient, for that the rector or vicar of the pariſh, and not the curate, ought to preſent. This objection was anſwered by the 113 canon of 1603, which provides that in the abſence of the rector, the curate may preſent.

Ld. Ch. Juſt. *Vaughan* ſaid in this caſe, that the convocation, with the aſſent of the King under the great ſeal, may make canons for the regulation of the church, as well concerning laicks as eccleſiaſticks.

From hence an occaſion was taken to diſpute concerning the force of theſe canons; Mr. Juſtice *Tyrrell* ſaid, I hold that the King and convocation without the parliament cannot make any canons which ſhall bind the laity, though they may the clergy; my Lord Chief Juſtice *Vaughan* differed in this, and ſaid, the canons of 1603, are certainly in force, though never confirmed by act of parliament; and that the convocation, with the aſſent of the King under the great ſeal, may make canons for the regulation of the church, and that as well concerning laicks as eccleſiaſticks, and ſo is *Lyndwood:* indeed they cannot alter or refringe the common law, ſtatute law, nor the King's prerogative; all that is required in making new canons is, that they confine themſelves to church matters.

Another judge of the court differing in judgment with Ld. Ch. Juſt. *Vaughan*, and the other two declaring no opinion at all on the queſtion, greatly weakens this authority.

It muſt be admitted to appear from hence, that *Vaughan* Chief Juſtice was of a different opinion from that which the court has now delivered; but the weight of this authority, will be greatly weakened, when it is obſerved, that it was upon a motion without much conſideration; that another judge of the court declared himſelf of a contrary judgment, and the other two declared no opinion at all on this queſtion, ſo that it comes only to the opinion of a ſingle judge againſt another, and all this upon a point not properly in the cauſe; for it did not appear by the proceedings in the ſpiritual court, that there was a preſentment by the curate, and the affidavit was irregular, and could not ſupply it; and the whole court finally held that it was not neceſſary to ſhew any preſentment at all.

The opinions of *Newton*, *Coke*, *Tyrrell*, *Holt* and *King*, and the anſwer of the judges in the Star-chamber, muſt preponderate againſt the ſingle opinion of *Vaughan*.

Upon ſtating theſe authorities, it is eaſy to decide which preponderates; as to that extraordinary anomalous caſe of *Bird* and *Smith* in Chancery, I think no ſtreſs is to be laid upon it, and then there remains only the opinion of Lord Chief Juſtice *Vaughan*, againſt which I oppoſe the opinions of *Newton*, *Coke*, *Tyrrell*, *Holt* and *King*, and the anſwer of all the judges in the Star-chamber, which carries in it a plain implication of the ground we now go upon.

Second queſtion. The ſpiritual court has a juriſdiction by the antient canon law in the caſe of a clandeſtine marriage.

The ſecond general queſtion made at the bar was, admitting that the lay perſons cannot be puniſhed for a clandeſtine marriage by virtue of the canons of 1603, whether the ſpiritual court had juriſdiction of ſuch a cauſe againſt them by the antient canon law received and allowed within the realm of *England*; and we are all of opinion that the ſpiritual court had ſuch a juriſdiction.

I have had occaſion already to mention the rule laid down by my Lord *Coke* in *Cawdrie*'s caſe, that ſuch canons and conſtitutions eccleſiaſtical, as have been allowed by general conſent and cuſtom within the realm, and are not contrary or repugnant to the laws, ſtatutes and cuſtoms thereof, nor to the damage or hurt of the King's prerogative, are ſtill in force within this realm, as the King's eccleſiaſtical laws of the ſame; this rule is warranted not only by the reaſon and nature of the thing, but alſo by a ſtrong expreſs declaration of parliament in the preamble to the ſtatute of 25 *H.* 8. *ch.* 21. concerning Peter-pence, and diſpenſations; and though in the proviſo at the end of the ſtatute 25 *H.* 8. 19. for continuing the antient canon law, until the intended reformation thereof ſhould be compleated, no mention is made of cuſtom or uſage, yet there are words of the ſame import; and in the act 35 *H.* 8. *ch.* 16. for prolonging that power during that King's life, the proviſo for continuing the antient canons is repeated and more clearly penned thus, " Such canons con-" ſtitutions, *&c.* as be accuſtomed and uſed here.

Here reſts the ſure foundation of all eccleſiaſtical juriſdiction in this kingdom; and of this a rational and natural account is given in a manuſcript treatiſe of that great and learned Judge Lord Chief Juſtice *Hale*, which I have peruſed: " I conceive, ſays he, that when " chriſtianity was firſt introduced into this iſland, it came not in " without ſome form of external eccleſiaſtical diſcipline (or coertion) " though at firſt it entred into the world without it; but that ex-" ternal diſcipline could not bind any man to ſubmit to it, but " either by force of the ſupream civil power, where the governors " received it, or by the voluntary ſubmiſſion of the particular per-" ſons that did receive it; if the former, then it was the civil " power of this kingdom which gave that form of eccleſiaſtical diſ-" cipline its life; if the latter, it was but a voluntary pact or ſub-" miſſion, which could not give it power longer than the party " ſubmitting pleaſed, and then the King allowed, connived at, and " not prohibited it, and thus by degrees, ſays my author, introdu-" ced a cuſtom, whereby it came equal to other cuſtoms or civil " uſages.

Lord *Hale*, in a manuſcript treatiſe, lays it down that external diſcipline of the church could not bind any man to ſubmit to it, but either by force of the ſupream civil power where the governors received it, or by the voluntary ſubmiſſion of the particular perſons who did receive it.

It remains then to be enquired, whether that part of the canon law which prohibits clandeſtine marriages, hath been received and allowed in *England*.

The canons of the council of *Lateran* in the decretals, *l.* 4. tit. 3. *ch.* 3. *cum inhibitio*, which contain a general prohibition againſt clandeſtine marriages, and require publication of banns by the miniſter in the church, were adopted into the canons of the church of *England* by the convocation held at *London* 3 *E.* 3. which was in the year of our Lord 1328. *Lynwood*, *lib.* 4. tit. 3. *de clandeſtina diſpenſatione*, *cap. Quia ex contractibus*, ſays, It inflicts the puniſh-

ment of ſuſpenſion on the clergyman for three years, offending by celebrating a clandeſtine marriage; and then adds, *Et hujuſmodi contrahentes pœna debita percellendo*; *Lynwood* in his gloſs on the words *pœna debita*, explains them thus: *Erit arbitraria cum non exprimatur. Hodie vero ſic contrahentes (ut aliqui volunt) ſunt ipſo facto excommunicati:* ſo that he took it that the contracting parties marrying clandeſtinely were liable to the puniſhment of excommunication.

If there were a long courſe of precedents of a proceeding by eccleſiaſtical cenſures againſt lay perſons marrying clandeſtinely, it would be of great weight in a caſe of this nature, though a few inſtances would not.

That the juriſdiction of proceeding by eccleſiaſtical cenſures againſt lay perſons marrying clandeſtinely, has been received, uſed and allowed in *England*, was ſaid by Doctor *Andrews* in his argument, to appear by many entries in the regiſtry of the ſee of *Canterbury*, ſome whereof he cited particularly; and it muſt be admitted that a long courſe of ſuch precedents would be of great weight in a caſe of this nature, though a few inſtances would not, becauſe they might paſs *ſub ſilentio*, and the parties might chooſe to ſubmit rather than undergo the expence and clamour of a ſuit for a prohibition.

In *Mattingley* and *Martins*, *Jo.* 257. it was reſolved, that if any perſon marry without publication of banns or licence, they are citable for it into the eccleſiaſtical court, and no prohibition lies.

It is therefore more material, that this juriſdiction hath received the ſanction of a judgment of this court in the caſe of *Mattingley* verſus *Martins*, *Paſc.* 8 *Ca.* 1. *Jones* 257. That caſe was upon a demurrer in prohibition to a ſuit in the court of the archdeacon of *Berks*, againſt a huſband and wife for a clandeſtine marriage, had without banns or licence. Upon argument, *Whitlock* and *Croke* were of opinion that the prohibition ought to ſtand; but *Richardſon* Chief Juſtice, and Sir *William Jones* were of a contrary opinion, that the prohibition ought not to ſtand: the court being thus divided, they deſired the advice and aſſiſtance of *Heath*, Chief Juſtice of the Common Pleas, *Davenport* Chief Baron, *Denham* and *Hutton*, who all agreed with *Richardſon* and *Jones*, that there ought to be a conſultation; and the ſecond point mentioned in the book to have been expreſsly reſolved was, "That if any perſon marry without publi- "cation of banns, or licence, diſpenſing with it, they are citable "for it into the eccleſiaſtical court, and no prohibition lies," and a conſultation was awarded.

Otherwiſe lay perſons contracting ſuch marriages would without ſuch a juriſdiction in the ſpiritual court have been unpuniſhed till the ſtatute of *W.* 3. was made.

This reſolution is in point, and I can find no authority againſt it; it is alſo ſupported by the ſtronger reaſon, becauſe though clandeſtine marriages have always been complained of as a great grievance, and highly detrimental to the publick and private families, yet lay perſons contracting ſuch marriages, muſt without ſuch a juriſdiction in the ſpiritual court have been abſolutely unpuniſhed, until the late ſtatute of *W.* 3. *cap.* 35. was made; which is not to be believed.

But that ſtatute gives riſe to the third general queſtion in this cauſe, which is, whether this juriſdiction of the ſpiritual court is taken away by the conſtruction and operation of the ſtatute 7 & 8 *W.* 3. *c.* 35. *ſ.* 4. which inflicts a penalty of 10 *l.* for this offence, to be recovered in the King's court: the words are theſe, "And for "the better aſcertaining, levying and collecting the ſaid duties on "marriages and licences as aforeſaid, be it further enacted, that "from and after the 24th of *June* 1696. every man ſo married "without licence or publication of banns as aforeſaid, ſhall forfeit "the ſum of 10 *l.* to be recovered with coſts of ſuit in manner as "aforeſaid, by any perſon who ſhall inform or ſue for the ſame."

Third general queſtion.

The court unanimouſly of opinion that the ſtatute of 7 & 8 *W.* 3. hath no operation to take away the eccleſiaſtical juriſdiction as to the huſband clandeſtinely married.

Before I conſider the effect and conſequence of this ſtatute upon the main queſtion, I would make two obſervations upon it; Firſt, That though ſome doubt was made by Mr. Serjeant *Wynne* upon the ſecond argument, whether this clauſe in the ſtatute be now in force, yet upon looking into the ſeries of ſtatutes relating to ſtamp duties, it clearly appears to be ſo; for by the act of 8 & 9 *W.* 3. *ch.* 19. it was continued till the 1ſt of *Auguſt* 1706. and by the act 5 *An. ch.* 19. *ſ.* 3. it was further continued for the term of 96 years, therefore that objection muſt be laid out of the caſe.

Secondly, That this penalty of 10 *l.* is inflicted only upon the huſband, "Every man ſo married ſhall forfeit it;" ſo that ſuppoſing the eccleſiaſtical juriſdiction to be taken away by implication in this caſe, it could only be as to the man, and then the prohibition could only ſtand *quoad* him, and a conſultation muſt go as to the proceedings againſt the wife.

But upon a mature deliberation we are all of opinion, that this ſtatute hath no operation to take away the eccleſiaſtical juriſdiction as to the huſband clandeſtinely married.

The general queſtion is, whether an act of parliament inflicting a pecuniary penalty or other temporal puniſhment, upon an offence of which the ſpiritual court had a prior juriſdiction, without a ſpecial ſaving thereof, doth not take away ſuch juriſdiction, hath been much agitated, and undergone diverſity of opinions.

In the caſe of *Grove* verſus *Elliott*, 2 *Ventris* 41. cited to another purpoſe, the whole court of Common Pleas held that the ſpiritual court might proceed againſt a perſon for keeping a conventicle, notwithſtanding the ſtatute of *Charles* the ſecond againſt conventicles: So in the caſe of *Cory* againſt *Pepper* in 2 *Levinz* 222. and Sir *Thomas Jones* 131. for teaching ſchool without licence.

But notwithſtanding this, there are many opinions in the books to the contrary; and the caſe of *Chadwick* verſus *Hughes*, *Carth.* 464.

is a later caſe, and is directly oppoſite to the reſolution of *Cory* verſus *Pepper* in the inſtance of teaching ſchool without licence.

The caſe of *Burdett* verſus *Matthews* in the firſt year of Q. *Anne* was ſubſequent to them all, and then it was thought a point of ſuch difficulty as to be ſolemnly argued, but by reaſon of the death of one of the parties it was never determined.

Where the eccleſiaſtical cenſures and temporal puniſhment are both levied againſt the identical offence, the rule of *nemo bis puniri debet pro eodem delicto*, is ſtrong againſt allowing a double proceeding.

It muſt be admitted that where the eccleſiaſtical cenſure and temporal puniſhment are both levied againſt the ſame identical offence, the rule of *Nemo bis puniri debet pro eodem delicto*, is a ſtrong objection againſt allowing ſuch a double proceeding, for how could a ſentence in the eccleſiaſtical court be pleaded by way of *auterfoits convict* to an action or information upon the ſtatute.

But we hold the caſe now in judgment to be a kind of middle caſe, plainly diſtinguiſhable from any of the former in the material ground of the point now under conſideration.

The pecuniary penalty, enacted by the ſtatute 13 *Car.* 2. in the caſe of teaching ſchool without licence, is inflicted *eo nomine* for a puniſhment of the ſame offence, for which the ſpiritual judge inflicts excommunication.

In the caſe of teaching ſchool without licence, the pecuniary penalty enacted by the ſtatute 13 *Car.* 2. of uniformity, is inflicted directly and *eo nomine* for a puniſhment of the ſame offence, and in the ſame reſpect for which the ſpiritual judge inflicts the puniſhment of excommunication; the intent of the temporal puniſhment is to prevent the ſuppoſed miſchief of unlicenſed perſons teaching ſchool, and ſo is the intent of the eccleſiaſtical cenſure; and as the penance enjoined is a ſatisfaction to the publick for that offence, ſo is the penalty of the ſtatute.

But in the caſe now before us, the penalty of 10*l.* on the huſband is not inflicted on the offence of a clandeſtine marriage as ſuch, I mean as a breach of the publick order of the church, and of general inconvenience, and evil example, but collaterally and in a different reſpect, which is to ſecure the duties on marriages and licences. The clauſe is introduced with theſe expreſs words, "And for the better "aſcertaining, levying, and collecting the ſaid duties as aforeſaid, "be it further enacted, *&c.*"

This makes it in reality, and not in fiction only, a proceeding *diverſo intuitu ubi eadem cauſa diverſis rationibus ventilatur, as in the expreſſion of the Stat. de Articulis clerici.* 2 *Inſt.* 622.

The ſtatute inflicts a penalty in reſpect of a clandeſtine marriage being a fraud on the publick revenue, but the eccleſiaſtical cenſure is to puniſh it as an offence againſt the publick order of the church.

The eccleſiaſtical cenſure is to puniſh the offence directly *eo intuitu* as it is a clandeſtine marriage, a crime againſt the publick order of the church, and of general inconvenience, and of evil example; the

ſtatute

ſtatute inflicts a penalty in reſpect of another conſequence ariſing from it, as it infers a fraud and diminution of the publick revenue; and this reſtriction does not ariſe by conſtruction but by the expreſs declaration of the legiſlature themſelves.

In this view it ſeems rather more ſtrong than the common caſe on the ſtatute 18 *Eliz. ch.* 3. concerning the puniſhment of the mothers, and reputed fathers of baſtard children.

The ſtatute not only provides for the indemnity of the pariſh, but alſo for the puniſhment of the offence of lewdneſs; the words are concerning baſtards begotten, and born out of lawful matrimony, (an offence againſt God's law and man's law,) the ſaid baſtards being now left to be kept at the charge of the pariſh where they be born, to the great burthen of the ſaid pariſh, and to the evil example and encouragement of lewd life, it is enacted, that two juſtices of the peace upon examination, ſhall and may by their diſcretion take order as well for the mother, and reputed father of ſuch baſtard child, as alſo for the better relief of every ſuch pariſh, and ſhall and may likewiſe take order for the keeping of every ſuch baſtard child, *&c.*

The 18 *Eliz.* which concerns the mothers, *&c.* of baſtard children, inflicts a temporal puniſhment, to prevent undue charges on pariſhes; the ſpiritual court puniſhes it by penance, as it is a publick ſcandal to the church; and therefore it has never been imagined that the one has repealed the other.

This ſtatute inflicts a temporal puniſhment upon an act of lewdneſs, not as ſuch, *viz.* as a ſpiritual offence, and mere inconvenience, but to prevent undue charges being brought upon pariſhes. The ſpiritual court puniſhes it by penance and eccleſiaſtical cenſures, as it is a crime of incontinence, a ſpiritual offence, a publick ſcandal to the church; the ſtatute puniſhes a conſequence ariſing from it, the having a baſtard, as that may infer an unjuſt burthen upon the pariſh where it is born; and theſe puniſhments being *diverſo intuitu*, in theſe different reſpects the one for the criminal act directly, the other on account of a particular evil conſequence ariſing from it, have been ſuffered to go on hand in hand ever ſince the making of the ſtatute, and it was never imagined that the one, had repealed the other.

By this reaſoning I hope I have eſtabliſhed a ſubſtantial diverſity between the ground we go upon, in determining this caſe, and the common argument which hath generally been made uſe of to ſupport proceedings in the ſpiritual courts for offences puniſhable in the temporal courts; that argument is, that the former proceed only *pro ſalute animæ* of the offender, but the latter puniſh him either in body or purſe.

But that is a diſtinction in words without a real difference, for all puniſhment is intended for the reformation of the offender, and an example to others; and this is the end both of the eccleſiaſtical cenſure, and the temporal penalty, when they are both inflicted imme-

That the ſpiritual courts proceed only *pro ſalute animæ* of the offender, and the temporal puniſh him either in body or purſe, is a diſtinction in words without a real difference; but in this caſe it is otherwiſe where the eccleſiaſtical cenſure is for the criminal act, and the temporal penalty for a fraud.

diately and directly for the ſame thing; but it is otherwiſe here, where the eccleſiaſtical cenſure is for the criminal act, and the temporal penalty for a fraud, conſequentially ariſing from that act; further, there is another ground to ſupport this proceeding in the ſpiritual court, and to diſtinguiſh the caſe from thoſe which have been above cited. The rubrick prefixt to the office of matrimony in the book of common prayer, both thoſe of 2 & 8 *Ed.* 6. and 13 & 14 *Cha.* 2. ſay firſt, the banns of all that are to be married together, muſt be publiſhed in the church thrice on ſeveral *Sundays* or holy-days in the time of divine ſervice.

By the ſtatutes of 1 *Eliz.* and 13 & 14 *Ch.* 2. the laity are bound by the rubrick againſt marrying without publication of banns, and by the firſt act are expreſsly puniſhable by the cenſures of the church; and by the ſecond act the power of the ordinary is directed to be continued and applied for puniſhing the like offence againſt the rubrick of the preſent book of common prayer.

This proviſion is confirmed by the ſeveral acts of uniformity of theſe Kings, and by reference is expreſſly made part of the reſpective acts. The act of uniformity, 1 *Eliz. ch.* 2. re-enacts the book of common prayer, *E.* 6. without any alteration in this particular, and has this clauſe, *ſection* 16, "Be it further enacted, that all and ſingular the ſaid arch-biſhops and biſhops, and all other their officers exerciſing eccleſiaſtical juriſdiction, as well in places exempt, as not exempt within their dioceſes, ſhall have full power and authority by this act to reform, correct and puniſh, by cenſures of the church, all and ſingular perſons which ſhall offend within any of their juriſdictions or dioceſes againſt this act, and ſtatute; any other law, ſtatute, privilege, liberty or proviſion heretofore made, had or ſuffered to the contrary notwithſtanding." The act of uniformity 13 & 14 *Ca.* 2. *ch.* 4. *ſection* 24. runs thus, "And be it further enacted, that the ſeveral good laws and ſtatutes of this realm which have been formerly made, and are now in force for the uniformity of prayer and adminiſtration of the ſacrament within this realm of *England*, and places aforeſaid, ſhall ſtand in full force and ſtrength, to all intents and purpoſes whatſoever, for the eſtabliſhing and confirming the ſaid book of common prayer, *&c.* herein before mentioned, to be joined and annexed to this act, and ſhall be applied, practiſed and put in uſe, for the puniſhing all offences contrary to the ſaid laws, with relation to the book aforeſaid, and no other," the conſequences following from theſe clauſes ſeem to be, *Firſt*, that the laity are bound by the rubrick againſt marrying without publication of banns; *Secondly*, That by the expreſs words of the act of uniformity, 1 *Eliz.* they were puniſhable by the cenſures of the church for acting contrary to it. *Thirdly*, That by the act of uniformity 13 & 14 *Car.* 2. this power of the ordinary is continued, and directed to be applied and practiſed for puniſhing the like offence againſt the rubrick of the preſent book of common prayer.

Hereupon a new queſtion ariſes, ſuppoſing that the enacting this pecuniary penalty by the *St.* 7 & 8 *W.* 3. *c.* 35. might by implication have taken away, or repealed any authority which the ſpiritual court had originally in this matter by force of the canon law, whether

ther it ſhall operate to take away a juriſdiction expreſſly given to it by a former act of parliament, and conſequently *pro tanto* to repeal that act of parliament.

The rule touching the repeal of laws, is, *leges poſteriores priores contrarias abrogant*: but ſubſequent acts of parliament in the affirmative giving new penalties, and inſtituting new methods of proceeding, do not repeal former methods and penalties of proceeding, ordained by preceding acts of parliament, without negative words; and as in 7 & 8 *W.* 3. *ch.* 35. there are no negative words, both may ſtand together, and either the one or the other may be put in execution.

Subſequent acts of parliament in the affirmative, giving new penalties, do not repeal former ordained by preceding acts without negative words.

Beſides, a latter act of parliament hath never been conſtrued to repeal a prior act, without words of repeal, unleſs there be a contrariety and repugnancy between them, or at leaſt ſome notice taken of the former law in the ſubſequent one, ſo as to indicate an intention in the law-makers to repeal it.

In the act of King *William* no ſort of notice is taken of the act of uniformity, but the proviſion declared to be for a different purpoſe, the ſecuring a particular duty or revenue to the crown.

I have now gone through the reaſons upon which the court founds its judgment, and in doing it I have been the more large and particular, in order to prevent any miſtakes about the ground of our opinion.

The evil of clandeſtine marriages, is one of the growing evils of the times, productive of many calamities in families, and of great miſchief and diſorder in the community, and therefore we thought it our duty not to weaken any lawful method by which it may be reſtrained and puniſhed.

Clandeſtine marriages are a growing evil, and therefore the court would not weaken any method by which they may be reſtrained.

The judgment muſt be, that the prohibition ſtand as to proceeding only for the plaintiff's being married at an uncanonical hour, (*i. e.*) not between the hours of 8 and 12 in the forenoon, that circumſtance having been as far as appears to us introduced by the canons of 1603, and that a conſultation be awarded as to the reſidue of the cauſe.

The prohibition to ſtand as to the proceeding only for the plaintiff's being married at an uncanonical hour, and a conſultation awarded as to the reſidue of the cauſe.

This learned and celebrated argument was made by Lord *Hardwicke*, in delivering the opinion of the whole court of King's Bench, when he was Chief Juſtice, and Sir *Francis Page*, Sir *Edmund Probyn* Knights; and *William Lee*, Eſquire, Juſtices.

A TABLE

A TABLE OF The Principal Matters.

Account.

See Titles **Decree, Maſter in Chancery, Maſter's Report.**

WHEN there is a plea of a ſtated account, to a bill brought for a general one, the plaintiff muſt amend; but pays only the coſts of the day. *Page* 1

A bill may be brought for errors in an account, though it has been ſettled for three or four years. 113

Where fraud appeared in a ſtated account, the whole decreed to be opened, though it was a ſtated account of 23 years ſtanding. 119

The Houſe of Lords, very often, in matters of account which are intricate, refer it to two merchants named by the parties, to conſider the caſe, and report their opinions upon it, rather than leave it to a jury. 144

Where perſons have mutual dealings, ſigning the account is not neceſſary to make it a ſtated one, but it is keeping it any length of time, without making an objection, which binds the perſon to whom it is ſent, and prevents his entring into an open account afterwards. *Page* 252

The delivering up vouchers is an affirmation that the account between the parties is a ſtated one; but it is not abſolutely neceſſary they ſhould be delivered up at the time the account is ſettled. 252

Bankers keep the drafts which are made upon them on files, becauſe they are vouchers, and of uſe in clearing up diſputes between their ſhop and a third perſon. 252

If a defendant by his anſwer acknowledges any particular ſum due, though he ſwears thoſe ſums were diſcharged, yet it is ſtill a ground for directing an account. 254

A plea of a ſtated account is bad, unleſs it ſhews the account was in writing, and what the balance was. 399

When at law a perſon in an account is allowed ſums under 40*s.* on his oath, he muſt ſwear poſitively, and not to his belief only; the ſame directions as to this matter are given under a decree in this court, that he muſt peremptorily ſwear to the fact. *Page* 410

The caſe of *Sturt* and *Melliſh* being very much entangled, and the tranſactions of long ſtanding, the court choſe rather to diſmiſs the bill, and leave the plaintiff to his action at law, than direct an account before the Maſter. 610

Acquieſcence.

Where a man, conuſant of his right, ſuffers another to build on his ground, without ſetting up a right till afterwards, the court will oblige the owner to permit the perſon building to enjoy it quietly. 83

Where there is a ſecond ſuit between the ſame parties, you may inſiſt on an acquieſcence under a decree in the firſt, unleſs the bill be diſmiſſed without any prejudice to the queſtion in that cauſe. 354

Action. See Titles **Fraud** and **Acquieſcence.**

Where the motives to an action are unjuſt, though the cauſe of action was juſt, a court of equity will always take this into conſideration, though they cannot at law pay any regard to it. 194

Where a perſon has a ſole excluſive right, which is infringed upon, if an action of treſpaſs will not lie, he may have an action of the caſe; for the law will not permit a man, who has a right, to be without a remedy. 392

Ademption. Vide Titles **Legacy, Satisfaction.**

Where after making a will a father advances a child with a portion as great, or greater than the legacy, ſuch proviſion has always been held an ademption; but when the deviſe has been of a reſidue, no inſtance where a ſubſequent portion has been held to be an ademption. *Page* 215

J. makes a will the 4th of *May* 1738. ſoon after *S.* makes his addreſſes to the plaintiff; and in *July* applied to *J.* her great uncle, for his approbation, who agreed to give *S.* 500*l.* and drew a note payable to him on the 25th of *March* 1739. and lodges it in *H.*'s hands to be delivered to *S.* after the marriage was had, and ſaid he would leave the plaintiff ſomething by will, but would not be obliged to do it; on the 19th of *Auguſt* 1738. *J.* dies; and the next day the plaintiff and *S.* were married. Lord *Hardwicke* held, the legacy of 1000*l.* given under *J.*'s will to the plaintiff, was not ſatisfied by the 500*l.* given upon the marriage in the teſtator's life-time. 516

Where a father gives a legacy *generally* under a will to a daughter, he muſt be underſtood to mean it as a portion; and if he afterwards gives her a ſum on marriage, it is an ademption of the legacy. 518

Double portions are what this court ſtrongly leans againſt; and whether the portion given in the life-time be leſs or not, is no ways material, where an orphan is under the care of a collateral relation, and he by will gives her a legacy, which is expreſſed to be for her portion, and afterwards provides for her in his life-time; Lord *Hardwicke* was inclined to think, this would be an ademption. 518

In the caſes of ſatisfaction of legacies, parol declarations have always been admitted. 518

Where a father gives a daughter 500*l.* as a portion in marriage, and ſays, I will leave her ſomething by my will, but will not oblige myſelf to do it, this would not be an ademption. 519

The altering of a will as to one niece, can never be taken as an evidence of the teſtator's intention to alter the legacy as to another. 519

A father adminiſtrator *durante minore ætate* of his daughter, who was executrix and reſiduary legatee of her grandmother's eſtate, agreed when ſhe married the plaintiff, that he ſhould have 800*l.* which

which in the ſettlement is called a *portion:* Lord *Hardwicke* refuſed to decree an account of the grandmother's perſonal eſtate, as ſhe had been dead 20 years; but directed the father's repreſentative ſhould account for his perſonal eſtate as to the 800*l.* only, and intereſt at 4*l. per cent.* from the marriage. *Page* 521

Adminiſtration and Adminiſtrator. Vide Titles **Executor, Spiritual Court, Marſhalling of Aſſets, &c. Next of Kin.**

An adminiſtrator is not in every caſe chargeable with intereſt on account of perſonal eſtate. 151

It is not an invariable rule, that an adminiſtrator ſhould be allowed coſts at all events. 151

The court had decreed an account againſt *C.* of the aſſets of her huſband as his adminiſtratrix, after his death, ſhe took all his goods and ſtock in trade, and carried on the ſame buſineſs: The Maſter reported 1400*l.* due to the plaintiffs upon the balance of accounts, who inſiſted on intereſt for that ſum: *Lord Hardwicke held, that this being a demand on ſimple contract, and the adminiſtratrix not having yet ſold the goods, her only fund for raiſing money, ſhe ſhall not be charged with intereſt on the* 1400l. 439

Affidavit. See Titles **Maſter's Report, and Oath.**

The not ſwearing expreſly to words ſpoken, but adding to that effect, is a proper caution in an affidavit. 60

Age. See Title **Infant.**

Agreement. See Titles **Purchaſe, Infant, Leaſe, Covenant, Statutes of Champerty, Articles.**

The court of chancery, in carrying agreements into execution, govern themſelves by a moral not a mathematical certainty. 20

Where a part of the agreement is performed on one ſide, it is but common juſtice it ſhould be carried into execution on the other. *Page* 100

It is not only contrary to the ſtatute of frauds, but to the common law before the ſtatute, to add any thing to an agreement in writing by parol evidence. 383

If parties are entring into an agreement, and the will out of which the forfeiture aroſe was lying before them, and their council, while the draughts were preparing, the parties ſhall be ſuppoſed to be acquainted with the conſequence of law as to this point. 591

After an agreement has intirely ſettled all diſputes between parties and their ſeveral rights, the hands of the court are ſo tied up, they will not enter into a queſtion which might have been ſtarted, had there been no ſuch agreement. 592

Agreement Parol. See Titles **Statute of Frauds and Perjuries, Agreement.**

Agreement under Hand. See more under **Marriage Bzocage Bonds.**

Agreement, when to be perfozmed in Specie, and when not.

J. D. who died inteſtate, left three ſiſters; his perſonal eſtate being agreed to be divided into thirds, two mortgages, one in fee, the other for a term, each for 150*l.* were allotted to the defendant, one of the ſiſters; before any aſſignment, her huſband borrowed 200*l.* of the plaintiff upon note, and, as a further ſecurity, left the two mortgages with him, and gave his note, promiſing to aſſign them, and then dies. Bill brought againſt his adminiſtrator, and againſt the mortgagors, to be paid principal and intereſt, or to foreclоſe. *Lord Hardwicke held, that the huſband's promiſe to procure an aſſignment of the mortgages, amounted in equity to a diſpoſition of them* pro tanto, *ſo as to ſatisfy the plaintiff's debt, which being done, they belong*

Belong to the wife as her choſes in action. *Page* 207

A proviſo in articles for the purchaſe of an eſtate, that if either ſhould break the agreement, he ſhould pay 100 *l.* to the other; the defendant, on being offered two years purchaſe more, accepted it, notwithſtanding his agreement. *Lord Hardwicke decreed a ſpecific performance of the articles.* 371

The offering to pay the ſtipulated ſum will not vacate the agreement, for it is no more than the common caſe of a penalty, 371

A penalty has never been held to releaſe parties from their agreement, for though incurred, they muſt perform it notwithſtanding. 371

Agreement on marriage. See Title **Settlement after Marriage.**

A limitation under marriage articles to *A.* the intended huſband for life, remainder to the iſſue of their two bodies, will not intitle him to diſpoſe of the eſtate, but will be carried into ſtrict ſettlement in this court. 73

If a ſettlement be juſt in general, a particular advantage to one ſide or the other will not affect it. 521

S. a taylor by trade, and poſſeſſed of a real eſtate of 14 *l. per ann.* in 1730 made his addreſſes to *W.* then 26 years of age, and whoſe father it was thought would give her 500 *l.* to her fortune: On the courtſhip coming to his knowledge, he declared his diſlike of the match, and forbid *W.* giving *S.* any encouragement; the courtſhip being carried on notwithſtanding, in *January* 1732, *S.* met *W.* in a market-town, and there, in an alehouſe, bonds were executed, to which two ſtrangers were witneſſes, and the only perſons preſent; one from *W.* in the penalty of 600 *l.* conditioned, that if ſhe did, on or before the expiration of 13 months after her father's death, marry *S.* or if ſhe ſhall not, nor will not marry *S.* but marry ſome other perſon, then ſhe ſhall pay to *S.* 500 *l.* at or immediately after failure of ſuch marriage, or elſe the obligation to remain in full force. Another bond from *S.* the ſame *mutatis mutandis*, with that from *W.* with a covenant in it, that if he ſhall not, or will not marry *W.* but marries ſome other woman, to forfeit and yield up to *W.* for her own uſe, all his eſtate, real and perſonal. One of the witneſſes to the bonds ſwore they were read over before execution, the other, that they were not; one that they were exchanged, the other, that they both remained in the cuſtody of *S.* In 1736, the father of *W.* died, who left her 340 *l. the* 13 *months expired*, and then *W.* filed her original bill to be relieved againſt her bond, and dying ſoon after, her adminiſtrator revived the cauſe; and *S.* brought a croſs bill for ſatisfaction out of *W.*'s aſſets. *Page* 535

Though a parent has no power to prevent the marriage of his child, yet his conſent his expected, and by the laws of ſome countries neceſſary. 540

Lord *Hardwicke* compared it to the caſes of bonds given before marriage, to return a part of the portion, where the fraud was not between the contracting parties, but on the parents of one of them, who being deceived in this reſpect, it has induced the court to ſet aſide ſuch bonds. 540

Lord *Hardwicke* doubted whether a breach of the condition could have been aſſigned without *S.*'s ſhewing a tender of himſelf by writing, or ſending, and thought his aſſent muſt have been an actual propoſal, and the firſt act. 541

When the deeds, previous to the marriage of the plaintiff with *John Tyrrell*, were reading over to her, ſhe obſerved there was a miſtake, for that the moiety of the eſtate, of which her mother was ſeiſed, was limited to his uſe for life, and not to her ſeparate uſe after her mother's death, as had been agreed, and refuſed to execute unleſs the miſtake was rectified; in order to do this, by the deſire of the truſtees, he gave a note under his hand, whereby he agreed with the plaintiff, that ſhe ſhould enjoy and receive the profits of one moiety of the eſtate, after the deceaſe of her mother: The marriage was had ſhortly after; and in *July* 1739, the mother died; and in

July 1740, *Tyrrell* became a bankrupt; and the aſſignees being in poſſeſſion of the rents of this moiety, refuſed to let the plaintiff receive them, or to make any ſettlement for ſecuring the receipt thereof to her, purſuant to the agreement before the marriage. *The Maſter of the* Rolls *of opinion, that a note under the hand of the huſband ought to be looked upon as part of the ſettlement, and as the wife would have been relieved if ſhe had brought a bill againſt the huſband, equally ſo, as brought againſt the aſſignees who ſtand in his place.* *Page* 558

Parol evidence cannot be admitted to explain the agreement between the parties; but as to the occaſion of ſigning the note it may. 560

A ſettlement will controul a writing executed after; but the parties refuſing to execute the ſettlement without it, they muſt be conſtrued as one intire agreement, and both conſiſtent. 560

Though the words *ſeparate uſe* are not in the note, the words *enjoy the profits imply it.* 561

Alien.

In the plea of an alien, you muſt aver the perſon was an alien, or otherwiſe it is no bar. 397

An alien may take by purchaſe, but then it is for the benefit of the crown. 398

There is no inſtance where it has been held, that a perſon by marrying an alien woman is ſeized of the eſtate purchaſed by her. 398

Annual Reſts.

The court direct *Annual Reſts* in an account of the rents of real, but not of perſonal eſtate. 410

A mortgagee by entring into poſſeſſion, by his own act makes himſelf accountable; and it is in this caſe the direction of annual reſts is given. 410

Annuity. See Title Statute of Limitations.

An annuity granted by the Duke of *Wharton* to Dr. *Young*, in conſideration that the publick good is advanced by the encouragement of learning, and in conſideration likewiſe of the love he bore of him; this is not a legal conſideration, nor does it amount to a valuable one in the eye of the law. *Page* 152

Giving up a pecuniary advantage at the time an annuity is granted, amounts to a valuable conſideration, as much as a ſum of money paid down at the time. 154

There being arrears due on the firſt annuity, the promiſing not to ſue for them was a good conſideration, and from that time it ceaſed to be a voluntary grant. 154

In reſpect to arrears of an annuity, there is no certain rule of giving intereſt; the moſt frequent inſtances are, where it was the bread of the wife or child. 211

The court gave intereſt on the arrears of an annuity from the time a Maſter's report was confirmed, which was 28 years in favour of the repreſentative of the annuitant only. 211

A junctim annuity decreed to be redeemed on clearing the arrears, and paying the whole principal ſum advanced, and intereſt to the time only, the plaintiff having offered to redeem. 231

After the regiſter had drawn up the minutes, Lord *Hardwicke* declared, he had a great averſion to theſe contracts, and that he would have decreed a redemption *ab initio*, if it could have been done conſiſtent with the rules of equity. 235

A deviſe to truſtees of a ſum of money, to be laid out in the purchaſe of an annuity *clear* for *A. means free from taxes.* 376

Where an annuitant has entred, and is in poſſeſſion of the eſtate charged with it, the court will not oblige him to quit the poſſeſſion, till the grantor allows him intereſt for the arrears of his annuity. 411

Anſwer. See Titles Courts of Law, Evidence, Coſts, Defendant, Infant, Plea.

Taking exceptions to an inſufficient anſwer, is tantamount to a demurrer at

at law upon an inſufficient plea. *Page* 24

The caſe of *Hawkins* verſus *Crooke*, before Lord Chancellor *King*, 4 G. 2. was not determined upon ſatisfactory reaſons, for receiving coſts upon a Maſter's reporting an anſwer inſufficient, is by no means accepting it for an anſwer 24

Lord *Hardwicke* inclined to think, that where there is an amended bill, and an anſwer put in to it, the plaintiff is intitled to a decree *pro confeſſo*, abſtracted from any proceedings in the original cauſe. 25

As well on commiſſions to take anſwers and pleas in the country, as before the Maſters in chancery, the commiſſioners ſhall ſee the defendants ſign their anſwers or pleas for the future. 289

Where a plaintiff is charged by an anſwer, he muſt diſcharge himſelf by proof, and cannot do it by reading the whole anſwer, as he may at law. 383

Lord *Hardwicke* doubted, whether an infant can, before he comes of age, put in a new anſwer, ſo as to rehear the cauſe over again; for if there ſhould be a decree againſt him on the ſecond hearing, he may, with as much reaſon, put in a third anſwer, which would occaſion infinite vexation. 487

Appeals.

On an appeal from the *Rolls*, the appellant may be let into new evidence, which was not read there, provided he will give up his depoſit. 408

Articles. See Title Agreement.

The articles, and the indenture of releaſe, in this caſe, muſt be conſidered as one and the ſame act, being both dated on one and the ſame day, and a different conſtruction ought not to be put upon them. 457

Articles are conſidered in this court as minutes only, which the ſettlement may afterwards explain more at large. 545

There is no difference between articles unexecuted *in toto*, or in part only; for all the caſes go upon this ground, that what is covenanted to be done, is conſidered as done. *Page* 545

Aſſets. See Titles Executor, Party, Deſcent, Bond.

Admiſſion of aſſets by an executor to one legatee, is an admiſſion to all. 3

It is not a general rule, that any perſon who has aſſets, may be made a defendant; to conſtitute ſuch a perſon a neceſſary party, the plaintiff muſt ſhew he either denies he has any aſſets, or applies them improperly. 33

The court never eſteem it an ingredient to take the aſſets out of the hands of an executor, that he is not of affluent fortune, ſo long as the teſtator himſelf has placed this confidence in him, without regarding his circumſtances. 126

A ſon and a daughter by one venter, a ſon by the ſecond, the father dies indebted, the ſon by the firſt enters, is ſeiſed, and dies; the daughter is intitled, being a *poſſeſſio fratris*, and is liable to her father's debt. 206

It is an inaccurate expreſſion, to ſay, a reverſion after an eſtate-tail is not aſſets, for there is a liableneſs which makes it aſſets *in futuro*. 206

After aſſets are diſcovered, by a bill brought in this court, the plaintiff ſhall not be turned over to law, but decreed a ſatisfaction here. 363

The court will not charge intereſt upon an executor, who makes uſe of aſſets come to his hands, in the way of his trade. 603

Aſſets marſhalled, and in what order debts are to be paid. See Titles Bond, Creditor, Heir, under the Diviſion, *Matters controverted between the Heir and Executor*, &c. *Deviſe*, *Deviſee*, *Specifick Legacies*.

A deviſe of an eſtate charged with the payment of debts to a collateral relation, being a deviſe to a ſtranger, the deſcent

deſcent is broke, and it is equitable aſſets. *Page* 293

Where a mere truſt-eſtate deſcends upon an heir at law, it will be conſidered as legal, and not as equitable aſſets. 293

H. who was ſeiſed in fee of an eſtate, having borrowed money in 1724. gave a bond for it, and a mortgage on it for a ſecurity afterwards: in 1728, by will he deviſes the mortgaged eſtate, and a freehold for three lives to his wife, and appointed her ſole executrix; in 1734 he purchaſed one moiety of the reverſion in fee of the lifehold eſtate, and the other moiety in 1737. and died without altering his will; the queſtion was, if the perſonal eſtate is not ſufficient to pay the mortgage, whether the eſtate deſcended on the plaintiff ſhould not make up the deficiency, ſo that the eſtate deviſed to the wife might not be affected whilſt there were real aſſets. Lord *Hardwicke held at the firſt hearing, the wife was not intitled to ſuch exoneration in a court of equity, but muſt take the eſtate with its burthen.* 424

On the one hand it would be hard for an heir at law, out of a ſmall pittance, to pay a debt out of it in favour of a deviſee, and on the other hand, where the eſtate deſcended is large, it would be hard to leave the burden on the ſpecifick deviſee when the mortgage almoſt exhauſts the eſtate: on account of theſe difficulties Lord *Hardwicke* adjourned the caſe to ſearch for entries of judgments at law on the ſtatute of fraudulent deviſes, and for precedents in equity, where there are ſpecialty debts and mortgaged eſtates deviſed beſides. 427.

Lord *Hardwicke* was of opinion that the wife is intitled to have the mortgage upon the eſtate deviſed to her exonerated out of the real aſſets deſcended upon the heir, and reverſed the former decree totally as to this point. 430

Where a will ſets out with a deſire that the debts may be paid in the firſt place, the wife with reſpect to creditors muſt have taken the eſtate *cum onere* deviſed to her, but is not ſufficient to fix the burden upon the legatee ſo as to make a variation with regard to the different funds out of which the debts are to be paid; or tranſpoſe the order in which they are to be applied for that purpoſe. *Page* 431

To leſſen the eſtate which remains to the wife under the will, where the intention of the teſtator was totally to diſinherit the heir, would ſound harſh in a court of equity. 431

It is the rule in equity, that perſonal aſſets muſt be firſt applied to ſatisfy a ſpecialty debt, and if deficient, the heir ſhall be charged for the real aſſets deſcended. 434

In *Pitt* verſus *Raymond*, the bill was to have ſatisfaction out of the aſſets deſcended and deviſed; Lord *Talbot* directed, if the perſonal were not ſufficient, an account was to be taken of aſſets deſcended, and if theſe were deficient, then of the deviſed eſtate, which ſhews his opinion as to the order in which the aſſets were to be marſhalled. 434

The land in the caſe of *Galton* and *Hancock* is given to the wife, which muſt mean effectually, for if ſubject to the mortgage, it is an ineffectual deviſe. 436

The election of the creditor to come for ſatisfaction either againſt the real or perſonal eſtate will not determine what ſhall untimately be the fund which ſhall be charged. 438

The rule in marſhalling of aſſets is of ſuch conſequence to the practice of this court, that it ought to countervail any arguments of hardſhip to particular perſons. 439

Aſſets by deſcent and in the hands of the heir. See titles Mortgage, Executor.

A man cannot by any form of conveyance whatever raiſe a fee-ſimple to his own right heirs, by the name of heirs, as a purchaſe, ſo as to prevent the reverſion from being aſſets to ſatisfy the debts. 57

T. D. on his marriage ſettled his eſtate on himſelf for life, on his wife for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and every other ſon in tail male, remainder

agreement, that in caſe any difference ſhould ariſe between them, it was to be referred; and the matters in the plaintiff's bill relate only to a partnerſhip, and yet have never been ſubmitted to arbitration, nor has he ever propoſed a reference, though the defendant offered and was always ready to do it. *Lord Hardwicke diſallowed the plea; for as it is a bill to diſcover, and be relieved againſt frauds, the arbitrators cannot examine on oath, which, by the agreement, they ſhould have had a power of doing.* *Page* 569

Bargains Catching. See Titles **Infant, Heir.**

SIR *J. B.* remainder in tail in the eſtate in queſtion, being diſtreſſed, conveyed two manors, of the yearly value of 300 *l.* expectant on an eſtate for life in his uncle Sir *Samuel Barnardiſton*, for the ſum of 300 *l.* to the defendant, his heirs and aſſigns, from and after the deceaſe of Sir *Samuel Barnardiſton*, without iſſue male. 133

Sir *J. B.* brought a bill to be relieved againſt this bargain, as unconſcionable. *Lord Hardwicke held it a void conveyance, even in point of law; for as the plaintiff had a remainder in tail only, he could but convey ſuch eſtate as he had, and not diſpoſe of the inheritance.* 133

A perſon who conveys an eſtate-tail, conveys *totum ſtatum ſuum*, which is an eſtate for life; and as the deed in this caſe only carries an eſtate for life, it is not ſuch an eſtate as the parties contracted for, and therefore void. 134

A judgment of 6000 *l.* being taken at the time of the purchaſe, as a ſecurity for the performance, Lord *Hardwicke* directed it ſhould ſtand only as a ſecurity for principal, intereſt, and coſts, and no further. 134

There are all the material ingredients in this caſe, as in thoſe which have been cited, to ſet aſide this agreement as a catching bargain againſt a neceſſitous heir. 135

What guides the court in all theſe caſes, is the taking the advantage of an heir's being diſtreſſed, and is the principal ground of theſe decrees. *Page* 135

The court have always extended their relief in ſuch caſes, for the ſake of the publick, to prevent people's gaming to the prejudice of improvident perſons, and the ruin of families: Coſts decreed to Sir *John Barnardiſton.* 136

If a perſon will enter into a hard bargain with his eyes open, a court of equity will not relieve him upon this footing only. 251

Baron and Feme. See Titles **Depoſitions, Aſſignment, Money, Miſtakes, Power, Will, Letters, Agreement, when to be performed in Specie or not, Bankrupt, Dower, Deviſe, Redemption and Foreclosure, Creditors, Bonds, Portion, Spiritual Court, Marriage.**

A wife, who cannot in conſcience conſent to ſuch an anſwer as is drawn up by the huſband, will be allowed to anſwer diſtinct from him. 50

Where a huſband, by menaces, prevails on a wife to put in an anſwer, he may be puniſhed for a contempt. 50

A criminal converſation againſt a huſband cannot, in a civil ſuit, be read in evidence againſt a wife, as it would tend to make her incur a forfeiture of her portion, eſpecially if ſhe is an infant. 64

A wife may as well diſpoſe of perſonal eſtate, over which ſhe has an abſolute controul, as ſhe can diſpoſe of real eſtate by joining in a fine with her huſband; and, on her conſent in court, her fortune was directed to be paid to the huſband, though he appeared to be an inſolvent perſon. 67

A father by deed creates a truſt of a real eſtate, for the benefit of his daughters, and directs the rents to be paid them, whether ſole or covert, for their ſeparate uſe; they marry, and join with their huſbands in bonds, for money lent to their huſbands; the truſtees under the father's deed ordered to pay the

rents and profits of the truſt eſtate to the bond creditors. *Page* 68

Though a huſband has impoſed on a wife, by giving her a bond void at law, yet this court will eſtabliſh the agreement according to the intention of the parties. 97

This court will not allow a wife maintenance, where there is full proof of her elopement and adultery. 97

The huſband having poſſeſſed himſelf of the greateſt part of the wife's fortune, and left the kingdom, the intereſt ariſing from truſt money was directed to be paid to the wife till the huſband thinks proper to return, and maintain her as he ought. 98

P. gives a third of a moiety of the reſidue of his perſonal eſtate to *S. P.* who marries, and whilſt out of the kingdom, aſſigned together with her huſband the third of a moiety which was to ariſe out of *P.*'s eſtate, in truſt for their daughter, provided they died before they came to *England*. *S. P.*'s firſt huſband died, and ſhe afterwards married a ſecond, who ſurvived her: *If ſhe had continued a widow, ſhe would have been intitled to a decree for this third, and no notice would have been taken of the daughter's intereſt.* 180

A huſband cannot ſue for a wife's *choſe in action* till he has adminiſtred. 180

If a bond be given to a *feme ſole*, who marries afterwards, the huſband and wife muſt join in the action; otherwiſe, if made to the wife after marriage, the huſband alone may bring the action, and recover. 208

A huſband may aſſign the truſt of a wife's term, unleſs it be a truſt from himſelf for the wife's benefit; ſo likewiſe he may diſpoſe of her mortgage in fee, as well as her mortgage for a term. 208

A huſband may aſſign a wife's poſſibility, if it be for a valuable conſideration, and he may releaſe her bond without receiving any part of the money. 208

A promiſe during coverture does not bind a wife; but, if repeated after the huſband's death, it is a confirmation. 245

Coverture is no excuſe for not redeeming a mortgage, for if a woman becomes afterwards diſcovert, the ſtatute of limitations will run from that time. *Page* 333

A feme covert, who had a ſeparate eſtate, employed workmen in her huſband's houſe, without his directions, and promiſed to pay them; the Maſter of the *Rolls* doubted, whether a parol promiſe can ſubject lands, but ſhe ſubmitting to pay, he decreed accordingly. 379

A huſband has a mortgage upon his eſtate, the wife joins with him in charging her own; if ſhe ſurvives, her eſtate ſhall be looked on only as a pledge, and ſhe is intitled to be ſatisfied out of his eſtate, as ſtanding in a mortgagee's place. 384

Where the huſband aſſigns the wife's truſt of a term for a valuable conſideration, the aſſignee need not make a proviſion for the wife before he could be intitled. 421

As at law the huſband could diſpoſe of a term for years, ſo he may diſpoſe of the truſt of a term, for the ſame rule of property muſt prevail in equity as well as at law. 421

This differs from the other caſes, for the huſband at once aſſigned all the fortune, and which he could not reduce into poſſeſſion without the aſſiſtance of this court. 422

The material point was, the aſſignment of the whole portion, and if ſuch a practice ſhould be allowed, it would defeat all the care of the court with regard to infants. 422

The wife's portion has been decreed to the huſband, though he has not made a ſettlement adequate to it, where the ſettlement was before marriage, otherwiſe on a voluntary ſettlement after marriage. 448

Where by ſettlement, the wife has an eſtate *ex proviſione viri*, the court has refuſed to interpoſe to ſettle the eſtate otherwiſe. 477

Every voluntary conveyance of the huſband is not fraudulent againſt creditors. 513

Though a huſband by law is bound to maintain his wife and child, yet the fund out of which the maintenance is to ariſe, are liable to his creditors. 513

The

The decrees in the ſpiritual court for alimony and maintenance, are only againſt the perſon of the huſband, but affect not the huſband's eſtate ſo as to take it from his creditors. *Page* 513
The conſiderations in deeds are not to be weighed in too nice ſcales 514
The huſband during the coverture has a legal remedy by diſtreſs for the arrears of the wife's annuity, without being firſt obliged to make a proviſion for her. 514

Bankrupt. See **Compoſition of Debts,** under Titles **Debts, Merchants.**

An aſſignee under a commiſſion of bankruptcy, cannot compound a debt, without a previous meeting of the creditors. 7
Creditors in bankrupt caſes are intitled to the intereſt the huſband has in the wife's *choſe in action* during his life. 515
The reaſon why commiſſioners of bankrupts compute intereſt on debts no lower than the date of the commiſſion is, becauſe it is a dead fund. 528
Under old acts of parliament, a man was conſidered as guilty of a crime or tort, in becoming a bankrupt. 528
The court will not carry a voluntary conveyance of a bankrupt into execution againſt his aſſignees; otherwiſe as to a conveyance for a valuable conſideration before the bankruptcy 562
Where by acts before marriage, the huſband made himſelf in the nature of a truſtee for the wife, his aſſignees muſt be ſo too of courſe. 562

Bill. See titles **Anſwer, Defendant, Plea, Rules, Sequeſtration, Statute of Limitations, Account, Coſts, Maſter's Report, Court of Chancery, Bill of Peace, Party, Bill of Review.**

The praying general relief is ſufficient, though the plaintiff ſhould not be more explicit in the prayer of his bill. 3
Where general relief is prayed in one part of a bill, and particular relief in another, it muſt ſtand over to be amended. *Page* 3
A bill for want of parties is not diſmiſſed, but ordered to ſtand over; and a decree of Sir *Joſeph Jekyll*'s to diſmiſs it on this account, was reverſed in the Houſe of Lords. 15
In equity taking a bill *pro confeſſo*, is analogous to taking a declaration for true at law, where the plea fails. 24
A co-adminiſtrator who was a plaintiff in a bill in 1723, brought, in 1739, a bill partly of revivor, partly ſupplemental, to the ſame purpoſe, pretty near with the original: *Lord Hardwicke allowed the plea of a former diſmiſſion:* for otherwiſe he ſaid, it would be keeping up a right *in nubibus* and *in cuſtodia leg is*, and parties would never know when to be at reſt. 82
Where amendments are ſo large as they cannot be added, there a new engroſſment, and a new ſervice on the parties, is neceſſary. 119
After a plaintiff has had a third order to amend his bill, he ſhall not be allowed to do it but upon coſts to the defendant to be taxed by a Maſter. 123
If after a croſs bill filed, a plaintiff in an original bill will amend it in material parts, and thinks fit to compel an anſwer to the amendments at the ſame time with the original bill, he waives his priority of anſwer to the original. 218
Where a bill is amended both in diſcovery and relief, the pendency of the ſuit, as to thoſe parts which are amended, is only from the time of the amendment. 218
A perſon may bring a bill with two different aſpects, that if one fails, the other may as effectually anſwer the purpoſe for which the bill was brought. 325
It is improper to charge in a bill a woman had criminal converſation with particular perſons, as it would affect the character of ſtrangers, and fill it with private ſcandal. 339

Bill of Peace.

Where a man ſets up an excluſive right, and the perſons who can controvert it are numerous, and he cannot by one action at law quiet that right, he may come here *firſt*, which is called *a bill of peace*, and the court will direct an iſſue to determine the right as between lords of manors and their tenants, or tenants of one manor and another. *Page* 484

Bill of Review. See title Decree.

Where a decree is neither ſigned nor inrolled, you cannot bring a bill of review. 40

It is altogether unneceſſary to oblige a man to ſign and inroll a decree made againſt himſelf, in order to intitle him to bring a bill of review. 117

Where a decree has not been ſigned and inrolled, a bill in the nature of a bill of review, is a proper one. 178

The diſcovery of new matter in being at the time of a decree, but not known till after, intitles the party to a review. 178

Papers in the hands of a party to a former cauſe after publication had paſſed, though not produced then, may be read upon a bill of review. 179

Where parties apply for leave to bring a new bill, upon new matter diſcovered after a decree, they muſt ſhew that it is relevant; for it's being merely new matter will not intitle them to ſuch a bill. 529

The leave of the court muſt be aſked before a bill of review, for *new matter* can be filed; *otherwiſe* if brought to reverſe a decree upon error appearing on the face of it. 534

A defendant may plead the decree, and demur againſt opening the inrolment to a bill of review brought for error apparent, and on the plea and demurrer the court will judge, whether there are grounds for opening the inrolment. 534

Biſhop. See title Taxes.

Bond or Obligation. See titles Attorney and Solicitor, Baron and Feme, Judgment, Marriage, Mortgage, Intereſt of money, Game and Gamekeeper, Heir, Redemption and Foreclosure under Mortgage, Statute of fraudulent deviſes, Aſſets.

Two ſeparate bonds having been given upon the ſame day for different ſums, when one for the whole ſum would have been the moſt proper and natural method, the court directed an inquiry into the conſideration of the bonds on a ſuſpicion of fraud. *Page* 16

A tradeſman ignorant of the nature of a bond, fills up one from *A.* and *B.* to *C.* in which the obligors are only jointly bound; one of them being dead, it was inſiſted the ſurvivor was anſwerable for the whole money; but the court relieved the plaintiff, it being the manifeſt intention of the parties the obligors ſhould be jointly and ſeverally bound. 31

Where a prior incumbrancer has a bond likewiſe, it ſhall be poſtponed to all other incumbrances, whether by mortgage, judgment, or ſtatute-ſtaple. 54

A. gave a woman who cohabited with him a bond for 2000 *l.* and intereſt quarterly during her life, and after her death to her children, but from the date of the bond to the day of his death, which was four years and a half, he conſtantly maintained her. Lord *Hardwicke* held the maintenance muſt clearly be taken to have been in lieu of intereſt. 84

Where no demand has been made on a bond for 20 years, the judge will direct a jury to find it ſatisfied. 144

The expence a perſon was put to in ſtanding for member of parliament is not a valuable conſideration to ſupport a bond given to reimburſe the obligee. 154

A bill was brought for relief againſt a judgment on a bond, in which the plaintiff was jointly bound with his ſon in the penalty of 100 *l.* that the ſon ſhould not commit any treſpaſs in the Duke of *Beaufort*'s royalty, by ſhooting,

ing, hunting, fiſhing, *&c.* except with the licence of the gamekeeper, or in company with a qualified perſon: the ſon having catched two flounders with an angling rod, the bond was put in ſuit, and judgment for the penalty, *&c.* The gamekeeper's brother-in-law, and another ſervant of the Duke's, aſked the plaintiff's ſon to angle with them, when he catched the two flounders, and the verdict was found merely on their evidence. Lord *Hardwicke* decreed the plaintiff ſhould be relieved againſt the verdict, and that the Duke ſhould refund the 100 *l.* recovered on the bond, and the 40 *l.* coſts of ſuit. *Page* 190

Where principal and intereſt on a bond is not paid on the day fixed by the maſter, on the defendant's ſetting down the cauſe again, the bill will be diſmiſſed with coſts to be taxed. 287

Where there is a bond debt to the wife *dum ſola*, and the husband recovers it at law, there is no inſtance of this court's granting an injunction, for the ſuit was proper at law; and therefore this court leaves it to its natural courſe, without meddling with a legal queſtion. 420

The creditor may proceed againſt the heir if he pleaſes, and he has no way to help himſelf; for the law knows no diſtinction of the perſonal eſtate's being to be applied firſt. 426

The teſtator himſelf has laid a real burden upon the lands deviſed by mortgaging them, and therefore different from the caſe of a general bond debt. 426

A bond given to *A.* payable at a future time, without naming his executors, if *A.* dies before that time, the executors will be intitled to ſue upon the bond. 509

Books. See **Law-Books.**

The property of books cannot veſt in authors, *&c.* without being firſt regiſtred with the ſtationers company. 95

The ſtatute of 8 *Anne c.* 19. for veſting the copies of books in authors is not a monopoly, but ought to receive the moſt liberal conſtruction. 143

Books colourably ſhortned only are within the meaning of the act. *Page* 143

An abridgment fairly made is a new book, becauſe the judgment of the author is ſhewn in it. 143

This is not a caſe proper for law, as it would be abſurd for a judge to ſit and hear both books read over, which is neceſſary where one is only a copy from the other. 244

The parties ought to fix on two perſons of learning in the law to compare the books, and report their opinion. 144

The defendant Mr. *Curle* on his anſwer being put in, moved to diſſolve an injunction againſt his vending a book of letters from *Swift*, *Pope* and others. 342

A collection of letters as well as other books is within the intention of the 8th of Queen *Anne*, the act for the encouragement of learning. 342

The receiver of the letter has at moſt a joint property with the writer, and the poſſeſſion does not give him a licence to publiſh. 342

Reprinting a book in *England*, which originally was pirated and printed in *Ireland*, will not be ſuffered, being a mere evaſion of *the act*. 342

No works have done more ſervice to mankind than thoſe on familiar ſubjects, and which never were intended to be publiſhed. 343

The injunction continued as to letters written by Mr. *Pope*, not as to thoſe written to him. 343

Buildings. See title **Acquieſcence.**

Lengthening of windows, or making more lights in the old wall than formerly, does not vary the right of perſons. 83

Canons. See title **Ward.**

THE canons which have not the authority of an act of parliament are not binding on laymen, but certainly are preſcriptions to the eccleſiaſtical courts, and likewiſe to clergymen. 158

The canons muſt be purſued with the utmoſt exactneſs by eccleſiaſtical perſons, and a clergyman who preſumes to marry a perſon out of the pariſhes in which the man and woman reſide, is liable to penalties. *Page* 159

Caſe. See title Rule, and Rehearing.

Upon the appeal in the caſe of *Peacock* verſus *Spooner*, (2 *Vern.* 195.) to the houſe of Lords, the judges in their opinions were equally divided, but the decree below was affirmed notwithſtanding. 73

The caſe of *Liſle* and *Gray* is differently reported in *Jones*, *Levinz*, and *Raymond*, but by the record of the caſe ſearched for by order of Mr. Juſtice *Tracy*, it appears the judgment of the court of King's Bench was affirmed in the Exchequer-chamber. 90

The decree in *Heli* and *Bond*, *Eq. Ca. Abr.* 342. on appeal to the houſe of Lords was affirmed by the unanimous opinion of the judges of the courts of Common Pleas and Exchequer. 200

Lord *Hardwicke* expreſſed his diſlike of the decree in the caſe of *Chidley* verſus *Lee*, reported in *Prec. in Chan.* 228. and ſaid he ſhould have been inclined to have determined it otherwiſe. 523

Sir *Thomas Jones* in his report of *Liſle* verſus *Grey*, *page* 114. has intirely miſtaken the caſe. 574

The eſſential difference between this caſe, and *Coulſon* verſus *Coulſon* in the court of King's Bench, the 8*th* of *May* 1744. which was the date of the judge's certificate, is, that was a mere legal eſtate, the preſent a truſt in equity. 580

Certiorari. See titles Writ, Habeas Corpus.

Where the tenor of a record, inſtead of the record itſelf, is removed by *Certiorari* out of an inferior court, it is erroneous, as no proceedings can be had upon it. 317

Where a replevin is in a court of record, you may remove it by a *certiorari* either from the court of King's Bench or from this court. *Page* 317

Where a *certiorari* iſſues in order only to uſe the record as evidence, then the tenor, if returned, is ſufficient, and countervails the plea of *nul tiel record*; but when the record itſelf is to be proceeded upon, the record muſt be returned. 318

Whether it be before judgment, or after, makes no difference, in both caſes the record itſelf muſt be removed. 318

The court may ſuperſede a certificate, but cannot quaſh it, without a view of the record. 318

Charitable Corporation.

The bill was brought to be relieved againſt the defendants as committee-men, or in other offices, and to have a ſatisfaction for a breach of truſt, fraud, and miſmanagement. 400

Committee-men are properly agents to thoſe who employ them in the truſt to ſuperintend the corporation affairs. 405

A groſs non-attendance in a committee-man may make him guilty of the breaches of truſts committed by others. 405

A truſtee's ſaying, he had no benefit from the truſt, but merely honorary, is no excuſe for his want of diligence. 406

Where a ſupine negligence appeared in all the committee, by which a complicated loſs has happened, they are all guilty. 406

A court of equity can lay hold of every breach of truſt, be it in a publick or a private capacity. 406

There can be no injury but there muſt be a remedy; as the tribunals of this kingdom are wiſely formed both of courts of law and equity. 406

Though the committee were not privy to the original fraud, yet they are guilty in the ſecond degree, by neglecting to uſe the power inveſted in them, to prevent the ill conſequences ariſing from ſuch a confederacy. 406

A Table of the Principal Matters.

Charity and Charitable Uſes. See title Coſts.

There was a deviſe to charitable uſes under a will in 1734. the teſtator lived till *July* 1736. a month after the new ſtatute of mortmain took place, and then dies without revoking his will; upon a reference to the judges for their opinion, whether this was a good diſpoſition to charitable uſes, all of them except Mr. Juſtice *Denton* certified that the deviſe was good in law. *Page* 36

Each particular object may be private, but it is the extenſiveneſs which will conſtitute it a publick charity. 87

A deviſe to the poor of a pariſh, is a publick charity, the ſame as to a diſpoſition of a ſum amongſt poor houſekeepers. 88

The owner of land charged with an annuity, for the payment of a ſchoolmaſter, will not be excuſed from the payment thereof on account of there having been no ſchoolmaſter for ſix years. 238

Though there are not perſons in a pariſh ſufficient to anſwer the deſcription of a charity, yet the land charged with the payment of a charity is not diſcharged during that time. 238

Five ſhillings *per* week allowed by way of *nomine pœnæ*, if either of the half-yearly payments of an annuity was in arrear 42 days after it became due; *the court will direct it only to ſtand as a ſecurity for legal intereſt when the principal ſum is not regularly paid.* 239

Commiſſioners of charitable uſes have no power under the 43 *Eliz. c.* 4. to give coſts, but this court can do it. 239

L. by will gives to *Breadſtreet* ward 200 *l.* according to Mr. ——— his will. Lord *Hardwicke* would not allow of parol evidence to explain the teſtator's intention when there is a *blank* only, but decreed the money in this caſe to be diſpoſed of in ſuch charities as the alderman for the time being and the principal inhabitants ſhall think the moſt beneficial to the ward. 239, 240

Any perſon, though the moſt remote in the contemplation of the charity, may be relators in an information. 328

Sir *J. T.* deviſed copyhold lands in charity, that he had before ſurrendred to the uſe of his will, which conſiſted of eleven ſheets, the two firſt of which he ſigned, and died before he ſigned the reſt, nor were there any witneſſes. Lord *Hardwicke held it to be a good appointment of the copyhold eſtate for the charity.* Page 497

Exceptants to a decree of charitable uſes were allowed coſts on thoſe exceptions, where they prevailed; and on thoſe where they did not, the reſpondents were intitled to coſts. 551

Notwithſtanding a decree of commiſſioners under a commiſſion of charitable uſes, the court of Chancery may ſtill permit a ſuit to be inſtituted here, in which neither ſide is bound by what appeared before the commiſſioners, but may ſet forth new matter. 552

Civil Law.

The text civil law takes the differences and diſtinctions in caſes much more rationally than the commentators do. 638.

The rule to be collected from the paſſages in the caſe of the *Duke of St. Albans* againſt *Miſs Beauclerk*, is, that the apparent intention of the teſtator muſt govern indouble legacies. 639

Clerk in Court. See title Solicitor.

Club.

Where there is a general truſt of money for a ſociety, a particular member cannot ſet off a private debt againſt a ſhare he may be intitled to on a contingency. 84

Codicil. See title Specific Legacies.

A codicil is in it's nature a part of the will, and an extenſion of the intention of the teſtator. 630

College and Dean and Chapter Leaſes. See title Leaſes.

Colliery.

Colliery.

A colliery is a trade, and therefore an account may be taken of the profits here. *Page* 630

Colonies. See Titles Executors, Insurance.

A commiſſion was prayed, for examining witneſſes in the *Weſt Indies*, as the facts ariſe there, and to ſtay the defendants proceeding at law on a policy: Lord *Hardwicke* granted the commiſſion, and the injunction, as the voyage was at and from *Carthagena* to *Porto Bello*, and the facts muſt neceſſarily ariſe in the *Weſt Indies*. 359

A teſtator, who lived in *Jamaica*, gave legacies to be paid in ſterling money in the firſt place, and the two legacies immediately following generally, without ſaying in ſterling money, and at the end of his will, ſeveral more to be paid in ſterling money: Lord *Hardwicke* held, that the plaintiff muſt take his legacy in *Jamaica* money; for his expreſſing himſelf differently, ſhewed a different intention. 465

A bond given at *Dublin*, or a note in *Jamaica*, muſt be paid in the current money; the ſame with regard to a will. 465

The legatees living in *England* makes no diſtinction, for the reſidence of the perſon deviſing muſt decide it. 466

Though the effects are partly in *Jamaica*, and partly in *England*, yet as this is a deviſe of a compounded reſidue, without ſeparating the funds, no argument can be drawn from it in favour of the plaintiff. 466

Committee. See title Lunatick.

Common Recovery. See Titles Recovery, Eſtates in fee-tail.

Where the tenant in a common recovery has not pleaded *non-tenure*, he gains a new eſtate, though the limitations are to the old uſes, and the will is revoked by it. *Page* 324

The force of a conveyance by common recovery, to extinguiſh all conditions, powers and incidents annexed to an eſtate-tail, ariſes from hence, that the law conſiders it in the nature of a real action, and the recoveror is in by right. 591

Companies. See Titles Creditors, The Charitable Corporation.

The office of a director is of a mixed nature, publick, as ariſing from the charter of the crown, but at the ſame time is not an employment that affects the publick government, for none of the directors of the great companies are required to qualify by taking the ſacrament. 405

Concealment, Covin, Colluſion. See Title Fraud.

Condition. See Titles Deviſe, a Subdiviſion under Title Will, Reſtraint on marriage, Forfeiture.

To one for life, and to *B.* on certain conditions and reſtrictions, and to *C. in forma prædictâ* will take in every condition and reſtriction in the preceding limitation to *B.* 620

Condition ſubſequent. See Title Reſtraint of marriage.

It is the conſtant rule of law, in conditions ſubſequent, that if the performance becomes impoſſible by the act of God, it is abſolutely void. 18

C. by his will gives legacies to his nieces, to be paid to them *at* 21, *or marriage*, which ſhall firſt happen, provided they marry with the conſent of their father and mother, or the ſurvivor of them; otherwiſe to ſink into his perſonal eſtate. The legacies veſted at their attaining the age of 21, and either of them marrying without conſent afterwards is of no conſequence: For Lord *Hardwicke* held,

held, that the marriage with consent of the father and mother must be construed so as to relate to the time of the legacies vesting. *Page* 587

Contempt.

It is incumbent on courts of justice to preserve their proceedings from being misrepresented; and the minds of the publick should not be prejudiced before a cause is heard. 469

There are three kinds of contempts, scandalizing the court, abusing the parties, and prejudicing mankind before a cause is heard. 471

The calling an advertisement in the *Gloucester* Journal *a hue and cry after a commission of charitable uses*, was held to be a libel in the printer, and the court committed him. 472

Contingent Remainder.

T. B. bequeaths 3000*l.* to his sons *J.* and *G.* to be laid out in lands in *W.* to be conveyed to them for forty years, and after the expiration of that term, to the use of *W. B.* his grandson, for life, and his first and other sons in tail male, afterwards to another grandson, with like limitations, and so to a third, *&c.* then to the testator's three sons for life successively, and their respective first and other sons in tail male; and for default thereof, to his own right heirs. *Though there were no trustees in the will to preserve the contingent remainders, yet Lord Hardwick ordered such trustees should be inserted in the conveyance to be settled by the master.* 279

Lord *Hardwicke* said, in the directions he gave in this case, that he adhered to the rules of conveyancing laid down by the great men before the restoration, and during the usurpation. 281

The words in Mrs. *R.*'s will, *in case my daughter should die, leaving no heirs of her body*, is a gift to the daughter for life, with a contingent remainder to such heir of her body as shall be living at the time of her death. 646

Leaving, is a participle of the present tense, and relates to the time of the daughter's dying. *Page* 647

No weight has been laid on the want of the words for life, where the intention of the testator has otherwise appeared, especially in the case of *a trust executory*, for there this court is bound to see a settlement made agreeable to the intention of the testator. 648

Copyhold. See Titles Surrender, Estates in Fee-tail, Charity.

W. S. makes his will, and signs it, but it was unattested by witnesses; as the testator had not surrendered his copyhold estate, the question was, Whether it passed? The court held it did; for the statute of frauds and perjuries relates to such estates only as pass by 34 *&* 35 *H.* 8. which takes in fee simple only, and does not extend to customary estates. 37

Where a man is seised of copyhold lands, and surrenders to the use of his will, and executes a will, though it is not attested by witnesses, yet it shall direct the use of the surrender. 37

Where the legal estate is in trustees, as he cannot in that case surrender the copyhold lands to the use of his will, they will pass by his will only. 38

A copy of an admittance, though not signed by the steward of the court, may be read in evidence, where it is of thirty years standing. 45

A copyhold surrendered to the use of a will, passes by a general devise of lands, notwithstanding there are freeholds. 85

The same construction, in the cases of surrenders of copyhold estates, must take place as in all other conveyances at law. 101

Before admittance, a mortgagee may bring a bill of foreclosure; and after a decree, an ejectment for the possession of the mortgaged premisses. 101

Fenny lands being frequently buried under water for seven or eight years, and producing no profit at all to the copyholder, he may, by way of compensation, when the water is drained, and the land

land improved from the additional ſoil brought by the floods, be intitled to common of turbary, and to dig up the ſoil of the lord of the manor for turf. *Page* 189

After proclamations made on ſo many court days, if the copyholders do not come in, the lord may ſeize upon their lands. 449

A decree againſt the lord of the manor will not bind copyholders in fee, or freeholders for life, who were no parties to it. 516

Corporation. See **The Charitable Corporation.**

Where a certain number are incorporated, a major part of them may do any corporate act, though nothing mentioned in the charter. 212

It is not neceſſary that every corporate act ſhould be under the ſeal of the corporation. 212

Coſts in Law and Equity. See Titles **Maſter in Chancery, Bond, Rule, Orders, Truſtee, Executor, Adminiſtrator, Heir** and **Anceſtor, Matters controverted between the Heir, Executor,** and **Deviſee.**

Though there had been no demand, or rent paid in 30 years, yet, as it was recovered by a verdict, the plaintiff ſhall have his coſts at law; but as the laches aroſe on his part, and the obſcurity of the title to the rent, from the want of a demand, for ſuch a length of time, he ſhall not have coſts in equity. 14

In notorious frauds, the court anciently made a defendant pay exemplary coſts, but has been for ſome time diſuſed, from the difficulty of carrying it into execution. 43

A bill diſmiſſed with coſts, where the plaintiff had refuſed a fair offer of accommodation. 48

Where the eſtates of two teſtators have been ſo blended as to create confuſion, the executor of an executor ſhall be excuſed coſts, though it appeared he had aſſets enough to pay the plaintiff's coſts. *Page* 80

Where the court think it would accelerate a decree, they will poſtpone the conſideration of coſts till the cauſe comes back from the Maſter, though there are ſufficient grounds for decreeing them at the hearing. 111

A plaintiff may apply to the court for coſts, where a defendant gives unneceſſary trouble in carrying a decree into execution. 112

In equity, as well as at law, coſts follow the juſtice of the demand. 113

Notwithſtanding a teſtator directed that his executors, for any expences they ſhall be put to, ſhall be allowed coſts out of his eſtate; yet, as there was a plain fraud in this caſe in the executors, the court decreed coſts againſt them. 126

Where a plaintiff, on a bill to perpetuate the teſtimoney of witneſſes, has examined, and thereby had the fruit of her bill, neither herſelf, nor the defendant, are intitled to coſts 167

When a multiplicity of actions have been brought, where the cuſtom might have been tried in one, it is ſuch a vexation, that the plaintiff ſhall have the coſts both in law and equity. 167

Where the court did not think the anſwer full enough, and directed an iſſue upon the merits, this is not hearing a cauſe upon bill and anſwer only, but a ſubſequent proceeding, and therefore is out of the rule of diſmiſſion, with forty ſhillings coſts. 286

Where a plaintiff, merely to keep his cauſe alive, replies, and afterwards withdraws his replication, and ſets it down on bill and anſwer only, that it may be diſmiſſed with forty ſhillings coſts, this is evading the juſtice of the court, for, otherwiſe, he muſt have paid the full coſts, to be taxed by a Maſter. 288

Coſts in equity are diſcretionary, and given to the time of the decree; at law, *unica directio fiat damnorum*, and wait till the final judgment. 400

Where the poverty of the plaintiff would not allow her to carry on the cauſe, Lord *Hardwicke* ordered the coſts to be taxed, and paid to her, to impower her to go on with the ſuit. 400

It is conſcience, and not any authority, directs this court in giving coſts. *Page* 552

Though on a demurrer to a perſon's being examined as a witneſs, it has been over-ruled; a *ſubpœna* cannot be taken out againſt him for coſts, yet the court will give them upon an application by motion. 592

Conveyances, Aſſurances, Conſtruction and Operation of them. See title **Deeds.**

The preſumption of a ſatisfaction is ſtronger in the caſe of a deed than of a will, where a bounty is ſuppoſed to be intended. 634

Covenant. See title **Agreement.**

Where there is a covenant for the truſtees to convey the inheritance, this court will conſider it as actually conveyed, and the term in the truſtees as attendant only on the inheritance, and ſo connected together in the *ceſtui que truſt*, that it can never be ſevered in favour of an heir or executor, though it may in the caſe of creditors. 67

Counſellor. See title **Demurrer, Notice.**

Council have a right to draughts as precedents, but not to detain them where either party may have a benefit from the inſpection of them. 214

This court will not ſuffer a council to maintain an action for fees, or if he happens to be a mortgagee, to inſiſt on more than legal intereſt, under pretence of a gratuity for buſineſs formerly done in the way of a council. 332

Court of Chancery. See titles **Attorney and Solicitor, Creditors, Juſtices of the Peace, Marriage Articles, Orders, Party, Poſſeſſion, Deeds, Maintenance, Portions, Receiver, Account, Annual Reſts.**

The proceedings in this court are formed according to the courſe of the civil law in ſome reſpects, and analogous to the common law in others. *Page* 23

Where perſons cannot ſhew a title at law, by the writings being out of their hands, they may properly come into this court. 198

Where a matter which ariſes within the juriſdiction of the courts of *Wales* is of value or difficulty, parties may take their remedy here; but if of ſmall conſequence, it is an inducement to this court to diſmiſs the bill with coſts. 253

Whilſt ſuits were depending in the court of Chancery the plaintiffs indict the defendant's agent at the ſeſſions, *where they themſelves are judges*, for a breach of the peace. Lord *Hardwicke* made an order to reſtrain the plaintiffs from proceeding at the ſeſſions, till the hearing of the cauſe, and further order. 302

There is no reſtraining power over criminal proſecutions in this court. 302

Pendente lite here, this court would have ſtopped an action of treſpaſs *vi et armis*. 302

Where a bill is brought to quiet the poſſeſſion, if after that a bill of indictment is preferred for a forcible entry, this court will ſtop the proceedings upon ſuch indictment. 303

The plaintiff lent *B.* 500 *l.* on note, on an aſſurance that an aunt had left him 4000 *l.* by will. *B.* died ſoon after, and his repreſentatives refuſed to pay the 500 *l.* as the legacy was directed to be laid out in land and ſettled on *B.* in fee. *Lord Hardwicke ſaid, it was a very cruel caſe, but as it is the eſtabliſhed rule of the court that money deviſed to be laid out in land ſhall be conſidered as land, the plaintiff can have no remedy.* 307

Court of King's Bench. See title **Special Pleadings.**

The authority which the Star-chamber had in caſes under 4 & 5 *Ph.* & *M.* relating to the taking away maidens, is now aſſumed by the court of King's Bench. 64

Courts of Law. See titles **Bill, Poſſeſſion, Coſts, Account, Special Pleadings, Parties.**

In courts of law where there is no plea, judgment is by *nil dicit*; but if a plea be put in, though ever ſo imperfect, there cannot be a judgment *nil dicit*, the plaintiff muſt demur, and if allowed, then he has judgment, becauſe the plea, or anſwer of the defendant, (for anſwer is equally uſed at law as in equity,) is inſufficient. *Page* 23

Where you draw the juriſdiction out of a court of law, you muſt have all the parties before the court, who are neceſſary to make the determination complete, and to quiet the queſtion. 515

Court of Record. See titles **Certiorari, Habeas Corpus.**

Court Spiritual. See **Spiritual Court.**

Creditors. See titles **Diſtribution, Purchaſes, Rules, Debts, Bonds, Special Pleadings, Settlement after Marriage.**

The court of Chancery will not decree publick companies to make calls in favour of a particular creditor. 56

An aſſignment by the clerk of the peace to creditors under the ſtatute for relief of inſolvent debtors need not be ſealed. 242

If there is a mortgage for years, and the reverſion in fee left in the mortgagor, it will be legal aſſets, becauſe the bond creditor may have a judgment againſt the heir of the obligor and a *ceſſet executio* till the reverſion comes into poſſeſſion. 294

Where a plaintiff, a ſpecialty creditor, muſt come here for relief, the court will do equal juſtice to all creditors without any diſtinction as to priority. 294

Joſeph Burr by his will directs his whole eſtate to be turned into money, and gives it to his executors in truſt for the benefit of his four ſons and his daughter *Jenny*, to be divided equally between them, and if either die before 21, his or her ſhare to go to the ſurvivor; *Henry Burr*, one of the ſons, died under age, and his ſhare went over to the ſurvivors. *Page* 417

In 1739, Mr. *Vobe* married the daughter, but made no proviſion for her, and being indebted to the defendant, gave him a bond, and aſſigned over all the ſhare which in his wife's right he was intitled to in her father's perſonal eſtate, and afterwards a ſecond aſſignment for the benefit of his creditors in general; his wife during theſe tranſactions was under age; the executors of the father have made no diviſion of his perſonal eſtate; *Vobe* became a bankrupt, and his wife had two children to maintain; her ſhare under the will amounted to about 600*l.* and the defendant the creditor's debt to 500 *l.* 417

Lord *Hardwicke* was of opinion not to allow the creditor of the huſband to receive the fortune of his wife, without making ſome proviſion for her; and recommended it to the creditor to give her and her children ſome part of the principal of her fortune. 417

His Lordſhip afterwards decreed, in conſequence of an agreement between the parties, that a moiety of the fortune of the wife ſhould be placed out for her ſeparate uſe during her life, and after her death to be paid to her children in equal ſhares. 417

As a father would not have married his daughter without inſiſting upon ſome proviſion; neither will the court of Chancery who ſtand in *loco parentis* do it. 419

Where *Specialty* creditors exhauſt the perſonal aſſets, *ſimple contract* creditors ſhall ſtand in their place, and may come upon the real. 436

If a creditor has two funds, he ſhall take his ſatisfaction out of that upon which another creditor has no lien. 446

Curteſy.

Tenancy by the curteſy muſt come out of the inheritance, and not the freehold. 47

A tenancy by the curteſy is an excreſcence out of the inheritance, and a continuation of it for a certain time. *Page* 47

There can be no tenancy by the curteſy, where the children take by virtue of a remainder over, and not by deſcent from their mother. 47

To entitle the huſband to take as tenant by the curteſy, the inheritance muſt deſcend upon the children. 47

Cuſtom. See titles **Copyhold, Evidence, Manors.**

An occupant who is only a tenant at will, can never have a right to a common of turbary by taking away the ſoil of the lord. 190

This court will not put perſons to ſet forth a cuſtom with ſo much exactneſs as is requiſite at law, or with the nicety the court of Exchequer expects. 190

Cuſtom of London. See title **Hotchpot.**

A child of a freeman muſt abide by the will *in toto*, or by the cuſtom *in toto*. 43

If a freeman of *London* makes a voluntary deed, in conſideration of love and affection only, and reſerves the power over the eſtate to himſelf, the property will continue in him, and is ſubject to the cuſtom. 62

The cuſtom of *London* will operate on the orphanage part of a freeman's eſtate, and he cannot leave it to go in ſuch proportion as he pleaſes. 63

A freeman of *London* taking the advantage of his ſon's neceſſities, in conſideration of a bond for ſecuring the ſon an annuity of 50 *l.* prevails on him to releaſe the ſhare he had in the orphanage part; the father alſo prevailed on another of his ſons to give him a releaſe of his ſhare of the orphanage part, in conſideration of an annuity of the ſame nature: but there were not the ſame proofs of his being forced into the releaſe, and the father had at times advanced him 400 *l.* *the plaintiff being turned out of doors, left deſtitute and void of maintenance, a releaſe extorted under ſuch circumſtances cannot be ſupported, but is abſolutely void.* Page 160

The court was alſo of opinion the other ſon was equally intitled to be relieved. 160

By the cuſtom of *London* the orphanage part muſt go in equal ſhares, and if the father turns the money into any other ſhape, which he thinks may take it out of the cuſtom, yet the court has relieved the children. 160

If a father, merely for the ſake of maintenance, and not for advancement in marriage or trade, obliges his ſon to releaſe his right to the orphanage ſhare, ſuch releaſe is abſolutely void. 161

A freeman of *London* by will leaves a ſon a legacy of 200 *l.* and gives the reſidue of the teſtamentary part to his daughter and another perſon; on the application of the ſon two years after the will was made, the father gave him 100 *l.* and took a receipt for ſo much in part of a legacy, and a ſhort time after gave him another 100 *l.* and took a receipt from him in full of what was intended him by the will; the teſtator died without altering his will, the 200 *l.* muſt be conſidered as an advancement, and brought into hotchpot upon the cuſtomary ſhare; but how far the ſon may be intitled to a compenſation out of the ſurplus of the dead man's part, for ſo much as he ſhall ſuffer by bringing the 200 *l.* into hotchpot, the court gave no opinion, reſerving this point till it came back on the Maſter's report, it being doubtful whether there would be any ſurplus. 277

It is an eſtabliſhed rule that a legatee cannot take the legacy and claim his cuſtomary part too, unleſs the teſtator mentions the legacy ſhall come out of his teſtamentary ſhare. 278

A freeman of *London* aſſigned over leaſehold houſes to truſtees for particular purpoſes, reſerving to himſelf an eſtate for life, where the truſt was not to commence till after his deceaſe. *Lord Hardwicke held it to be a fraud on the cuſtom, and decreed the deed of aſſignment to be cancelled.* 377

A freeman of *London* by will divided his eſtate according to the cuſtom, and deviſed the dead man's part among his wife and children; afterwards he gave a daughter 1000 *l.* in marriage, which the court declared to be a ſatisfaction of the orphanage ſhare, but not as to her ſhare in the dead man's part. *Page* 523

A freeman of *London* by will took upon him to diſpoſe of all his eſtate, as well the orphanage as the teſtamentary part; where ſome of the children ſhall elect to abide by the cuſtom, and others by the will, *their ſhares of the orphanage part ſhall not accrue to that part, but ſhall go according to the diſpoſition of the father.* 627

The children of a freeman may take both parts, when the father has diſpoſed of the teſtamentary only. 629

The cuſtom, where a wife of a freeman is compounded with, is to divide his eſtate into two parts, as if there was no wife. 629

Where the wife has compounded with the huſband, a freeman of *London*, he is to be conſidered in regard to the cuſtom as leaving no wife. 644

Debts, Creditor and Debtor. See titles **Truſt for payment of debts, Paraphernalia, Rule, Executor, Intereſt of money, Statute of Limitations, Separate Maintenance, Power, Aſſets, Eſtates in Fee-tail, Real Eſtates, Judgment, Special Pleadings.**

WHERE there are mutual demands, a defendant upon an action at law may as well ſet off upon 5 *Geo.* 2. *the bankrupt act*, as in common caſes under *G.* 2. 49

This court only removes fraudulent conveyances out of the way, but will not decree profits back againſt the original debtor and owner of the eſtate, received *pendente lite*, in favour of judgment creditors, from the filing of the bill, but equity follows the law, and leaves them to their remedy by *elegit.* 107

Simple contract creditors ſhall ſtand in the place of bond creditors, and be allowed out of the real eſtate equal to what has been exhauſted out of the perſonal. *Page* 110

Where the land does not yield annual profits, all debts will not carry intereſt out of a truſt for payment of debts. 111

Lands charged by a will with the payment of debts, all the debts contracted by a teſtator during his whole life will be a charge. 274

Where a father in a purchaſe takes an eſtate in it himſelf for life, with remainder to his ſon in fee, as the father has the profits for life, the eſtate is liable to his creditors. 480

The father in this caſe was in poſſeſſion of the whole eſtate, and neceſſarily appeared the viſible owner; ſo that the creditor by an *elegit* might have laid hold of a moiety, which differs it from all the other caſes. 481

It is not neceſſary that a man ſhould be actually indebted at the time he enters into a voluntary ſettlement, to make it fraudulent; for if he does it with a view to his being indebted at a future time it is equally fraudulent, and ought to be ſet aſide. 481

Where a creditor agrees to take leſs than his debt, provided it be paid preciſely at the day, and the debtor fails of payment, the general rule of equity is, that he cannot be relieved. 527

Compoſition of Debts.

Where a creditor for 1700 *l.* agrees with his debtor, a failing man, to take 11 *s.* in the pound, to be paid by inſtalments; and the debtor after the firſt payment becomes a bankrupt; Lord *Hardwicke* was inclined to think, the 1700 *l.* and not the groſs ſum of the compoſition only, might be proved under the commiſſion of bankruptcy. 527

In what priority debts are to be paid by an executor or adminiſtrator, ſee alſo under **Aſſets.**

Decree. See titles **Bill of Review, Parties, Acquieſcence, Account, Intereſt of Money.**

There need not be certain and poſitive evidence, as to the finding of deeds after a decree, but ſuch only as the court thinks reaſonable. *Page* 40

The Earl of *Bradford* by his will gave all his eſtate to truſtees, in truſt for the defendant Mr. *Newport* and the heirs of his body, and to pay ſuch ſums out of the rents and profits for his maintenance as Lord *Bradford* ſhould by any writing appoint. By a codicil he directs the truſtees during Mr. *Newport*'s minority to pay the rents to the plaintiff, ſo much as ſhe pleaſes to be applied for his maintenance, and the reſidue to her own uſe; by another codicil directs the truſtees ſhall not ſettle the eſtate on Mr. *Newport* and the heirs of his body till 26, and till then ſuch maintenance as the truſtees and the plaintiff ſhall think fit. Mrs. *Smith* inſiſted ſhe was intitled to receive the rents and profits till Mr. *Newport* attained the age of 26, but the Maſter of the Rolls was of opinion they veſted in Mr. *Newport* at 21. and the time of receiving prolonged only till 26. and decreed the truſtees ſhould account for the rents, *&c.* from his age of 21 to 26, to the committee of his eſtate, Mr. *Newport* being found a lunatick. 344

Shepherd, who had a mortgage for 4000 *l.* on *Jennings*'s eſtate, in 1725. forgave him 800 *l.* and three years afterwards lends him 800 *l.* again; in the intervening time *Titley* advances 2000 *l.* to *Jennings*, and obtains a mortgage on the ſame eſtate. In 1729. Sir *T. P.* agrees to purchaſe of *Jennings* 1850 *l.* fee-farm rents iſſuing out of Sir *T. P.*'s eſtate, and finding *Jennings* had mortgaged the fee-farm rents to *Shepherd* applied to him, who agrees when he is paid his 4000 *l.* he will convey them to Sir *T. P.* in a former cauſe on a reference to a Maſter to take an account of what was due to *Shepherd*, the Maſter allowed no more for principal than 3200 *l.* and the bill is brought for 4000 *l.* and intereſt, and unleſs paid, that *Titley* may ſtand foreclоſed. Lord *Hardwicke* ſaid in the other cauſe the Maſter was confined to *Shepherd*'s mortgage, but the preſent is for a new purpoſe different from the former, and a mortgagee after a decree for a redemption, may bring a bill for a foreclоſure; but the court will not make an inconſiſtent decree in a ſecond cauſe between the ſame parties, on account of the confuſion it would create; but at the ſame time Lord *Hardwicke* declared he would not upon an order in a former cauſe tie up the plaintiff, but will direct the cauſe to ſtand over, ſo as to give him an opportunity of laying the matter before the court on a bill of review or otherwiſe, as he ſhall be adviſed. *Page* 348

Shepherd inſiſted, that on advancing 800 *l.* again the deed ought to ſtand as it did before, a ſecurity for 4000 *l.* the parties intending it ſhould; and his council offered to read parol evidence to ſhew this intention, which was objected to as being within the ſtatute of frauds and perjuries. Lord *Hardwicke* ſaid, that the loan of the 800 *l.* cannot be conſidered as a continuance of the old mortgage in 1725. and in reſpect to an intervening incumbrance, is a new one, admitting *Shepherd* to have notice, and therefore would not allow the parol evidence. 350

The court never ſuffer a *decree to account* to be ſigned and inrolled, becauſe it ties up their hands from relieving, if there ſhould have been any defect in the directions of the decree. 383

A *decree quod computet* makes no variation as to an executor, for before a final decree, he may confeſs a judgment, and it does not at all alter the nature of the demand. 385

A decree *quod computet* does not paſs *in rem judicatam* till the final decree. 387

No ſtreſs to be laid on the words that each party do pay in a decree *quod computet*, for till the account taken it is impoſſible to pronounce which will be the debtor or creditor. 387

To ſupport a plea of a former decree, you muſt ſet forth ſo much of the firſt bill and anſwer as will ſhew the ſame point was then in iſſue. 603

Deeds. See titles **Cuſtom of London, Conveyances, Aſſurances, Conſtruction and Operation of them, fraud.**

Deeds executed near together may be conſidered as a part of the ſame tranſaction. *Page* 76

The intention of the parties appearing on a deed, always governs the court in conſtructions. 91

The court will make a favourable expoſition of words in marriage ſettlements to ſupport the intention of the parties, and even in voluntary ſettlements, if the words lean more ſtrongly to the one conſtruction than to the other, it muſt likewiſe prevail. 91

It is no ground for a court of equity to ſet aſide a deed, that a perſon put an unguarded confidence in another. 202

Though the *conſideration* is not expreſſed in a deed, yet if the court ſees what was the real and material conſideration, it has great weight, notwithſtanding the ſtatute of frauds and perjuries. 202

A mortgage and an aſſignment of a mortgage were put into *B.*'s hands to receive the principal and intereſt, who pawned them to the defendant *S.* for 100 *l.* Lord *Hardwicke* held, that as the pawner muſt by the deeds appear to have no property, he could not avoid decreeing *S.* to deliver the deeds to the plaintiff, and leave the pawnee to his remedy at law againſt *B.* 306

The plaintiff is proper in bringing a bill here for the recovery of the deeds; for in an action of trover he could only have damages for the detainer. 306

An attorney's ſaying that he only followed directions in drawing deeds under fraudulent circumſtances, will not excuſe him from paying coſts. 328

On deeds the rule is certain, that they ſhall be controuled by the rules of law, and the intent that appears on the face of the deeds. 575

Iſſue in a deed, is always a word of purchaſe. 582

Deeds loſt or concealed.

Where a deed happens to be loſt, you cannot at law read a copy, becauſe you muſt declare with *a profert hic in curia*, and therefore you may bring a bill here to be relieved againſt the accident of the original's being loſt. *Page* 81

Deeds obtained by dureſs, compulſion, ſee before title **Bond.**

Defendant. See titles **Evidence,** *Ne exeat regno*, **Parties, Rule, Demurrer, Rehearing, Account, Plea, Anſwer.**

Where a bill is brought for new matter diſcovered ſince the hearing, a defendant, if he can ſhew there is no new matter, muſt take advantage by plea or demurrer, for it is too late to inſiſt upon it at the hearing. 40

Where a bill prays an account, and allowances in that account, a defendant may equally make objections, as if he had brought his croſs bill. 59

Though the plaintiff has not replied to the defendant's anſwer, yet deſiring him to do an act, will intitle the defendant to his coſts, to be taxed. 101

A miniſter of a pariſh, who prevents an order for a defendant's appearance being publiſhed purſuant to 5 *G.* 2. *c.* 25. is indictable for a contempt. 114

When a defendant has anſwered to a diſcovery prayed by a bill, he cannot afterwards demur to it. 157

Though you anſwer to the diſcovery, yet you may demur to the relief. 157

The defendant prayed to amend her anſwer by adding a new fact, granted on the particular circumſtances of her caſe. 294

Where a defendant has miſtaken a fact, or a date, the court will give him leave to amend his anſwer. 294

Where a defendant cannot be made to appear, it amounts to the ſame thing as if proceſs had been taken out for want of an appearance, and carried on to a ſequeſtration. 510

Demurrer. See titles **Witneſs, Defendant, Coſts, Plea, Uſury, Merchants, Injunction, Reſtraint of Marriage.**

A defendant muſt take advantage of a defect in form, by a demurrer; it is too late to object after he has anſwered. *Page* 137

A demurrer to a bill, for the diſcovery of a caſe which the defendant had ſtated to his council, for an opinion, overruled. 214

Though a defendant has not demurred to a bill, as being too trifling for this court to entertain, yet he may take advantage of the objection at the hearing; for a bill may have been ſo drawn, as to have prevented a demurrer. 253

A man who demurs at law, demurs in chief, and it is a perpetual bar, if judgment ſhould be againſt him; but if a demurrer is over-ruled here, a defendant may inſiſt afterwards upon the ſame thing by his anſwer. 284

The defendant demurred to the diſcovery ſought concerning proceedings before the court of delegates. Lord *Hardwicke* held, that the ſentence in the delegates cannot be read, as this is a demand for real eſtate; and they proceed there by different laws, and in matters too relative to the perſonal eſtate only; and allowed the demurrer as to this part. 387

The defendant alſo demurred to the diſcovery, ſought with relation to the perjury, in a ſuit at law, charged to be committed by her procurement. 387

As a demurrer cannot be good for part, and bad for part, Lord *Hardwicke* allowed it likewiſe as to the diſcovery ſought in relation to the ſubornation of perjury. 389

A demurrer will lie to a bill brought, which ſeeks a diſcovery of the defendant, whether a particular perſon is living, or where he is, in order only to make him a party to a ſuit. 394

A bill brought by a principal, to diſcover what goods the defendant bought of his agent; he demurred, for that he is not obliged to ſet out what gain he has made by the retail of them; but the demurrer was held to be inſufficient, and over-ruled. *Page* 394

The defendant demurred to the plaintiff's bill, brought to eſtabliſh a right to an oyſter fiſhery, and to be quieted in the poſſeſſion of it, as being a matter properly triable at law. *Lord Hardwicke declared, that where the right of a fiſhery is in diſpute only between two lords of manors, they can neither come here till it is firſt tried at law, and therefore allowed the demurrer.* 483

Depoſitions or Examination. See titles **Evidence, Witneſs.**

On a bill brought by a wife againſt her huſband, to have a maintenance out of her fortune, on ſuggeſtion of cruel uſage by him; depoſitions to prove criminal converſation againſt the wife, in excuſe for his ill uſage, cannot be read, unleſs the criminal converſation is expreſly charged by the anſwer. 96

Charging the wife has behaved in an indecent manner, will intitle the huſband to read evidence againſt her of criminal converſation, for it is not neceſſary to make the charge in groſs terms. 97

This court will order depoſitions to be referred to a Maſter, for ſcandal and impertinence. 235

A bill was brought to eſtabliſh a bond, for ſecuring an annuity of 60*l. per ann.* given the plaintiff, as *præmium pudicitiæ*; a croſs bill praying the ſecurity may be delivered up, as the plaintiff was a common proſtitute. The defendant's council offered to prove the plaintiff guilty of lewdneſs with a particular perſon; it was objected, the charge in the croſs-bill being only, ſhe was a lewd woman, the defendant ought to confine herſelf to a general character, and not to particular inſtances. *Lord Hardwicke thought the objection of great conſequence to the practice of the court, and took time to conſider till the firſt day of rehearing after the term.* 333

On the 27th of *July* 1742, Lord *Hardwicke*, on a rehearing of this cauſe, ſaid, it is ſufficient

ſufficient to put in iſſue a general charge of lewdneſs, and under this you may give particular evidence, but then it muſt be pointed and applied to the general charge. *Page* 337

That a wife has *miſbehaved herſelf*, does not imply ſhe is an adultereſs; and a depoſition in that caſe to prove her one ought not to be read. 338

Saying that a wife did not behave with that duty as became a virtuous woman, will not intitle the huſband to enter into proof of her committing adultery, unleſs there is an expreſs charge of this kind, for the virtue of a woman does not conſiſt merely in chaſtity. 338

Depoſitions de bene eſſe.

It is too late at the hearing of the cauſe to object to depoſitions taken *de bene eſſe* for irregularity; in ſuch a caſe the court ought to have been moved to diſcharge the order for publication 190

Diſcent. See alſo **Purchaſe.**

If the ſame eſtate is deviſed to *H.* which he would have taken by diſcent, he is in by diſcent. 293

Deviſe and executory Deviſe. See **Will.**

Deviſe for Payment of Debts. See **Truſts for raiſing Portions, Payment of Debts.**

Diſtribution. Who ſhall be preferred with regard thereto.

A creditor cannot take an aſſignment of a bond given by an adminiſtrator, purſuant to the ſtatute of diſtributions, to adminiſter faithfully, and exhibit an inventory, *&c.* nor will an action lie upon it, though aſſigned for a breach he was indebted to the aſſignee in the ſum of 200*l.* upon ſpecialty. 66

J. W. died inteſtate 1724. and left iſſue *T. W.* who died within a week after his father, and his wife *enſeint*, and on the 20th of *May* following was delivered of a daughter; ſhe is intitled to her ſhare under the ſtatute of diſtributions, as much as if ſhe had exiſted in his lifetime. *Page* 115

There is no determination under the ſtatute of 1 *Jac.* 2. that the half blood ſhall take equally with the whole. 116

The principal intention of the act of *Jac.* 2. is to prevent the mother's running away with too much to her children by a ſecond huſband. 116

That the ſhares veſt on the death of the inteſtate, holds equally in lineal and collateral ſucceſſion. 117

The contention between the common law, and eccleſiaſtical court, gave riſe to the ſtatute of diſtributions. 117

The juriſdiction of the eccleſiaſtical court made more extenſive by the ſtatute, than was allowed by the common law. 117

The ſtatute of diſtributions is to be conſtrued by the rules of the civil law:

The act of 1 *Jac.* 2. is an act of continuance *C.* 2. and ought to be conſtrued in the ſame manner. 118

The civil law makes a difference between a child *in ventre ſa mere in eſſe*, at the father's death, and only conceived. 118

Divine Service. See titles **Parſon, Toleration.**

Reading prayers, or a ſermon, in a private family, is not performing divine ſervice. 499

Divine ſervice is an expreſſion made uſe of in ſeveral acts of parliament, eſpecially in thoſe that direct the reading of proclamations, where the order is, that it be read after divine ſervice. 500

Donatio Cauſa Mortis. See **Legacy.**

Dower. See titles **Baron and Feme, Free Bench.**

The defendant purchaſed a real eſtate of the plaintiff's huſband, and the eſtate being in mortgage for a term, he agreed to

to pay it off out of the purchaſe money, and to aſſign the term to a truſtee for the purchaſer to attend the inheritance, which was accordingly done; the huſband died in 1719, and in 1737 the plaintiff brought her bill againſt the defendant, for an account of profits, and to be paid her dower: *Sir Thomas Abney ſitting for the Maſter of the* Rolls, *decreed dower for the plaintiff, but Lord Chancellor reverſed the decree, and diſmiſſed the bill without coſts. Page* 208

Since the caſe of *Radnor* verſus *Vandebendy*, *Shower's Parl. Caſ.* 69. it has been a ſettled rule, that if a purchaſer has taken in a term precedent to the right of dower, be it a ſatisfied one, or money paid for it, it is a bar to the wife's dower; but if the mortgage had ſubſiſted at the huſband's death, the wife might have redeemed and been intitled *to dower*; or if he had paid it off, and taken an aſſignment of the term to attend the inheritance, and died ſeiſed, the wife would have been endowed. 209

All the caſes in relation to the point of dower are ſettled and reconciled in *Radnor* and *Vandebendy*. 209

Though a huſband deviſes an eſtate to a wife larger than her dower, ſhe is intitled to both notwithſtanding. 427

It is now an eſtabliſhed doctrine, that a wife is not dowable of a truſt eſtate. 526

In *Banks* verſus *Sutton*, Sir *Joſeph Jekyll* took a diſtinction in regard to a truſt, where it deſcends to the huſband from another, and not created by himſelf; but Lord *Talbot* afterwards, in the caſe of the *Attorney General* verſus *Scott*, determined directly contrary to this diſtinction. 526

Ejectment. See title Younger Children.

THE confeſſion of leaſe, entry, and ouſter, will operate only to the purpoſe for which the ejectment is intended, and is equally fictitious with the ejectment it ſelf. *Page* 241

A mortgagee is not precluded from bringing an ejectment at law at the ſame time he has a bill of foreclоſure depending here. 343

Election.

A bill being brought here, praying relief as well as a diſcovery, whilſt an action at law was carrying on upon the ſame account, the court obliged the plaintiff to make his election; who, electing to proceed at law, he amended his bill, by ſtriking out the part which prayed relief, and the bill thereupon was diſmiſſed of courſe, as praying nothing but a diſcovery; and the coſts of the diſmiſſion were taxed to the defendant at 38*l.* The plaintiff recovered judgment againſt the defendant in damages and coſts to the amount of 440*l.* and petitions to ſet off the coſts at law againſt the coſts here. *Lord Hardwicke thought it reaſonable; and if the precedents (which he ordered to be ſearched) would juſtify him, ſaid, he would grant the petition; but he doubted whether the practice of the court would allow of it, by reaſon that the bill of diſcovery had been diſmiſſed out of court.* 166

Eſtates. See title Truſtees to preſerve Contingent Remainders.

Eſtates in Fee-Tail. See titles Father and Son, Catching Bargain, Expoſition of Words, Truſtees to preſerve Contingent Remainders.

A copyhold ſurrendered to the huſband for life, to the wife for life, remainder to the heirs of the bodies of huſband and wife, remainder in fee to the ſurvivor, *gives to the wife, who ſurvived, an eſtate tail only, after poſſibility of iſſue extinct, and the eſtate-tail veſts in the heirs of the huſband and wife.* 101

If tenant in tail, remainder in fee, grants an eſtate to *A.* to commence after the death of tenant in tail, and then levies

a fine to other uſes, *A.*'s eſtate is merged in the fine. *Page* 199

It was made a queſtion 150 years ago, but is now ſettled, that if tenant in tail, remainder in fee, levies a fine, a common recovery bars the fee, and the iſſue in tail have not a *ſcintilla juris.* 201

The ſon's recovery would have barred the creditors; a fine would not have done it, for the reverſion in fee would ſtill have been liable. 206

The eſtate now come into poſſeſſion, is liable to the ſpecialty debts of the father; and, by circuity, the ſimple contract creditors are to ſtand in the place of ſatisfied bonds. 206

A deviſe of lands to one for life, and to the heirs of his body, has always been held to be an eſtate-tail; but where it is to one for life, and after his death, to the iſſue of his body, there is no inſtance where it has been ſo conſtrued. 265

A deviſe to *A.* for life, and to the heirs of his body, unites the two eſtates ſo, as to make the firſt taker tenant in tail. 444

Eſtates for life. See titles **Father and Son, Eſtates in Fee-tail, Waſte, Expoſition of Words, Truſtees to preſerve contingent Remainders.**

As a tenant for life, and the perſon in remainder in nature of a tenant in tail of a freehold leaſe may certainly join, and bar the next in limitation, ſo he who has both the intereſts united in himſelf may alſo bar the intail of ſuch a leaſe. 259

Where a ſecond ſon is tenant for life of a freehold leaſe, remainder to the heirs of the body of the father, the tenant for life, and the elder brother may bar the intail. 260

The courſe of the court with regard to a tenant for life is, that he ſhall keep down the intereſt by rents and profits, but portions or principal money on any other incumbrance ſhall be born by the whole eſtate; and therefore the defendant Sir *George Saville* ſhall not account for the rents or the value of the timber cut down, in order they may be applied towards raiſing the daughters portions. *Page* 463

Eſtates for Years. See titles **Fine, Deviſe.**

A demiſe of a leaſe for years to the ſame perſon to whomt he fee is deviſed, and which commences in the life of the deviſor, is no revocation of the fee. 72

Where there is a deviſe of a leaſe for years to a man, and if he die without iſſue, remainder over, the whole intereſt veſts in the firſt taker; otherwiſe if it had been a leaſe for lives, for there the firſt taker had a power over it only during his own life to have diſpoſed of it, but if he makes no uſe of that power, immediately upon his death it veſts in the remainder-man, who takes as a *ſpecial occupant.* 376

Eſtates by Implication. See title **Implication.**

Term attendant on the Inheritance.

A term attendant on the inheritance is conſidered as a part of it, and ſhall not be ſevered from it, nor can it paſs without it. 72

Limitation of terms for Years. See titles **Money, Portions.**

An agreement for a dean and chapter eſtate, though ſigned by the dean only ſhall bind the chapter. 45

Edward Buſſey poſſeſſed of a term for 59 years by a ſettlement made after marriage, conveyed it to truſtees in truſt to permit his wife *Grace Buſſey* to receive the rents during the term, for her ſeparate uſe, if ſhe ſo long live, and after her deceaſe to permit him to enjoy the rents during his life, and after his deceaſe in truſt for the *heirs of the body* of *Grace by Edward Buſſey*, and for want of ſuch iſſue, remainder to *Henrietta*

Hodgeſon for her life, and after her deceaſe in truſt for her two ſons *William* and *Edward*. *Page* 89

Edward Buſſey died, having never had any iſſue, and *Grace* his wife ſurvived him. It was held that the whole term was not veſted in *Grace Buſſey*, and that the words *heirs of the body* were not words of limitation but purchaſe, and the leaſe was ordered to be depoſited in court for the benefit of all parties. 89

Words of limitation are improperly uſed on terms for years. 90

The words *if Grace Buſſey ſhall ſo long live*, are an affirmative implying a negative at the ſame time, that if ſhe did not live ſo long, the remainder of the term ſhould go over. 91

For want of ſuch iſſue, is the ſame as for want of ſuch ſon or ſuch daughter, for the word *ſuch* confines it to ſuch iſſue as is meant by the words *heirs of the body*. 92

Heirs of the body here mean the heir of the body living at the death of *Edward Buſſey*, or born in a reaſonable time after. 92

Evidence and parol Evidence. See titles **Baron and Feme, Decree, Copyhold, Depoſitions, Papiſt, Witneſs, Manors, Fraud, Charity and Charitable Uſes, Infant.**

A witneſs if intereſted muſt produce a releaſe, or his evidence cannot be read. 15

The rule that you can have no decree upon the evidence of a ſingle witneſs againſt the oath of a defendant in his anſwer are equally ſtrong with thoſe that are affirmed by the depoſition. 19

Where a plaintiff ſets up a title to an eſtate, and makes a perſon defendant who diſclaims all right, though the plaintiff does not bring him to a hearing, he cannot read his evidence as a proof of his own right to the prejudice of another defendant. 39

The rule with regard to evidence is a reaſonable one, and ſuch as the nature of the thing to be proved will admit of. 40

J. W. being ſolicited by *T. W.* and his ſiſter to do ſomething for them, ſaid if you will ſurrender your copyhold for the benefit of *R. W.* I will ſecure annuities to each of you for lives; whereupon *T. W.* promiſed to ſurrender his copyhold accordingly; and *J. W.* did actually ſurrender his, charged with annuities of 5*l.* *per ann.* for *T. W.*'s life, and 2*l.* 10*s.* for the ſiſter. *R. W.* the defendant to the bill brought by *T. W.* for the annuities, refuſed to pay them unleſs *T. W.* will ſurrender his own copyhold eſtate, purſuant to his promiſe, and inſiſted, though there was no written agreement between *J. W.* and *T. W.* parol evidence may be admitted to prove this fact; *the court of opinion R. W. may be allowed to read parol evidence to rebut the equity ſet up by T. W.'s bill.* Page 98

The defence ſet up by *R. W.* ariſes from the impoſition of the plaintiff *T. W.* and therefore is not at all affected by the ſtatute of frauds and perjuries. 99

A bill for quit rents and an account produced, it muſt be proved to have been a ſteward or bailiffs, or it is not evidence of payment here any more than at law. 140

Where the evidence of a ſingle witneſs againſt a negative in a defendant's anſwer is corroborated by a great number of circumſtances, it is ſufficient to ſupport an equity. 140

The evidence of a neighbouring manor, ſhall not in general be admitted to ſhew the cuſtoms of another manor, becauſe each is to be governed by it's own. 189

But it is not ſo univerſal, as not to be varied in ſome inſtances; for in mine countries, the courts of law have admitted evidence with regard to profits of mines, *&c.* out of other manors, where they are ſimilar, to explain the cuſtom of the manor in queſtion. 189

Where a perſon is mentioned by a nickname, or where there have been two perſons who have had the ſame chriſtian and ſurname, parol evidence has been admitted to aſcertain whom the teſtator meant. 239

A Table of the Principal Matters.

Examination of Witneſſes. See title Depoſitions.

The defendant having examined Mr. *Briſtow*, his clerk in court, the plaintiff exhibited interrogatories for croſs-examining him, to which he *demurred*, for that he knew nothing of the matters inquired of, except what came to his knowledge as the defendant's clerk in court, or agent, *Lord Chancellor overruled the demurrer, and ordered him to anſwer to the interrogatories.* Page 524

This demurrer covers too much, it ought to conclude, that he knew nothing but by the information of his client. 524

Where at law the party calls upon his attorney for a witneſs, the other ſide may croſs examine him, but it muſt be only relative to the ſame matter. 524

Council, ſolicitors or attornies may be privileged from being examined in ſuch caſes, but not an agent. 524

Dolliffe, on his going abroad as a ſupercargo, by articles covenanted with the *South-Sea-Company* he would not demur to any bill they might bring within *two* months after his return, which was altered afterwards to *ſix*; *Gambier*, who drew the articles demurred, as council to the company, to *Dolliffe*'s examining him; the demurrer over-ruled, *for that what he knew was as the conveyancer only.* 525

Exchanges.

In the law of exchanges, where there is an alienation by one of the parties, and an eviction, it is not clear whether the heir at law or the alienee ſhould enter. 369

Excommunication.

Lord *Hardwicke* over-ruled all the exceptions upon a motion to quaſh the writ of *ſignificavit*, and held there was ſufficient in this caſe to warrant the court to iſſue the *excommunicato capiendo.* 498

A man may be reſident in one dioceſe, and come into another, and commit the offence charged upon him in the *ſignificavit*, and this for the purpoſe of being cited, is a reſidence ſufficient; and he may be proſecuted in the dioceſe where he committed the offence, or otherwiſe there would be no remedy. *Page* 500

Execution of a power. See Power, alſo Deeds, and the conſtruction and operation of them.

Executor and Adminiſtrator. See titles Bond, Expoſition of Words, Truſtees, Coſts, Aſſets, Legacies, and under title Legacy the diviſion of Abatement and refunding of Legacies, Decree.

Where a man purchaſes a leaſehold eſtate from an executor, it ceaſes to be a truſt on the land; for where money is wanting an executor muſt ſell. 42

Where a creditor of a teſtator accepts of an executor's bond, it is conſidered as a new ſecurity, for it ſhews he relies more on the executor's credit than the charge in the will. 42

An expreſs deviſe of an eſtate to an executor to ſell, or a charge on it for payment of debts, without ſuch power, gives him an equal right to do it. 43

Where an executor is alſo the truſtee for payment of debts, the aſſets ſhall ſtill be equitable, and not legal, and all the creditors muſt be paid *pari paſſu.* 50

An adminiſtrator, though inſolvent, muſt be a party to a bill for diſcovery of aſſets. 51

Where one executor is indebted to the teſtator by mortgage, if the co-executors are apprehenſive he is inſolvent, they ſhould bring a bill againſt him for ſale of the eſtate, and not for a foreclоſure, becauſe being an executor has given him an intereſt in the mortgage. 56

Two perſons executors and truſtees under a will, would not prove the will, nor ſuffer the *ceſtuy que truſt* to take out letters of adminiſtration *cum teſtamento annexo*, till he had executed a deed, by which he was to pay *a hundred pounds* to one executor, and two hundred pounds to the other, within ſix months after

after they ſhall have exhibited an inventory. Lord *Hardwicke* declared the deed was unduly obtained, and decreed no allowance ſhould be made for the ſum of 100 *l.* and 200 *l.* to the plaintiffs. *Page* 58

An adminiſtration taken out here will not extend to the colonies in *America*, but an agent there, who gets in aſſets under the exemplification of a probate, is equally chargeable as if the executor got them in himſelf. 63

A debtor leaves a creditor by note payable on demand his executor; this court will not allow him intereſt for it, becauſe he may turn money to his own advantage, which is coming in by the teſtator's aſſets. 106

Though executors are not to pay coſts, yet they ſhall not be allowed any, becauſe they are ſuppoſed to reimburſe themſelves by the credit they take in the account kept by them. 108

Where the repreſentative of an inteſtate is ſeeking to give preference by confeſſing judgments, the court will give the plaintiff leave to proceed at law to recover judgment with a *ceſſet executio*, and in this court, for a diſcovery and account of aſſets. 119

Though an adminiſtration is not taken out till after the filing of the bill, yet if procured before a cauſe comes to a hearing in equity, it is ſufficient; otherwiſe at law, becauſe there the defendant may crave *oyer* of the letters of adminiſtration. 120

If an executor, for the benefit of the teſtator's eſtate, ſhould inveſt part of it in the funds, or transfer money from one ſtock to another, this is not a converſion, but you may ſtill follow it as much as if it continued in the ſame condition as at the teſtator's death. 159

A wife who was an executrix was reſtrained from getting in the aſſets of a teſtator, her huſband being in the *Weſt-Indies*, and not amenable to the proceſs of this court. 213

A receiver appointed to collect in aſſets, and to bring actions in the name of an executrix, muſt give ſecurity to indemnify the executrix on account of ſuch actions. 213

An executor before probate may ſo far act as to get in and receive his teſtator's eſtate, or releaſe debts, or even bring actions for them. *Page* 125

Though executors have a year to pay legacies, yet that does not extend to debts, but they are liable to be ſued the moment after the teſtator's death. 301

An executor by an eſtabliſhed rule of law may retain to pay his own debt, but is not obliged to take in part, where there is not aſſets enough to pay the whole. 411

A proviſion out of a real eſtate for one executrix will not bar her, neither will ſpecifick legacies given to one, bar either of the reſidue in the perſonal eſtate, but are put in only to give one a preference of the other. 626

A teſtator may give an executor the perſonal eſtate as a legacy, and exempt from debts. 626

How to account.

It being an expreſs condition of an executor's taking himſelf under a will that he ſhould diſcharge the legacies within a year after the teſtatrix's death, he paid into the hands of *the three children of P.* their legacies of 100 *l.* each; the eldeſt ſixteen, the ſecond fourteen, and the youngeſt nine years of age, at the time the father embezilled the money; the children by their bill demanded a repayment. *Lord Hardwicke* held at firſt, that as the executor made this payment to ſave a forfeiture of what he himſelf took under the will, he ought not to pay it over again; but afterwards thinking it a doubtful point, recommended it to the executor to give the children ſomething, who agreeing to pay 50 *l.* to be divided amongſt the three, they were ordered to releaſe their legacies. 80

The rule laid down by Lord *Cowper* in the caſe of *Dagley* verſus *Tolferry*, 1 *Wms.* 285. *that in all caſes where executors pay infants legacies to fathers they ſhall be paid over again*, *Lord Hardwicke* declared he thought was too ſtrict. 81

Though the perſon is come of age, during whoſe infancy the will appointed an executor *durante minore ætate*, yet if the executor *durante, &c.* has not collected in the whole eſtate, he muſt be brought before the court. *Page* 121

In what caſes an executor ſhall or ſhall not be a truſtee.

Where there is any declaration that executors are but truſtees, or if they have particular legacies given to them, the rule of the court of Chancery is, that the reſidue ſhall be conſidered as undiſpoſed. 18

Where a teſtator appoints a perſon executor, it is giving him the reſidue, unleſs he has a particular legacy, and the ſame rule holds in the eccleſiaſtical court. 46

A legacy given directly to *B.* or to *A.* in truſt for *B.* is the ſame thing, and equally excludes the reſidue. 47

Where a reſidue is given to an executor for life, it implies a negative that he ſhall not have it for any longer term. 47

Where the reſidue is undiſpoſed, and a teſtatrix has always declared the next of kin ſhall have nothing, the executors, though they are legatees, ſhall have the reſidue notwithſtanding. 68

The court, with reſpect to the reſidue, will depart from their general rules in favour of the next of kin, where the teſtator's intention is proved to be againſt them. 69

If the court is ſatisfied *the next of kin* were not intended to have the reſidue, the executor muſt have it of courſe, for there is no medium between them and executors. 69

A teſtator gives the reſidue of his eſtate to his executrix, or to her heirs, executors, adminiſtrators or aſſigns; ſhe died in his life-time; the court held it was given her as executrix, and ſhe dying before the teſtator, he is dead as to the reſidue. 86

At law a legacy does not veſt in the legatee till the executor's aſſent; but here he will be decreed to deliver the ſpecific legacies according to the will, being conſidered in this court as a bare truſtee for legatees. 77

Expoſition of Words. See titles **Condition, Contingent Remainder, Truſt, Will, Heir,** the diviſion **Deviſe** under title **Will, Words.**

The word *eſtate* in a will is ſufficient to paſs not only the land, but the intereſt the teſtator has in it likewiſe. *Page* 38

A deviſe of plate, jewels, linen, houſhold goods, and coach and horſes, will be confined to things of the ſame nature: goldſmiths notes, and bank-bills, do not paſs by thoſe words. 103

A teſtator having divided his perſonal eſtate into eight ſhares, gave four parts to his niece *Buffar and the children born of her body*; the plaintiff was born after the will was made, and Mrs. *Buffar* dies in the teſtator's life-time; *this is not a lapſed legacy, for ſhe did not take an eſtate-tail; but as a joint-tenant with the plaintiff, and as ſhe is dead, he takes the whole by ſurvivorſhip.* 220

Children are words of purchaſe, and not of limitation, except it is to comply with a teſtator's intention, and it can take effect no other way. 222

K. by his will ſays, I make *D.* my ſole heir and executrix, and if ſhe dies without iſſue, *then* to go to Lord *George Beauclerk*: *D.* levied a fine and ſuffered a recovery of the real eſtate, and inſiſts ſhe has an abſolute right both to the real and perſonal eſtates of the teſtator, and not obliged to account. *Lord Hardwicke held the limitation over was void, and cannot be confined to the defendant's dying without iſſue living at the time of her deceaſe, and diſmiſſed the bill.* 308

Then, in the grammatical ſenſe, is an adverb of time, but in limitations of eſtates, and framing contingencies, it is a word of reference, and relates to the determination of the firſt limitation in the eſtate when the contingency ariſes. 311

According to Lord *Hardwicke*'s note of *Forth* and *Chapman*, Lord *Macclesfield* held that the words *leave no iſſue*, muſt relate to the time of the deaths of the teſtator's two nephews *William* and *Walter*, and could not be extended to a dying without iſſue generally. 313

T. H. gives 500 *l.* by his will to be paid to his grandſon *T. P.* if he lived to be 21, and in caſe he died before, then to the other child or children of his daughter *M. P.* equally arriving at ſuch age. *T. P.* died before 21, and no child of *M. P.* was born or living at the teſtator's death. *The grandchildren born after the death of T. H. are intitled to the 500 l for not being in eſſe in his life-time, he muſt have had in view the future children of his daughter.* Page 329

The words *equally arriving at the age of* 21 making it doubtful whether any thing veſted till 21, the court directed the 500 *l.* to be put out to intereſt, and paid in the mean time to the teſtator's ſon; but if the child or children of *P.* arrived at their ages of 21. then the 500 *l.* to be paid to them, and intereſt from the time it became payable. 330

The word *repriſes*, is of uncertain ſignification; but ought to be conſtrued *ſecundum ſubjectam materiam.* 545

Cowell's Interpreter, and *Blount's Law Dictionary*, explain the meaning of repriſes; but *Spelman*, who is a far better antiquary than either of them, has not the word in all his Gloſſary. 545

A direction in a will, that the intereſt, with the principal of the reſidue of a teſtratrix's real and perſonal eſtate, ſhall be ſettled on her daughter, *or* the heirs of her body, as the executors ſhall think fit, will not empower them to give it from the daughter to the grandchildren; for in this caſe the word *or* muſt be conſtrued *and*, in order to put a reaſonable conſtruction on the will. 643

Factor and Principal.

WHERE a factor makes an agreement for the hire of a ſhip with *the maſter* on his own account for 48 *l.* a month, and not on the part of the merchants his principals, they are not liable, nor their goods put on board to ſatisfy the maſter's demand, but they are liable to pay the factor the freight for the cargo; and as he was bound by the charty-party, which gave the maſter a ſpecific lien on the goods, he has a right to be paid in the firſt place, before the aſſignees of a factor under a commiſſion of bankruptcy againſt him, who ſtand only in the place of the bankrupt. *Page* 621

If a factor becomes bankrupt, and the merchant's goods are not mixed with his, they ſhall have them. 623

Whoever lets his ſhip to hire, muſt take care the hirer is ſubſtantial; for if he be not competent, the maſter muſt ſuffer for his neglect. 623

To pay cuſtoms or for ſalvage a factor may detain goods. 623

Father and Son. See titles Fraud, Grandchild, Court of Chancery, Purchaſe, Witneſs.

An agreement between a child and a father to alter the limitations under a ſettlement, will not be ſet aſide, on pretence of a ſon's being drawn in by the father's power and authority. 85

A parent's duty to provide for all his children will extend to poſthumous ones. 116

Where a father tenant for life, draws in a ſon tenant in tail, to join in a conveyance which would deſtroy his remainder, this court on very ſlender evidence of ſuch a practice in a father will relieve the ſon; for ſuch an attempt in a father is a plain fraud upon the cuſtom. 161

Lord Chancellor *King*, in the caſe of *Gliſſen* verſus *Ogden*, refuſed to give relief on a conveyance obtained by a father from a child, as thinking it a fair bargain; but the Lords upon an appeal in *March* 1731. laid great weight on the circumſtance of the conveyance being obtained by a father from his daughter in diſtreſs, and reverſed the decree. 258

The defendant's late father gave a judgment to the plaintiff's teſtator for 120 *l.* a ſettlement ſet up in bar, made after the marriage of the defendant's father and mother in 1694. in which the father was tenant for life, the mother tenant for life, and the defendant firſt tenant in tail; in 1700. the father purchaſed

4 *l. per annum* jointly with the defendant, to them and their heirs; in 1708. he made another joint purchaſe with his youngeſt ſon of 5 *l. per annum*, and ſettled it as a proviſion for his younger children, paid the purchaſe money for both the eſtates, and continued in poſſeſſion to his death in 1735. the plaintiff inſiſting that all the eſtates are ſubject to the judgment, and that the ſettlement being after marriage was voluntary, brought his bill to have ſatisfaction out of the eſtates of the conuſor of the judgment. A creditor on the circumſtances of this caſe was decreed to be let in upon the eſtates jointly purchaſed by the father and his ſons, and a moiety of each directed to be ſold, and the money ariſing therefrom to be applied to the ſatisfaction of this judgment. *Page* 477

Though the father pays the whole conſideration, yet if the purchaſe is made in the name of a younger ſon, the heir cannot maintain it as a truſt for the father. 480

Though it may be proper *ſtare deciſis*, yet Lord *Hardwicke* thought the caſes had gone full far enough in favour of advancements, and that he ought not to carry it further. 480

The reaſon why a purchaſe in the ſon's name, though the poſſeſſion continued in the father, has been held an advancement of the ſon, is, becauſe the father was his natural guardian during his minority. 480

A purchaſe in the names of father and ſon, *as joint-tenants*, is no advancement of the ſon, as it does not anſwer the purpoſe, for till a diviſion the father has the poſſeſſion of the whole, and even after it a moiety, beſides the chance of the other moiety by ſurvivorſhip. 480

Fee-farm Rent. See title **Diſtreſs and Rent.**

Fee-ſimple and Fee-tail. See **Eſtates.**

Fine. See title **Covenant.**

A covenant in a mortgage deed by a huſband and wife in 1692. to levy a fine in the *Eaſter* term following, but was not levied till *Trinity* term 1695; for 10 *l.* more they join in a conveyance of the equity of redemption, and covenant the fine heretofore levied, ſhould be to the uſes of this deed. The covenant in 1695. held to be good and binding on the huſband and wife, and that the former deed might be laid out of the caſe, as the covenant under it for levying the fine in *Eaſter* term was not ſtrictly purſued. *Page* 79

Tenant for years, at will, or at ſufferance, cannot by fine deveſt an eſtate and turn it to a right. 240

If a perſon has loſt his right by a legal bar, he can have no remedy. 240

Though in a fine there are often more parcels of land than belong to the conuſor, yet a court of equity will reſtrain it to ſuch lands as really belong to him. 241

Where a fine and non-claim is levied by one who got poſſeſſion under a forged deed, a court of equity will decree againſt the fine. 381

Where tenants give a conditional poſſeſſion only, provided they may pay their rents to a third perſon, till a ſuit is determined, a fine levied under ſuch a poſſeſſion will not be ſuffered to ſtand. 390

Should ſuch a fine prevail, what is ſaid to be a ſolemn act and the end of all controverſies, would ceaſe to be ſo, and introductory of numerous frauds; even at law fines will be ſet aſide for fraud; as in the caſe of a tenant for years. 390

If a perſon purchaſes an eſtate, which he ſees has a defect upon the face of the deed, yet a fine will be a bar; for that defect is the very occaſion of levying the fine. 631

A perſon who purchaſes from a truſtee who levies a fine, is as much a truſtee as he was; the ſame as to a grantee of a mortgagee, his fine will not diſcharge the equity of redemption. 631

The operation of a fine and non-claim is not by turning it into a right, but it is by force of the bar ariſing from the ſtatute of non-claims. 631

Forfeiture. See title **Reſtraint on Marriage**, a ſubdiviſion under title **Marriage, Condition.**

Where there is a condition annexed by a will to a deviſe of real or perſonal eſtate, and no notice required to be given, unleſs the legatees perform the condition they cannot be intitled, and where there is a deviſe over, a forfeiture incurs. *Page* 616

Fraud. See titles **Heir**, and **Anceſtor, Marriage, Agreement under hand, Attorney and Solicitor, Baron and Feme, Bonds, Catching Bargain** under title **Heir, Colluſion, Covin, Concealment, Deeds, Executors, Impoſition, Account, Charitable Corporation, Will, Father and Son.**

A note of hand at the beginning of it, was mentioned to be for 20*l.* borrowed and received; but at the latter end, were theſe words, *which I promiſe never to pay.* Lord Chief Juſtice *Parker* held, the plaintiff in the action was well intitled to recover the 20*l.* upon the lending on one ſide, and the borrowing on the other, notwithſtanding the words in the concluſion of the note. 32

Where money is lent to two perſons, and either through fraud, or want of ſkill, the bond is made a joint only, inſtead of a joint and ſeveral bond, theſe are heads of equity on which the court always relieves. 33

Where a mortgagee was preſent whilſt a mortgagor was in treaty for his ſon's marriage, and fraudulently concealed his mortgage, the court decreed the ſon, the wife, and the iſſue, ſhould hold the lands againſt the mortgagee and his heirs. 49

Where a perſon advancing money, refuſes after an abſolute conveyance, to execute a defeaſance, this court will relieve againſt the fraud. 99

In a caſe of fraud, the evidence of a perſon who joined in granting and conveying away her eſtate was admitted, though it invalidated her right to the eſtate ſhe had ſo granted and conyeyed. *Page* 228

Where a father obtained an abſolute conveyance from a daughter, in order to anſwer one particular purpoſe, and afterwards makes uſe of it for another, this court will relieve under the head of fraud. 254

The plaintiff, as heir at law to Sir *John Lee*, brought a bill to ſet aſide a conveyance of the eſtate of the defendant, on a ſuggeſtion of fraud, impoſition, and undue influence: Lord *Hardwicke* held, the plaintiff ought to be relieved, and decreed the deed ſhould be delivered, and poſſeſſion of the eſtate likewiſe given him. 324

Settled ever ſince the caſe of *Powis* and *Andrews*, that a will cannot be ſet aſide for fraud here, becauſe where it is a will of perſonal eſtate, it may be ſet aſide in the eccleſiaſtical court, and a will of real eſtate at law. 324

Not reading a deed to a perſon in the rough draft before the execution, nor in the ingroſſment at the time it was executed, is a badge of fraud. 327

E. making *T.* believe the grant of a ſtewardſhip was ſo drawn, that he might revoke it at pleaſure, whilſt *E.* had taken it to himſelf and his heirs; the court held, that *E.* having abuſed the truſt repoſed in him, and manifeſtly intending to get the eſtate into his own hands, the grant of the ſtewardſhip muſt be delivered up, and *T.* muſt have his full coſts of ſuit. 332

Fraud is what is done in ſecret, and where there is a concealment from the party in a matter which concerns him in intereſt. 561

Frauds and Perjuries. See **Agreement.**

Free Bench. See title **Dower.**

The father of the plaintiff's huſband bought cuſtomary freehold lands, which were conveyed to him and *D.* and the heirs of the father, who dies, after deviſing the lands to his ſon in tail, who dies;

dies; living *D.* the plaintiff lays the cuſtom for the whole as her free bench. *Lord Hardwicke ſaid, this was a demand of cuſtomary dower out of the truſt of a freehold eſtate, and diſmiſſed her bill.* Page 525

It is a dying ſeiſed of the huſband, and not a ſeiſin during coverture, intitles the widow to her free bench. 526

Freehold, things fixed thereto: See alſo **Matters controverted betwixt the Heir and Executor** under title **Heir.**

Game and Game-keeper. See title **Bond.**

AN unqualified perſon ſhooting a game-keeper's dog will juſtify a judge in directing conſiderable damages. 192

Bonds taken for the preſervation of the game, and to prevent poaching, are for the benefit of the obligor, as this ſort of idleneſs leads to worſe conſequences. 193

There is no act of parliament which directs taking bonds in this particular caſe, but the acts which relate to the cuſtoms, and the act 5 *G.* 1. *c.* 15. againſt deer-ſtealing directs ſuch bonds, ſo that the doing of it is not *malum in ſe.* 193

Theſe bonds are not intended as a bare ſecurity that the obligor ſhall not offend for the future, but are by way of ſtated damages between the parties. 193

Fiſhing with an angling rod is not poaching, nor was it ever ſo eſteemed. 194

Gaming.

A motion for further time to redeem a mortgage, and that it ſhould ſtand as a ſecurity only for what was *bona fide* advanced, but forfeited as to what was won at play: Lord *Hardwicke* ſaid, as Mr. *Fleetwood* in a former cauſe, where he might have done it did not inſiſt on a redemption, the foreclоſures could not regularly be kept open, but on the whole circumſtances allowed three months. *Page* 467

The inforcing the gaming act is of great conſequence to the public, and not confined merely to the intereſt of private perſons. 467

Though gameſters call them *debts of honour*, yet this court thinks it falſe honour, and that the perſon who informs and diſcovers theſe practices has done a meritorious act. 467

Grandchildren. See title **Expoſition of Words.**

A parent is bound by nature to ſupport a child; but this has not been extended to grandchildren, and therefore not intitled to intereſt. 330

Guardian. See titles **Infants, Maintenance.**

Though there be no cauſe depending, there may be an application to the court in the caſe of guardianſhip of children. 14

A teſtamentary guardianſhip is not aſſignable. 14

If a guardian purchaſes his ward's eſtate immediately upon his coming of age, though it carries ſuſpicion with it, yet if he gave the full conſideration, it is not voluntary, nor can it be ſet aſide. 15

Habeas Corpus. See title **Certiorari.**

A *Habeas corpus* and a *certiorari* differ; that removes the body *cum cauſa*, and you declare *de novo* in the ſuperior court; but on a *certiorari* you muſt proceed on the record, as it ſtands when removed. 317

Heir and Ancestor. See title **Assets, Will, Specific Legacies.**

The heir at law does not want an expreſs intention to take by a will, though it is otherwiſe with regard to a deed. *Page* 151

An heir at law is as much at liberty to invalidate the will, as the deviſee to eſtabliſh it; and ſuch a ſuit is to all intents a *lis pendens.* 174

If an heir conveys an eſtate to a ſtranger whilſt there is a ſuit for eſtabliſhing a will, and it is afterwards eſtabliſhed, the grantee of the heir is bound. 175

If an heir at law in a ſuit to eſtabliſh a will, prevails to ſet it aſide, he ſhall have the benefit of the evidence in that cauſe againſt a purchaſer *pendente lite.* 175

An heir muſt be charged in *the debet* as well as *the detinet*, and before the ſtatute of jeofails, it would have been error if otherwiſe; which ſhews he is to be conſidered as a debtor. 205

If judgment be by default againſt an executor, it can only be *de bonis teſtatoris*; but if againſt the heir it may be *de bonis propriis.* 205

Though a perſon has an intention to diſinherit his heir, yet if it was owing to fraud and impoſition, this will fetch back and reveſt it in the heir. 327

An heir is intitled to his coſts, for it is the law which caſts the deſcent upon him; otherwiſe as to an executor, becauſe he may renounce. 408

A bare intention, or even negative words, will not exclude an heir at law from inſiſting on a reſulting truſt. 566

A man by empowering other perſons to diſpoſe of his eſtate, diſinherits his heir, as much as by his own actual diſpoſition. 567

Where a teſtator ſays, I will my heir ſhall ſell the land, without mentioning for what purpoſe, he is not obliged to ſell; but if he appoints his executor to ſell, it is turned into perſonal aſſets, and leaves no reſulting truſt in the heir. 568

Matters controverted between the heir, Executor, and Deviſee, ſee titles **Aſſets marſhalled, and in what order Debts are to be paid,** and **Bond.**

All my freehold lands in the tenure of the widow *L.* and the reſidue of my eſtate, conſiſting in ready money, plate, jewels, leaſes, judgments mortgages, *&c.* or in any other thing whereſoever or whatſoever, I give to *A. H.* or her aſſigns for ever. *The court will intend an inteſtacy in favour of the heir at law, unleſs there is a clear intention to paſs the real eſtate.* Page 102

Where an heir at law will bring a bill to ſet aſide a will for inſanity, inſtead of an ejectment, he ſhall pay coſts if he fails. 424

Where an heir is brought before the court as a defendant, and an iſſue at law is directed to try the fraud or inſanity of the teſtator, though he fails in overturning the will, the court will not give coſts againſt him, but very often allows the heir his coſts. 424

Before the ſtatute of fraudulent deviſes an heir would have had the aid of the perſonal eſtate in eaſe of the real, but if there was no perſonal, is not intitled to a contribution from the deviſee. 432.

Heir. See **Bargains catching.**

Hotchpot. See **Cuſtom of London.**

W. on his ſon's marriage ſettled 5000 *l.* old and new annuities on himſelf for life, then on *W.*'s wife for life, remainder to his ſon for life, with remainder to his intended wife for life, with remainder to the iſſue of the marriage: *Not only ſo much as his eſtate for life in theſe annuities is valued at, but the whole* 5000 *l. muſt be brought into hotchpot before the ſon can be admitted to a ſhare of W.'s perſonal eſtate who died inteſtate.* 635

Implication.

TRUSTS by implication ariſe where one perſon pays the purchaſe money, and the conveyance is taken in the name of another; but the rule is not ſo large as to extend to every *voluntary conveyance.* Page 256

Incumbrance. See Securities.

A prior creditor who buys in a puiſne incumbrance, though he did not give the full value, ſhall be allowed the whole; otherwiſe as to a truſtee, agent, heir at law, or executor, who ſhall be allowed no more than what they gave for ſuch incumbrance. 54

Infant. See title Guardian, Diſtribution, Executor under diviſion how to account, Witneſs, Maintenance, Anſwer.

Children have a natural right to the care of their mother. 15

A ſchool boy contracts a debt of 59 *l.* for *Burgundy, Champaign, Claret, &c.* with *G.* a victualler in the ſpace of five months time; in a few days after he came of age, *G.* prevails on him to give a note for the 59 *l.* without producing any account, or delivering him a bill. *The court upon the circumſtances of the caſe decreed the note to be delivered up to be cancelled.* 34

There is no difference either in law or equity between an infant of 16 or 17 and one turned of 20; the latter if impoſed upon, equally relievable with the former, for till an infant attains 21 he is conſidered as ſuch. 35

If an infant takes up goods before, and gives a note for them after he comes of age, provided there be no fraud, it is good at law. 35

Where an unconſcionable bargain is made with an infant before he comes of age, and a note of hand is taken from him immediately on his coming of age, the court on a bill brought even by the executor will order it to be cancelled: for attempting thus to ſubſtantiate ſuch a bargain made with an infant, during his infancy, is a principal ingredient with a court to relieve. *Page* 25

Where a mother ſecretes her children who are infants, ſervice of a *ſubpœna* on her is ſufficient, as ſhe is the natural guardian of the children. 70

A child *in ventre ſa mere* is *in rerum natura*, and is as much one, as if born in the father's life-time. 117

This court will grant an injunction to ſtay waſte, in favour of an infant *in ventre ſa mere.* 117

Though a witneſs be an infant, her tender years will not invalidate her evidence; for circumſtances of diſtreſs make as great an impreſſion on a young mind as an old one. 245

If an infant, who contracted a debt during his minority, ſhews his conſent to it by confirming it after he comes of age, it will effectually bind him, though it was *voidable* at his election. 245

If a plaintiff who is of age does not reply, it is an admiſſion of the facts in the anſwer; but an infant can admit nothing, and therefore his not replying does not affect him. 377

Where there is an application to the court to lay out part of an infant's perſonal eſtate in land, if he dies before 21, or does not approve of the purchaſe when he comes of age, the property will not alter. 413

Infants when of age are intitled to put in a new anſwer; and if they can, to make a better defence. 531

At law, the courts in ſome caſes will admit the parol to demur, even where the ſuit is brought by the infant as demandant. 531

This court has in ſome few inſtances given an infant, where he was a plaintiff, a day, to ſhew cauſe, but it muſt be on extraordinary circumſtances. 531

An infant is proper in applying to put in a better anſwer, where he might not be able to come at the ſame evidence when he is of age; as the fact he wants to examine to is of long ſtanding, and the witneſſes conſequently very old, and may die before he arrives at 21. 532

Indictment.

In an indictment for keeping a common bawdy-houſe or gaming-houſe, though the charge is general, yet you may give particular facts in evidence. *Page* 339

In an indictment *of Barretry* the defendant is intitled to *a copy of the articles*, which are to be inſiſted on againſt him at the trial. 340

Injunction. See titles Mines, Waſte, Merchants.

The plaintiff through ſeveral meſne aſſignments, being in poſſeſſion of a right originally in the city of *London* of ſupplying *Southwark* with water, prays an injunction to reſtrain the defendant from incroaching on his right, by raiſing engines, laying pipes, *&c.* and to have it eſtabliſhed in this court: the defendant demurred to the bill, for that the plaintiff ought firſt to have eſtabliſhed his right at law. *Lord Hardwicke allowed the demurrer; as the chance there was of the plaintiff's right falling to the ground at law, was a ſtrong reaſon for it.* 391

Inſanity. See Lunatick, Spiritual Court.

In an iſſue on *non compos mentis* you may give particular acts of madneſs in evidence, and not general only, that he is inſane. 340

Inſurance.

Whilſt a ſhip is preparing for a voyage upon which it is inſured, the inſurer is liable; but if the voyage is laid aſide, and the ſhip lies by for five, ſix or ſeven years, with the owner's privity, the inſurer is not liable. 359

It is neceſſary the party injured ſhould have an intereſt or property in the houſe inſured at the time the policy is made out, and at the time the fire happens; and therefore after the leaſe of the houſe expired, the inſured's aſſigning the policy does not oblige the inſurers to make good the loſs to the aſſignee. *Page* 554

The term in the books that treat of inſuring is *averſio periculi*, the intention being to avert any damages or loſs the *inſured* might ſuſtain. 556

Policies of inſurance are not aſſignable in their nature, nor intended to be aſſigned from one to another perſon, without the conſent of the office. 557

Intention. See title Expoſition of Words.

A court of equity is more liberal than a court of law in conſtruing words to make them agree with the intent of the party. 581

Intereſt of Money. See titles Adminiſtrator, Bonds, Annuity, Mortgage, Power, Ireland, Uſury.

A. by will in 1699. creates a truſt term of 21 years for the payment of debts and legacies, to be paid within five years after his death, and by a codicil deviſes the ſame eſtates to truſtees and their heirs to pay the wife during her life 300 *l. per ann.* and with the ſurplus profits his debts and legacies: the teſtator's widow did not die till 1736. the queſtion was, whether a legatee for 20 *l.* and a ſimple contract creditor for 76 *l.* 9 *s.* are intitled to intereſt upon the legacy, and debt, and from what time? It was held that intereſt on the legacy begun at the expiration of the five years, but on the debt from the time only it was aſcertained by the Maſter's report, and confirmed in 1717. 108

A legacy in it's nature carries intereſt, and there is no diſtinction between a reverſionary eſtate and any other. 110

Lord *Hardwicke* declared he knew of no general rule, that on a truſt created for the payment of debts, ſimple contract ones ſhall carry intereſt. 110

A gift of 300 *l.* due upon a bond does not carry the intereſt incurred in the teſtator's life-time, becauſe it was doubtful what it might amount to, from the uncertainty

certainty of the time the teſtator might live after making his will. *Page* 112
The court often decrees intereſt from the time the demand was liquidated, though the debt did dot carry intereſt in it's own nature. 212
It is the rule of this court to allow no more than 4 *l. per cent.* where the will does not mention intereſt on portions charged upon land, and has alſo been extended to the caſes of legacies and portions charged upon perſonal eſtate. 343
Though there be no particular reſervation of intereſt by a decree, yet there is a diſcretionary power in this court to allow it, upon ſpecial circumſtances. 440
From 1725. the time Lord Chancellor *King* came to the great ſeal, the court have never directed more than 4 *l. per cent.* intereſt, under a decree to account for perſonal eſtate. 523
Irish interest allowed 302

Jointure. See title **Taxes.**

If by any accident after the execution of a power there is an exceſs in the lands ſettled on the jointreſs, ſhe ſhall have the benefit: by parity of reaſon, if there is a deficiency by inundation or caſualties, ſhe muſt acquieſce under it. 544

Joint-tenants and Tenants in Common. See titles **Expoſition of Words, Diviſion, Deviſe** under title **Will, Tenants in Common, Preſentation.**

Nothing but an actual alienation of a joint-tenancy can ſever it, the bare declaration of one of the parties to a deed that it ſhall be ſevered, is not ſufficient. 55
A joint-tenancy is undoubtedly no favourite of a court of equity, though otherwiſe at law. 55
A maxim in equity is *alienatio rei præfertur juri accreſcendi*, but it muſt be actual, and not from implication only. 55
The words, ſhare and ſhare alike, have been held theſe 200 years to make a tenancy in common. 122
Lord Chief Juſtice *Holt* leaned ſtrongly to a joint-tenancy, but it is not favoured in courts of equity. *Page* 122
The word *reſpectively* will ſeparate an eſtate, and make it a tenancy in common. 123
On a bill for a partition between two joint-tenants, the plaintiff muſt ſhew a title in himſelf, and not alledge generally, that he is in poſſeſſion of a moiety. 380

Ireland. See title **Outlawry.**

Where the debt was contracted in *England*, but the bond taken for it in *Ireland*, to be paid at a certain time, and at 7 *l. per cent.* it ſhall carry *Iriſh* intereſt. 382

Judge.

It is a much greater reproach to a Judge to continue in his error than to retract it. 439

Judgments. See titles **Securities, Mortgage, Bargain catching.**

Where a judgment is ſtill ſtanding out, and no ſatisfaction has been entered upon record, this court will not meerly on a preſumption from length of time decree it to be ſatisfied, eſpecially as the plaintiff here might have pleaded payment at law, on account of its being an old judgment, under the ſtatute for amendment of the law. 45
If a perſon in cuſtody confeſſes a judgment, whilſt his council is attending, it will not be ſet aſide for dureſs. 193
An action of covenant brought, and an interlocutory judgment *quod recuperet*; before final judgment the teſtator dies, the executor confeſſes a judgment to a bond creditor, he may plead it in bar to a *ſcire facias* on the action of covenant. 386
G. H. in 1693. confeſſed a judgment, but it was not to take place till after the death of a woman who lived in 1726. the eſtate ſubject to this judgment deſcended to *J. H.* who mortgaged it to

the defendant; and in 1721 became a bankrupt, five years before the judgment was to take place. *Lord Hardwicke held, the repreſentative of the judgment creditor, and not the aſſignee under the commiſſion, is intitled to redeem the mortgage, and to have the eſtate of G. H. exonerated out of J. H.'s eſtate, if ſufficient.* Page 440

Lord *Hardwicke* in *Stileman* and *Aſhdown*, being of the ſame opinion he was at the former hearing, affirmed the decree he made on the 8th of *December* 1748. 608

After a bond debt is turned into a judgment, the creditor cannot in the lifetime of the anceſtor bring any action upon the bond, nor againſt the heir, for it is intirely extinct; but he ſtill obtains a great advantage, as the judgment binds the land, and gives him the preference to all bond creditors. 609

A court of equity will not oblige a judgment creditor to wait till he is paid out of the rents, but will accelerate the payment by directing a ſale. 610

Juriſdiction. See titles **Court, Court of Chancery,** and **Spiritual Court.**

Juſtices of Peace.

The power of the court of Chancery over juſtices of peace is confined meerly to the putting them in commiſſion, and cannot puniſh them for male-behaviour, which is the province of the court of King's Bench only. 2

Vagrants only, and not perſons of rank, are within the act 17 *G.* 2. *c.* 5. *ſ.* 20. that impowers juſtices of peace to take care of lunaticks. 52

King. See titles **Prerogative, Attainder, Lunatick.**

AN account with the King can be in the court of Exchequer only. 56

F. ſeiſed of an eſtate in fee, deviſed it to his wife for life, and after her death to one *Hacon* to ſell, and in the firſt place to pay debts and legacies, and the reſidue to the plaintiffs. *Hacon* who had a bare power is dead, and for want of heirs to *F.* the eſtate is eſcheated to the crown. *The bill was brought againſt the Attorney General on behalf of the crown, to have the will eſtabliſhed and eſtate ſold; the court of Exchequer might do this, as it is a court of revenue, but it cannot be decreed here, and therefore Lord Chancellor diſmiſſed the bill.* Page 223

The father of *L.* had a mortgage in fee on Sir *William Perkins*'s eſtate, who was attainted; the ſon of *L.* brought his bill to foreclоſe, and made the Attorney General a party; the court would not decree a foreclоſure againſt the crown, but directed the mortgagee ſhould hold and enjoy till the crown thought proper to redeem the eſtate. 223

Law-Books. See title **Civil Law.**

THE *Practical Regiſter in Chancery* is not a book of authority, but it is better collected than moſt of the kind. 22

Leaſes and Covenants therein. See **Eſtate for Life, Eſtate for Years** under title **Eſtate, Aſſignment.**

The court of Chancery will not decree a ſpecifick performance of covenants in dean and chapter leaſes of a long ſtanding, but will be left to their remedy at law. 44

Leſſees under deans and chapters preſerve the ſame deſcriptions in their leaſes ſince, as they did before the reſtraining ſtatutes, for fear of incurring the penalties. 45

R. N. the laſt life in a biſhop's leaſe, agrees with *C. N.* to ſurrender this leaſe on a promiſe of the biſhop of *W.* to grant a new one for three lives, *viz.* for *R. N.*'s life, *C. N.*'s life, and the ſon of *C. N.* and in conſideration of *R. N.*'s ſurrendering the old leaſe, it was agreed the new one ſhould be in truſt for the infant ſon of *C. N. The whole purchaſe money was paid by C. N. to the biſhop*, but the legal eſtate was

was granted in the new leaſe to *R. N.* and his heirs, during his own life and the lives of *C. N.* and his wife. *C. N.* after the death of *R. N.* took upon him to diſpoſe of it. *R. N.* by a deed poll dated the day after the leaſe declares his intention to be, that *C. N.* and his ſon, ſhould after his deceaſe hold to them and their heirs during the remainder of the term; *Lord Hardwicke* held *R. N.* had a valuable ſhare in the conſideration of the new leaſe, having given up his intereſt in the old, and that having a right to declare the truſt, *C. N. had his life only in the leaſe.* Page 74

A leſſee for 11 years at 140 *l.* rent, who had covenanted for himſelf, his executors and adminiſtrators, but not *aſſigns*, that he would not without the leſſor's conſent aſſign over the leaſe, becomes a bankrupt; *H.* the aſſignee under the commiſſion, enters on the farm, ſells off the crop and ſtock, pays the *Michaelmas* rent for 1739. and the day before the next rent day aſſigns over the leaſe to *R.* The leſſor brought a bill to oblige *H.* to keep the leaſe during the term. It appearing in proof that *R.* never ploughed or ſowed the land, never reſided on the farm, but occupied it rather as an agent, Lord *Hardwicke* held it to be a fraudulent tranſaction between *H.* and *R.* and decreed *H.* to anſwer the half year's rent due at *Lady-day* 1740. and the aſſignment to be ſet aſide. 219

The whole *nomine pœnæ* for a leaſe to a tenant to prevent his ploughing up old paſture ground ſhall be paid, and not at the rate of 5 *l. per cent.* only on the rent reſerved, for the intention of it is to give the landlord ſome compenſation for the damage he has ſuſtained from the nature of his land being altered. 239

B. after making his will, ſurrenders the college leaſes he had deviſed by the will, and accepts two new leaſes, and pays a large fine; the laſt was not ſealed with the college ſeal till after the death of the teſtator. Lord *Hardwicke decreed that the leaſe actually renewed after the deviſe of it, was a revocation of that deviſe, otherwiſe as to the leaſe not perfected for want of the college ſeal.* 593

Where a teſtator expreſſes himſelf in the preſent tenſe, it relates to what is in being at the time of making the will. *Page* 597

If a teſtator who had deviſed an eſtate for lives ſurrenders it afterwards, and takes a new leaſe, it is a revocation. 597

A deviſe of a leaſe, and of the right of renewal, carries both the leaſe and the right. 598

Where a teſtator ſays, I give all my eſtate, right and intereſt I ſhall have to come in a college leaſe at the time of my death, though renewed after the will, it paſſes notwithſtanding. 599

A republication of the will would not have altered the caſe, becauſe the very thing itſelf was intirely annihilated. 599

Legacy and Legatees. See titles **Executor and Adminiſtrator, Reſtraints on Marriage, Satisfaction, Will, Revocation of a Will.**

Where a legacy is a charge upon perſonal eſtate, this court will ſet apart a ſufficient ſum to anſwer it, though not immediately payable. 58

Where there are two executors, and a legacy is left to one for mourning for himſelf, his wife and children, he is not excluded, but ſhall have a moiety of the reſidue notwithſtanding. 222

Where a firſt will charges real eſtate with legacies, and by a ſecond there are general pecuniary ones, though not executed in form, yet the latter legacies will be equally a charge upon the land. 276

The perſonal eſtate veſts in the executor, and no legacy can come out of it without his conſent. 598

As long as the fund itſelf exiſts upon which a legacy is charged, though it devolves either upon the heir or executor, yet they take it ſubject to the charge. 605

Specific Legacies. See titles **Aſſets marſhalled,** &c. **Civil Law.**

General pecuniary legatees are to be preferred to an heir at law, *a fortiori* a ſpecific

ſpecific legatee of land; for it is a rule of law, that every deviſee is in nature of a purchaſer. *Page* 437

Where the ſame ſpecific thing is given by two codicils, it can only be conſidered as a repetition. The ſame rule as to legacies of the like ſum, or of the like quantities or things, though given in different writings, unleſs it can be ſhewn it was the teſtator's intention to make them additions. 636

Legacies of greater ſums, values or quantities, given by a laſt than by a firſt codicil, are not additional, but augmented ones. 636

Legacies of leſs ſums or quantities, or values, given by the laſt than by the firſt codicil, are not additional, but ademptions, or diminutions *pro tanto.* 636

Where another legacy is given for the ſame cauſe, though in different inſtruments, there ſhall not be a double legacy. 640

The gift of the reſidue which is *totidem verbis* the ſame in the firſt and fourth codicil, makes it manifeſt the teſtatrix intended to ſubſtitute one in the place of the other. 640

Legacies or Portions veſted, lapſed or extinguiſhed.

A teſtator gives a part of his ſtock in trade to *R. T.* provided he attains 21, but if he dies before 21, remainder over to the plaintiffs; he died before that age; the adminiſtrator of *R. T.* is not intitled to the intermediate profits from the teſtator's to the infant's death. 41

Thomas Condon by his will gives to each of his two daughters *Iſabella* and *Diana* 1000 *l.* to be raiſed and paid to them immediately after the deceaſe of his wife out of the rents, *&c.* of his manors, *&c.* in *Yorkſhire*, or by ſale or mortgage with intereſt after the rate of 6 *l. per cent. from the deceaſe of my wife* until the ſaid ſums ſhall be duly paid to my daughters, *or their reſpective executors, adminiſtrators or aſſigns*; and in caſe either of his ſaid daughters died before him, then the ſurvivor, her executors, *&c.* was to receive all the ſums before deviſed out of his ſaid lands to be raiſed, and the part of the daughter ſo dying ſhall not ceaſe or ſink into the eſtate, for the benefit of my heir, but ſhall remain and be raiſed for the benefit of my ſurviving daughter. *Page* 127

The teſtator died, and left only one ſon and two daughters, *Iſabella* and *Diana*, after his death *Diana* married Sir *William Lowther*, and died in 1736. *Anne* the mother died in the year following; the huſband brings the bill to have the ſum of 1000 *l.* raiſed out of the eſtate charged: Lord *Hardwicke* was of opinion the 1000 *l.* ought to be raiſed. 128

It has been determined where a legacy upon land depends on two contingencies, though one of them doth not happen the legacy ſhall be raiſed. Where the poſtponing the time of payment of a a legacy has been owing to the circumſtances of the teſtator's eſtate, and not to the circumſtances of the legatees, that is not ſo ſtrong a caſe for a legacy's ſinking into the eſtate, as where the poſtponing the payment of it has appeared to have ariſen from circumſtances on the part of the legatee. 128

An inference may be drawn in the plaintiff's favour from the direction that the legacy ſhall be paid to the daughters, *or their reſpective executors, adminiſtrators and aſſigns.* 128

T. H. deviſes copyhold lands he had ſurrendred to the uſe of his will, to his wife for life, and after his deceaſe to his ſon *Stephen*, till the defendant his grandſon attained the age of 23. and as ſoon as he attained that age gives it to him and his heirs, on condition that he pays *Elizabeth Hancock* 60 *l.* within two years after he attains 23. and in default of payment of the 60 *l.* then the teſtator gave *Elizabeth Hancock* a power to enter and receive the rents till the 60 *l.* was paid. 507

The teſtator died ſoon after making his will; *Elizabeth Hancock* married the plaintiff, and lived till the defendant attained his age of 23. but died within 2 years after he attained that age. Lord *Hardwicke* decreed the 60 *l.* to be raiſed out of the copyhold lands, and to be paid to the plaintiff. 507

A Table of the Principal Matters.

Abatement and refunding of Legacies.

Where a legacy is given to an executor generally, for his care and pains, it makes no difference; for if there is a deficiency of aſſets, he muſt abate in proportion with the other legatees. *Page* 171

In what caſes a legacy ſhall or ſhall not be a ſatisfaction of a debt or other demand on the teſtator's eſtates. See title **Satisfaction.**

S. by a codicil, without any date, gives 1000*l.* a-piece to *Mary* and *Sarah Robins*; and if either die before their legacies are paid, the whole to the ſurvivor; each of the legacies directed to remain in the executors hands till legatees attain 21. *S.* afterwards enters into two bonds, one to *Mary* and another to *Sarah*, reciting he was deſirous to provide for their maintenance; each of the bonds were in the penalty of 4000*l.* for ſecuring 2000*l.* provided they marry in his life-time, with his conſent, or in caſe they ſurvive him. As the principal ſums given by the bonds are upon two contingencies, they ought not to be conſidered as a ſatisfaction of the legacies under the codicil. 491

A legacy to a daughter under the will of her father, was held to be ſatisfied by his giving her a marriage portion afterwards. 492

A legacy left to a creditor is a ſatisfaction, if it is equal or exceeds the debt; otherwiſe if given upon a contingency. 493

Surplus and Reſiduary Legatee. See title **Executor, and in what Caſe the Executor ſhall be only a Truſtee for the Surplus.**

It is ſettled, that wherever a legacy is given to an executor for his care and pains, he is, as to the reſidue, a truſtee only for the next of kin. 46

Ademption of a Legacy. See titles **Ademption, Satisfaction.**

Letters. See titles **Books, Merchants.**

The loſing letters, which when written were not material, though they may become ſo afterwards, is no reflection upon a party. *Page* 75

A ſecond huſband having by letters in his life time, declared he was willing the daughter of his wife ſhould have her mother's whole fortune; theſe letters, as he is dead, are not to be taken as a bare hint, but an appropriation of the fortune for the benefit of the daughter. 181

If a huſband indorſes a note given to him by the wife, as between him and the indorſee, it is good. 181

Libel. See title **Contempt.**

Whether a libel be publick or private, the method is to proceed at law; and this court has no cognizance of it, unleſs it is in the caſe of a contempt, where it is an abuſe of their proceedings. 469

Printing *initial* letters will not protect a libeller, for that objection has been long got over. 470

Calling a perſon an affidavit-man is libellous, for it means a man who is ready to ſwear on all occaſions, without any conuſance of the fact. 471

Printing a brief before the cauſe comes on is a contempt, as it is prejudicing the world with regard to the merits. 472

If a printer prints any thing that is libellous, it is no excuſe to ſay, that he had no knowledge of the contents. 472

It is a mitigation of the printer's offence, if he will diſcover the perſon who brought the libel to him. 472

Limitation of Terms for Years. See this title **Under Eſtate for Years.**

Limitation. See **Statute of Limitations.**

Limitation of Eſtates. See title **Perſonal Eſtates.**

There is no authority can be produced where it has been held, that a limitation of perſonal eſtate ſhall be confined to a dying without iſſue living at the death of the *firſt taker.* *Page* 314

If the court ſhould admit of a diſtinction between chattels real and perſonal, it would introduce confuſion. 314

London. See **Cuſtom of London.**

Lunatick.

A perſon's keeping a commiſſion of lunacy by him for ſeveral years, without putting it into execution, is a contempt of the court, and will be diſcharged with coſts. 52

The rules of judging here, and at law, in caſes of inſanity, are the ſame. 327

A committee of a lunatick's real eſtate may cut down timber for repairs. 407

An inquiſition of lunacy is always admitted to be read, but is not concluſive evidence, for you may traverſe it. 412

Where, before an inquiſition of lunacy, a perſon who was found a lunatick, has made a purchaſe, with the approbation of his only ſon; the court will not change the diſpoſition that has been made of this ſum of money; but the purchaſe will ſtand. 412

The court have allowed part of a lunatick's perſonal eſtate to be laid out in repairs, and even upon improvements of his real eſtate. 414

After the court of wards was taken away by act of parliament, the juriſdiction over lunaticks and idiots reverted back to the court of chancery, to whom it originally belonged. 553

Maintenance.

See titles **Bonds, Baron and Feme, Portions.**

THE court, upon *ex parte* applications, may allow maintenance for an infant, where no cauſe is depending. *Page* 315

It is at the peril of a guardian in ſocage, what he applies for maintenance. 315

The convenience in theſe applications is the inducement to perſons of worth to accept of the guardianſhip, where they have the ſanction of this court for every thing they do on account of maintenance. 316

There being a borrowing and a lending in the caſe of a mortgage, the real eſtate is conſidered only as a pledge, and the perſonal is liable in the firſt place; but this rule has never been carried ſo far as to extend it to a proviſion in a ſettlement charged on real eſtate for maintenance for a child during her minority. 444

The court, in the caſe of an elder brother, will direct the Maſter to make a larger proviſion for him, that he may be enabled, as the head of the family, and the houſekeeper, to maintain the younger. 447

Manors. See title **Evidence.**

Marriage. See under titles **Baron and Feme, Ademption, Agreements on marriage,** ſee under title **Agreement, Truſtee, Debts, Creditor and Debtor.**

This court will not judge according to ſtrict rules of law, on a gift of land *cauſa matrimonii prælocuti.* 202

If a perſon who makes addreſſes on a view of marriage, and a reaſonable expectation of ſucceſs, gives preſents, and the lady deceives him afterwards, the preſents ought to be returned, or the value of them allowed. 409

But where made to introduce a perſon only to a woman's acquaintance, he is looked

upon in the light of an adventurer; and if he loſes by the attempt, muſt take it for his pains, eſpecially where there is a diſproportion between the lady's fortune and his. *Page* 409

E. B. by an agreement made on her father and mother's marriage, was intitled to 6000*l.* Mr. *B.* juſt before his marriage, ſigned a paper, whereby he agreed that every thing which ſhould come to *Elizabeth* by her father's death, ſhould go to them for their reſpective lives, and after the death of the ſurvivor, to the heirs of the body of *Elizabeth* by him begotten: The queſtion was, whether this agreement ſhould be carried into execution for the benefit of the eldeſt ſon, or on his being intitled to a very great eſtate under the grandfather's will, and *B.*'s younger children having no proviſion, the court would conſtrue the paper ſo, that the whole ſhould go to them, or a proviſion, at leaſt, made for them out of this fund: As this was a limitation to the heirs of the wife, it veſted in her only; and the huſband conſenting, Lord *Hardwicke* decreed the 6000*l.* to be ſettled on her younger children. 474

A ſettlement after marriage is good, where the huſband was not indebted at the time, and the wife, when married, an infant. 520

Neither the huſband, nor a perſon ſtanding in his place, can have the wife's fortune, without making a proviſion. 520

Reſtraints on Marriage. See title **Forfeiture.**

A father by his will ſays, I give the ſum of 1000*l.* to my only daughter *M. G.* to be paid her at 21, or day of marriage, provided ſhe marry with the conſent of my executors; but in caſe ſhe dies before the money become payable on the conditions aforeſaid, then I give the ſaid 1000*l.* equally between my two younger ſons, and appoints four executors. 16

M. G. married contrary to the directions of her father's will, but all the executors were dead before the marriage: *M. G.* held to be intitled to the 1000*l.* under her father's will notwithſtanding, the death of the perſons whoſe conſent was neceſſary before the marriage being an excuſe. *Page* 16

A mother by her will ſays, in caſe my daughter *M. G.* ſhall marry before ſhe is 21, without the conſent of my executor, under his hand firſt obtained, *that then ſhe ſhall not be intitled to any part of the legacies as I have herein left her*, but that whole ſhare ſhall be divided amongſt my ſons; and appointed *J. G.* to be her ſole executor. 16

The executor renounced the executorſhip in the moſt formal manner, in the eccleſiaſtical court; and on his renouncing, *T.* took out adminiſtration to the mother, with the will annexed. 17

M. G. married without the conſent of the executor, or adminiſtrator: The marriage is a breach of the condition, and the portion forfeited, for the word *executor* is deſcriptive of every perſon who ſhall be adminiſtrator, being a power not annexed to the office of executor, but independent from the reſt of his duty as executor. 18

A. gives 2000*l.* to *Agnes* his daughter, payable at her age of 21, or marriage, if ſhe marries with the conſent of his executors; provided if either of the legatees die before their legacies become payable, ſuch legacy to be divided between the ſurvivor of her brother and ſiſters. *Agnes* married at 15, without the conſent of the executors. Mr. Juſtice *Parker* held it to be a deviſe *in terrorem*, and that the legacy is veſted, as marriage, one of the contingencies, has happened. 184

Whether a condition be precedent or ſubſequent, if in reſtraint of marriage, the court have always put a favourable conſtruction upon them, to prevent a forfeiture. 261

Where there is no objection to the perſon or eſtate of the gentleman, who propoſes, and the young lady is herſelf inclined to the match, truſtees ſhould conſider themſelves in the light of a parent, and readily come into a conſent. 261

Truſtees ſaying in a letter, *we ſhall be obliged to conſent*, for the happineſs of the lady will be conſtrued a preſent conſent. *Page* 265

An executor brings a bill for the diſcovery of the defendant's marriage, who demurs, for that if ſhe was to diſcover what is aſked, it would be a forfeiture of her legacy of 1500 *l.* as it is given conditionally, if ſhe marries with the conſent of the truſtees under the will. *Lord Hardwicke allowed the demurrer, as ſhe cannot anſwer to the marriage without ſhewing at the ſame time it was againſt conſent.* 392

A huſband by will gave an eſtate to his wife whilſt ſhe continued a widow, with a limitation over to another, in caſe of her ſecond marriage; the remainderman brought a bill for the diſcovery of the ſecond marriage, and ſhe demurred as ſubjecting her to a forfeiture. *Lord Talbot over-ruled the demurrer, as it was not a condition, but a limitation over of an eſtate, and therefore could not properly be called a forfeiture.* 393

Maſter in Chancery. See title **Account, Maſter's Report.**

Where a cauſe is referred to a Maſter to take an account, the court looks on the reference as a ſubſequent proceeding beyond the bill and anſwer, and will diſmiſs the bill with coſts to be taxed. 287

It being referred to a Maſter to take an account between a mortgagor and mortgagee under a bill of foreclоſure, his report was confirmed in the year 1736. Lord *Hardwicke* diſmiſſed the defendant's petition for a *bill of review*, as it appeared the defendant's agent, attorney and ſolicitor, attended the ſettling the account on his behalf before the Maſter, which bound the party. 533

Where the ſum is large, and the mortgagee is forced to enter on the eſtate, he ſubjects himſelf to an account, but the Maſter is not obliged for a ſmall exceed of intereſt to apply it to ſink the principal, nor is it an invariable rule, that in taking ſuch accounts, he muſt make annual Reſts. 534

Maſter's Report.

Upon exceptions to a Maſter's report you cannot read affidavits made ſubſequent to it, notwithſtanding the affidavits of the adverſe party were filed but the evening before the report. *Page* 21

A bill referred to a Maſter for impertinence, he reports it pertinent; the defendant excepts generally, without ſpecifying the parts of the bill which are impertinent; the objection was overruled, as being irregular; for though the exception was taken in ſo general a manner, the party may go upon it, without pointing out particular paſſages. 182

Where the error in a Maſter's report is owing to a party's not laying a material piece of evidence before him, the court will not direct him to review his report upon any other terms than the exceptant's giving up his depoſit. 408

A Maſter in taking an account may ſtate *ſpecial* matter, though he has no expreſs direction from the decree to do it. 621

Merchants. See titles **Demurrer, Statute of Limitations, Factor and Principal.**

A point which materially concerns the merchants in general, will induce the court to continue an injunction. 229

A merchant's copy book of letters has been allowed to be read, where a perſon who has the original letters refuſes to produce them. 611

Tranſactions with a foreign prince and his government, do not concern the trade of merchandize. 612

A letter of attorney from one merchant to another, to get in debts, will not make the perſon ſo deputed a merchant within the exception of 21 *Jac.* 1. 613

Mines. See titles **Purchaſe, Purchaſer,** and **Purchaſe Money.**

Where the crown has only a bare reſervation of royal mines, they cannot grant

a licence to any perſon to come upon another man's eſtate, and ſearch for ſuch mines; but when mines are once opened, they can reſtrain the owner of the ſoil from working them, and can either work the mines themſelves, or grant a licence for others to work them. *Page* 20

If a perſon has only threatned to open mines, a plaintiff may certainly come into this court to reſtrain a defendant from doing it. 182

Miſtakes. See title **Baron and Feme.**

Miſtakes and miſapprehenſions in the drawers of deeds are as much a head of relief as fraud and impoſition. 203

The inattention or laches of a married woman, cannot hurt her right. 545

Modus. See **Tithes.**

A *modus* to take part of the tithes for the whole has always been held a void cuſtom. 138

Money. See the diviſion **Deviſe,** &c. under title **Will, Real Eſtate.**

3000 *l.* was veſted in truſtees for the purpoſes following, *viz.* 2000 *l.* thereof to be paid to the eldeſt ſon, and 1000 *l.* for the benefit of the younger children, and agreed under articles before marriage the 3000 *l.* ſhould be laid out in land, and the eſtate ſo purchaſed ſhall be to the ſame uſes, *&c.* and ſubject to the ſame conditions which are declared concerning the 3000 *l.* *Decreed that the lands ſhall be taken as money, the laying it out upon real eſtate being merely to make the fund for the benefit of the children more permanent and ſecure.* 188

Mr. *D.* on his marriage with Mrs. *D.* covenanted that his heirs, *&c.* ſhould lay out 20000 *l.* in the purchaſe of lands to the following uſes; to himſelf for life, then to the intent his wife ſhould receive 800 *l.* a year for her life as her jointure, then to his firſt and other ſons in tail male, with remainder to his own right heirs. *Page* 452

Mr. *D.* died in 1723. without laying out the 20000 *l.* in a purchaſe, or leaving any iſſue: his heirs at law were *B.* his ſiſter, married to Mr. *B.* and the plaintiff his nephew by another ſiſter; Mr. *D.* was a freeman of *London*, and his widow became intitled to one moiety of that, and *B.* and his wife and the plaintiff to the other moiety. Articles of agreement were entered into between the next of kin and the widow, wherein it was covenanted, that 20000 *l.* *South-ſea* annuities ſhould be transferred to truſtees, who ſhould ſell them, and lay the money out in land, and ſettle it to the ſame uſes as were in the former articles; the annuities were aſſigned to truſtees accordingly. Mrs. *B.* died, whereby the plaintiff became intitled as heir to all the real eſtate; but Mr. *B.* contended, that the ſubſequent articles had turned the money realized by the former into perſonal eſtate again, and that thereupon he became intitled to his wife's ſhare as her adminiſtrator. *Lord Hardwicke of opinion the wife was not capable of changing the nature of her eſtate by articles, becauſe under coverture and unable to contract.* 452

Before the wife could in this caſe have altered the property or courſe of deſcent, the money muſt have been inveſted in land, and there ſhe might have levied a fine of it, and given it to her huſband; or upon coming into court and conſenting to take this money as perſonal eſtate, and being examined as to ſuch conſent, it binds the money articled to be laid out in land as much as a fine at law would the land, and ſhe might diſpoſe of it to her huſband. 453

At law *money* ſo articled to be laid out in land is conſidered barely as money, till an actual inveſtiture; and equity alone views it in the light of real eſtate, and therefore this court can act upon it, as its own creature, and do what a fine at common law can upon land. 453

Lord *Hardwicke* of opinion the articles in 1724. do not import any variation of this eſtate from real to perſonal, for it being agreed the 20000 *l.* ſhould be transferred

transferred to truſtees to buy land, to be ſettled to the ſame uſes as in the articles of 1715. there is no doubt but this money is to be conſidered as realized, and the articles have made no converſion of the eſtate from real to perſonal. *Page* 454

The whole produce of the 20000 *l. South-ſea* annuities is to be laid out, when ſold, in the purchaſe of land, and not 20000 *l.* in money only, as all the parties who had any intereſt in the perſonal eſtate of *D.* agreed they ſhould be transferred to truſtees, to ſell and lay out in land the money ariſing thereby. 454

Monopoly. See title **Trade.**

The grant from the crown for the ſole making and vending of cards was one of the monopolies ſo frequent in *James* the firſt's time, and continued through all his reign, but did not laſt long in his ſucceſſors. 486

Mortgage. See titles **Deeds, Intereſt, Copyhold, Redemption and Foreclofure, Bill of Review,** and alſo **Gaming, Securities, Attorney and Solicitor, Fraud, Maſter in Chancery, Agreement when to be performed in Specie, Aſſets, Counſellor, Ejectment, Baron and Feme, Annual Rents, Aſſets marſhalled,** &c.

A mortgagee till he is fully ſatisfied, is not obliged to quit the poſſeſſion of the eſtate to the purchaſer of it. 2

A prior mortgagee, who has an aſſignment of a third mortgage as a truſtee only, cannot tack the two mortgages together, to the prejudice of intervening incumbrancers. 53

The reaſon why a mortgage may be tacked to a judgment is, becauſe a judgment creditor, by virtue of an *Elegit*, may bring an ejectment, and hold upon the extended value, and as he has the legal intereſt in the eſtate, the court will not take it from him. 53

A firſt mortgagee has the legal eſtate, and if he has a puiſne incumbrance, a ſecond mortgagee ſhall not redeem the prior, without redeeming the puiſne at the ſame time. *Page* 53

Where a mortgagee has a bond likewiſe from the mortgagor, the heir muſt diſcharge the one as well as the other, becauſe the moment he redeems the eſtate it ſhall be aſſets in his hands 53

A mortgagee cannot have a decree for an account of rents for any of the years back, during the poſſeſſion of the mortgagor. 107

A deviſe of 200 *l.* on a mortgage paſſes the principal only. 112

The court will not allow a mortgagee more than his principal and intereſt, notwithſtanding the mortgagor has agreed, he ſhall be paid for his trouble of receiving the rents, 120

A mortgagee, where the mortgage was only 4 and ½ *per cent.* compelled the mortgagor to turn the intereſt into principal at 5 *per cent.* at the end of every ſix months, and at the time the mortgage was paid off, inſiſted on an advance of ſix months intereſt over and above the intereſt which was due. The bill was brought for relief againſt the mortgagee, and the plaintiff was relieved accordingly, by the court directing the Maſter to take an account only of what is due on the original ſum at 4 and ½ *per cent.* and the plaintiff to pay the ſame rate of intereſt for any freſh money that ſhall appear to be due. 331

An agreement to turn intereſt upon a mortgage into principal, muſt be done fairly, and on the advance of freſh money. 331

A mortgagee may refuſe to part with the deeds till the money is paid, but ought not to deny an inſpection in his hands when he has notice to be paid off. 332

Though intereſt is in arrear when the mortgage is paid, a mortgagee ſhall not have intereſt for that intereſt. 332

Thomas Matthews gave the plaintiff at different times three notes, one for 450 *l.* another for 250 *l.* and the laſt for 150 *l.* and expreſſed in each to be ſecured by mortgage on my *Stoke Hall* eſtate; the drawer of the notes had before mort-

gaged the ſame eſtate to the defendant; the plaintiff takes in a prior mortgage to protect the ſums lent upon the notes. *Lord Hardwicke held there was nothing to differ in this caſe from the common one, and that the defendant ſhall be paid the money lent upon the notes in the firſt place, as well as the money due on the aſſignment of the prior mortgage.* Page 347

A ſettled rule, that the prior mortgagee may tack a judgment to his mortgage, though ſubſequent in time to a ſecond mortgagee, provided he has no notice of the ſecond; for the maxim is, *prior in tempore, potius in jure.* 352, 354

J. P. having married the daughter of *T. T.* who under his will was intitled to two houſes in fee, and having borrowed 50*l.* of *W. H.* by leaſe and releaſe in 1699. and a fine, conveyed theſe houſes to *W. H.* and his heirs *until he ſhould have received by the rents and profits thereof the* 50*l.* *with intereſt, and after payment by ſuch rent of the* 50*l.* then to the uſe of *J. P.* for life, remainder to his wife for life, laſt remainder to the heirs of *J. P.* 360

J. P. lived till 1710. and dying without iſſue, the houſes deſcended to *T. P.* his brother and heir at law, who conveyed them for a valuable conſideration to *Y. T. P.* dying ſoon after, *Y.* obtained adminiſtration, and inſiſted on the equity of redemption, upon paying what remains due on the mortgage to *W. H. Lord Hardwicke held that the two houſes deviſed under the will were a redeemable intereſt, and that no bar ariſes from the length of time.* 360

The mortgagee here was only in the nature of a tenant by *Elegit*, and as ſoon as his principal and intereſt was ſatisfied, the eſtate ceaſed in *W. H.* and *P.* or his repreſentatives might have maintained an ejectment; nor unleſs *H.* had continued in poſſeſſion 20 years after the money had been paid off, could the ſtatute of limitations have run. 362

The plaintiff may come here for an account of the profits received, as in an *Elegit* the conuſor has a right to ſee, if the conuſee, on the extended value, has received a ſatisfaction for his whole debt, and to have the ſurplus paid to him. 363

In common *Welſh* mortgages, on tendring principal and intereſt, the perſon intitled may come into this court for a redemption at any time. *Page* 363

Where a mortgagee takes an eſtate, ſubject to a perpetual account, he will not be relieved from his own contract. 363

The plaintiff is intitled to redeem on the common terms, and not obliged to bring an ejectment for the poſſeſſion, but ſhall have a decree for it here. 363

A mortgage is a debt by ſpecialty, and the land is only regarded as a pledge for the money in this court. 435

A mortgagee may take his remedy againſt the executor, or againſt the heir; but the election of the mortgagee does not vary the right as to the funds, or determine which ought properly to be charged. 435

A perſon who has two eſtates mortgages both to *A.* and afterwards one of them only to *B.* the firſt ſhall take his ſatisfaction out of that which is not in mortgage to the ſecond mortgagee, though the eſtates deſcend to two different perſons. 446

Redemption and Foreclosure. See title **Stocks.**

The heir of the mortgagor, on preferring a bill to redeem, need not bring the original mortgagee, (where he has aſſigned,) before the court, for the aſſignee as ſtanding in his place, will be decreed to convey. 39

After a poſſeſſion of a mortgagee for 25 years, the court decreed a redemption on the defendant's ſubmitting by his anſwer to be redeemed. 140

If during a ſuit to redeem the mortgagor aſſigns the equity of redemption, and there is a decree againſt him, the aſſignee is bound by it. 175

Praying relief, where a mortgagee is made party to a bill, is the ſame as praying to redeem; and if on a reference to a maſter, to ſee what is due for principal, intereſt and coſts, the plaintiff does not redeem the mortgagee, the court will, at his application, diſmiſs the bill, which is equivalent to a foreclosure. 267

P. a *ceſtui que truſt* of a real eſtate, made a mortgage upon it in fee, and deviſes the equity of redemption to his ſon and his heirs, ſubject to the payment of his debts, and died indebted by bond and ſimple contract; as this was a mortgage of the whole inheritance, and nothing remaining in the mortgagor, the bond-creditor can have no preference, but muſt be paid *pari paſſu* with other creditors. *Page* 290

No inſtance where an equity of redemption has been held to be liable to the execution of a bond creditor, in the life of the mortgagor. 292

Length of time pleaded in bar to a redemption of a mortgage, being made as long ago as 1713. the mortgagor's ſolicitor appearing to have ſettled an account in 1730. in order to pay off the mortgage; Lord *Hardwicke* held that would ſave the right of redemption. 333

Tenant by the curteſy is no excuſe, for it is of no conſequence to a mortgagee who has the equity of redemption; if if they do not make uſe of their right, they ſhall be barred. 333

The plaintiff's grandfather in 1689 mortgaged the eſtate in the queſtion to *Whiteheads*; they afterwards mortgaged it to *Cartwright* and *Heywood* and their heirs for 200 *l.* who to ſecure the intereſt leaſed the eſtate to the plaintiff's father in *June* 1689. and to his aſſigns for 5000 years at 12 *l.* a year rent for the three firſt years, and 10 *l.* a year rent for the remainder of the term; and if at three years end the 200 *l.* was paid, and intereſt, then the premiſſes were to be reconveyed: receipts given ſometimes for intereſt, and ſometimes for a rent charge, the laſt in 1730, the 200 *l.* lent was charity money, directed to be laid out in the purchaſe of lands in fee, and the rents to be applied for cloathing 24 needy houſekeepers. In 1738 the plaintiff gave notice he would pay the money, but the defendant refuſed to take it, and inſiſted it was an abſolute purchaſe, *and ſo decreed* by the Maſter of the Rolls; *and on an appeal*, Lord *Hardwicke being of the ſame opinion, affirmed the decree.* 494

Where a mortgagee by agreement, either in the mortgage deed, or a ſeparate one, fetters the redemption, with a fraudulent deſign to get the eſtate, it will not avail. *Page* 495

In common mortgages the want of a covenant for repayment of the mortgage money is no bar to a redemption. 496

Where a mortgagee has been in perception of the rents and profits for a conſiderable time, the court will not decree a redemption, as it would be making him a bailiff to the mortgagor. 496

Ne exeat Regno.

ON a motion to prevent the defendant's going out of the kingdom till he has put in his anſwer, the court ordered he ſhould give ſecurity to abide by the decree that ſhall be made at the hearing. 66

There is no inſtance of a *Ne exeat Regno* being granted where it is not a mere equitable demand, except where a wife ſued in a ſpiritual court for alimony, and the huſband threatned to leave the kingdom; and to aid that court, and out of compaſſion to her, it was granted. 210

New trial.

The court will not grant a new trial upon a ſuggeſtion that the party was not apprized of a particular evidence, and therefore not prepared to give an anſwer. 319

A diſtinction was taken formerly between trials at bar and at *niſi prius*; but in the caſe of the *Queen* and *the Bailiffs and Burgeſſes* of *Bewdley* eleven judges againſt one determined a new trial ought be granted. 320

The intent of directing iſſues here is only to inform the conſcience of the court, and therefore not tied down to the ſame ſtrictneſs of verdicts as courts of common law. 320

A notice to the defendant before the trial, that the plaintiff will prove a perſon to be abroad, though it does not point out

out the particular place where, is ſufficient for the defendant to be prepared to encounter this evidence. *Page* 320

Where there are two trials, and the laſt was at the bar, the court lays more weight on this, from the ſolemnity of it and the length of the examination, becauſe the reaſon for directing a trial at bar is in order to that. 378

An original motion muſt be made for a new trial, and the court will not anſwer a petition for it, where the cauſe comes on upon the equity reſerved. 378

Next of kin. See title **Executor** under the diviſion **where he ſhall be only a Truſtee, Perſonal Eſtate.**

G. a brewer had iſſue by his firſt wife *Elizabeth*, who married without his conſent to Mr. *Burnaby*, and by his ſecond a daughter named *Frances*; and having a conſiderable real and perſonal eſtate, by his will gave the reſidue of his perſonal eſtate to any ſon he ſhould have by his wife, at 21. and if no ſon, then to his daughter *Frances* at 21, or marriage; but if ſhe died before either, then if his daughter *Elizabeth* ſhould have a ſon, he bequeated the ſaid reſidue to ſuch ſon as ſhould attain 21. and if ſhe had no ſon, then he gave the ſaid reſidue to the defendant *Ekins*, ſubject to the payment of 4000 *l.* to the daughter of his daughter *Elizabeth*. 473

The teſtator died, and his daughter *Frances* alſo an infant, and the plaintiff being intitled, when of age, to the reſidue, brought his bill. 473

The queſtion was, whether the intereſt of the reſidue of *G.*'s perſonal eſtate, from the death of *Frances* his daughter to the time it will veſt in his grandſon, muſt be accumulated, or whether it is an intereſt undiſpoſed of, and goes to the next of kin of the teſtator. *Lord Hardwicke was of opinion that the intereſt muſt accumulate, and is a part of the reſidue, till the deviſe to the grandſon veſts.* 473

Though not at law, yet in this court a man may die partly teſtate, and partly inteſtate; but when a whole reſidue is given, it is a contradiction to ſay any part of that eſtate is undiſpoſed. 475

If a perſonal eſtate is increaſed by any event after the teſtator's death, it is part of the reſidue, and will paſs as ſuch, and ſo will the intereſt of that reſidue, for that intereſt is aſſets, and part of the eſtate. *Page* 476

Nonſuit. See titles **Trial, New trial.**

If there is evidence a plaintiff is not apapprized of, he may ſuffer a nonſuit, and on his coming back to this court for new directions, they would have ordered another iſſue at law, notwithſtanding the nonſuit. 321

Note of hand. See title **Baron and Feme.**

The indorſee of a note may recover againſt an indorſor, though the original drawer was an infant. 182

Though former indorſees might not pay a valuable conſideration, yet if the laſt indorſee gave money for it, it is as to him a good note. 182

Notice. See titles **Mortgage**, and the diviſion **Tender of Money due thereon**, and **Regiſter Act.**

A bill brought to redeem againſt the defendant, who had notice of the plaintiff's title, but bought of the Marquis of *Wharton*, who had no notice; the objection allowed for not bringing the repreſentative of the Marquis before the court, or otherwiſe the *puiſne* purchaſer would be deprived of that defence. 139

A purchaſer with notice himſelf, from a perſon who bought without notice, may ſhelter himſelf under the firſt purchaſe. 242

Where by a tranſaction foreign to the buſineſs in hand, a council or attorney employed to look over a title has notice, this ſhall not affect the purchaſer. 242

Denying notice of the plaintiff's title at the time of the execution of the deed or payment of the conſideration money,

is not ſufficient; you muſt ſwear you had no notice at or before the execution. *Page* 397

Nuſance. See title **Acquieſcence.**

Oath.

See titles **Affidavit, and Evidence.**

A Quaker cannot be admitted to exhibit articles of the peace againſt her huſband, upon her affirmation, as it is in nature of a criminal proſecution. 70

In the caſe of articles of the peace, where the party complained of is not in court, an attachment for a breach of the peace goes on the oath of the complainant only. 70

The ſteward of a court ſwearing he never heard of an agreement between perſons *at or before* the ſurrender of the copyhold eſtate, is an evaſion, and a negative pregnant that he heard of it after. 100

Orders. See titles Defendant, Coſts, Bill, Anſwer.

An order for a cauſe to ſtand over indefinitely does not imply, that it is put off only to the next term. 2

A repreſentative of a perſon, who had obtained an order to tax a bill, can revive it only on the ſame terms, the undertaking to pay. 114

To bring a defendant into contempt on an order of taxation, you muſt have a copy of the bill at his houſe, and the report of the ſum at which the bill is taxed. 114

In regard to diſmiſſing bills where the cauſe is ſet down on bill and anſwer only, where it is ſo ſet down after withdrawing a replication, it ſhall be diſcretionary in the court for the future to diſmiſs with forty ſhillings coſts, or coſts to be taxed, or with no coſts; and an order for this purpoſe directed to be fixed in the regiſter's office. 288

The parties intereſted in an order for the appointment of a receiver, take upon them to print it, with a recital of the material facts in the cauſe relevant to the order, and diſperſe it among the tenants: Some other parties inſiſted this was a contempt of the court. Lord *Hardwicke* held it to be no contempt; but ſaid, at the ſame time, he did not approve of ſuch practice. *Page* 488

As the manner of drawing orders here is of long ſtanding, Lord *Hardwicke* ſaid, he would not alter the courſe of them, but wiſhed they were framed with the ſame ſimplicity as orders made by the courts of common law. 489

Outlawry.

There can be no judgment in chief at common law upon a default, either for want of appearance, or for want of pleading; but after a ſeizure on a *capias utlagatum*, the remedy lies in a court of revenue. 23

A *cuſtodium* is the poſſeſſion of lands belonging to an outlaw, granted to the plaintiff by the court of exchequer in *Ireland.* 408

Papiſt.

THE ſtatute of the 12th of Queen *Anne* does not in the caſe of a papiſt make the whole truſt void, but only the term upon an avoidance of a living which is veſted in the univerſities. 157

A conviction of a recuſancy cannot be given in evidence againſt a third perſon under 11 & 12 *W. & M.* againſt papiſts, but you muſt prove the facts. 65

The plaintiff, whilſt a papiſt, aſſigned an advowſon to the defendant for the term of 99 years, and having conformed, has brought his bill for a reaſſignment of the term, ſuggeſting he had only aſſigned it for himſelf in truſt, and to avoid the penalties of the ſtatute of 3 *Jac.* 1. and 1 *W. & M.* 155

The defendant pleaded the ſtatute of frauds and perjuries in bar to the diſcovery, but by his anſwer admitted, that the advowſon was aſſigned to him for the purpoſes charged by the bill. *Page* 155

Lord *Hardwicke* held, the plea muſt be over-ruled, being coupled with an anſwer which admits the facts; and was inclined to think, if the defendant had demurred to this part of the bill, ſuch a fraudulent conveyance would, at the hearing, have been made abſolute againſt the grantor. 155 & 156

The act of 12 *Ann* does not, in the caſe of a papiſt, make the whole truſt void, but only the turn upon an avoidance, which is veſted in the univerſities. 157

Papiſts on their conformity are freed from any penalties they might otherwiſe ſuſtain in reſpect of their recuſancy. 157

The proteſtant next of kin are only intitled to the profits in caſe of deſcents; for in caſe of a purchaſe or grant by a papiſt, they are void by the ſtatute of 11 & 12 *W.* 3. 210

Paraphernalia. See **Settlement before Marriage.**

A huſband by will diſpoſes of jewels which the wife was poſſeſſed of in his life-time, bought partly with her own, and partly with his money, to his brother, whom he made executor; the wife intitled to thoſe which are given to the brother as her paraphernalia. 77

A wife, with reſpect to her paraphernalia, has been conſidered in the nature of a creditor, and having a lien upon real eſtate. 78

The value of the jewels makes no alteration. 79

A wife has been admitted a creditor to the value of her paraphernalia upon a truſt eſtate for payment of debts. 79

The huſband's having the poſſeſſion of the jewels makes no alteration, where the wife has worn them as ornaments of her perſon, whenever ſhe was dreſſed. 79

Where a huſband's perſonal eſtate is not ſufficient to pay his debts, a wife cannot ſet up any claim to jewels, rings, pictures, dreſſing plate, and other trinkets, given her before marriage. *Page* 104

Where there is no truſt on real eſtate for payment of debts, a widow cannot come upon it at all events, to be ſatisfied her paraphernalia. 105

The wife is not barred of her paraphernalia by a deviſe of the uſe of all houſhold goods, furniture, plate, linen, &c. for life. 217

Parol Agreement. See **Agreement Parol.**

Parol Evidence. See titles **Evidence, Decree, Will, Agreement, Agreement on Marriage.**

M. P. gave her real and perſonal eſtate to the plaintiffs equally between them; and on the death of one of them, the whole eſtate to *J. U.* in tail; and for want of ſuch iſſue to *R. U.* in fee, with a few pecuniary legacies; and charged her real eſtate with the payment, if the perſonal eſtate ſhould not be ſufficient; *and by her will declared ſhe gave all the reſt and reſidue of her perſonal eſtate to her uncle* L. C.*'s three daughters.* 372

The council for the reſiduary legatee offering to read the parol evidence of the attorney who drew the will, that he had expreſs directions to give the perſonal eſtate to the three daughters of *L. C. Lord Hardwicke ſaid, this was not a caſe where parol Evidence can be read, though there were ſome things here which might make a judge wiſh to admit it.* 372

Courts of law and equity admit parol evidence in two caſes only, to aſcertain the perſon, where there are two of the ſame name, or where there has been a miſtake in a chriſtian or ſurname, and in reſulting truſts, relating to perſonal eſtate; as where an executor has a ſmall legacy, and the next of kin claim the reſidue, there parol proof is admitted

admitted to aſcertain who was to have it. *Page* 373

Lord *Hardwicke* declared he was not ſatisfied with Lord *Cowper*'s rule of admitting parol evidence in doubtful wills, and that Mr. Juſtice *Tracy*, who aſſiſted Lord *Cowper* in the great caſe of *Strode* againſt *Ruſſel*, in which there was an appeal to the Houſe of Lords, was, at firſt, of the ſame opinion with him, but on conſideration, was clear the evidence could not be admitted; and this alteration in his judgment was mentioned in the Houſe of Lords. 374

In the caſe of *Selwin* and *Brown*, Lord *Hardwicke* ſaid, he was of opinion, that parol evidence ought to have been admitted; and that even Lord *Talbot*, when he had heard the cauſe, had a remorſe of judgment at the ſame time he rejected the parol evidence, but the Houſe of Lords refuſed it, as of moſt miſchievous conſequence, and affirmed the decree. 374

The teſtatrix's charging the real eſtate with the legacies, if the perſonal is not ſufficient, ſhews her intention in one event totally to revoke the deviſe of the perſonal; and there being an alteration of her intention before ſhe finiſhes her will, the conſtruction is, ſhe has altered her intention throughout, and the the plaintiff is not intitled to any part of the perſonal eſtate, but the reſidue belongs to the three daughters of Mr. *L. C.* and Lord *Hardwicke* decreed accordingly. 375

Parſon. See titles **Divine Service, Toleration.**

A parſon can neither preach, adminiſter the ſacrament, or celebrate marriage, without a licence from the biſhop; for the canons of 1603, are expreſs as to that matter. 499

It is not neceſſary for a miniſter to have a licence from the biſhop of the dioceſe for every particular caſe; but he may ſuſpend him wholly where he is irregular, till he ſubmits to perform his duty properly. 500

Parſonage. See title **Preſentation.**

A rector may cut down timber for the repairs of the parſonage houſe or chancel, but not for any common purpoſe. *Page* 217

He is intitled to botes for repairing barns and outhouſes belonging to the parſonage. 217

Parties. See **Statute of Fraudulent Deviſes.** See titles **Aſſets, Courts of Law, Letters, Acquieſcence.**

At law, if you join the heir and executor in an action, they may demur, otherwiſe in equity, for every perſon muſt be a party who is neceſſarily ſo. 51

Where the repreſentation is conteſting in the ſpiritual court, a bill may be brought for a diſcovery of aſſets againſt the heir, without making an adminiſtrator a party. 51

A perſon who has a legal intereſt, need not in every caſe be a party, where the whole equitable intereſt is aſſigned over. 235

Where a mortgagee in fee has made an abſolute conveyance, with ſeveral limitations and remainders over, if a perſon brings a bill to redeem, he muſt make at leaſt the firſt tenant in tail a party, or otherwiſe the decree for a redemption cannot be complete. 237

If at the hearing, a plaintiff waives the relief he prays againſt a particular perſon, the objection for want of his being a party will have no weight. 296

On a bill for an account of fees, to eſtabliſh a right, you muſt have all perſons before the court who have any pretence to a right; for they will be bound by a decree here; otherwiſe as to a judgment at law, which will not bind the right of a third perſon. 296

In equity you may take exceptions for want of parties, at the hearing of the cauſe or demur, but you cannot plead it in abatement at law, after you have gone upon the merits. 510

Where

Where a party in a *firſt* cauſe has examined a great number of witneſſes to eſtabliſh a particular point, the court will never ſuffer him in a ſecond to contradict what he attempted to prove in the firſt, as it muſt neceſſarily introduce perjury. *Page* 531

Where one party ſets up a title inconſiſtent with the title ſet up by another, though he fails in his own claim, yet he may appear to have a right to ſomething under the other's claim, and in that caſe the court will not deprive him of it. 533

Partners and Partnerſhip. See **Account.**

Items in a partnerſhip account, relating to the particular intereſt of a book-keeper, will not be ſupported in this court. 159

Where one partner is out of the kingdom, the partner who is before the court ſhall pay the whole of the joint demand. 510

Perſonal Eſtate. See titles **Baron and Feme, Real Eſtate, Words.**

A teſtator gives his only daughter the ſum of 3000 *l.* at her age of 18, or marriage, and directs truſtees to levy and raiſe by mortgage or ſale of his lands, together with his perſonal eſtate, as much as will pay the 3000 *l.* but that it ſhall not be raiſed till 18, or marriage, out of the before mentioned eſtate, or land, *that it may not be a debt on his perſonal eſtate.* Lord *Hardwicke* held that the perſonal eſtate was excepted, and that the 3000 *l.* is a charge on the real eſtate. 57

Perſonal eſtate is the natural and proper funds for the payment of debts, unleſs there are expreſs words to exempt it. 58

Where real eſtate is expreſsly deviſed for payment of debts, the perſonal is exempted; but if the real is not ſufficient, the perſonal muſt be applied. 79

A teſtator ſays, As to the reſt and reſidue of his lands, tenements and hereditaments, his will is, that the annual profits ſhall be equally divided between *R.* and *S.* and nothing ſaid about the perſonal eſtate. By all the rules of Grammar as well as law, the words *reſt and reſidue* muſt relate to ſomething that went before, and where the teſtator calls it by the name of real eſtate, can never be ſaid to affect his perſonal. *Page* 168

A limitation over of perſonal eſtate after the death of the firſt taker without iſſue, is genally void. 312

Courts of equity will carry the limitation of a perſonal chattel, or truſt of it, no further than the judges have done in the caſe of legal limitations of terms for years. 312

A material difference between the profits of a real and perſonal eſtate; rents never can become part of the perſonal eſtate, but the profits of the perſonal eſtate are the eſtate itſelf. In the caſe of real eſtates, the thing itſelf is not diſpoſed of, but deſcends till the contingency happens; perſonal eſtate neither deſcends or goes to the next of kin, but is veſted in the executor. 476

Where truſtees have a power of ſelling real eſtate and turning it into money, or keeping it in land at their option, it will be ſubject to the ſame truſt as the perſonal eſtate is applied to, whether ſold or kept as real eſtate. 562

B. who was indebted to the plaintiff and others on bond, and ſeiſed in fee of lands in *Lincolnſhire* and two other counties, and alſo poſſeſſed of perſonal eſtate, wills, that all his eſtate in the county of *Lincoln*, or a ſufficient part, be ſold as ſoon as his executrixes conveniently can, for the payment of his lawful debts and legacies and funeral, then gives ſeveral ſpecific legacies and a picture and prints to *E. M.* and appoints *E. M.* and *D. M.* joint executrixes: Sometime after making his will he adds theſe words to it, I give to them all my perſonal eſtate not herein before deviſed, and then executed it over again in the preſence of three witneſſes, whoſe names appeared under it. *The perſonal eſtate under* B.*'s will paſſed as a ſpecific legacy to the executrixes, and ſhall not be applied in exoneration of the real eſtate.* 624

Though a real eſtate be deviſed to be ſold, yet if a teſtator has done nothing to exempt the perſonal, it ſhall be primarily liable. *Page* 625

The rule is, perſonal eſtate ſhall be firſt applied, unleſs there are expreſs words, or a plain intention of the teſtator to exempt it, or to give it as a ſpecific legacy. 625

Plantations. See title **Colonies.**

Plea. See titles **Account, Defendant, Decree, Rule, Award, Notice, Alien, Courts of Law, Special Pleadings.**

A plea of a bill for the ſame matter overruled, where the laſt was brought by the plaintiff in a different right from what the former was. 44

A plea may be good for part, and overruled for part, but a demurrer muſt be good for the whole, or void for the whole. 44

A plea for not bringing the repreſentatives of the perſonal eſtate before the court allowed, though ſuſpected to be put in for delay merely. 51

A plea muſt firſt be removed out of the way, before a plaintiff can have an injunction to ſtay proceedings at law. 113

A plea of a bare title only, without ſetting forth any conſideration, will not protect a defendant from giving an anſwer to the title ſet up by the plaintiff. 241

Where there is a plea which covers too much, it may ſtand for part and be overruled for part, otherwiſe as to a demurrer. 284

The defendant pleaded likewiſe a fine and non-claim, in bar of the title ſet up by the plaintiff; Lord *Hardwicke* over-ruled it, becauſe the pendency of the ſuit here, as it was a proper matter of equity, has prevented the running of the fine. 389

No exception can be taken to an anſwer whilſt a plea is depending, for that muſt firſt be removed out of the way. 390

On a plea of a purchaſe for a valuable conſideration without notice of the plaintiff's title, it is ſufficient to aver, that the perſon who conveyed was ſeiſed, or pretended to be ſeiſed, when he executed the purchaſe deeds; but where a purchaſer ſets up a fine and non-claim as a bar, he muſt aver that the ſeller was actually ſeiſed. *Page* 630

A purchaſer's denying notice at or before the execution of the deeds is not ſufficient; he muſt aver that he had none at or before the payment of the money. 630

Portions or Proviſions for Children. See **Maintenance,** ſee **Legacies or Portions veſted,** under title **Legacy;** ſee **Truſt for raiſing Portions and Payment of Debts** under title **Truſt, Satisfaction, Veſted Intereſt, Statute of Limitations, Baron and Feme.**

Ever ſince the caſe of *Pawlet* verſus *Pawlet,* it has been the rule that where there is a portion to be raiſed out of land, if the perſon dies before the day of payment comes, it ſinks for the benefit of the heir. 131

A reaſonable diſtinction may be made from that caſe, between a time of payment that appears to have been derived from the circumſtances of the perſon, and from the circumſtances of the fund. 132

It is probable there may be ſome common lawyers who do not know, if a portion is charged on land, that it will ſink in the inheritance, if the perſon dies before time of payment. 132

J. C. by will created a term of 100 years, in truſt out of the rents or by mortgage to raiſe portions of 100 *l.* for each of the daughters of his ſon *T. C.* payable at 18, or day of marriage, and 6 *l.* a year for their maintenance till their reſpective portions became payable, with a proviſo that his ſon *T. C.* may make a jointure of all or any part of the premiſſes, and alſo a proviſo that in caſe ſuch perſon, who ſhall be next in remainder expectant on the term of 100 years, ſhall pay to the daughters of *T. C.* their portions of 100 *l.* before or after the ſame are due, then the term of 100 years to ceaſe. *T. C.*

T. C. had two daughters but no ſon, and left a widow who had a jointure of the whole premiſſes; *E. C.* the grandſon of the teſtator by his ſecond ſon, is become tenant in tail under the will. *G. H.* the daughter of *T. C.* who married 18 years ago brought the bill to have her portion raiſed immediately. *Page* 354

The portions cannot be raiſed in the life-time of the jointreſs ſo as to affect her; for when *T. C.* executed the power, the eſtate aroſe out of the will of *J. C.* and is precedent to the 100 years term. 354

The court in modern caſes have thought it hard to raiſe daughters portions in the father's life-time, and therefore have refuſed to do it: In ſtill more modern caſes where the portion was large, the court have refuſed it, in favour of the remainder-man. 356

Conveyancers now are grown ſo cautious as to inſert negative words, to prevent portions being raiſed in a father and mother's life-time. 357

The maintenance here is a preſent charge upon the eſtate, and is not poſtponed till after the term comes into poſſeſſion, ſo that maintenance runs on till then; and no harm can ariſe from mortgaging the reverſion, as the arrears muſt be ſatisfied the moment the term comes into poſſeſſion. 357

The defendant cannot redeem the term, and exonerate the eſtate, without paying intereſt for the portions from the time they became due. 358

Where a huſband makes a voluntary aſſignment of the wife's portion, the volunteer ſtands in his place only; the ſame equity in regard to executors, and the ſame as aſſignees of bankrupts. 420

Where a term for raiſing portions is placed after an eſtate-tail, which ſhould have been before, this court will rectify the miſtake. 457

Portion not only implies a fortune out of the father's eſtate, but may alſo relate to what the wife brings with her in marriage, and anſwers to the word *dos* in *latin.* 522

Power and Execution thereof. See titles **King, Portion, Jointure, Cares.**

A huſband by marriage articles and ſettlement had a power to diſpoſe of a reverſionary intereſt in an eſtate, in ſuch proportions as he ſhould think fit among the iſſue of the marriage: he by will delegates it to his wife, to diſpoſe of in ſuch ſhares as ſhe pleaſes between his ſon and daughter. *This is like a power of attorney*, and not tranſmiſſible to a third perſon, but could be executed by the huſband only. *Page* 88

G. W. having a power to charge his wife's eſtate with 2000 *l.* gives by his will 500 *l.* apiece to his two ſiſters, and dies in debt to the plaintiffs: conſidered as the perſonal eſtate of *G. W.* and where there is a general power reſerved to a perſon for ſuch uſes as he ſhall appoint; this makes it his abſolute eſtate, and gives him ſuch a dominion over it as will ſubject it to his debts. 172

Though a power to diſpoſe by appointment of a reverſion in fee be not made uſe of, yet it ſhall be aſſets to ſatisfy ſpecialty creditors. 172

A power in truſtees of raiſing portions by rents, or by mortgage, is no reaſon for poſtponing the raiſing, in order that they may make their election. 353

Where there is a power of charging land with a groſs ſum, it imports intereſt of courſe. 358

A wife in caſe ſhe ſurvived her huſband, and there were no younger children, had a power of diſpoſing of 4000 *l.* by deed or will executed in the preſence of three witneſſes; and this ſum was a charge on the real eſtate of the huſband. Before her ſecond marriage, ſhe, by articles executed in the preſence of two witneſſes only, appointed 2000 *l.* out of the 4000 *l.* to be for the uſe of her intended huſband; the remaining 2000 *l.* ſhe diſpoſes of by will, but does not execute it in the preſence of three witneſſes. Lord *Hardwicke* held, that the articles were a good appointment of the 2000 *l.* for the benefit of her ſecond huſband. 414

Though

Though the appointment here was inaccurately expreſſed, and in an informal manner, yet being executed for a valuable conſideration, this court will ſupply the defect. *Page* 415

The will under which the 2000 *l.* is given *being a voluntary diſpoſition*, as it has not purſued the power, by being executed in the preſence of three witneſſes, is a void appointment, and ſinks into the real eſtate. 415

Whoever takes under a power, takes from the grantor, and not from the power itſelf. 565

Power of Revocation. See **Revocation.**

Poſſibility.

In equity, notwithſtanding a doubt of Lord *Cowper*'s in the eſtate of *Jacobſon* verſus *Williams*, 1 *P. W.* 382. it is now very well known that a *poſſibility* may be both releaſed and aſſigned. 420

Where either real or perſonal eſtate is given upon a contingency, and that contingency does not take effect in the life-time of the firſt deviſee, yet, if real, his heir, if perſonal, his executor, will be intitled. 621

Poſſeſſion. See title **Statute of Limitations.**

Courts of law as well as courts of equity will make a ſtrong preſumption in favour of a poſſeſſion of 21 years. 67

Preſentation to a Church or Chapel.

Where there are ſeveral *ceſtuy que truſts* of a preſentation, and they do not all agree, there can be no nomination. So in the caſe of joint-tenants before ſeverance, they muſt all agree or no act can be done. 483

Where there are parceners in an advowſon, who cannot agree in one perſon, the court will direct them to draw lots who ſhall have the *firſt* preſentation. 483

Prints and Engravings. See title **Statutes.**

Proceſs. See titles **Contempt, Infants, Attachment, Defendant.**

Where an attachment has iſſued againſt a perſon, and the ſheriff takes a bail-bond for his appearance, and delivers it to the plaintiff, the court will diſcharge a rule made upon the ſheriff to ſhew cauſe why he does not bring in the body; for the plaintiff is not without remedy; as he may move on a *cepi corpus* returned for a meſſenger to the county where the perſon lives. *Page* 507

Prochein Amy. See **Infant.**

Purchaſe, Purchaſer, Purchaſe Money. See titles **Agreement, Statute of Frauds and Perjuries, Guardian, Mortgage, Mines, Father and Son, Plea.**

Where a purchaſer has given a full value for an eſtate, the miſtake or ignorance of ſome of the parties to a conveyance of their claim under a marriage ſettlement ſhall not turn to the prejudice of a fair purchaſer. 8

In a grant of an eſtate by the crown, there was a reſervation of all royal mines; the defendant agreed to purchaſe this eſtate of the plaintiff, but refuſing afterwards to compleat his purchaſe, the bill is brought to carry the agreement into execution; on a reference to a Maſter, he reported it was probable there are ſuch mines, and therefore the plaintiff cannot make a good title. 19

On exceptions to the report, the court allowed them, and ſaid as there never had been an exertion of this right in the crown in a ſingle inſtance ſince the grant, and no poſſibility there ever will, it would be of miſchievous conſequence to admit it to be an objection to a title. 19

T. S. deviſes all his real and perſonal eſtate to *G.* his heirs, *&c.* charged with the

payment of his debts; the plaintiffs, who are bond creditors, never aſked for their principal, but received their intereſt regularly for 16 years of *G.* the executor, who during this interval made ſeveral ſales of the teſtator's eſtate; it was held by the Maſter of the Rolls, that the bill brought by the bond creditors ſhall be diſmiſſed, and a purchaſer ſhall not be diſturbed after a quiet poſſeſſion of 16 years. *Page* 41

A ſettlement, though made after marriage, yet being in conſideration of a portion that was paid at the time cannot be impeached by ſubſequent creditors. 479

Where a purchaſer has an advantage by the dropping in of lives, the court will direct an inquiry, what intereſt was proper to be paid by him on that account. 489

The dropping in of lives on eſtates in the weſt of *England* is not conſidered as accidental, but as part of the annual profits of the eſtates. 490

If the purchaſer under a private contract does not pay the purchaſe money at a time fixed, he will be chargeable with intereſt, as he muſt bear any loſs; ſo likewiſe will he be intitled to any profits that ariſe from the eſtate. 490

A purchaſer made an objection to a title for want of a deed, which had been inrolled at a publick office, but could not be found; a copy of it taken in 1632. atteſted to be a true one by five witneſſes, produced in court; Lord *Hardwicke* was of opinion this would have been ſufficient, even without an atteſtation. 541

Real Eſtate. See titles **Perſonal, Debts.**

WHERE money is given to be laid out in lands, and when bought to be ſettled on ſuch and ſuch perſons, on a bill brought here the court is to direct a purchaſe, and the profits of the money to go as the land itſelf, till purchaſed. 369

Where there is a direction by a will to purchaſe a particular eſtate, which is afterwards ſwallowed up by an inundation, the money ſo deviſed ſhall not go to an executor, but as the rents would have done when the land was purchaſed. *Page* 369

Antiently they were ſo tender of landed eſtates, that the ſheriff could not even in caſes of the crown extend the lands of the debtor if his chattels were deficient, and ſo could be made appear to the ſheriff. 435

Where real eſtate is given to a deviſee of perſonal for the payment of debts, it is aſſets. 566

Receiver. See **Statute of Limitations.**

The court has not a juriſdiction to appoint a receiver unleſs a cauſe be depending. 315

The caſe of ideots and lunaticks has been inſiſted on as a ſimilar caſe; but the juriſdiction which the court exerciſes with reſpect to them, is a particular one, and therefore not like the preſent. 315

Recogniſance. See under title **Securities, &c.**

Recovery. See titles **Common Recovery, Eſtates in Fee-tail.**

Redemption. See title **Mortgage.**

Regiſter Act.

The plaintiff, a judgment creditor, upon an eſtate in *Middleſex*, prays to be let in upon it preferably to the defendant a mortgagee of the ſame eſtate, on a ſuggeſtion he had notice of the judgment before the mortgage was executed. The judgment was entered on the 12th of *March* 1733. but not regiſtered till the 12th of *June* 1735. the mortgage was made the 24th of *May* 1735. and regiſtered *June* 2, 1735. There being only a defendant's confeſſion of notice proved, in direct contradiction to his

anſwer, and contrary to a poſitive act of parliament made to prevent perjury; Lord *Hardwicke* decreed, ſo far as the bill ſeeks to poſtpone the defendant's mortgage, it ſhould be diſmiſſed with coſts. *Page* 275

The regiſter act is notice to every body, and the meaning of it was to prevent parol proofs of notice or not notice. 275

It is only in caſes of fraud this court have broke in upon the act, though one incumbrance was regiſtered before another. 275

Apparent fraud, or clear notice, would be a proper ground of relief, but ſuſpicion of notice, though a ſtrong one, will not juſtify the court in breaking in upon an act of parliament. 276

Rehearing.

A cauſe on a rehearing muſt be opened as a caſe. 50

Lord *Hardwicke* thought a defendant making a uſual depoſit on petition for a rehearing was a great hardſhip on a plaintiff, and not an adequate compenſation. 138

You muſt make a decree complete againſt a defendant, though he has made a default, before you can petition for a rehearing. 152

Reſtraint on Marriage. See title Marriage.

A term for years created in a marriage ſettlement to pay if one child 6000 *l.* if two 6000 *l.* to be equally divided, and if three or more 8000 *l.* to be equally divided, and to be paid at 21. or marriage, provided if any of the younger children ſhould marry in the father's life-time without his conſent, and after his death without conſent of *the mother*, ſuch child ſhould forfeit his or her ſaid intended portion, to be diſtributed amongſt the reſt at the age of 21. or marriage, *with ſuch conſent*; with a further proviſo, that if any ſuch child ſhould marry *without ſuch conſent*, or die before 21. or marriage, *with conſent*, the portion to be divided amongſt the ſurvivors at 21. or marriage, *with conſent*. *Frances*, one of the daughters married with Mr. *Bendyſh without the mother's conſent*; and in the cauſe before Lord *Talbot* he declared, ſhe was not intitled to any ſhare of the 8000 *l.* another daughter died after the decree before 21. or marriage, whereupon Mr. *Bendyſh* in the right of his wife, who is 21. applied for her diſtributive ſhare of her ſiſter's contingent portion. Lord *Hardwicke* was of opinion the words under the marriage ſettlement, *ſuch child as married without the father's conſent ſhould forfeit her ſaid intended portion, extended to the whole intereſt each child might expect under the ſettlement whether certain or contingent.* Page 584

Revocation. See under title **Will, Revocation of a Will**, and under title **Eſtate, Leaſe for Years.**

Rule. See titles **Bill, Decree, Depoſitions, Appeals, Caſe, Execution, Defendant, Court of Chancery, Inſanity, Parties, Demurrer, Plea, Writ of Scire facias.**

Nice diſtinctions in caſes are to be avoided, for the more general a rule is, the better. 41

General rules ought to prevail, though in the caſe of creditors themſelves. 43

It is not a general rule to ſet aſide every purchaſe made by a truſtee of a part, or of the whole of a truſt eſtate, but muſt depend upon circumſtances. 59

It is an eſtabliſhed rule now, that if you elect to proceed at law on coming in of the anſwer, your ſuit here muſt be diſmiſſed, but on dropping that part of the bill which prayed relief, the court allowed the plaintiff to proceed at law. 85

Where debts and legacies are by a will directed to be raiſed by rents and profits, or by leaſing or mortgaging of the land; this reſtrains it merely to a payment out of rents, and the court cannot decree a ſale. 105

Lord

Lord *Hardwicke* recommended it to the parties to apply for a private act of parliament to obtain a ſale of the teſtator's real eſtates. *Page* 106

Where there is a diſpute as to boundaries, or unity of poſſeſſion, a defendant muſt ſet forth how he is intitled. 112

A party who is at liberty to ſurcharge and falſify, is not merely confined to errors in fact, but may take advantage likewiſe of errors in law. 112

You may at the bar pray a particular relief, though by your bill you have prayed a general one. 141

Whoever comes here for an account of rents and profits, prays a diſcovery as incident to it, and for that reaſon a defendant cannot demur and plead to the ſame matter. 282

A co-defendant's admiſſion to the advantage of the plaintiff, will not make his caſe better. 333

Where in a criminal proſecution the priſoner to ſtrengthen his character enters into particular facts to ſupport it, the proſecutor may likewiſe examine to particular facts. 339

Where the general life or converſation is in iſſue, the perſon muſt be prepared to invalidate that evidence, otherwiſe where it comes in collaterally. 340

If the plaintiff produces the order for a *ſubpœna* to rejoin, and an affidavit of ſome of the parties being out of the kingdom, the court will not diſmiſs his bill for want of proſecution. 604

Though a bill has been diſmiſſed for want of ſuch order and affidavit, yet upon producing them afterwards, and payment of coſts out of purſe, the court will retain it. 604

On motion to retain the bill, the plaintiff muſt ſhew that the order for the *ſubpœna* to rejoin was dated before the notice to diſmiſs. 604

Satisfaction. See titles **Truſts for raiſing Daughters Portions, &c. and Payment of Debts. Legacy, Portions, Ademption, Conveyances.**

FIVE hundred pounds given in a teſtator's life-time, is a ſatisfaction for the ſame ſum left in his will. *Page* 48

Where a leſs ſum is given under a will than under a ſettlement, it is not a ſatisfaction of a greater. 58

Though it is a rule, that a legacy greater, or as great as the debt, ſhall be taken to be a ſatisfaction, yet where there is a preſumption the teſtator's intention was otherwiſe, the court in late caſes have leant againſt the rule ſo far as to hold it not to be a ſatisfaction. 301

By a conveyance on the 19*th* and 20*th* of *February* 1694. made on the ſecond marriage of *William* Lord *Eland*, eldeſt ſon of *George* Marquis of *Halifax* with Lady *Mary Finch*, there was a term of 500 years created, charged on all the lands in *Nottinghamſhire* and *Yorkſhire* comprized in the marriage ſettlement, in truſt that in caſe there ſhould be a failure of iſſue male of this marriage, the truſtees after the commencement thereof ſhould raiſe if but one daughter 20,000 *l.* if two or more 25,000 *l.* equally to be paid to them at their age of 16, or days of marriage, if more daughters than one to have 200 *l.* a-piece maintenance till 18. and afterwards 300 *l. per ann.* to be paid at *Michaelmas* or *Lady-day*, which ſhould firſt happen after the commencement of the term; *provided, or in caſe lands of inheritance ſhall deſcend to the daughter from Lord Eland of as great value as the portions, then the* 500 *years term ſhall ceaſe.* 458

Marquis George by a conveyance of the 1ſt and 2d of *March* 1694 did in conſideration of his name and family, and to ſupport the ſame, in caſe neither he nor his ſons ſhould leave any iſſue male, ſettled the ſaid premiſſes on Sir *George Saville* for 99 years, if he lived ſo long, and to his firſt and other ſons in tail male, with ſeveral remainders over. 459

Marquis

A Table of the Principal Matters.

Marquis George being likewiſe ſeiſed in fee of ſeveral eſtates in other counties, and the reverſion in fee of divers manors on the death of the now Marchioneſs Dowager of *Hallifax*, and of ſeveral fee-farm rents on the death of *Catherine* Queen *Dowager*, made his will *March* the 17th 1691. and thereby gave his houſe at *Acton* to his wife for life, and after her deceaſe to Lord *Eland* and his heirs; and ſhe ſays, *As to all my lands not comprehended in the ſettlement made on my ſon's marriage, I give them to Lord Eland and the heirs of his body, and for want of ſuch iſſue, to my daughter Stanhope.* Page 459

Marquis George died without any other iſſue male than Lord *Eland*, who proved the will, and being ſeiſed under the will as above, by leaſe and releaſe of the 17*th* and 18*th* of *May* 1695. declared the uſes of a recovery of lands in the counties of *Northampton*, *Derby*, *York*, *Nottingham*, *Middleſex* and *Surry*, to be to him and his heirs: and by leaſe and releaſe of the 5*th* and 6*th* of *July* 1695. *Marquis William* ſettled the ſame lands to himſelf for life, and after his deceaſe to the uſe of ſuch perſon and for ſuch eſtate, as he by any writing in the preſence of three witneſſes, or by his will ſigned in the ſame manner, ſhould declare, *&c.* and in default of ſuch iſſue to his daughters and the heirs of their bodies; and in default of ſuch iſſue to Lady *Stanhope* and the heirs of her body; and in default of ſuch iſſue, to the right heirs of *Marquis George* for ever. 460

Marquis William by a codicil dated 20*th* of *Auguſt* 1700. reciting the recovery, deviſed all his ſaid lands to his executors for 500 years, on truſt to raiſe, in caſe he had no ſon, the ſum of 500 *l.* a-piece additional portion for each of his daughters, to be paid at 16, or marriage, and ſubject to the term deviſed the ſaid lands to his firſt and other ſons in tail male, and in default of ſuch iſſue, to remain to ſuch uſe and for ſuch eſtate as are thereof declared by the releaſe of the 6*th* of *July* 1695. 460

On *May* the 31ſt 1700. Marquis *William* died without any iſſue male, but by his firſt Lady had iſſue *Lady Ann Bruce*, and by his ſecond, Lady *Eſſex*, Lady *Dorothy* and Lady *Mary Saville*. 460

Sir *George Saville* after Marquis *William's* deceaſe, entered on the lands in *Nottinghamſhire* and *Yorkſhire*, and received the rents due at *Michaelmas* 1700 and has ever ſince paid the maintenance of Marquis *William's* three daughters, till the *Lady-day* next before they arrived at their ages of 16 years. *Page* 458

Mr. *Juſtice Tracy* held that the lands of which *William Marquis* of *Halifax* was ſeiſed in fee, and deviſed to his daughters in tail, were not ſuch an eſtate of inheritance as will be a ſatisfaction of the portions for his daughters by the ſecond wife, becauſe they claim theſe lands by purchaſe, and the proviſo in the marriage ſettlement reſtrains the ſatisfaction, to lands coming to the daughters by diſcent from their father. 458

The valuation of the lands deſcending to the daughters from their father, muſt be made according to the value of the lands at the time of the diſcent; for till the valuation made it cannot be known whether they are a full or a partial ſatisfaction. 461

The lands deſcended from Marquis *William* to his daughter in tail, are not ſuch an eſtate of inheritance as is within the meaning of the proviſo; for ſuch an inheritance was intended as is of certain value, an eſtate of inheritance in fee-ſimple. 462

The reverſion in tail expectant on the deaths of Lady Dowager *Halifax*, and the late Queen Dowager, are not ſuch eſtates of inheritance deſcended from Marquis *William* as are within the intent of the proviſo. 463

Lord Chief Juſtice *Pratt*, Sir *Joſeph Jekyll*, and Lord Chief Juſtice *King*, delivered their opinion in court, which agreed with Mr. Juſtice *Tracy's*, and Lord *Macclesfield* concurring, gave judgment accordingly. 464

In moſt caſes a father will be preſumed to have paid the debt he owes a daughter, when in his life-time he gives her a greater ſum than he owed her. 522

Scandal and Impertinence. See **Depoſitions.** 235—

Securities, Judgments, Statutes and Recognisance. See titles **Bonds, Incumbrances,** and **Mortgages.**

None but a *bona fide* purchaser of a puny incumbrance, without notice of intermediate ones, can tack it to a prior. *Page* 53

Separate Maintenance. See titles **Baron and Feme, Agreement on Marriage.**

Lord *Rivers* by will gave an annuity of 50 *l.* to the plaintiff, who afterwards in 1726. married the defendant *Fitzer*; in 1728. they agreed to part; by a deed of separation the husband covenanted to allow her 14 *l. per annum* out of his own estate, and 24 *l.* more to be paid quarterly out of the annuity of 50 *l.* and 12 *l.* a year to his daughter, by the plaintiff for her maintenance, to be paid quarterly. The bill is brought against the husband, and *Stephens* a creditor of his, since the execution of the deed of separate maintenance, to have the trusts of that deed performed. *Lord Hardwicke decreed according to the prayer of the bill as against the husband; and as to Stephens, that he should not release his claim upon the annuity till the plaintiff had paid him his debt.* 511

A. intitled to 500 *l.* marries whilst an infant, the husband by deed after marriage agrees the 500 *l.* shall be to her separate use for life, and after her death to the issue of the marriage; in the deed was a proviso, impowering the trustee to lend a part, or the whole to the husband; he lent him the 500 *l.* and in 14 months after he became a bankrupt; the trustee brought his bill to be admitted a creditor. Lord *Hardwicke decreed, he should come in as a creditor under the commission for the money he paid to the husband.* 519

In separate maintenances the court must be directed by judicial determinations, and not by what they think of them in their private judgment. 560

Sequestration, see under **Decree.**

After goods or a real estate are seised upon a sequestration for want of an answer, the plaintiff may still proceed, till he has got the bill taken *pro confesso.* Page 23

A sequestrator is not intitled to 6 *s.* 8 *d.* a day as his stated fee. 542

Settlement before Marriage.

Where a husband by a settlement before marriage was obliged to do a particular thing for the benefit of the wife, and he did a thing equally satisfactory, the court will presume a satisfaction by implication. 632

A wife, who by articles before marriage is by express words barred of every thing she could claim out of her husband's personal estate, by *the common law, custom of London, or otherwise howsoever, has no right to paraphernalia.* 642

Settlement after Marriage. See titles **Agreements on Marriage.**

A husband who had 1733 *l.* stock devised to him after marriage, vests it in trustees for the benefit of himself for life, of his wife for life, and afterwards for the benefit of his children. *The settlement is void both as to creditors before and after the marriage, and the trust estate was decreed to be sold, and applied to the payment of the husband's debts.* 600

Such a settlement good as against a father after marriage, and against a voluntary conveyance. 600

Solicitor. See **Attorney, Master in Chancery.**

South-Sea or other Stock.

The person whose name is entred in the *South-Sea* company's books is, with regard to them, the proprietor. 141

Brokers very often transfer ſtock without the principal's being ſo much as mentioned, and yet he may maintain an action againſt the perſon to whom the ſtock was transferred. *Page* 394

Special Pleadings. See titles **Courts of Law, Plea.**

In a plea of conviction for a capital offence, this court muſt judge with equal ſtrictneſs as if it was a plea at common law. 399

Saying that *A.* gave a mortal wound to *B.* of which he died, without mentioning in what part *B.* received the wound, is bad: ſo ſaying that *A.* was tried at *Galloway* aſſiſes, without ſaying the perſons who tried him had a commiſſion of gaol-delivery, is alſo bad. 399

In a proceeding at law, on a joint demand where one of the creditors will not join in the action, he is ſummoned and ſevered, and the other has judgment *quod ſequatur ſolum.* 510

Where an action is brought againſt two joint debtors, and one only appears, the creditor may have judgment for his whole debt againſt the perſon appearing, and by default againſt the perſon who does not appear. 511

In pleading there is the ſame ſtrictneſs in equity as in law. 632

Specific Deviſe or Legacy. See under title **Legacy.**

Specific Performance. See **Agreement when to be performed in Specie, and when not,** under title **Agreement.**

Spiritual Court. See titles **Diſtribution, Demurrer, Baron and Feme.**

The ſpiritual court, in caſes of controverted wills, appoint an adminiſtrator *pendente lite*, to take care of the eſtate. 286

Where a perſon, whether he is heir at law, or next of kin, or any other man whatſoever, keeps poſſeſſion of the teſtator's real or perſonal eſtate, ſuch an adminiſtrator is intitled to bring ejectments for the recovery of the poſſeſſion. *Page* 286

Lord *Hardwicke* thought it an abſurdity, that a will ſet aſide at law for the inſanity of the teſtator, may ſtill be litigated on account of perſonal eſtate in the eccleſiaſtical court, and expreſſed a wiſh the legiſlature would find a remedy for it. 378

If a proper ſuit had been inſtituted in the eccleſiaſtical court in relation to the validity of a marriage in the life-time of the pretended huſband, and a ſentence is given againſt the marriage, that would have bound every body; becauſe it is final and concluſive, as being the proper juriſdiction in caſes of this nature. 388

It is to be wiſhed indeed, that the proceedings in all courts were uniform; but at preſent the eccleſiaſtical court, which is the law of the land, frequently determines contrary upon the ſame facts. 389

Where the eccleſiaſtical court have given their conſent the huſband ſhould have the wife's portion, this court has granted an injunction to ſtay the proceedings *there*, becauſe they will not ſuffer the huſband to take the wife's portion, till he has agreed to make a reaſonable proviſion for the wife. 420

The principal regiſters in the prerogative-office diſagreeing about the appointment of a clerk, the deputy regiſter nominated one *Abbot*, who for a twelve month officiated, and received the fees amounting to 500 *l.* Lord *Hardwicke held, as he was an* officer *de facto, he had a right to the ſtated fees, and to retain them without account; and diſmiſſed the bill as againſt him with coſts.* 482

The right of nomination of a clerk to the regiſter is in the ſurviving grantees, in the grant of the late archbiſhop Doctor *Wake.* 483

Lord *Hardwicke* directed the two regiſters to draw lots, who ſhall firſt nominate a clerk, to fill up a late vacancy. 483

Star-chamber. See **Court of King's Bench.**

Statutes. See titles **Regiſter Act, Books.**

The act of 8 *G.* 2. for the encouragement of the arts of deſigning, engraving, *&c.* by veſting the properties thereof in the inventors for 14 years, is not merely confined to works of invention only, but means the deſigning or engraving any thing that is already in nature *Page* 93

A print publiſhed of any building, houſe, or garden, falls within the act of parliament. 95

The property of the prints veſts abſolutely in the engraver, though the day of publication is not mentioned. 95

It never was the intention of the act of the 10th of Queen *Ann*, for building the 50 new churches, that there ſhould be a ſuit in the ordinary courts of juſtice; the commiſſioners are the perſons to determine any diſpute. 144

If the commiſſioners do any thing improper, the court of king's bench will grant a *mandamus*. 145

The commiſſioners are by the act directed to account before the auditors of the treaſury; and if there is any grievance, the relief is by applying to a court of revenue. 145

The ſeveral acts relating to this matter muſt be taken together. 146

Nothing can iſſue by order of the treaſurer, without a previous one from the commiſſioners. 147

It is improper to make a perſon who acts miniſterially only a ſole party. 147

Where ſome of the undertakers under the act of 4 *Ann. c.* 13. in regard to briefs, are dead; in a bill for an account, their repreſentatives need not be brought before the court, for they are each anſwerable, the one for the other. 162

The enacting part of a ſtatute extends further than the preamble in many inſtances, even in criminal matters. 205

The 33 *H.* 8. *c.* 23. for trying treaſons, *&c.* within the King's dominions, *or without*, has been extended to trials in the *Weſt Indies*. 205

Statutes of Champarty.

Where a perſon undertakes to make out the title of another to an eſtate, and is to have a part of the lands as a ſatisfaction for his trouble, though the agrement for this purpoſe is artfully drawn, in order to keep it out of the *Statutes of Champarty*, he will not be intitled to have a ſpecific performance decreed here, but will be left to his remedy at law. *Page* 224

Statute of Fraudulent Deviſes. See titles **Party, Aſſets marſhalled, Heir,** under the Diviſion **Matters controverted between Heir and Executor,** &c.

A creditor brings a bill under the ſtatute of fraudulent deviſes, againſt the aſſignee of the deviſee only, the heir at law is a neceſſary party, and for want of his being before the court, the cauſe was ordered to ſtand over. 115

If an action at law is brought, it muſt be both againſt the deviſee and heir at law, and equity follows the law in this reſpect. 125

The defect in 13 *Eliz. c.* 5. of fraudulent conveyances, is remedied by 3 *W. & M. c.* 14. 204

The action under the ſtatute muſt be brought *jointly* againſt the heir and deviſee. 433

The proviſion in the act was introduced for the benefit of the creditors merely, without any regard either to the heir or deviſee; for otherwiſe there might have been a colluſion between the deviſee and heir at law, to play off the will or not, juſt as it ſhould ſuit them beſt; therefore it was a wiſe proviſion of the act, to join the heir and deviſee in the action, to ſecure the creditor at all events. 433

The reaſon why there are no precedents to be found of judgments at common law on this ſtatute is, that the proceedings in this court are more expeditious; for as both heir and executor are before

fore the court, the creditors may have a ſale. *Page* 433

In the caſes on this action in *Clifts* and *Lilly's Entries*, the writ charges the heir in the *debet* and *detinet*, and that the judgment muſt follow the writ and count, is a known rule at law. 433

Statute of Frauds and Perjuries. See titles **Agreement, Leaſe, Will, Revocation of a Will, Parol Evidence.**

The ſtatute requires that all declarations of truſt ſhould be in writing, otherwiſe they are abſolutely void, except ſuch as ariſe by conſtruction of law. 71

He who pays the purchaſe money has a reſulting truſt, but then he muſt clearly prove the payment. 71

There is another way of taking a caſe out of the ſtatute, which is by admitting parol evidence to ſhew the truſt, from the mean circumſtances of the pretended owner of the real eſtate, that makes it impoſſible for him to be the purchaſer. 71

Nothing is a reſulting truſt under the ſtatute of frauds and perjuries, but what are called ſo by operation of law. 150

Where a ſum of money is given originally, and primarily out of land, a will with that charge muſt be equally executed with the ſame ſolemnity, becauſe it is conſidered in this court as part of the land, ſince it can only be raiſed by ſale or diſpoſition of part. 272

Statute of Limitations. See **Limitations, Judgments, Poſſeſſion, Merchants.**

A bill depending for ſix years in chancery, is not ſufficient to take a debt out of the ſtatute of limitations. 1

The appointment of a receiver, will not alter the poſſeſſion of an eſtate in the perſon who ſhall be found intitled at the time the receiver was appointed, ſo as to prevent the ſtatute of limitations running on during the right in diſpute. *Page* 15

The ſtatute of limitations may be pleaded to the debt, but not to the diſcovery when the debt was due. 51

L. gives *D. P.* an annuity for life, ſhe dies in 1718, and in 1740, a bill is brought by her repreſentative for the arrears of the annuity, from the year 1708, to the death of *D. P.* the court, from the length of time, preſumed it to be paid, and diſmiſſed the bill with coſts. 71

Though the doctrine has prevailed, that the ſtatute of limitations will not run as to a legacy, yet it will not hold as to an annuity. 71

Portions, which became due in 1673, were ſued for in this court in 1717: Lord *Hardwicke* ſaid, ſuch a length of time creates a very ſtrong preſumption of their having been paid; and to induce the court to believe they are ſtill unpaid, almoſt amounts to proving a negative. 178

Though an original be filed at law, yet if there has been no proceeding upon it for ſix years, it will not prevent the ſtatute of limitations from running. 395

The creditor, by 4 *Anne*, has the ſame privilege on the debtor's being beyond ſea, as he had by the ſtatute of 21 *Jac.* on his being beyond the ſea himſelf. 613

Theſe ſtatutes muſt be ſo conſidered, as if the clauſes in the laſt had ſtood originally in the firſt. 614

Where a creditor who has been out of the kingdom returns, the time will run, and his going abroad again will give him no privilege; for that was gone by his having once returned after cauſe of action accrued. 614

If after an ouſter of the reſt, one tenant in common, or jointenant, continues in poſſeſſion of the whole for 20 years, it is a bar. 632

Statute. See **Securities.**

Stocks.

The repreſentative of Sir *T. C.* prays to redeem 2500*l.* *Eaſt India* ſtock, tranſferred to the defendant the 1ſt of *April* 1708, for ſecuring 2000*l.* and intereſt at 6 *per cent.* to be re-transferred on payment of principal and intereſt the 2d of *July* following. Sir *T. C.* died in 1709; the ſon brought this bill in 1729. Lord *Hardwicke* refuſing to decree a redemption diſmiſſed the bill. *Page* 303

It is not neceſſary to bring a bill of foreclоſure on a mortgage of ſtock. 303

Subpoena. See **Proceſs, Infants, Bill.**

Surrender. See title **Copyhold.**

A. C. deviſed all his lands, *&c.* to truſtees, till *R.* and *B.* attain 21, and in the mean time the rents to be applied towards their maintenance; and after they attained 21, then to *R.* and *B.* for their lives, and after their deaths, to the uſe of the heirs of *R.* and *B.* as tenants in common, and not as jointenants; part of the premiſſes were *copyhold*, which were ſurrendered to the uſe of the will; *B.* one of the deviſees attained 21, and by leaſe and releaſe, conveyed his moiety in the freehold lands to his ſiſter and her heirs, who married the plaintiff; and afterwards his copyhold lands in like manner, but made no ſurrender thereof: *Whatever words there may be in a will relative to copyhold lands, they can have no effect if there was no ſurrender, for nothing can paſs a legal eſtate but what will paſs it in law.* 304

Survivor. See alſo **Jointenants.**

Taxes.

WHERE a perſon had a power to make a jointure without any deduction for any charges impoſed or to be impoſed, parliamentary or otherwiſe; this does not mean only ſuch as are fixed and certain, but the land tax, though a fluctuating one, is clearly within the power. *Page* 542

A biſhop by covenanting to pay all taxes ordinary or extraordinary, does not ſubject himſelf to the land tax, becauſe he cannot bind his ſucceſſors; otherwiſe in the caſe of a common perſon, becauſe he can bind his heirs. 544

Tenants in Common. See titles **Jointenants, Statute of Limitations.**

Lord *Hardwicke* held, that the conſtruction in *J. B.*'s will of the words, *as his ſiſters ſeverally die*, is, that the ſiſters ſhould take as tenants in common, and not as jointenants. 441

Tenant by the Curteſy. See titles **Curteſy,** the diviſion **Redemption and Foreclоſure,** under title **Mortgage.**

Term for Years. See **Eſtate for Years.**

Term attendant on the Inheritance. See title **Eſtate,** laſt diviſion.

Timber. See title **Parſonage.**

Tithes.

A leſſee of a rectory for three lives, who had made a derivative leaſe, brings a bill for tithe in kind, and to eſtabliſh a cuſtom of ſetting out corn in ſtooks: Lord *Hardwicke* held the bill properly brought, though the tithes are out in leaſe, to prevent colluſion between a leſſee and occupiers. 136

Evidence of an exemption from tithes depends on uſage, and a poſterior one is evidence of the antecedent, where no other can be had. *Page* 137

Potatoes being ſown in great quantities in a common field, the rector brought his bill for them as a great tithe. Lord *Hardwicke* held, that potatoes being in their nature a ſmall tithe, the ſowing them in greater quantities makes no alteration. 364

The diſtinction between great and ſmall tithes might ariſe at firſt from the former producing greater, and the latter ſmaller quantities. 365

Though Lord Chief Juſtice *Holt*, in the caſe of *Wharton* verſus *Liſle*, 3 *Lev.* 365. held tithes ſhould be determined, whether great or ſmall, from their quantity; the judgment was contrary. 365

If potatoes in gardens ſhould be called ſmall tithes, and great in fields, it muſt vary every year in every pariſh. 365

Where arable is turned into paſture, it is an agiſtment tithe, and become a ſmall one from a great one. 365

Toleration.

The act of toleration was made to protect perſons of tender conſciences, and to exempt them from penalties; but to extend it to clergymen of the church of *England* who act contrary to the rules and diſcipline of the church, would introduce the utmoſt confuſion. 501

Trade. See titles **Merchants, Colliery.**

The plaintiff moved for an injunction to reſtrain the defendant from uſing the *Mogul* ſtamp on his cards, ſuggeſting the ſole right to be in the plaintiff, having appropriated the ſtamp to himſelf, conformable to the charter granted to the card-makers company by King *Charles* the Firſt: *Lord Hardwicke denied the injunction, and ſaid, he knew no inſtance of reſtraining one trader from making uſe of the ſame mark with another.* *Page* 484

A clothworker may maintain an action againſt another of the ſame trade, for uſing his mark, where it is done with a fraudulent deſign to put off bad cloths, or to draw away cuſtomers. 485

But the court will never eſtabliſh a right of this kind, claimed under a charter only from the crown, unleſs there has been an action to try the right at law. 485

The objection of the defendant's taking away the plaintiff's cuſtomers, by uſing the ſame mark, is of no more weight, than there would be in an objection to one innkeeper ſetting up the ſame ſign with another. 487

Trees. See **Timber.**

Trial. See title **New Trial.**

Truſt and Truſtee. See **Executor, Rule, Reſtraint of Marriage, alſo when and how to be charged and diſcharged.** See titles **Perſonal Eſtate, Free Bench, Uſe, Witneſs, Implication, The Charitable Corporation, Baron and Feme.**

If a truſtee, merely to have a point relative to his private intereſt determined, brings the *ceſtuy que truſt* before the court, he ſhall pay the whole coſts of the ſuit for ſuch a vexatious behaviour. 48

There may be caſes where the court will eſtabliſh an agreement made with a truſtee for an extraordinary allowance, beyond the terms of the truſt. 60

The court always holds a ſtrict hand over truſtees with regard to extra allowances. 60

Where land is given to *A.* without the word heirs, and a truſt declared of that eſtate, which can only be ſatisfied by *ceſtuy que truſt*'s taking an inheritance, the fee will paſs to *A.* even without the word heirs. 72

Breach of truſt can fall only on the perſonal eſtate of a truſtee. *Page* 119

When an eſtate is purchaſed in the name of one perſon, and the money is paid by another, he has a reſulting truſt; or where it is declared only as to part, and nothing ſaid as to the reſt, what remains undiſpoſed of, reſults to the heir at law. 150

If a huſband, even after marriage, conveys his wife's fortune to a truſtee for her ſeparate uſe, and the truſtee is guilty of a breach of truſt, this court will oblige him to make ſatisfaction to the *ceſtuy que truſt*. 243

It is not proper to direct an iſſue to try a truſt, nor is there any inſtance of its being done; for where a caſe depends upon the ſtatute of frauds and perjuries, it is incumbent upon this court to determine it, and therefore the bill muſt be diſmiſſed as to any relief prayed. 364

A teſtator deviſing an eſtate to perſons whom he names truſtees, for ſuch purpoſes as they or the major part of them ſhall think fit, gives no benefit to them, but is an authority only, by appointing a *quorum* out of the truſtees. 568

The caſe of Lord *Glenorchy* and *Boſville*, has eſtabliſhed a diſtinction of truſts *executed* and *executory*. 582

A truſt is, where there is ſuch a confidence between parties, that no action will lie, but is a caſe merely for the conſideration of equity. 612

Where executors are made truſtees, they can take nothing for their own benefit, unleſs it be particularly given to them; nor, as they have no ownerſhip, can they alter the intereſt of the *ceſtuy que truſts*. 643

Truſts for raiſing Daughters Portions, and Payment of Debts.

See titles **Portions, and Proviſions for Children, Satisfaction, Contingent Remainder.**

W. L. gave *A. M.* a bond for 300*l.* and intereſt, in 1728, and in 1731, paid her 100*l.* in 1736 he made his will, and gave all his lands in *B.* for a term of 200 years, upon truſt to raiſe and pay, *within two years after his death*, to *A. M.* 200*l.* and alſo deviſed other lands to the ſame truſtee for 300 years, on truſt to pay 200*l.* to *A. M. within one year after his death*, the executor of *L.* paid ſome part of the bond to *A. M.* in her life-time; the bill prays, that the legacies may be decreed *a ſatisfaction of the bond*, and that her executor may refund what he has received in part payment thereof: *The Maſter of the Rolls held this to be a contingent legacy; for if the legatee had died before the time of payment, it would have ſunk in the land, and that the rule of ademption not extending ſo far as to take in a contingent legacy, this is not a ſatisfaction of the bond.* *Page* 300

There is no manner of difference between a direction to truſtees to pay, and a gift; the teſtator is equally a donor in both caſes. 301

One deviſes his lands in *D.* to *A.* his couſin, an infant, at 21. ſubject to the incumbrances therein, and all his other lands to truſtees, to pay debts: Sir *Joſeph Jekyll* directed the mortgage on *A.*'s eſtate to be paid off, out of money ariſing by ſale of the truſt eſtate, though *A.* by bill had ſubmitted to diſcharge it. On appeal to Lord Chancellor *King*, he affirmed the decree. 438

Truſtees for preſerving Contingent Remainders.

A. ſeiſed in fee of ſeveral manors, Lands, *&c.* by will deviſed the ſame to *W. S.* and others, their heirs and aſſigns, on truſt out of the rents to pay his debts, and after payment thereof he deviſed the ſame eſtates to three of the truſtees, their executors, *&c.* for 500 years, on truſt to pay his legacies and 200*l.* a year to his ſiſter for life; and after the determination of the eſtate for years, he deviſed the premiſſes to all the truſtees in truſt as to one moiety, to the uſe of *T. B.* for life without impeachment of waſte, and after the determination of that eſtate, to the truſtees for life of *T. B.* to preſerve contingent remainders, and after

after his deceaſe then to the uſe of the heirs of the body of *T. B.* and for want of ſuch iſſue, then to *Benjamin Bagſhaw* in like manner as he had before deviſed the moiety to *T. B.* with the like remainders to other of his nephews, remainder to the teſtator's own right heirs. *T. B.* died without iſſue, and *Benjamin Bagſhaw*, after ſuffering a recovery to the uſe of him and his heirs of this moiety, deviſes it to his wife the plaintiff in fee, and dies; the defendant, the heir at law of *A.* inſiſted that *Benjamin Bagſhaw* had only an eſtate for life, that his recovery did not operate to affect the remainder in fee to the right heirs of *A.* and therefore the defendant as his heir was become intitled to the eſtate in queſtion. *The Maſter of the Rolls, after taking ſome time to conſider of this caſe, declared it was his opinion that the deviſe in the will of A. to Benjamin Bagſhaw was in tail, and that he took ſuch eſtate in a moiety of the premiſſes, and conſequently the recovery was well ſuffered, and barred all the remainders.* Page 570

Eſtates are to be governed by the ſame rules in law and equity, and technical expreſſions there, to receive the ſame interpretation here. 574

Lord *Hardwicke* being of opinion that *B. B.* took only an eſtate for life, he reverſed the decree at the Rolls, *pro tanto*, as decreed that *Benjamin Bagſhaw* had an eſtate-tail. 577

The eſtate deviſed to *B. B.* was not an uſe executed, but a mere truſt in equity; and the whole fee being deviſed to the truſtees, no legal fee could be limited upon it, and he could take no legal eſtate. 577

B. B.'s recovery was bad, for he could not make a good tenant to the *præcipe*, being before the debts were paid, and the fee deviſed to the truſtees was ended; and whatever defeats the recovery defeats the plaintiff's title. 578

Veſted Intereſt. See **Portions or Proviſions for Children, Condition ſubſequent.**

SAMUEL Parker by will gives 3000 *l.* to truſtees to be placed out at intereſt or on a purchaſe; and then to permit his wife to receive the intereſt during her natural life, and after her deceaſe to divide the whole principal with all intereſt amongſt his four children ſhare and ſhare alike, and the ſurvivors of them, *but not before they attain* 21, *or day of marriage.* Page 123

Conſtance, one of the four children, attained 22, but died in the life-time of the mother, ſo that the diviſion of the 3000 *l.* could not be made till after her death: The truſtees laid out the greateſt part of the money in the purchaſe of freehold and copyhold, and lent another part on bond; the court held this was a veſted intereſt in *Conſtance*, and that *ſurvivors* meant ſuch as ſhould be living at the death of the child before 21. and not ſuch as were living at the death of the mother: And that the repreſentative of *Conſtance* is intitled to a fourth of the bond, and a fourth in the whole in government ſecurities, and which has not been inveſted in land. 123

Thomas Condon by his will gives to each of his two daughters *Iſabella* and *Diana* 1000 *l.* to be raiſed and paid to them immediately after the deceaſe of his wife, or out of the rents, *&c.* of his manors, *&c.* in *Yorkſhire*, or by ſale or mortgage with intereſt after the rate of 6 *l. per cent. from the deceaſe of my wife* until the ſaid ſums ſhall be duly paid to my daughters, *or their reſpective executors, adminiſtrators or aſſigns*; and in caſe either of his ſaid daughters died before him, then the ſurvivor, her executors, *&c.* was to receive all the ſums before deviſed out of the ſaid lands to be raiſed, and the part of the daughter ſo dying ſhall not ceaſe or ſink into the eſtate for the benefit of my heir, but ſhall remain and be raiſed for the benefit of my ſurviving daughter. 127

The

The teſtator died, and left one ſon and two daughters *Iſabella* and *Diana*; after his death *Diana* married Sir *William Lowther*, and died in 1736. *Ann* the mother died in the year following; the huſband brings the bill to have the ſum of 1000 *l.* raiſed out of the eſtate charged; *Lord Hardwicke was of opinion the* 1000 *l. ought to de raiſed.* Page 127

He ſaid, it has been determined where a legacy upon land depends on two contingencies, though one of them doth not happen, the legacy ſhall be raiſed. 128

Where the poſtponing the time of payment of a legacy has been owing to the circumſtance of the teſtator's eſtate, and not to the circumſtances of the legatees, that is not ſo ſtrong a caſe for a legacy's ſinking into the eſtate, as where the poſtponing the payment of it has appeared to have ariſen from circumſtances on the part of the legatee. 128

An inference, his Lordſhip ſaid, may be drawn in the plaintiff's favour, from the direction that the legacy ſhall be paid to the daughters, *or their reſpective executors, adminiſtrators and aſſigns.* 128

The clauſe on which Lord *Hardwicke* principally founded his opinion was, the direction that if one daughter died before him, her part ſhould not ſink into the eſtate. 129

Upon the rehearing of this cauſe Lord *Hardwicke* ſaid he had no doubt at the firſt hearing, and thought there was as little doubt for it here as in any caſe. 131

Had the father entred into a bond to pay 1000 *l.* to his daughter after his wife's death, it would have been forfeited if the executor had refuſed to pay. When no time of payment is fixed, a legacy in general is held to be paid immediately, unleſs the end for which it was given ceaſed. 133

The poſtponing of the payment here was only for the convenience of the eſtate, becauſe the ſon would have been hurt if raiſed before his mother's jointure fell in. 133

Under marriage-articles 2000 *l.* part of 3000 *l.* veſted in truſtees, was amongſt other truſts directed to be paid to ſuch ſon as ſhall live to attain the age of 21. when and at ſuch time as he ſhall have attained the age of 23; the eldeſt ſon attained his age of 21. but died before 23. *Lord Hardwicke* held, that the ſon became abſolutely intitled to the money, and the time of payment only was poſtponed to the age of 23. *Page* 185

Viſitor and Viſitorial Power.

Voluntary. See titles **Fraud, Implication.**

Uſe. See alſo Truſt.

Natural love and affection is very ſufficient to create a uſe, and will amount to a covenant to ſtand ſeiſed though no other conſideration appear. 149

Uſes were introduced during the conteſts between the two houſes of *York* and *Lancaſter* to avoid forfeitures, and were exactly the ſame with what truſts are now. 150

A deviſe to *A.* and ſuch uſes as he ſhall appoint, was good before the ſtatute of uſes; for when he appoints, the *ceſtuy que truſt* is in by the feoffor, and not by the appointer. 568

The ſtatute of uſes has executed the legal eſtate, and joined it to the uſe; and the legal eſtate therefore muſt want to be executed by a conveyance to make it a truſt in equity. 583

Uſury.

On a bill to ſet aſide an uſurious contract, a defendant may demur to the diſcovery of what intereſt he agreed to take, for that he cannot ſet this forth without diſcloſing the very intereſt he has taken. 393

Ward. See **Guardian, Marriage.**

NO caſe calls more for the interpoſition of the legiſlature, than the marrying a ward without the leave of this court. *Page* 157

The giving away a woman at her marriage, as the father, though not an eſſential thing, yet is a ceremony always required, and therefore Lord *Hardwicke* committed the perſon who did it. 158

To make perſons liable to a contempt for ſuch a marriage, they muſt be concerned in the original contrivance, and be apprized of the infant's being a ward of the court. 158

The clergyman not appearing to be concerned in the deſign of doing this wrongful act, was not guilty of a contempt of the court. 159

His Lordſhip ordered the licence to be left in the regiſter's hands, that recourſe might be had to it if occaſion. 159

Waſte. See **Timber, Infant.**

It is not neceſſary to ſtay till waſte is actually committed where the intention appears, and the defendant by his anſwer inſiſts on his right to do it. 183

Though no proof appears of waſte, yet if the tenant for life inſiſts on a right to do it, and it is proved that he has none, the owner of the reverſion may have an injunction. 183

A tenant for life though without impeachment of waſte, ſhall be obliged to keep tenants houſes in repair, unleſs the charge is exceſſive, and ſhall not ſuffer them to run to ruin. 383

Will and Teſtament. See titles **Eſtates, Charity and Charitable Uſes, Codicil, Copyhold, Words, Expoſition of Words, Mortgage, Power, King, Statute of Frauds and Perjuries, Executor, Spiritual Court, Fraud, Decree, Annuity, Heir, Words.**

Though a feme covert has a power to diſpoſe of a ſum by a writing purporting to be a will, that does not give it the authority of one in the eccleſiaſtical court, but the huſband muſt be examined to his conſent, before it can be proved. *Page* 49

Where a probate differs from an original will, there muſt be an application to the ſpiritual court to amend. 50

Where a will is to be eſtabliſhed, the teſtator muſt be proved to be of a ſound and diſpoſing mind, eſpecially where there are infants in the caſe. 56

If a man leaves 20 ſeveral papers behind him executed at different times, in reſpect to perſonal eſtate, they ſhall all be taken as one will, and ſo conſtrued, that all may anſwer the teſtator's intention. 87

The court cannot declare a will well proved, where an heir at law is not to be found. 120

A will is ambulatory till a teſtator's death, nor till then can money directed to be laid out in land be conſidered as land. 167

A will executed firſt in the preſence of two witneſſes, afterwards the teſtatrix ſaid, this is my will, in the preſence of a third, but did not put her ſeal, nor did ſhe ſay, her name was of her own hand-writing. Lord *Hardwicke* gave no abſolute opinion, but was inclined to think, this was a void will, becauſe not exactly conformable to the ceremonies required by the ſtatute of frauds and perjuries, unleſs it had been reſealed by the teſtatrix in the preſence of the third witneſs, and unleſs ſhe had declared it to be her hand-writing. 176

Sealing her will without ſigning in the preſence of this witneſs, he ſeemed to think would have been ſufficient to make it a good will; but ſaid it was a point proper to be determined at law. *Page* 176

A teſtator ſigned and executed his will in *December* 1735. in the preſence of two witneſſes; afterwards in the year 1739. he with his pen went over his name in the preſence of a third witneſs, who ſubſcribed his name in the teſtator's preſence, and at his requeſt; this was held by the court of King's Bench in the caſe of *Jones* and *Lake*, *February* 1, 1742. to be a due execution of the will under the ſtatute of frauds and perjuries, for there being the oath of three atteſting witneſſes, it is the degree of evidence required by the ſtatute, and the ſame credit ought to be given to three perſons at different times, as at the ſame time. *See the note at the bottom of* Page 176 *and* 177.

A fraud in procuring a will cannot be determined here, but muſt be decided by a trial at law. 424

The intent of a teſtator in a will muſt be conſiſtent with the rules of law, and in many caſes his intent has been reſtrained; as where he has attempted a perpetuity, or to reſtrain a tenant in tail from alienation. 575

No perſon can take by a will, and at the ſame time do any thing that ſhall deſtroy the will. 629

Revocation of a Will. See Statute of Frauds and Perjuries, Leaſe.

A. G. by his will deviſes to his nephew *R. E.* all his dividends on his *South-Sea* annuities, and afterwards by a codicil gives his niece *Margaret Stone* 20 *l.* a year for her life, to be paid out of his *South-Sea* annuities. This is not a revocation *in toto*, but both deviſes may ſtand conſiſtently together. 86

R. B. gives to *Elizabeth Brudenell* 800 *l.* to be laid out for the advantage of herſelf during life, and afterwards to her children, and to *M. L.* 400 *l.* to be laid out in the ſame manner, and to the ſame purpoſe as Mrs. *Brudenell*'s, and the remainder of his eſtate in *N.* and *D.* and all his freehold and perſonal eſtate whatſoever, after payment of debts, to his brother *S. B.* *Page* 267

By a ſecond will, he gives to *M. L.* 100 *l.* and to Mrs. *Brudenell* 400 *l.* and the reſidue of his eſtate real and perſonal to *S. B.* 268

The firſt will was executed by the teſtator in the preſence of three witneſſes, and in every reſpect according to the ſtatute of frauds and perjuries. 268

There were no witneſſes to the ſecond, but the whole was written with the teſtator's own hand. 269

In a letter directed to *S. B.* the teſtator recommends Mrs. *Brudenell* to his kindneſs, and gives to his godchild 200 *l.* and if dead to Mrs. *Brudenell*'s eldeſt ſon, which he deſires only in caſe *S. B.* makes uſe of the laſt will. 269

Mrs. *Brudenell* brought a bill to have the legacies left to her raiſed out of the teſtator's real eſtate; the queſtions were, whether the legacies given under the firſt will were a charge upon the real eſtate, and whether revoked by the ſecond? 269

Lord Hardwicke decreed only the leſſer ſums to be raiſed out of the real eſtate of the teſtator. 274

The ſmaller ſums given here under the ſecond will, are but a leſſening of the *quantum* of the money given by the former, and are only new modelled or qualified, and equally a charge on the real eſtate. 274

The rule is the ſame as to revocations of a deviſe of lands, and a revocation of a ſum of money charged on lands, they muſt be revoked in the ſame manner. 272

Beſides expreſs revocations there are virtual ones, ever ſince the making of the ſtatute; as by extinguiſhing or deſtroying the thing deviſed, and where that is done by the teſtator in his life-time, it muſt prevail. 272

Suppoſe a will is made according to form, and afterwards the lands ſold by the teſtator which he had deviſed, though the form of revocation the ſtatute of frauds

frauds preſcribed is not purſued, yet it is a virtual revocation. *Page* 272

A feoffment to the uſe of a teſtator and his heirs, is a revocation; if a man charges his lands with a debt, and afterwards pays that debt, it is extinct, though there is no formal revocation. 273

Lands charged with a portion by a will, and the ſame given by a teſtator in his life-time; this is a virtual revocation of the charge, though there is no actual one. 273

In all caſes where a man gives a perſonal legacy charged on real eſtate, and the will is revoked, the legacies are gone; for where the land is meant only as a collateral ſecurity, if the thing ſecured be taken away, the ſecurity itſelf cannot ſubſiſt. 273

Where the ſame thing is given in a will to two different perſons, Lord *Coke* ſaid the latter words ſhall revoke the former; but in *Plowden*, in the caſe of *Paramore* and *Yardley*, it was held they ſhall take as joint-tenants; but Lord *Hardwicke* ſaid, he rather inclined to Lord *Coke*'s opinion. 374

Where a man gives a horſe to *A.* in the firſt part of a will, and in the latter end the ſame horſe to *B.* it is a revocation; and *Swinburne* is miſtaken in point of law, in ſaying they ſhall take as joint-tenants. 375

A teſtator who had a leaſehold eſtate deviſes it, and afterwards purchaſes the reverſion in fee; this is a revocation of the will *pro tanto*, and the eſtate deſcends upon his heir at law. 425

The rule of revocation of wills is the ſame in equity as at law. 598

Though a feoffment be to the ſame uſes with thoſe in a precedent will, yet it is a revocation. 598

Deviſe, Deviſee. See titles **Aſſets, Truſt for raiſing Portions, Truſtees and Payment of Debts** under title **Truſt**, and **Heir** under the diviſion **Matters controverted between the Heir, Executor and Deviſee, Veſted Intereſt, Expoſition of Words, Eſtate for Years.**

G. L. by her will gives the reſidue of her ſtock in trade in truſt for the ſeparate uſe of her daughter, and appoints her executrix, but makes no diſpoſition of the ſurplus; this is not a legacy, but an exception out of the ſtock the teſtatrix had given to her ſon, and does not exclude the daughter from the ſurplus. *Page* 45

A deviſee for life of goods muſt ſign an inventory, to be depoſited with the maſter for the benefit of all parties. 82

A deviſe in expreſs words is not extended by ſubſequent general ones. 113

Money will not paſs by a deviſe of all goods and things of every kind, where the deviſee has a money legacy at the outſet of the will. 113

A deviſe cannot relate to a child who was not *in eſſe* till many years after a teſtator's death. 122

A deviſe from a huſband to a wife of the uſe of all houſehold goods for life or widowhood, intitles her to uſe them any where, or even to let them out to hire. 217

J. R. by his will ſays, I give to my dear wife all my houſehold goods, furniture, plate, linen and china in my houſe at *E.* wherein I now dwell, or to the ſaid houſe belonging; and alſo the ſaid houſe, gardens, field and land thereto belonging, ſo long as ſhe continues my widow, and no longer: And I likewiſe give her my jewels, coach, chariot and coach-horſes; the queſtion was whether the words, *ſo long as my wife continues a widow, and no longer*, are to be confined to the teſtator's houſe at *E.* or to be extended to the whole that was deviſed to her: Lord *Hardwicke held, that the houſehold goods, furniture, plate, linen and china, were put under*

under the ſame reſtriction as the houſe itſelf; but that the jewels, coach, chariot and coach horſes, were the wife's abſolute property. Page 321

The putting limiting words in the firſt or laſt part of a ſentence makes no difference as to the conſtruction. 323

A teſtator may give one thing to a perſon for life, together with an abſolute property in another, unleſs the latter ſhould be appurtenant to the thing before given. 323

A teſtator gives to *James Merſon* all his lands, tenements and meſſuages whatſoever, after debts and legacies paid, and funeral expences are diſcharged: The debts being charged only contingently on the real, if the perſonal eſtate ſhould be deficient, the Maſter of the Rolls held, the plaintiff has only an eſtate for life. 341

It has been held, where there has been a deviſe of an eſtate to *A.* at the beginning and to *B.* at the end of a will, they ſhall take as joint-tenants. 373

Lord *Nottingham* firſt determined in favour of a *hæres factus*, that perſonal aſſets ſhould be applied in exoneration, but then he was a *hæres factus* of the whole real eſtate. 436

Pockley verſus *Pockley* was the firſt inſtance, where it was determined in favour of a deviſee of part of the eſtate only; and Lord *Nottingham*'s opinion has been followed ever ſince. 436

If a teſtator deviſes all his eſtates to *A.* and has only leaſehold, they will paſs. 451

If a man hath lands in fee and for years, and deviſeth all his lands, the fee-ſimple paſs only; and if he hath a leaſe for years, and no fee-ſimple, the leaſe for years paſſeth; for otherwiſe the will would be void. 451

A trial at law directed on this iſſue, whether the teſtator had both freehold and leaſehold, and in the ſame pariſh. 451

Witneſs. See titles **Evidence, Coſts, Depoſitions, Fraud, Infant, Coloniſes, Examination,** &c.

If a plaintiff examines only as to one point, the defendant may croſs-examine to the ſame, but cannot make uſe of ſuch witneſs to prove a different fact. *Page* 44

The rules of evidence in this court as to witneſſes, are exactly the ſame as at law. 48

Where a witneſs is dead, who atteſted a deed, you muſt prove him to be ſo. 48

Where an atteſting witneſs has lived abroad, a ſtrict proof of his death is required; otherwiſe where he has lived conſtantly in *England*, for in ſuch a caſe, the court will not expect a certificate of his funeral ſhould be produced. 48

Where a witneſs is under a neceſſity of exculpating her own behaviour firſt, no regard ought to be paid to her evidence againſt the conduct of others. 97

At law, where a perſon has granted and conveyed, the very words *grant* and *convey* imply a warranty on the part of the grantor, and he cannot be examined as a witneſs to overturn and invalidate the right and title granted by the deed. 228

At law no defendant can be examined as a witneſs; but in equity, a perſon made a defendant for form-ſake, may be examined in a cauſe, ſaving juſt exceptions. 229

A truſtee, though merely nominal, cannot be examined at law, but he clearly may in equity. 229

The Attorney General muſt enter a *noli proſequi* againſt a defendant, before he can be admitted as a witneſs, even in the caſe of the king. 229

It is in particular inſtances only, where fraud is charged by a bill, or in caſes of truſt, that this court does not confine itſelf within ſuch ſtrict rules as they do at law, but in general, the rules of evidence here and at law do not differ. 229

The ſatisfaction formerly for the non-appearance of a witneſs was by action only, but now the courts of law grant an attachment againſt him. *Page* 593

The father of *H.* the plaintiff in the original cauſe, examined *H.* to the merits; after his father's death, he brought a bill of revivor, and became a party intereſted; this does not diſqualify him from being an evidence. 615

Words. See **Expoſition of Words**, and title **Eſtates**, under the diviſion **Limitation of Terms for Years, Deeds, Intention, Condition, Contingent Remainder.**

J. C. ſeiſed of ſeveral freehold lands, and poſſeſſed of ſeveral leaſehold, deviſed to his wife, for life, all his eſtate in *London*, and after her death, he bequeathed the aforementioned eſtates to his daughter *A. C.* and her heirs; and to his wife gave all his goods, cattels and chattles, and made her ſole executrix; ſhe married again, and had the plaintiff by her ſecond huſband, who inſiſted, that by the deviſe to his mother of the reſidue, the leaſehold lands paſſed. *Lord Hardwicke thinking it very material, whether all the freehold lands were comprized in the teſtator's marriage ſettlement, directed a trial at law to aſcertain the fact.* 450

Words that are doubtful, and afford implication only, are not to be attended to where the teſtator has expreſſed himſelf in legal words. 576

The words without impeachment of waſte, do not give a power inconſiſtent with an eſtate-tail, or at leaſt will not defeat it. 576

Departing from ſtrict words has produced ſuch uncertainty, that it is to be wiſhed they had been left to legal conſtruction. 577

Where a teſtator's intent appears plain, this court will help an unapt expreſſion, by making the words, *heirs of the body*, words of purchaſe. 580

Heirs of the body have at law been conſidered as words of purchaſe, even in a deed. 580

On the conſtruction of Serjeant *Maynard*'s will, the words *heirs of the body* were held to be in the ſenſe of the firſt and every other ſon. *Page* 582

It is eſtabliſhed, that in a will, the word *iſſue* is as ſtrong as the word *heirs*. 582

Notwithſtanding all the parties are volunteers under a will, it is not neceſſary the words muſt be taken as they are, but in many caſes may be varied. 582

Writ. See **Proceſs**, and titles *Ne Exeat Regno*, *Certiorari*.

The court will not, on motion, ſuperſede a writ of replevin, unleſs there is a fraudulent uſe made of it. 237

After a writ has once iſſued here, it is *de officio*, and this court has nothing further to do in it. 237

Writ of Scire Facias.

Upon a *Scire facias* taken out on a judgment, a defendant ſhall inſiſt only on what he might have done at the hearing of the original cauſe. 468

The rule in equity is the ſame, with this difference only, that if any thing new has happened ſince the hearing, the defendant may avail himſelf of it. 468

Younger Children. See title **Portion.**

By articles on the marriage of the plaintiff's father and mother, her grandfather was to pay to a truſtee 1000*l.* and to ſecure to him 300*l.* on bond, to be laid out in the purchaſe of *South Sea* annuities, in truſt, after the death of the ſurvivor of huſband and wife, if they have a ſon, *or one or more younger children, ſons or daughters*, to pay the principal ſums *to ſuch younger children*, if but one, and if more than one, equally to be divided between them; and *F. F.* the ſiſter of the plaintiff's grandfather, by indentures of leaſe and releaſe, dated the ſame day with the articles, conveyed two

two freehold houſes to the uſe of herſelf for life, to the plaintiff's mother for life, then *to her younger child or children in tail general*, remainder to the mother in tail; the father and mother are dead, and left the plaintiff, their daughter and eldeſt child, and alſo a ſon; a bill was brought by the daughter, to have a maintenance out of the 1000*l.* and 300*l.* and the rents of the freehold houſes, and to have both transferred to her when ſhe comes of age; the queſtion was, whether the plaintiff, as ſhe is the eldeſt child of the marriage, can take. *Page* 456

Lord *Hardwicke* held, the plaintiff was intitled to the 1000*l.* and 300*l.* and the two freehold houſes, under a truſt in marriage articles; for an elder daughter, where there is a ſon is accounted a younger child. *Page* 456

In an ejectment, the plaintiff could not have recovered; for, being the eldeſt, ſhe would not at law be conſtrued a younger child; but in this court, as the articles are executory, they muſt be carried into execution, agreeable to the intention of the parties. 457

THE TABLE OF The Principal Matters To the APPENDIX.

Canons.

See titles **Laws, Convocation, Parliament, Clandeſtine Marriage.**

THE canons of 1603, which relate to clandeſtine marriages, are the 62d, 101ſt, 102d, 103d, and 104th, but none of theſe affect the parties contracting, except the laſt clauſe of the 104th, which relates to perſons married by colour of void licences. *Page* 652

The court of King's Bench of opinion, in the caſe of *Middleton* verſus *Croft*, that the canons of 1603, not having been confirmed by parliament, do not *proprio vigore* bind the laity. 653

Canons that have been allowed by general conſent within this realm, and are not repugnant to the laws, nor to the damage of the king's prerogative, are ſtill in force as the king's eccleſiaſtical laws. 664

The clergy are bound by canons confirmed only by the king; but they muſt be confirmed by the parliament to bind the laity. 665

No canon ſince 1603, though made in full convocation, can *proprio vigore* bind laymen. 665

In *Davis*'s caſe, 5 *G.* 1. *C. B.* L. C. J. *King* ſaid, it was the prevailing opinion, the canons did not bind the laity without an act of parliament, there being none to repreſent them in convocation. *Page* 666

It is ſaid at the end of the caſe *Bird* verſus *Smith*, *Moore* 781. to have been reſolved, that the canons of the church, made by the convocation, and the king, without the parliament bind in all matters eccleſiaſtical, as well as an act of parliament. 666

This, Lord *Hardwicke* declared, was a very extraordinary caſe, and the decree ſuch as will not be allowed as a precedent at this day; for there is no colour to ſay, that every biſhop in his dioceſe, archbiſhop in his province, and the houſe of convocation in the nation may make canons to bind within their limits. 667

Whatever, ſaid his Lordſhip, may be the power of convocation to bind the whole realm in matters eccleſiaſtical, it is no where declared in this caſe they can bind the laity. 667

Lord Chief Juſtice *Vaughan* in *Hill* verſus *Good*, *Vaugh.* 327. was of opinion, a lawful canon is a law of the kingdom, as much as an act of parliament. 667

In the caſe of *Grove* and *Elliot*, *Ventr.* 41. Mr. Juſtice *Tyrrel* held, the king and convocation, without the parliament, cannot make any canons which ſhall bind the laity. *Page* 667

Lord Chief Juſtice *Vaughan* ſaid, in this caſe, that the convocation, with the aſſent of the king, under the great ſeal, may make canons for the regulation of the church, as well concerning laicks as eccleſiaſticks. 668

Another Judge of the court differing in opinion with Lord Chief Juſtice *Vaughan*, and the other two declaring no opinion at all on the queſtion, greatly weakens this authority. 668

The opinions, ſaid Lord *Hardwicke*, of *Newton*, *Coke*, *Tyrrel*, *Holt* and *King*, and the anſwer of the Judges in the Star-chamber, muſt preponderate againſt the ſingle opinion of *Vaughan*. 668

Caſe. See titles **Canons, Convocation.**

The caſe in 1 *Ro. Ab.* tit. *Executor* 909. relating to *bona notabilia*, is of little authority; and *Rolls* himſelf expreſſes his doubt in the place cited; and nothing to the ſame effect is in the report of the ſame caſe. 8 *Co.* 135. 659

In the prior of *Leed's* caſe, 20 *H.* 6. 12. it was laid down, that the ordinary by his convocation had power to make conſtitutions provincial, by which (*ceux de Sainte Egliſe*) ſhall be bound, but they cannot do any thing which ſhall bind the *temporalty*. 662

Said in the caſe of the abbot of *Waltham*, *M.* 24 *E.* 4. 44. *b.* that the convocation has not power to bind *any temporal matter*, but only that which is ſpiritual, as to ordain faſting-days and holy-days, and they are only *ſpiritual judges*. 662

The words *la temporaltie* in this caſe ought to have no ſtreſs laid upon them, for though they are in the laſt edition of the year book, it is falſe printed; for in the old edition it is *le temporaltie*. 663

Lord *Raymond* and Lord Chief Juſtice *Eyre*, in a manuſcript report of the caſe of *the Biſhop of St. David's* and *Lucy*, *Paſch.* 11 *W.* 3. *Carth.* 485. agree with the printed one of Serjeant *Carthew*. Page 665

Clandeſtine Marriage.

The ſpiritual court has a juriſdiction by the ancient canon law in the caſe of a clandeſtine marriage. 668

Clandeſtine marriages are a growing evil; and therefore the court would not weaken any method by which they may be reſtrained. 675

The judgment in the cauſe of *Middleton* and *Croft* was, that the prohibition ſtand as to the proceeding only for the plaintiff's being married at an uncanonical hour, and a conſultation awarded as to the reſidue of the cauſe. 675

Convocation. See titles **Canons, Laws, King, Laity.**

In the convocation, the whole clergy of the province are either preſent in perſon or by repreſentation. 655

Lord *Hardwicke* ſaid the attempt of council to make the power of the convocation in ordaining canons co-extenſive with the judicial authority of their courts is full of ſo much miſchief, that it cannot be contended for with any ſhadow of reaſon or of law. 658

That *Newton* in the opinion he gave on the power of the convocation, means temporal perſons as well as things, is plain by the oppoſition of it to *ceux de Sainte Egliſe*, which words ſignify the perſons not the matters or rights of the holy church. 663

Where the caſe of the abbot of *Waltham*, *M.* 24 *Ed.* 4. 44. *b.* came before all the Judges in the Exchequer-chamber, *Vavaſor* ſaid the power of the convocation doth not extend over the temporal rights of the clergy themſelves, and the abbot's claim of exemption from collecting tenths, being a temporal right, he though a clerk was not bound. 664

The exception at the end of the convocation caſe, 12 *Rep.* 72. is miſprinted,

and no weight is to be laid upon it. *Page* 664

Deprivation. See title **Diſſenters.**

Diſſenters. See title **Deprivation.**

At an aſſembly of Lord Chancellor *Elleſmere*, the Lords of the council, and all the Juſtices of *England* in the Star-chamber, it was held, that deprivations of puritan miniſters by the high commiſſion court were lawful. 665

Judge. See title **Canons.**

Lord Chief Juſtice *Hale* in a manuſcript treatiſe, lays it down, that external diſcipline of the church could not bind any man to ſubmit to it, but either by force of the ſupreme civil power, where the governors received it, or by the voluntary ſubmiſſion of the particular perſons who did receive it. 669

King. See titles **Laws, Canons, Convocation.**

The binding force of ancient canons over laymen was derived from the ſupreme legiſlative power being veſted in the perſon of *the emperor*. 656

In *England* it is far otherwiſe, where the King has but part of the legiſtative power. 656

Laity. See titles **Canons, Caſe, Convocation, Judge, Statutes,** and **Statute of Uniformity.**

Ever ſince the reformation, the rule has been, that when any ordinances have been made to bind the laity, as well as the clergy, in matters merely eccleſiaſtical, they have been either enacted or confirmed by parliament. 657

Laws. See title **Convocation.**

No new laws can be made to bind the whole people, but by the King with the advice and conſent of both houſes of parliament, and by their united authority. *Page* 654

Every man may be ſaid to be party to, and the conſent of every ſubject is included in an act of parliament; but in the caſe of canons made in convocation, and confirmed by the crown only, all theſe are wanting, except the royal aſſent. 654

Maxim. See titles **Spiritual Court, Statutes.**

Where the eccleſiaſtical cenſures and temporal puniſhment are both levied againſt the identical offence, the rule of *nemo bis puniri debet pro eodem delicto*, is ſtrong againſt allowing a double proceeding. 672

Parliament. See titles **Laws, Laity, Judge.**

The acts of uniformity, *&c. ſince the reformation*, ſhew that the parliament have from that period been of opinion, that the power of making conſtitutions in eccleſiaſtical matters to bind the whole nation was in them. 659

Clear from 25 *H.* 8. *c.* 19. that both the King and the clergy thought it neceſſary to have the authority of parliament for abrogating part of the antient canons, and eſtabliſhing ſuch part as was to remain in force. 661

Power.

Nothing is more certain in law than this, that when any act is done under a power, that act is deemed to be done by the grantor of the power, and to have it's validity from him, and not from the perſon who executes it. 661

Spiritual Court. See titles **Clandeſtine Marriage, Statutes, Maxim, Statute of Uniformity.**

If there were a long courſe of precedents of a proceeding by eccleſiaſtical cenſures againſt lay perſons marrying clandeſtinely, it would be of great weight in a caſe of this nature, though a few inſtances would not. *Page* 670

In *Mattingley* and *Martins*, *Jo.* 257. it was reſolved that if any perſon marry without publication of banns or licence, they are citable for it into the eccleſiaſtical court, and no prohibition lies. 670

Otherwiſe lay perſons contracting ſuch marriages would, without ſuch a juriſdiction in the ſpiritual court, have been unpuniſhed till the ſtatute of *W.* 3. was made. 670

The 18 *Eliz.* which concerns the mothers, *&c.* of baſtard children, inflicts a temporal puniſhment, to prevent undue charges on pariſhes; the ſpiritual court puniſhes it by penance, as it is a publick ſcandal to the church; and therefore it has never been imagined that the one has repealed the other. 673

That the ſpiritual court proceed only *pro ſalute animæ* of the offender, and the temporal puniſh him either in body or purſe, is a diſtinction in words without a real difference; but in this caſe it is otherwiſe, where the eccleſiaſtical cenſure is for the criminal act, and the temporal penalty for a fraud. 673

Statutes. See titles **Laity, Spiritual Court.**

The court were unanimouſly of opinion that the ſtatute of 7 *&* 8 *W.* 3. hath not operation to take away the eccleſiaſtical juriſdiction as to the huſband clandeſtinely married. *Page* 671

The ſtatute of 7 *&* 8 *W.* 3. inflicts a penalty in reſpect of a clandeſtine marriage, being a fraud on the publick revenue; but the eccleſiaſtical cenſure is to puniſh it as an offence againſt the publick order of the church. 672

Subſequent acts of parliament in the affirmative giving new penalties, do not repeal former methods of proceeding, ordained by preceding acts, without negative words. 675

Statutes of Uniformity. See title **Parliament.**

The pecuniary penalty enacted by the ſtatute 13 *Car.* 2. in the caſe of teaching ſchool without licence, is inflicted *eo nomine* for the puniſhment of the ſame offence, for which the ſpiritual judge inflicts excommunication. 672

By the ſtatutes of 1 *Eliz.* and 13 *&* 14 *Ch.* 2. the laity are bound by the rubrick againſt marrying without publication of banns; and by the firſt act are expreſsly puniſhable by the cenſures of the church; and by the ſecond act the power of the ordinary is directed to be continued and applied for puniſhing the like offence againſt the rubrick of the preſent book of common prayer. 673

F I N I S.